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FOR LAWYERS, CONSULTANTS, AND LENDERS WHO COUNSEL BUSINESS, COMMERCIAL, AND REAL ESTATE CLIENTS

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FEATURE ARTICLE

CALIFORNIA COURT OF APPEAL ADDRESSES COUNTY ORDINANCE FOR MINISTERIAL OIL AND GAS WELL PERMITS— FINDS ORDINANCE OFFENDS CEQA ON MULTIPLE FRONTS

By Collin McCarthy, Esq., and Christina Berglund, Esq.

On February 25, 2020 (and modified on March 20, 2020), the Fifth District Court of Appeal issued a *partially* published opinion in *King and Gardiner Farms, LLC v. County of Kern.* [*King and Gardiner Farms, LLC v. County of Kern et al.*, ___*Cal.App.5th*___, *Case No.* F077656 (5th Dist. Feb. 25, 2020).] (*KG Farms*) in which the Court of Appeal held that Kern County (County) must rescind its certification of an Environmental Impact Report (EIR) and the adoption of a new ordinance intended to establish a streamlined review and ministerial permitting process for new oil and gas wells in the county. In the *published* portion of the 150-page opinion, the Court of Appeal held that: 1) the EIR improperly deferred formulation of specific mitigation measures for significant water supply impacts; 2) the EIR's discussion of the effectiveness of the water supply mitigation measures was inadequate; 3) the County's finding that the conversion of agricultural lands resulting from the ordinance would be mitigated to a less-than-significant level was not supported by substantial evidence because, among other things, the ordinance allowed for the use of agricultural conservation easements to offset impacts from conversion; and 4) the County inappropriately applied a single cumulative noise level threshold for determining the significance of the project's noise impacts, as opposed to also analyzing noise increases over ambient levels in different areas. As a result of these violations, the Court of Appeal held, the County must rescind its certification of the EIR and adoption of ordinance until the County complies with the California Environmental Quality Act (CEQA).

In the *unpublished* portions, the court further held that the EIR inadequately addressed certain air quality impacts resulting from the implementation of air quality mitigation measures; that a mitigation measure for particulate matter (PM2.5) emissions was not enforceable, and that the board of supervisors made no finding that mitigation of PM2.5 emissions was infeasible; and that a cumulative health risk assessment prepared after circulation of the draft EIR constituted significant new information that must be addressed in a revised and recirculated EIR.

Factual and Procedural Background

In January 2013, representatives of three oil and gas industry associations—the Western States Petroleum Association, California Independent Petroleum Association, and the Independent Oil Producers' Agency—approached the County with a proposal to amend its zoning ordinance to establish a streamlined, ministerial permitting process for new oil and gas wells in the County. At the time, the County did not have a permitting process in place except for a requirement to obtain a conditional use permit in certain residential and commercial zoning districts. Following the preparation and circulation of a draft EIR, in November 2015, the Kern County Board of Supervisors certified the Final EIR as being completed in compliance with CEQA and adopted the ordinance. Because some of the impacts of the ordinance would be significant and unavoidable, the board of supervisors also adopted a statement of overriding considerations upon finding that the ordinance's benefits

outweighed its significant environmental impacts.

Following the adoption of the ordinance, a private farm (King and Gardiner Farms) and several environmental organizations, including the Sierra Club, Natural Resources Defense Council, and Center for Biological Diversity, among others, filed petitions for writ of mandate challenging the EIR and ordinance on the grounds that that County violated CEQA and the State Planning and Zoning Law. After a trial on the consolidated petitions, the trial court largely rejected the petitioners' CEQA claims but held that the County's EIR violated CEQA by failing to analyze impacts on rangelands and from road paving as a mitigation measure to reduce dust emissions and other air quality impacts. Petitioners King and Gardiner Farms and Sierra Club appealed, arguing that the County violated CEQA in several additional respects. The Court of Appeal affirmed in part and reversed in part the trial court's ruling after finding that several of the petitioners' other CEQA claims also had merit.[1]

The Court of Appeal's Decision

The EIR Water Supply Analysis

Relying on the Supreme Court's decision in *Vineyard Area Citizens v. City of Rancho Cordova*, 40 Cal.4th 412 (2007), the petitioners first argued that the EIR failed to include an analysis of water supplies and related impacts "to the extent possible." As relevant here, as much as 75 percent of the municipal and industrial water supply in Kern County relied on groundwater extraction. Moreover, the Kern County sub-basin of the San Joaquin Valley Groundwater Basin, which includes most of the project area, is among the state's most-impacted groundwater basins, and has been in critical overdraft since 1980. As such, under the recently-enacted Sustainable Groundwater Management Act (SGMA), a groundwater sustainability plan was required to be adopted by January 31, 2020. Pointing to these conditions, the thrust of the petitioners' argument was that the EIR failed to adequately analyze project impacts to water supplies at a sufficiently localized-level, and instead contained only an analysis of impacts in three large regional subareas. In addition, the petitioners argued, the EIR failed to include an adequate discussion of water supplies in light of the state's recent historic drought.

Finding that factual questions predominated regarding whether the EIR analyzed water supplies "to the extent possible," the court applied the substantial evidence standard of review to petitioners' claim that a more localized analysis was required. The court rejected the petitioners' claim holding that substantial evidence in the record supported the County's approach. Specifically, the court held that information in the record about the data available and uncertainty in future water supplies, created in part by SGMA and the future implementation of groundwater sustainability plans, provided substantial evidence to support the determination that a more localized analysis would be speculative. Accordingly, the court held, the EIR did not violate the requirement to analyze water supply impacts to the extent reasonably possible at the time the analysis was prepared.

Next, turning to the legal question of whether the EIR adequately addressed drought conditions, the Court of Appeal concluded that the discussion was adequate in that it facilitated informed agency decision-making and public participation. The court rejected petitioners' argument that the EIR failed to include timely data, in violation of CEQA Guidelines § 15064, subdivision (b), requiring that the determination of impact significance be "based to the extent possible on scientific and factual data." According to the court, consistent with the former CEQA Guidelines § 15125, subdivision (a), the EIR included the information that was available at the time the Notice of Preparation was published and, therefore, was consistent with CEQA's reequipments. The court further rejected an argument that the County was required to update its analysis and recirculate the draft EIR in light of more recent drought-related information. According to the court, petitioners failed to meet their burden to show the County's decision not to recirculate the EIR was not supported by substantial evidence.

Water Supply Mitigation Measures

Petitioners also challenged the adequacy of the EIR's mitigation measures for water supply impacts. The EIR concluded that the ordinance would have a significant and unavoidable impact on water supplies because implementation of the ordinance would deplete the County's municipal and industrial water supplies. To mitigate this impact, the EIR proposed several water supply-related mitigation measures.

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One such mitigation measure provided that, to the extent feasible, applicants for permits under the ordinance shall increase or maximize the re-use of well "produced water." Produced water is groundwater that naturally occurs in oil and gas reservoirs brought to the surface with the extracted oil and gas and separated from the hydrocarbons after extraction. The Court of Appeal held that the requirement for applicants to increase or maximize their use of produced water violated CEQA's prohibition on the deferral of formulating mitigation measures because it merely set forth a generalized goal to be assessed based on future water usage, rather than establishing specific performance standards that must be met. The court noted that there is an exception to the general rule prohibiting the deferral of mitigation measures, but that to qualify for the exception the agency must commit itself to a specific performance standard for evaluating the efficacy of the measures to be implemented. The court opined that were it to hold such a measure satisfied CEQA, lead agencies and project proponents—aware of the court's precedent—would have scant incentive to define mitigation measures for other projects in specific terms. Instead, planning documents or ordinances adopted by local governments could merely state that permit applicants must reduce environmental impacts to the extent feasible. Allowing such an approach, the court reasoned, would undermine CEQA's purpose of "systematically identifying" feasible mitigation measures that will reduce environmental impacts. (Citing Pub. Resources Code, § 21002, subd. (b)(3).)

The court then turned to another water supply mitigation measure which required that the five biggest oil industry users of municipal and industrial water work together to develop and implement a plan identifying new measures to reduce municipal and industrial water use by 2020. The court held that this mitigation measure—which unquestionably deferred formulation of more specific mitigation—violated CEQA because it lacked specific performance standards for reduction to include in the plan. Moreover, the measure did not commit *the County* to the measures ultimately included in the plan. Rather, the court explained, it assigned the duty to implement the measure to unidentified third parties who may or may not agree to participate in the task or who might not act in good faith. Yet another flaw with this mitigation measure, according to the court, was that the plan was not required to be developed until 2020, whereas the ordinance took effect in 2015. Thus, the measure allowed permits for oil and gas activities to be issued without having to comply with the measures contained in the yet-to-developed plan. Accordingly, the measure violated CEQA's principle against delayed implementation of mitigation measures.

Another mitigation measure adopted by the County specified that:

> . . .[i]n the County's required participation for the formulation of a Groundwater Sustainability Agency [pursuant to the Sustainable Groundwater Management Act (Senate Bill 1281)], the Applicant shall work with the County to integrate into the Groundwater Sustainability Plan for the Tulare Lake-Kern Basin, best practices from the oil and gas industry to encourage the re-use of produced water from oil and gas activities.

The mitigation measure set a re-use "goal" of 30,000 acre-feet per year. The Court of Appeal held that this mitigation measure also violated CEQA because the groundwater sustainability plan mentioned in the measure must be adopted by January 31, 2020—four years after the ordinance was approved. Therefore, the measure was improperly deferred in another way—it improperly delayed implementation of the mitigation measure. Furthermore, the goal of re-using 30,000 acre-feet per year of produced water was merely a goal, and not an enforceable commitment, as required by CEQA.

Finally, the Court of Appeal held that because the water supply mitigation measures were of unknown effectiveness, in order for the County to properly adopt a statement of overriding considerations under CEQA, the EIR must:

> (1) describe the mitigation measures that are available (i.e., currently feasible) and (2) identify and explain the uncertainty in the effectiveness of those measures.

The court reasoned that such a requirement is mandated by the general rule that an EIR must alert the public and decisionmakers of the significant problems a project would create and must discuss currently

feasible mitigation measures. Here, the court held, the County's lack of information about how future applicants would reduce water usage or otherwise comply with the EIR mitigation measures constitutes a lack of sufficient detail to enable the public and decisionmakers to understand and meaningfully consider the information presented in the EIR.

Mitigation for the Conversion of Agricultural Lands

The court next considered the petitioners' challenge to the County's mitigation measures for the conversion of agricultural lands. The County's EIR found that, without mitigation, implementation of the ordinance had the potential to convert farmland throughout the County, including Prime Farmland, Unique Farmland, and/or Farmland of Statewide Importance, to non-agricultural use as a result of allowing oil and gas activities to occur on agricultural lands. The EIR concluded, however, that, with mitigation, the impact would be reduced to less than significant. The mitigation measure adopted by the County for this impact would have allowed permit applicants to adopt just one of four different mitigation options (discussed below). The court rejected this approach and held that because not all of the options constituted adequate mitigation under CEQA, the County lacked substantial evidence to support its conclusion that the impacts of the ordinance on the conversion of agricultural lands would be mitigated to a less-than-significant level.

As the court explained, option "a" under the EIR's agricultural mitigation measure authorized the use of agricultural conservation easements at a 1:1 ratio. That is, a conservation easement providing for the conservation of one acre of agricultural land for every one acre converted to non-agricultural uses. The court held that conservation easements do not constitute adequate mitigation because they do not create new agricultural land to replace the agricultural land being converted to other uses. Rather, conservation easements simply prevent the future conversion of the agricultural land. In other words, conservation easements do not actually offset a project's impacts on agriculture. Accordingly, the court held, the inclusion of option "a" in the agricultural mitigation measure was fatal as the option rendered the mitigation measure ineffective.

Option "b" of the agricultural mitigation measure allowed for the purchase of conservation credits from an established agricultural mitigation bank. While the court found that this mitigation approach could be sufficient to mitigate conversion impacts in theory, the court agreed with the petitioners that there was no evidence in the administrative record that such banks actually existed. Thus, the court held that the record lacked substantial evidence to support a finding that this option would actually mitigate agricultural impacts; therefore, option b was not sufficient mitigation under CEQA.

Lastly, the Court of Appeal concluded that the County had failed to adequately respond to comments suggesting a mitigation measure that would require the clustering of oil and gas wells so that fewer acres of agricultural lands would be converted under the ordinance. The County's response to comments explained that the County's General Plan contains a policy generally requiring the clustering of wells, however, the response did not specifically address the feasibility of adopting a mitigation measure requiring well clustering. The Court concluded that the County's responses to comments failed to comply with the requirements of § 15088, subdivision (b) of the CEQA Guidelines, which require a "reasoned analysis" in response to comments raising "significant environmental issues."

Analysis of Noise Impacts

Finally, the addressed court the adequacy of the EIR's noise impact analysis. To determine whether implementation of the ordinance would cause significant noise impacts, the County used a quantitative threshold of 65 dBA CNEL, meaning that the ordinance would not cause a significant noise impact if cumulative noise levels stayed below that threshold. The court held that the County's use of a single threshold violated CEQA because the threshold did not measure the increase in noise levels over ambient levels. Notably, comments on the EIR, as well as the County's own noise technical report suggested using an increase of 5 dBA over ambient levels to determine whether the increase in noise levels constituted a significant impact. For unexplained reasons, however, the County did not do so. Instead, the County argued that it was entitled to substantial deference in selecting the significance thresholds. While the court

agreed that the County is entitled to deference in its choice of significance thresholds under CEQA, the court held that the County's use of an absolute noise threshold for evaluating all ambient noise impacts violated CEQA in this instance because it did not provide a "complete picture" of the noise impacts that may result from implementation of the ordinance.

The Remedy

With regard to the appropriate remedy following the court's invalidation of the EIR, the County requested the court to exercise its equitable powers to preserve the status quo and allow the ordinance to remain in effect while the County corrects the deficiencies in the EIR and mitigation measures. The court declined to do so. The court reasoned that the usual remedy in a CEQA case is to order the respondent to rescind its approvals, and it saw no reason not to do so in this case. Unlike other "extraordinary cases" that allowed an ordinance or similar action which benefited the environment to remain in place, the court found that the oil and gas permitting ordinance was not adopted for the benefit of the environment. Rather, the primary purpose of the ordinance, according to the court, was to accelerate oil and gas development in the County and its associated economic benefits.

In addition to directing the County to rescind the EIR certification and approvals the court also directed that the new EIR prepared by the County include updated baselines for the water supply and air quality analyses because conditions have changed since the County issued the notice of preparation (NOP) of the original draft EIR that warrant updating the baseline.

Conclusion and Implications

The Fifth District's substantial decision is notable for the breadth of the areas of CEQA analysis and the detail in which each are addressed. The case provides significant and useful guidance on issues including water supply, noise, and air quality analyses, among others. Perhaps most significant is the Fifth District Court of Appeal's analysis of the EIR's mitigation measures and, more specifically, its discussion of the principles governing the deferral of mitigation measure formulation and the development of adequate performance standards.

The court's decision is available at: https://www.courts.ca.gov/opinions/documents/F077656.PDF.

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REGULATORY DEVELOPMENTS

U.S. BUREAU OF RECLAMATION RELEASES KLAMATH RIVER PROJECT INTERIM PLAN, WHICH PROVIDES ADDITIONAL WATER FOR ENDANGERED SPECIES

In late March 2020, the U.S. Bureau of Reclamation (Bureau) released a proposed Interim Plan to operate the Klamath River Project for a three-year period, with up to an additional 40,000 acre-feet per year made available for the benefit of endangered species and their critical habitats. The Interim Plan would govern the project's operations while the Bureau, the National Marine Fisheries Service (NMFS), and the U.S. Fish and Wildlife Service (FWS) complete consultation on the Bureau's proposed longer-term operations plan. The Bureau's long-term operations plan is the subject of a federal Endangered Species Act lawsuit filed by the Yurok Tribe and environmental groups.

Background

The Klamath River Project (Project) is located in Klamath County, Oregon, and Siskiyou and Modoc counties in California. The Project, which is operated by the Bureau of Reclamation, supplies irrigation water for approximately 230,000 acres of farmed land. Project water is stored and released from three reservoirs: Upper Klamath Lake, Clear Lake, and Gerber Reservoir. Additional water is available to the Project from the Klamath and Lost rivers, which is delivered through a network of diversion structures, canals, and pumps. Approximately 200,000 acres are served from Upper Klamath Lake and the Klamath River, and 30,000 acres are served from the Lost River, Clear Lake, and Gerber Reservoir. Several federally endangered species, such as coho salmon, and their critical habitats are dependent on the waters of the Klamath River.

The federal Endangered Species Act imposes requirements for protection of endangered and threatened species and their ecosystems, and makes endangered species protection a governmental priority. For marine and anadromous species (like salmon), the Secretary of Commerce, acting through the National Marine Fisheries Service, may list any species, subspecies, or geographically isolated populations of species as endangered or threatened. In addition to listing a species as endangered or threatened, the Secretary of the Interior must also designate "critical habitat" for each species, to the maximum extent prudent and determinable. For species other than marine or anadromous species, such as for terrestrial species, the Secretary, acting through Fish and Wildlife Service (FWS) may list and otherwise regulate the take of such species.

The Biological Opinions

At its most basic level, a Biological Opinion (BiOp)evaluates whether an agency action is likely to either jeopardize the continued existence of a listed species or result in the destruction or adverse modification of such species' designated critical habitat. Opinions concluding that the proposed action is likely to jeopardize a species' continued existence or adversely modify its critical habitat are called "jeopardy opinions," and must suggest "reasonable and prudent alternatives" that the Secretary believes will minimize the subject action's adverse effects. However, "no jeopardy" opinions do not require reasonable and prudent alternatives, but may still set forth reasonable and prudent measures that the action agency must follow if it is to obtain "incidental take" coverage, i.*e.* legal protection for incidentally taking a protected species.

On March 29, 2019, the National Martine Fisheries Service and the U.S. Fish and Wildlife Service (collectively: the Services) submitted to the Bureau their coordinated Biological Opinions evaluating the Bureau's 2018 Biological Assessment for proposed operations of the project, as modified (2018 Operations Plan). In evaluating the Bureau's 2018 Operations Plan, the Services each prepared Biological Opinions in 2019, concluding that the 2018 Operations Plan would not jeopardize the continued existence of Southern Oregon/Northern California Coast (SONCC) coho salmon, Southern Resident killer whale (SRKW), and Lost River sucker (LRS)

and shortnose suckers (SNS), nor would it destroy or adversely modify their designated critical habitat.

Subsequently, the Bureau analyzed the 2018 Operations Plan under the National Environmental Policy Act (NEPA), resulting in an Environmental Assessment (EA) and Finding of No Significant Impact (FONSI), which was finalized on April 1, 2019. Thereafter, the Bureau began operating the Project pursuant to both Services BiOps and the EA. However, in late summer 2019, Earth Justice on behalf of the Yurok Tribe, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources filed a lawsuit, Case No. 3:19-cv-04405-WHO, in the U.S. District Court for the Northern District of California, challenging, among other things, the "no jeopardy" and "no adverse modification" conclusions in NMFS' BiOp, as well as the Bureau's associated EA.

In August 2019, it was discovered that "computer modeling input files" used to evaluate the amount of available habitat for SONCC coho fry in the Bureau's 2018 Operations Plan and NMFS' 2019 BiOp, contained erroneous information related to the BiOp's "Weighted Usable Area habitat curves" for SONCC coho salmon. Accordingly, the files revealed effects of the 2018 Operations Plan on listed species or their critical habitats that were not previously considered in the BiOp or EA. In particular, the Bureau has expressed concerns related to the amount of habitat available for juvenile coho salmon, in addition to disease mitigation as had previously been the focal point of the Bureau's consultation with NMFS. The Bureau requested re-initiation of formal consultation with both Services on November 13, 2019.

Prior to the Bureau's request to reinitiate consultation with the Services, plaintiffs in the federal lawsuit filed a motion seeking a preliminary injunction to force the Project to operate under a 2012 operations plan in compliance with a corresponding BiOp from 2013, and which would require the Bureau to increase Klamath River flows to address coho salmon disease and habitat concerns. In late January, plaintiffs modified their motion for preliminary injunction, requesting an additional 50,000 acre-feet (AF) of water allocated for Klamath River flows for the benefit of endangered species and their critical habitats.

The New Environmental Assessment and the Proposed Action Alternative

On February 7, 2020, as part of the reinitiated consultation process, the Bureau transmitted a new Environmental Assessment to both Services for Project operations from April 1, 2020, through March 31, 2024. However, the Bureau and the Services subsequently agreed that additional time would be required to complete the consultations. Accordingly, the Bureau proposes to operate the Project pursuant to the Interim Plan for the period of April 2020 to March 2023 while the Bureau and the Services continue the formal consultation process. Litigation over the 2018 Operations Plan and NMFS' 2019 BiOp will be stayed pending the consultation process, provided the Project is operated in accordance with the Interim Plan.

The Interim Plan constitutes the Bureau's Environmental Assessment for Project operations during the three-year period to which it applies, and analyzes two water management approaches: A No-Action Alternative, and a Proposed Action Alternative. The EA adopts the "Proposed Action Alternative."

The Proposed Action Alternative consists of water supply and water management approaches for Upper Klamath Lake, and the Klamath and Lost rivers. These approaches attempt to replicate natural hydrologic conditions observed in the Upper Klamath Basin. The EA reflects the Bureau's effort to comply with the ESA, while also maintaining reliable water deliveries to agricultural water users during the agricultural season. The Proposed Action Alternative generally includes: 1) storing waters of the Klamath and Lost rivers; 2) operating the Project to deliver water for irrigation purposes subject to water availability; and 3) maintaining conditions in Upper Klamath Lake and the Klamath River that comply with ESA requirements.

Under the Proposed Action Alternative, Project operations conducted after the agricultural season would be oriented toward filling Upper Klamath Lake during the fall/winter in order to bolster the ecologic benefit of the volumes available for the Environmental Water Account, which includes habitat and disease mitigation flows. The Proposed Action Alternative provides an additional 40,000 acre-feet of

water for the Environmental Water Account, which is 20,000 acre-feet more than a proposed but rejected alternative in the 2018 Operations Plan and 10,000 acre-feet less than the amount plaintiffs requested in their motion for preliminary injunction.

Notably, 17,000 acre-feet of the additional water for the Environmental Water Account would come from Upper Klamath Lake, while the rest would be supplied by other Project facilities. As analyzed in the EA, Upper Klamath Lake levels are not anticipated to decline significantly due to the additional water releases. In particular, the Proposed Action Alternative would maintain Upper Klamath Lake levels deemed to be protective of ESA-listed suckers, because it includes spring and annual Upper Klamath Lake minimums deemed important to sucker spawning and survival. The remaining 23,000 acre-feet from the Project's other supplies would be largely consistent with what the Bureau proposed in its 2018 Operations Plan. Following the winter months, when Upper Klamath Lake increases would be stored for the benefit of species and habitat, the Project would be operated to provide the Project's irrigation supply during the following spring/summer operational period.

Conclusion and Implications

While parties on both sides of the litigation involving the 2018 Operations Plans and NMFS' 2019 Biological Opinion generally perceive the Interim Plan as an acceptable compromise during the Bureau of Reclamation and the Services' continuing consultation process, it is unclear what longer-term operations plan will be developed. Potentially, the three-year Interim Plan may influence longer-term project operations by providing a test case weighing additional Environmental Water Account supplies with irrigation supplies and needs. It also remains to be seen whether there will be any deviation from the Interim Plan operations and whether plaintiffs will challenge any such deviations for purposes of lifting the stay on litigation. Finally, whether increased flows from the Environmental Water Account will provide the hoped-for ecological benefits remains to be seen, and could play an important role in future negotiations. For more information, *see:*

U.S. Bureau of Reclamation, *Environmental Assessment—Klamath Project Operating Procedures 2020-2023*, available at: https://www.usbr.gov/mp/nepa/includes/documentShow.php?Doc_ID=42944.
(Miles B.H. Krieger, Steve Anderson)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period. Due to COVID-19, there were significantly less items to report on this month.

Civil Enforcement Actions and Settlements—Air Quality

•April 9, 2020 - The U.S. Environmental Protection Agency (EPA) is taking corrective action to provide stability in the Pennsylvania and West Virginia economies. Specifically, the agency has established an emissions standard for a new sub-category of six small coal-refuse power plants under the Mercury and Air Toxics Standards (MATS). These coal-refuse power plants are an important source of reliable energy, a key economic driver in the rural communities where they are located, and a proven method for turning waste into a usable source of power while at the same time remediating a longstanding environmental threat. By taking this action, EPA is addressing a matter left unresolved by the last administration that threatened to put the coal-refuse industry and the surrounding communities out of business. "Coal refuse" refers to legacy material from mining operations, some of which can date back almost a century. Antiquated mining practices from past decades resulted in piles of low quality coal, mixed with rock, clay and other material, being effectively abandoned near coal mines. This action will help landowners reclaim land in these legacy coal mining areas. This reclaimed land is often redeveloped into park land, nature areas, or put to other beneficial uses. The new emission standards apply to a subcategory that includes six existing electric generating units that burn eastern bituminous coal refuse (EBCR). All are small units operating in Pennsylvania or West Virginia. As a result of this final rule, EPA does not expect emissions to increase above current levels.

•April 13, 2020 – EPA has reached an administrative settlement agreement with Peco Foods, Inc. resolving allegations that the company violated Section 112®(7) of the Clean Air Act (CAA), Chemical Accident Prevention Provisions, and the regulations codified at 40 C.F.R. Part 68, commonly referred to as the Risk Management Program (RMP) at five of its facilities located in Alabama (Tuscaloosa) and Mississippi (Bay Springs, Brooksville, Canton, and Sebastopol). The objective of the CAA 112®(7) and RMP is to prevent accidental releases of extremely hazardous substances and to minimize the consequences of those releases that do occur. Accidental releases of extremely hazardous chemicals can have serious consequences on public health, safety, and the environment. Peco Foods produces poultry products and uses anhydrous ammonia in their ammonia refrigeration process. Ammonia is regulated as an extremely hazardous substance. EPA alleges that Peco Foods failed to identify hazards associated with its ammonia refrigeration systems and failed to design and maintain a safe facility by not compiling process safety information documentation for the technology of the process, by not developing operating procedures for the safe operation of the facility, by not adequately training employees, and by not conducting inspections and testing operating equipment. The Consent Agreement and Final Order was filed on February 25, 2020. Under the terms of the agreement, Peco Foods took steps to return the five facilities to compliance, will pay a penalty of $106,250 and will donate emergency response equipment valued at $398,438, to the local fire departments.

Civil Enforcement Actions and Settlements—Water Quality

•April 9, 2020 - EPA has finalized an administrative order on consent with Sheffield Ranch Corp. and Fred Wacker resolving alleged violations of the Clean Water Act related to unpermitted construction, bank stabilization and discharges to the Yellowstone River near Hathaway in Rosebud County, Montana.

In June 2018, Montana Fish, Wildlife and Parks notified the U.S. Army Corps of Engineers (Corps) that a segment of the Yellowstone River's bank had been stabilized without a multi-agency permit required to do work in Montana's waterways. Upon receipt of an application from Sheffield Ranch, submitted after the bank stabilization work had been completed, the Corps inspected the site and observed that material for bank stabilization had been placed in and along approximately 200 linear feet of the Yellowstone River without authorization from the Corps. The Corps referred the matter to EPA for enforcement. Under the terms of the order, Sheffield Ranch and Mr. Wacker have agreed to submit and implement a restoration plan to remedy the impacts of the unauthorized activities and ensure the long-term stability of the riverbank. Sheffield Ranch and Mr. Wacker have also agreed to purchase 838.4 mitigation credits from the Lower Middle Yellowstone Mitigation Bank. Mitigation banking is a means to offset the ecological loss of a project constructed in waters of the U.S. by the restoration, creation, enhancement or preservation of wetlands, streams or other waters at a location other than the project site. In this case, the purchase of credits will contribute to the restoration and enhancement of a portion of approximately 63 acres of wetlands and over 45,000 linear feet of streams, securing additional actions to protect habitat along the river. The portions of the Yellowstone River disturbed by the unauthorized activities provide numerous functions and values including aquatic and wildlife habitat, runoff conveyance, groundwater recharge, recreation and aesthetics. The river also is habitat for pallid sturgeon, an endangered species. Placement of dredged or fill material into the Yellowstone River can have adverse impacts on fish and wildlife habitat and the plants and insects they rely on as food sources.

• April 16, 2020 – EPA announced that Roubin & Janeiro, Inc., owner of an asphalt manufacturing facility in Washington, D.C., has agreed to several actions to protect the Anacostia River from polluted stormwater runoff. In an Administrative Compliance Order on Consent, EPA cited the company for failing to take required measures to reduce pollution discharges including failing to minimize exposure of material storage areas to stormwater runoff, failing to properly store solid waste debris, failing to minimize potential for leaks and spills, and failing to prepare an adequate site map in the facility's Stormwater Pollution Prevention Plan. EPA's action was based on information from a joint inspection by EPA and the D.C. Department of Energy and the Environment (DOEE). Under the consent order, the company will implement measures to reduce polluted runoff including: construction of aggregate containment structures; construction of a vehicle pollutant containment structure; updating the site map and stormwater pollution prevention training protocol; updating site inspection schedules and processes; and updating its pollution prevention plan. These actions are designed to minimize the flow of asphalt manufacturing related stormwater pollutants to the Anacostia River. EPA coordinated with DOEE in determining the appropriate stormwater pollution prevention measures. In agreeing to the consent order, the company neither admitted nor denied the factual allegations or liability for the alleged violations. Uncontrolled storm water runoff from industrial and construction sites often contains oil and grease, chemicals, nutrients and oxygen-demanding compounds and other pollutants. The Clean Water Act requires owners of certain industrial and construction operations to obtain a permit before discharging storm water runoff into waterways. These permits include pollution-reducing "best management practices," such as spill prevention safeguards, material storage and coverage requirements, runoff reduction measures, and employee training.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

• April 2, 2020 - EPA has settled with Triangle Oil, Inc., for violations of EPA's Spill Prevention, Control, and Countermeasure (SPCC) requirements at its bulk fuel storage facility near John Day, Oregon. SPCC rules help protect our waters from discharges from facilities storing and handling petroleum fuels and other oils. The Triangle Oil facility, with storage capacity of just over 75,000 gallons, is located within 400 feet of Canyon Creek and one mile from the John Day River, a Columbia River tributary. By signing the Consent Agreement and Final Order (CAFO), Triangle Oil, Inc., agrees to pay a $27,000 penalty. SPCC rules help prevent oil discharges into navigable waters or adjoining shorelines. Preventing uncontrolled releases at bulk petroleum storage facilities reduces safety risks to workers, the community

and the environment. The CAFO resolves alleged violations that were documented during the 2015 inspection, including:

•Uncontrolled and unmonitored site drainage.

•Lack of adequate secondary containment for piping, transfer areas, bulk storage and other containers.

•Inadequate tank integrity program.

•Limited availability of required facility records covering inspection and personnel training records and documentation of buried piping inspection. EPA's SPCC program and rules are central to the Agency's oil spill prevention operations.

•April 15, 2020 - EPA announced that Tangier Oil Company, Inc. has agreed to take actions to reduce the risks of spills of fuel oils into the Chesapeake Bay. These actions will address the company's alleged environmental violations at a fuel storage distribution facility that the company operates in the Tangier Harbor in Virginia. The Tangier Oil facility, which transfers oil to and from docked vessels, has an aboveground oil storage capacity of 150,360 gallons -- including six 20,000-gallon and three 10,000-gallon storage tanks for diesel fuel, gasoline, and kerosene. EPA's Administrative Order on Consent with the company addresses violations of the Clean Water Act's Spill Prevention, Control, and Countermeasure (SPCC) and the Facility Response Plan (FRP) requirements. The alleged violations included:

Failure to have secondary containment around bulk storage tanks that is adequate to contain oil leaks;

•Failure to comply with inspection requirements;

•Failure to develop and implement oil spill preparedness and response training; and,

•Failure to develop and fully implement a program of facility response drills and exercises.

In entering into this consent order, the Tangier Oil Company neither admitted or denied these violations but agreed to take actions on a specified timetable including: submitting a revised SPCC plan and FRP; remedying deficiencies in the facility's secondary containment; hiring an independent consultant to evaluate and remedy any deficiencies associated with the integrity of oil storage tanks/equipment; and implementing mandatory employee training, drills and exercises.

•April 16, 2020 – In a settlement with the EPA, Texas-based Raven Power LLC recently paid a $105,000 penalty for allegedly failing to timely report a 2017 release of a hazardous substance from the H.A. Wagner Generating Plant in Baltimore. EPA cited the company for violating two federal laws requiring immediate reporting of releases of hazardous substances – the Emergency Planning and Community Right-to-Know Act (EPCRA); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund. EPCRA requires notification to the state and local emergency officials, and CERCLA requires notification to the National Response Center (NRC), the national point of contact for reporting oil and hazardous chemical spills. According to EPA, the company did not provide required immediate notices to federal, state and local emergency response officials immediately after facility personnel became aware at approximately 8 a.m., Sept. 11, 2017, of a release of approximately 1,126 pounds of sodium hypochlorite directly into the adjacent Patapsco River. EPA alleged that the company did not notify the NRC until 12:20 p.m., more than four hours after learning of the release, did not notify Maryland emergency officials until after 1 p.m., and failed to notify local officials at the Anne Arundel County Office of Emergency Management. EPA also cited the company for failing to provide required written follow-up notification to state and local officials.

Indictments, Convictions, and Sentencing

•March 21, 2020 - Unix Line PTE Ltd., a Singapore-based shipping company, was sentenced in federal court before U.S. District Court Judge Jon S. Tigar in Oakland, California, after previously pleading guilty to a violation of the Act to Prevent Pollution from Ships. Unix Line PTE Ltd. was sentenced to pay a fine of $1,650,000.00, placed on probation for a period of four years, and ordered to implement a comprehensive Environmental Compliance Plan as

a special condition of probation. In pleading guilty, Unix Line admitted that its crew members onboard the Zao Galaxy, a 16,408 gross-ton, ocean-going motor tanker, knowingly failed to record in the vessel's oil record book the overboard discharge of oily bilge water without the use of required pollution-prevention equipment, during the vessel's voyage from the Philippines to Richmond, California. On Oct. 24, 2019, Unix Line was indicted by a federal Grand Jury of obstruction of justice and a violation of the Act to Prevent Pollution from Ships. Under the plea agreement, Unix Line pled guilty to one count of a violation of the Act to Prevent Pollution from Ships. According to the plea agreement, Unix Line is the operator of the Zao Galaxy, which set sail from the Philippines on Jan. 21, 2019, heading toward Richmond, California, carrying a cargo of palm oil. On Feb. 11, 2019, the Zao Galaxy arrived in Richmond, where it underwent a U.S. Coast Guard inspection and examination. Examiners discovered that during the voyage, a Unix Line-affiliated ship officer directed crew members to discharge oily bilge water overboard, using a configuration of drums, flexible pipes, and flanges to bypass the vessel's oil water separator. The discharges were knowingly not recorded in the Zao Galaxy's oil record book when it was presented to the U.S. Coast Guard during the vessel's inspection.

• April 9, 2020 - Rong Sun, a/k/a Vicky Sun made her initial appearance on federal charges of illegally selling an unregistered pesticide, illegally importing the unregistered pesticide, and Rong Sun, a/k/a Vicky Sun made her initial appearance on federal charges of illegally selling an unregistered pesticide, illegally importing the unregistered pesticide, and mailing a prohibited article. Sun was charged with a criminal complaint filed by the U.S. Attorney's Office on April 8, 2020. According to U.S. Attorney Pak, the charges, and other information presented in court: The defendant allegedly sold an unregistered pesticide, Toamit Virus Shut Out, through eBay, claiming that it would help protect individuals from viruses. The pesticide was marketed as "Virus Shut Out" and "Stop The Virus." The eBay listing depicted the removal of viruses by wearing the "Virus Shut Out" and "Stop The Virus" product. Additionally, the listing stated that "its main ingredient is ClO2, which is a new generation of widely effective and powerful fungicide recognized internationally at present. Bacteria and viruses can be lifted up within one meter of the wearer's body, just like a portable air cleaner with its own protective cover." It also stated that "In extraordinary times, access to public places and confined spaces will be protected by one more layer and have one more layer of safety protection effect, thus reducing the risks and probability of infection and transmission. The listing further claimed that Toamit is "office and home essential during viral infections reduce transmission risk by 90 percent." The Federal Insecticide, Fungicide and Rodenticide Act, FIFRA, regulates the production, sale, distribution and use of pesticides in the United States. A pesticide is any substance intended for preventing, destroying, repelling, or mitigating any pest. The term "pest" includes viruses. Pesticides are required to be registered with the EPA. Toamit Virus Shut Out was not registered and it is illegal to distribute or sell unregistered pesticides. In addition, Sun allegedly imported the pesticide from Japan, violating the anti-smuggling law and then sent it via U.S. Postal Service priority mail.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT MAKES CLEAR THAT THE ADMINISTRATIVE 'FINALITY' REQUIREMENT UNDER *WILLIAMSON COUNTY* FOR FEDERAL LAND USE TAKINGS CLAIMS REMAINS INTACT

Pakdel v City and County of San Francisco, 952 F.3d 1157 (9th Cir. 2020).

In one of the first federal "takings" cases after last year's U.S. Supreme Court decision in *Knick v. Township of Scott*, Case No. 17-647, 588 U.S. ___ (2019), the U.S. Court of Appeals for the Ninth District, in a March 18, 2020 decision, made clear that the administrative "finality requirement" elaborated in the 1985 decision *Williamson County Regional Planning Commission v. Hamilton Back*, 473 U.S. 172 (1985), still remains in place. As part of this finality requirement, a prospective federal takings plaintiff must pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision before bringing a federal action.

Factual and Procedural Background

Plaintiffs owned a tenancy-in-common interest in a multi-unit building in the City of San Francisco (City). Under a fairly common ownership arrangement in the city, several tenants-in-common share ownership over an entire building and then enter into agreements among themselves to give each owner an exclusive right to occupy a particular unit. Plaintiffs leased their tenant-in-common unit to a tenant but planned on occupying the unit upon their retirement.

Until recently, the City conducted a lottery to determine which tenant-in-common buildings could be converted into condominium units and the lottery faced a severe backlog. In 2013, to clear the backlog, the city temporarily suspended the lottery and replaced it with the Expedited Conversion Program (ECP) which allowed tenancy-in-common property to be converted into condominium property on the condition that its owner agreed to offer any existing tenants in affected units with lifetime leases within the converted property. The City also had procedures to request exemptions to the lifetime lease offer requirement.

Plaintiffs purchased their property in 2009. In 2015, plaintiffs, along with their co-owners, applied to convert the building into a condominium building under the ECP. While advancing through the application process, plaintiffs had several opportunities to seek a waiver from the lifetime lease requirement. They never did so and in January 2016, the San Francisco department of public works approved plaintiffs' "tentative conversion map." In November of 2016, plaintiffs signed an agreement with the city to offer a lifetime lease to their tenants and even offered their tenants such a lease. At the last minute, before signing executing the lifetime lease they offered to their tenant, tenants refused to sign the lease and instead sued the City in the U.S. District Court for the Northern District of California. Plaintiffs contend under various theories that the City's lifetime lease requirement violated the Takings Clause of the Fifth Amendment of the U.S. Constitution.

The *Knick v. Township of Scott* Decision

Plaintiffs case reached the U.S. District Court before the U.S. Supreme Court's decision in *Knick v. Township of Scott*. Before *Knick*, regulatory takings plaintiffs had to clear two hurdles in local and state venues before seeking relief in federal court. Such plaintiffs needed to: 1) obtain a final decision through whatever administrative procedures were available to challenge the alleged taking in the local jurisdiction (Finality Requirement), and 2) exhaust all state court remedies available to obtain compensation for regulatory takings (Exhaustion Requirement). The U.S. Supreme Court's decision in *Knick* eliminated the exhaustion requirement.

Because plaintiffs filed their lawsuit before the *Knick* decision, the U.S. District Court dismissed plaintiffs' suit for failure to exhaust all available state remedies to obtain compensation. Plaintiffs appealed to the Ninth Circuit.

The Ninth Circuit's Decision

The Ninth Circuit began by noting that constitutional challenges to local land use decisions are not considered by federal courts until the posture of such challenges are considered "ripe." Before *Knick*, a case needed to meet the two requirements above before it was "ripe" for federal review:

> First, under the finality requirement, a takings claim challenging the application of land-use regulations was not ripe until the government entity charged with implementing the regulations ha[d] reached a final decision regarding the application of the regulations to the property at issue… Second, under the state-litigation requirement, a claim was not ripe if the plaintiff did not seek compensation [for the alleged taking] through the procedures the State ha[d] provided for doing so.

The Ninth Circuit acknowledged that the U.S. Supreme Court's *Knick* decision removed the second requirement above, and as a result, plaintiffs' failure to seek just compensation in state court no longer barred them from brining their takings claim in federal court. The Court of Appeals then analyzed whether plaintiffs takings claims were ripe under the first pre-*Knick*, "finality" requirement.

Ripeness and the 'Finality' Requirement

First the court recognized that the *Knick* decision left the first or "finality" pre-*Knick* requirement intact. Plaintiffs did not argue this, but instead argued that they satisfied the "finality" requirement by refusing to sign the lifetime lease that it agreed with the City of San Francisco to sign, after failing to attempt to seek a waiver of the lifetime lease requirement through the procedures made available by the City. The court disagreed.

In doing so, the court analyzed the rationale behind the "finality" requirement that was articulated by the Supreme Court in the 1985 case *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*. As the court in *Williamson County* noted, the finality requirement exists in constitutional land use challenges because many of the factors essential to determining whether a taking has occurred (economic impact of the action, and extent to which it interferes with investment backed expectations):

> . . .simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land use question.

The finality requirement addresses the high degree of discretion that local land use boards have in granting variances from their general regulations with respect to individual properties. In light of this discretion, federal courts simply cannot "make a sound judgment about what use will be allowed by a local land use authority merely by asking whether a development proposal" facially conforms to the land use regulations at issue. As the court noted, a federal court cannot decide whether a regulation:

> . . .has gone too far until it knows how far the regulation goes which requires a final and authoritative determination of how the regulation will be applied to the property in question.

Applying 'Finality' under *Williamson County*

The court went on to articulate that the *Williamson County* "finality" rule requires a plaintiff:

> to meaningfully request and be denied a variance form the challenged regulation before bringing a regulatory takings claim…but the term variance is not definitive of talismatic; if other types or permits are available and could provide similar relief, they must be sought.

The court then analyzed the various avenues that the San Francisco department of public works made available to plaintiffs during the ECP application. Public works staff had discretion to authorize exceptions to the lifetime lease requirements. Plaintiffs could have sought an exception at the January 7, 2016 hearing on the ECP application's tentative map. The City also notified plaintiffs that before the City approved a final conversion map, plaintiffs could raise any objections to the conditions of the tentative conversion map approval, including the lifetime lease requirements. Plaintiffs also could have raised an objection to the lifetime lease requirement to the City board of supervisors and were notified of this in a letter that followed initial approval of the conversion

map. At each of these opportunities, plaintiffs failed to seek an exception to the lifetime lease requirement, until all available procedural methods had expired.

Plaintiffs nonetheless alleged that they met the finality requirement by refusing to execute the finality lease. The court disagreed. The "finality" requirement requires plaintiffs to timely avail themselves of the administrative avenues available to seek a variance or exception from a challenged land use regulation:

> Plaintiffs cannot make an end run around the finality requirement by sitting on their hands until every applicable deadline has expired before lodging a token exemption request that they know the relevant agency can no longer grant. . . .

The court also recognized that although there is no exhaustion requirement for actions brought under § 1983, in the land use takings context, a property owner's failure to seek a variance (or similar exception) through procedures made available by the local land use authority, means that the authority had not reached a final decision.

Conclusion and Implications

The U.S. Supreme Court's recent decision in *Knick* was a boon for federal regulatory takings plaintiffs who want to avoid the need to pursue state court actions. However, the Ninth Circuit's decision in *Pakdel* makes clear that such plaintiffs still need to pursue the procedurally available avenues, within the timelines prescribed by local agencies, to seek relief from a challenged land use decision. *Williamson County's* finality requirement remains firmly intact, for now, within the Ninth Circuit. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/03/17/17-17504.pdf. (Travis Brooks)

ALLEGATIONS OF RICO VIOLATIONS IN 'CLEAN DIESEL' LITIGATION SURVIVE MOTION TO DISMISS

Albers v. Mercedes-Benz USA, LLC, et al., ___F.Supp.3d___, Case No. 16-881 (D. N.J. Mar. 25, 2020).

A third U.S. District Court has rejected a motion to dismiss Racketeer Influenced and Corrupt Organizations Act (18 U.S.C. § 1962, RICO) allegations in a "clean-diesel" case, holding that allegations a car manufacturer and parts supplier committed mail fraud when they worked together to deceive the U.S. Environmental Protection Agency (EPA) with respect to federal Clean Air Act (CAA) compliance were not an attempt to repackage a Clean Air Act violation as a RICO-predicate act. Further, the court rejected the argument that private-plaintiffs were barred from alleging fraud on the EPA as a RICO-predicate act; rather, the alleged deception of consumers was the illegal act alleged, although that deception may have involved also deceiving EPA.

Background

The putative class representatives allege that, from 2007 through the beginning of 2016, German car manufacturer Mercedes sold diesel cars (Subject Vehicles) in the United States that they advertised as:

> . . .'the world's cleanest and most advanced diesel' with 'ultra-low emissions, high fuel economy and responsive performance,' representing that they emit 'up to 30 percent lower greenhouse-gas emissions than gasoline.'

However, per the class allegations, Mercedes and its parts-supplier Bosch:

> . . .installed an electronic control unit in the Subject Vehicles known as electronic diesel control unit or 'EDC' 17[, which] allegedly functioned as a defeat device, *i.e.*, turned off or limited emissions reductions during real-world driving conditions as compared to lab testing.

The purpose of the defeat device was to persuade regulators and consumers that the Subject Vehicles met emissions standards, including those limiting al-

lowable emissions of NOx (nitrous oxide), a pollutant regulated under the Clean Air Act (42 U.S.C. § 7401 *et seq*.) The defeat devices accomplished this sleight of hand by detecting when the Subject Vehicles' emissions were being measured under laboratory conditions, when emissions limitations functions would be enabled. Conversely, when the defeat devices sensed that the Subject Vehicles were being driven under normal conditions, emissions controls were disabled and performance—as well as emissions—were thereby enhanced.

The putative class representatives alleged that they paid a premium for their "green diesel" cars. Their complaint stated claims under various state consumer protection laws as wells as violation of the federal RICO, pursuant to which they seek civil penalties. The RICO enterprise is alleged to be one by which the Mercedes and Bosch defendants coordinated their operations through the design, manufacturing, distributing, testing, and sale of the Subject Vehicles.

The elements of a RICO violation are: "1) conduct 2) of an enterprise 3) through a pattern 4) of racketeering activity." "Enterprise" is defined "exceedingly broadly" to include both corporate entities and informal associations. *Boyle v. U.S.*, 556 U.S. 938, 944 (2009). With respect to the pattern of racketeering activity, the statute "requires at least two acts of racketeering activity within a ten-year period," which may include federal mail fraud under 18 U.S.C. § 1341 or federal wire fraud under 18 U.S.C. § 1343.

In addition, it was alleged that:

> . . .the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

Bosch sought to dismiss the RICO claim, arguing, *inter alia*, that "[p]laintiffs should not be allowed to convert their [CAA] claim into a RICO claim," and that they "may not base their RICO claim on a 'fraud on the regulator theory." 18 U.S.C. § 1962(c).

The District Court's Decision

Defendants argued that plaintiffs' allegations of racketeering involved violations of federal emissions standards, and therefore their RICO claim is "simply a disguise for a private CAA claim." Plaintiffs countered that the CAA's savings clause "Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief ....," 42 U.S.C. § 7604(e)—preserves their claim. The District Court adopted a third analytical lens: that plaintiffs' RICO claim:

> . . .is not premised on a violation of the CAA; rather, it alleges a pattern of deceptive marketing practices that amount to mail and wire fraud. These claims, while surely related to the concerns of the CAA, do not adopt the CAA as a predicate or rest on a violation of the CAA.

This result echoes that of other District Courts that have considered similar attacks on RICO claims arising from similar facts. *Counts v. Gen. Motors, LLC*, No. 16-CV-12541, 2018 WL 5264194, at *12 (E.D. Mich. Oct. 23, 2018), and *In re Duramax Diesel Litig.*, 298 F. Supp. 3d 1037, 1088 (E.D. Mich. 2018).

Analysis under the *Cleveland* Decision

Separately, Bosch attached the RICO claims against itself—a parts supplier—to the extent that those claims relied on allegations that Bosch assisted Mercedes with false applications to EPA as RICO-predicate acts, relying on *Cleveland v. U.S.*, 531 U.S. 12 (2000). In *Cleveland*, the defendant was accused of having submitted "false statements in an application for a state gambling license" as the basis of a mail fraud claim, the RICO-predicate act:

> The Supreme Court held that the mail fraud statute aims at the deprivation of a victim's property. It requires 'the object of the fraud to be 'property' in the victim's hands [but ...] a Louisiana video poker license in the State's hands is not 'property.' *Id.* at 26-27.

Here, however, the gravamen of plaintiffs' complaint is not that that Bosch and Mercedes acted together to deceive EPA, but rather Mercedes and Bosch "made material misrepresentations that induced [plaintiffs] to purchase vehicles" they would not otherwise have purchased, or to have paid higher prices than they otherwise would have paid:

In short, the alleged scheme to defraud buyers included misrepresentations to the EPA, but EPA is not alleged to be the mail or wire fraud victim.

Plaintiffs' RICO claims thus survived the motion to dismiss.

Conclusion and Implications

Class-action plaintiffs' RICO claims against various auto manufacturers have survived motions to dismiss in various jurisdictions, but it remains to be seen whether plaintiffs can succeed in proving notoriously difficult to prosecute RICO claims.
(Deborah Quick)

CAFO CITIZEN SUIT FAILS TO ESTABLISH 'IMMINENT AND ONGOING THREAT' UNDER RCRA AND THE CLEAN WATER ACT

Garrison v. New Fashion Pork, LLP, ___F.Supp.3d___,
Case No. 18-CV-3073-CJW-MAR (N.D. Iowa Mar. 27, 2020).

Recently the U.S. District Court for the Northern District of Iowa was faced with claims of water and soil contamination from runoff and manure spreading from a nearby confined animal feeding operation (CAFO). In the end, plaintiff was unable to establish any ongoing actions, thus failing in it's case under RCRA or the federal Clean Water Act.

Factual and Procedural Background

Defendants, New Fashion Pork, LLP, own and operate a confined animal feeding operation in Emmet County, Iowa on a piece of land known as the "Sanderson property." Plaintiff, Gordon Garrison, is an adjacent landowner. Plaintiff alleged that defendants' misapplication of hog manure to defendants' fields caused manure to runoff into water on the plaintiff's property constituting a violation of the federal Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and Iowa statutes, regulations and common law.

The hog manure pit on the Sanderson property is customarily emptied by defendants every fall after the crop harvest is complete. To empty the pit, defendants fill a tanker truck with manure and then apply the manure directly into the soil and cover the manure with another layer of soil. Excess manure that is not applied to defendants' fields is sold as fertilizer to other farms.

Plaintiff alleged that, on two separate occasions, defendants improperly applied the manure to fields on the Sanderson property, causing the manure to run off the Sanderson property and into water on plaintiff's property. First in 2016, plaintiff observed defendants apply manure to the Sanderson property when the soil was saturated. Second, in the fall of 2018, defendants applied manure on top of frozen ground and snow. Because the ground at the Sanderson property was too frozen and snow-covered to inject the manure into the soil, the defendants got permission from the Iowa Department of Natural Resources (DNR) to spray manure onto the frozen ground rather than inject it. However, in December 2018, the weather became unreasonably warm, which caused the manure to unfreeze and run off the Sanderson property.

Defendants moved for summary judgment on plaintiff's RCRA and CWA claims and requested the court to decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. The parties also filed separate motions to strike portions of and exclude certain expert testimony reports.

The District Court's Decision

Defendants' Motion for Summary Judgement of Plaintiff's Federal Claims

RCRA's citizen suit provision permits a private party to bring suit only upon a showing that the solid waste or hazardous waste at issue may present an imminent and substantial endangerment to health or the environment. The CWA similarly requires a Plaintiff to demonstrate an "imminent an ongoing threat." Thus, in order to prevail on its motion for summary judgement, Defendants were required to demonstrate that the hog manure spreading activity did not present an imminent and ongoing threat under the RCRA or CWA.

Defendant made two arguments in support of their motion. First, defendant argued that plaintiff could not show an ongoing violation because defendants did not apply the manure on the Sanderson property following the 2019 harvest, electing instead to dispose of the manure from the Sanderson property onto another property owned by the defendants. Second, defendants argued that plaintiff did not have sufficient evidence to meet the threshold "imminent and ongoing" requirement under the RCRA or CWA.

In response, plaintiff argued that defendants' decision to apply the manure to other fields and a statement from defendants' environmental manager that the lawsuit was "definitely a consideration" in defendant's decision to begin spreading manure elsewhere effectively served as an admission that defendants were creating an imminent and substantial endangerment. Second, that water test results show that defendants' repeated application of manure to the Sanderson field polluted plaintiff's property. Finally, plaintiff argued, that the manure was disposed of in violation of the RCRA's anti-dumping provision.

Defendants' Change in Manure Spreading Practice

In regards to defendants' first argument, the court reasoned that in order for the court to find that defendants' changed spreading practice showed there was no threat of future or imminent harm, there must be clear evidence demonstrating that the original spreading practice could not reasonably be expected to recur. Defendants had done nothing to show that they would not start applying manure to the Sanderson property after the lawsuit is resolved.

The court was also unpersuaded by plaintiff's argument that defendants' change in spreading practice demonstrated an imminent and ongoing threat, and constituted an admission of such a finding. First, the court held that the change in practice alone did not show an imminent and ongoing threat. Second, defendants' environmental manager's statement was not sufficient evidence.

Plaintiff's Physical Observations and Water Test Results

Turning to plaintiff's second argument, the court held that plaintiff's physical observations and water test results failed to establish a substantial endangerment to plaintiff's property. On the issue of physical observations, the plaintiff provided deposition testimony that Plaintiff once observed manure applied to saturated soil. The court determined that a single observation was insufficient to establish an imminent and ongoing threat. On the issue of water test results, the court determined that the results would need to show a pattern of periodic spikes of nitrate levels in the water correlating to defendants' emptying of the manure pit. Plaintiff's water samples, however did not indicate such a pattern. The court also found plaintiff's argument that it takes time for over applied manure to work its way through the soil, into the plaintiff's drainage system and into plaintiff's stream was unpersuasive. It held that plaintiff's second argument failed because the water tests did not establish a discernable pattern of violations, and further that, Plaintiff failed to provide sufficient evidence showing that the nitrate levels were caused by defendants' misapplication.

Open-Dumping and RCRA

Plaintiff also argued that Defendants' over application of manure constituted "open dumping" in violation of RCRA. The court held that this argument also failed because the plaintiff failed to cite to any authority supporting its assertion that the open dumping prohibition was exempted from the threshold requirement under the citizen suit provision of the RCRA that the violation must be ongoing. Thus, the court determined the plaintiff waived this claim by failing to cite any supporting legal authority.

Remaining Claims

The court declined to exercise supplemental jurisdiction over plaintiff's remaining state law claims and dismissed them without prejudice. The court was also presented with the parties' motion to strike and exclude certain expert witness reports. The court determined the grant of defendants' summary judgement rendered this issue moot.

Conclusion and Implications

This case demonstrates that a single occurrence of a past violation is not sufficient to meet the "imminent and ongoing" threshold requirement under the RCRA or the CWA.
(Nathalie Camarena, Rebecca Andrews)

U.S. DISTRICT COURT GRANTS SUMMARY JUDGMENT ON PUBLIC NUISANCE CLAIMS RELATING TO PCB CONTAMINATION OF SAN DIEGO BAY

San Diego Unified Port District v. Monsanto Co.,
___F.Supp.3d___, Case No. 3:15-CV-00578 (S.D. Cal. Mar. 26, 2020).

The U.S. District Court for the Southern District of California recently considered a series of motions for summary judgement challenging claims that a PCB manufacturer is liable under a public nuisance theory for costs to clean up PCB contamination the San Diego Bay (Bay). In *three separate decisions*, the U.S. District Court granted summary judgement against the City of San Diego, but upheld the San Diego Unified Port District claims for public nuisance and abatement remedies Trial is scheduled for fall 2020.

Factual and Procedural Background

Starting in the 1980s, the San Diego Regional Water Quality Control Board (RWQCB) issued several cleanup and abatement orders after finding elevated levels of Polychlorinated Biphenyls (PCBs) in sediments and fish living in the San Diego Bay (Bay). PCBs are a non-biodegradable, stable compounds originally manufactured to cool and insulate heavy-duty electrical equipment. Monsanto was the sole manufacturer of PCBs from the 1930s to 1979. PCBs are virtually indestructible, and once released into the environment, PCBs bind to soil and sediment, travel long distances, and remain pervasive in the environment for long periods of time. The RWQCB found PCBs bioaccumulated in Bay fish and may pose a serious risk to human health. Fish consumption advisories also warned women over 45 and children under the age of 18 should avoid consuming fish from the Bay due the risks of PCB contamination. Under the Port Act, the San Diego Unified Port District (Port District) has authority and powers to "protect, preserve, and enhance" the water quality and natural resources of the Bay. As a title holder and trustee to the Bay, the Port District incurred costs overseeing and funding sediment caps to remediate PCB-contaminated sites.

In one cleanup and abatement order for the Shipyard Sediment Site, the RWQCB named the City of San Diego (City) as one of the discharging parties responsible for remediation. The RWQCB found the City's municipal separate storm sewer system (MS4) discharged urban sediment and storm water contaminated with toxic substances, including PCBs, into the Bay. The City ultimately incurred approximately $17 million to investigate and cleanup PCBs in the Shipyard Sediment Site pursuant to a settlement of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and state law claims.

In 2015, the Port District and the City jointly initiated an action against Monsanto Company, Solutia Inc., and Pharmacia Corporation (collectively: Monsanto) alleging the PCBs in the Bay constituted a public nuisance. A nuisance, as applied here, is:

> . . .anything which is injurious to health…or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstruct the free passage or use, in the customary manner, of any navigable lake, or river, bay stream, canal, or basin. . . .

The City's amended complaint alleged a single cause of action that the continual presence of PCBs in the City's MS4 constituted a public nuisance and allowed the City to recover its remediation costs. The Port District also brought public nuisance, purpesture, and abatement claims against Monsanto for public nuisance related to PCB contamination in the Bay. The Port District alleged Monsanto knowingly promoted the use, sale, and improper disposal of PCBs, despite knowing PCBs posed an environmental and health risk.

On August 2, 2019, Monsanto filed motions for summary judgment against all claims brought by the Port District and the City. The Port District also filed a motion for summary judgment against Monsanto's affirmative defenses.

The District Court's Decision

As the moving party, Monsanto had the burden to

show there was no genuine dispute of material fact and it was entitled to judgment as a matter of law. Monsanto could discharge its burden by showing an absence of evidence to support the Plaintiff's case. If so, the court then considered whether Plaintiffs' presented sufficient evidence to show a genuine issue for trial.

Public Nuisance and Evidenced of Physical Harm

The court first considered whether Monsanto was entitled to judgment on the City's claim for public nuisance by considering whether there was sufficient evidence showing the presence of PCBs injuriously affected the MS4. The court's order emphasized that to be a nuisance, the interference must be both substantial and unreasonable. Substantiality is the "real and appreciable invasion of the Plaintiff's interests" that is "definitely offensive, seriously annoying, or intolerable." Monsanto argued the City's claim for public nuisance failed because the City lacked evidence of the City's property, the MS4, incurring injury.

Though the court found evidence of PCBs in the MS4, evidence of physical harm to the MS4 was lacking. Nothing in the record indicated the MS4 was physical damaged or structurally altered due to the presence of PCBs. Further, the City did not claim PCBs caused physical damage to the MS4 or that retrofitting or repairs were necessary as a result. The court found the evidence did not show PCBs prevented the City from operating the MS4 as designed. The court then turned to the City for admissible evidence of substantial and unreasonable harm, but found no evidence that the presence of PCBs in the MS4 necessitated physical repairs, upgrades, or maintenance. As a result, the court concluded the City failed to establish the presence of PCBs caused "substantial and unreasonable" harm to the MS4.

Investigative and Remedial Costs as Damages

In addition, the court considered whether the City could claim its costs investigating and cleaning up the Bay as public nuisance damages. The City contended all investigation and cleanup costs were a direct result of PCB contamination in the MS4 owned by the City, but the court found the clean-up costs related to a list of pollutants from the MS4, not just PCBs. Without evidence to show costs incurred directly from PCBs, the Court concluded the City failed to establish a substantial connection between the investigation and cleanup costs incurred and the presence of PCBs in the Bay.

Port District Injury

Using the same standards applied to the City, the court reached a different conclusion about whether the PCBs caused "substantial and unreasonable" injury to the Port District. Under California law, pollution of water is a public nuisance, and the record was replete with specific facts from the RWQCB orders to support the conclusion that PCBs polluted the Bay. Monsanto argued the Port District could not claim injury for sediment caps they expressly approved. The court acknowledged that, while logically accurate, pollution of the Bay was the alleged nuisance, not the sediment caps.

The court was also persuaded by the Port District's evidence showing the PCB pollution interferes with the public health and the public's right to use the Bay. Under California law, pollution in a body of water may be deemed a nuisance where it interferes with the public right to "wild game." Monsanto argued the PCB interference could not be substantial if fish populations in the Bay were thriving, but the court disagreed. Fish consumption advisories warning against PCBs directly supported the conclusion that PCBs caused substantial harm to human health and the use and enjoyment of the Bay. Thus, the court upheld the Port District's public nuisance claim and denied Monsanto's motion for summary judgment.

Purpesture Claim

The court then turned to the Port District's purpesture claim. Purpesture occurs where a party makes an unlawful physical encroachment, intrusion, or obstruction of a public land to "enclose or make several that which is common to many" on public land for personal gain. Monsanto moved for summary judgment because the PCBs did not prevent physical access to the Bay's resources. The court agreed. The court could not find any evidence that the PCBs provided Monsanto "exclusive use and dominion to the exclusion of the public" in the Bay. Thus, the court granted summary judgment to Monsanto as to the purpseture claim.

Equitable Cause of Action for an Abatement Fund

Finally, the court dismissed Monsanto's challenge that the Port District's equitable cause of action for an abatement fund was unripe. The court reasoned the injury—PCBs in the Bay—had already occurred, and trial could adjudicate whether abatement was a proper remedy without necessitating a final amount to be set.

Conclusion and Implications

This case represents one of many novel cases alleging a PCB manufacturer may be liable under a public nuisance theory for environmental cleanup costs decades after customers used its product. The U.S. District Court's analysis of the City of San Diego's public nuisance claim suggests monetary liability for site remediation under environmental hazardous waste statutes is alone insufficient to show a public nuisance has caused "substantial and unreasonable" harm. Instead, evidence of physical harm directly incurred to an MS4 from the public nuisance may be required.
(Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS ENVIRONMENTAL ANALYSES FOR MASTER PLANNED COMMUNITY DEVELOPMENT PROJECT

Environmental Council of Sacramento v. County of Sacramento,
45 Cal.App.5th 1020 (3rd Dist. 2020).

The California Third District Court of Appeal, in a decision certified for publication on March 2, 2020, affirmed a judgment denying a petition filed by Environmental Council of Sacramento and Sierra Club, which challenged the County of Sacramento's approval of the Cordova Hills, LLC master-planned community project. The court held that the Environmental Impact Report (EIR) for the project, which contemplated residential and commercial uses, and a potential university, was not deficient for failing to analyze the project without the university.

Factual and Procedural Background

In 2007, the Cordova Hills Ownership Group submitted an application to the county to develop the proposed master-planned community of Cordova Hills. The project would be located on 2,669 acres of vacant grazing land in southeastern Sacramento County, and would include residential, office, retail, a university campus, schools, parks, and trails. The project provided for 8,000 residential units to accommodate a population of 21,379 persons. If built, the proposed 224-acre university campus would accommodate an additional 4,140 student-residents.

The development application initially identified the University of Sacramento as the university tenant, but the University later withdrew from the project in 2011. Pursuant to the project's development agreement, the property owner must transfer the land back to the county if it failed to procure a university tenant within 30 years. During this 30-year window, the agreement required the property owner to provide the county with updates on the status of a potential university tenant and prohibited the owner from seeking a change in the land use designation. The agreement also required the property owner to establish a "University Escrow Account," which required separate payments of $2 million after the issuance of 1,000, 1,750, and 2,985 building permits. If a university is ultimately built, money from the escrow count would be released to university for campus-related operations. If a university is not built, the funds would be released to the county for purposes of attracting a university to the location.

In January 2010, the project applicant filed an amended application and the county published a notice of preparation for a draft EIR six months later. The county released the draft EIR in January 2011, and the final EIR in November 2012. The board of supervisors certified the final EIR and adopted a statement of overriding considerations in January 2013. The county's approvals included general plan and zoning ordinance amendments, a tentative subdivision map, an affordable housing plan, a development agreement, a public facilities financing plan, and a water supply master plan amendment.

Procedural History

In March 2013, petitioners filed a petition for writ of mandate challenging the project—alleging that the EIR contained an inadequate project description and environmental analysis, and failed to analyze land use impacts and adopt feasible mitigation measures. The petitioner's central argument claimed that, because a university is unlikely to be built, the EIR erroneously assumed buildout of a university and failed to sufficiently analyze the project without a university.

The trial court denied the petition upholding the county's certification of the final EIR and project approvals. Petitioners timely appealed.

The Court of Appeal's Decision

The court reviewed the administrative record for legal error and substantial evidence and the county's action *de novo*—resolving all reasonable doubts in favor of the county's findings and decision. Under

these standards, the court affirmed the trial court's judgment denying the petition, holding that the EIR contained an adequate project description, environmental impact analysis, and feasible mitigation measures to satisfy the California Environmental Quality Act (CEQA).

Adequacy of Project Description

The court first analyzed whether substantial evidence existed to support petitioners' assertion that the EIR failed to provide an adequate project description due to the strong likelihood that a university will never be built. The project's development agreement imposed conditions on the developer to make good faith efforts to attract a university to the site. Though the developer may ultimately fail to locate a university, the court found that petitioners did not present any credible and substantial evidence to support their claim that the proposed university is an illusory element of the project. Because the EIR is not required to address the speculation that the university will not be built, the court held that the project's description was legally adequate.

Adequacy of Environmental Impact Analyses

Petitioners further contended that the EIR misrepresented the significance of the project's impacts to air quality, climate change, and traffic, by assuming the university would be built. The court dismissed each of these claims, finding that the EIR concluded impacts would be significant and unavoidable, and that adopted mitigation measure would substantially reduce impacts.

As to the air quality analysis, the court rejected petitioners' assertion that NOx and ROG emissions would only be mitigated by 20 percent, rather than 35 percent, if the university is not built. The court explained that the EIR's mitigation measure, AQ-2, requires compliance with the project's air quality management plan, which seeks to reduce emissions by 35 percent. AQ-2 also prohibits any amendments to the Cordova Hills Specific Planning Area (SPA) that would increase emissions beyond a 35 percent reduction, unless further approved by the county. Therefore, if the university is not built, changes to the SPA cannot increase NOx and ROG emissions beyond the 35 percent reduction absent county approval.

Relatedly, petitioners claimed the county was required to recirculate the EIR to address revisions to AQ-2 based on the county's position that the mitigation measure would mitigate NOx and ROG emissions, even if the university were not built. The court rejected this contention, finding that AQ-2 requires a 35 percent reduction of NOx and ROG emissions if the SPA is amended, unless the county approves otherwise. Because the NOx and ROG emissions vastly exceed local thresholds of significance, regardless of whether they are mitigated by 20 percent or 35 percent, the 15 percent discrepancy does not increase environmental impacts or constitute significant new information requiring recirculation.

Petitioners also argued that the EIR failed to adequately address climate change impacts by assuming the university would be constructed. As with mitigation measure AQ-2, the court explained that mitigation measure CC-1 prohibited amendments to the SPA from increasing greenhouse gas emissions above the project's anticipated per capita amount. Thus, if the university is not built, the SPA cannot be amended to authorize more than the 5.80 metric tons of greenhouse gases per capita figure disclosed in the EIR.

Lastly, the court rejected petitioners' assertion that the EIR's traffic analysis was inadequate because it was based on the full buildout of the university. The court held that the EIR sufficiently analyzed traffic impacts because the full university build out constituted a "worst-case" traffic scenario. In the event the university is not built, daily traffic trips may be reduced, thus, petitioners failed to meet their burden of showing how the EIR underestimated traffic impacts.

Consistency with Regional Transportation Plan

Petitioners claimed that the EIR failed to analyze whether it was consistent with the Metropolitan Transportation Plans/Sustainable Communities Strategy (MTP/SCS) adopted by the Sacramento Area Council of Government. Petitioners asserted that including the project in the county's future MTP/SCS would require changes to the current land use pattern and transportation system. Agreeing with the county, the court found that petitioners failed to raise this issue during the administrative process, thereby waiving the issue on appeal. The court further explained that nothing in Senate Bill 375 (which mandates preparation of an SCS) or any evidence cited by petitioners, indicates a project must be evaluated under CEQA for consistency with an SCS.

Adequacy of Mitigation Measures

Finally, the court reviewed petitioners' claim that the county violated CEQA by failing to adopt feasible mitigation measures to minimize the project's environmental impacts. Specifically, petitioners argued the county should have adopted a mitigation measure that would require phasing of project development to provide assurance that a university would be constructed. Petitioners contend that if the university is not constructed, greenhouse gas emissions, vehicle miles travelled (VMT), and ozone precursors will be significantly greater. The court, however, found that petitioners failed to provide any evidence in the record to support their conclusion that phasing would be feasible. Thus, petitioners forfeited this argument as it is not the court's duty to independently review the record to find facts in support of petitioners' claim.

Conclusion and Implications

The appellate court's opinion reaffirms that an agency's failure to include a "no-build analysis" does not necessarily constitute a CEQA violation. In circumstances where an EIR contemplates the "full build out" of a multi-component project, the EIR will likely sufficiently analyze and account for all "worst case" scenario impacts, such that a "no-build analysis" is not necessary. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C076888.PDF.
(Christina Berglund, Bridget McDonald)

CALIFORNIA COURT OF APPEAL AFFIRMS INVALIDATING CITY'S MITIGATED NEGATIVE DECLARATION FOR MIXED USE PROJECT IN ENVIRONMENTALLY SENSITIVE AREA

Save the Agoura Cornell v. City of Agoura Hills,
___Cal.App.5th___, Case Nos. B292246, B295112 (2nd Dist. Feb. 24, 2020, *pub.* Mar. 17, 2020).

In a lengthy opinion, the Second District Court of Appeal upheld a trial court decision striking down the City of Agoura Hills' approval of a mixed-use project with a Mitigated Negative Declaration (MND) despite the project's location on an environmentally sensitive site. The Court of Appeal repeatedly found that the project MND's mitigation measures improperly deferred action, were inadequate, or lacked sufficient performance criteria to be effective. The case is another clear example of the inherent weaknesses involved in defending a Negative Declaration under the "fair argument" standard in the face of any meaningful project opposition or indication that a project may result in environmental impacts.

Factual and Procedural Background

Agoura and Cornell Roads, LP, and Doran Gelfand (appellants) sought to develop the "Cornerstone Mixed-Use Project," (Project) which proposed 35 residential apartment units along with retail, restaurant and retail on a visually prominent, undeveloped 8.2-acre hillside site in the City of Agoura Hills (City). The project site is environmentally sensitive in several regards and characterized by grasses, oak trees and scrub oak habitat, and at least three plant species considered to be rare, threatened or endangered. The project site includes an area determined to be eligible for inclusion of the California Register of Historic Resources that contained artifacts belonging to the Chumash Tribe. Portions of the site are also designated open space and a Significant Ecological Area. Project approval included a development permit, conditional use permit, oak tree permit, and a tentative parcel map. The Project was subject to the California Environmental Quality Act (CEQA), and the City prepared a MND after determining that an Environmental Impact Report (EIR) was not required.

On January 5, 2017 the city's planning commission voted to approve the project and adopt the MND. An environmental group appealed the planning commission's approval and, on March 8, 2017, despite fairly significant opposition to the project, the city council denied the appeal. After taking into account the proj-

ect's proposed mitigation measures, the city council found that there was no substantial evidence in the record that the project would have a significant effect on the environment.

On April 7, 2017, Save the Agoura Knoll, a local citizens group (petitioners) filed a verified petition for writ of mandate in the Superior Court, alleging multiple CEQA violations, a violation of the Planning and Zoning Law, and a violation of the city's oak tree ordinance. The Superior Court granted the petition as to the CEQA and Oak Tree Ordinance, but denied petitioners' Planning and Zoning Law claim.

The Court of Appeal's Decision

Appellants raised a number of arguments that the Second District ultimately rejected.

Procedural Arguments

Appellants raised a number of procedural arguments, likely in an attempt to avoid defending the project MND under the "fair argument" standard of review which presents a low threshold to require preparation of a full environmental impact report; an EIR is required if there is any substantial evidence in the record that from which a fair argument can be made that the project might have a significant environmental impact.

Appellants argued that petitioners could not show that they exhausted their administrative remedies because petitioners did not explicitly state that they exhausted their administrative remedies in their opening brief, instead only expressly raising that issue in their reply brief. Appellants also argued that petitioners failed to exhaust administrative remedies with respect to every CEQA claim in the petition.

Regarding the first issue above, although petitioners bear the burden of demonstrating exhaustion of administrative remedies, the court found that petitioners did not fail to do so. Petitioners were not required to specifically argue the issue of exhaustion in their opening brief, and, in any event, the opening brief stated and cited to enough evidence in the administrative record to demonstrate that they exhausted their administrative remedies.

The court also rejected appellants' claims that petitioners failed to exhaust their administrative remedies with respect to each of their CEQA claims. In each instance, the court was able to find public comments raised during hearings on the project, comment letters, and reports by the city's own consultants to determine that each of petitioners' CEQA claims were sufficiently raised during the city's approval process. As such, the court found that the city was fairly appraised of petitioners' claims, and "had the opportunity to decide matters, respond to objections, and correct any errors before the court's involvement."

Cultural Resources

The project site is home to an archaeological remains of a pre-historic Chumash Tribe settlement. The MND incorporated three mitigation measures to reduce potentially significant impacts to these resources: 1) construction monitoring requiring notification of finds and measures to preserve areas where finds occur, 2) notification to tribe representatives if human remains are encountered, and 3) if the first measure is not feasible, a data recovery excavation program to document artifacts prior to disturbance.

The Court of Appeal found that despite these measures, a fair argument existed that the project would result in significant impacts to cultural resources. The court noted that the first mitigation measure was not feasible because project designs would necessarily disturb the historical site. As such, the mitigation measures impermissibly deferred formulation of mitigation measures that might actually be effective. The court also found that the third mitigation measure was not sufficiently defined, and the MND did not sufficiently analyze how it would mitigate environmental impacts.

Appellants also challenged the evidentiary value of the comments regarding project impacts on cultural resources by Dr. Chester King. Dr. King's qualifications were sufficiently laid out in the record, and his opinions were reached after reviewing relevant studies and project approval documents. Even though Dr. King did not visit the project site, his opinion constituted substantial evidence that the project might result in significant impacts.

As to impacts to cultural resources, the court held that an MND was not appropriate and an EIR was required.

Sensitive Plant Species

The Court of Appeal also found that a fair argument existed that the project would result in signifi-

cant impacts to the three sensitive plant species at the project site. All three sensitive plant species were susceptible to project impacts from fuel modification (fire prevention) activities, grading, and landscaping. The MND incorporated three mitigation measures that the court again found insufficiently addressed potential impacts: 1) avoidance of two of the three species, and if avoidance was not possible, preparation of a restoration plan including on and off-site preservation and restoration, 2) as to the third species, avoidance and, if needed, preparation of a restoration plan, and 3) with regard to fuel modification activities, measures requiring a biologist to flag all sensitive plants on-site and demarcate a buffer of at least ten feet from the plants. The court found that the first to mitigation measures were based on old studies and were infeasible because data showed that restoration and relocation of the sensitive species was next to impossible, no feasible alternatives were provided if restoration or relocation failed.

Aesthetic Resources

The MND noted that the project site's mature oak trees offered a scenic resource, and that a knoll of oak trees on the project site was an especially significant scenic resource that the project would possibly develop or remove. Petitioners alleged that the MND insufficiently mitigated these impacts and that substantial evidence indicated that the project would cause significant aesthetic impacts. Appellants apparently did not raise substantive arguments against petitioner's claims, and instead claimed that petitioners failed to exhaust their administrative remedies with respect to aesthetic impacts. As noted above, the court disagreed rejected appellants' claims.

Oak Tree Ordinance

The project would result in removal of 29 of the 59 valley and coast live oak trees on the project site and would impact the areas where six other oak trees were located, while removing over one-third of the site's scrub oak habitat. The court found that the record contained substantial evidence that the project's grading activities would impact the subsurface water source to site oak trees without establishing any method of replacing such water. The MND's mitigation measures involving in-lieu fees and oak tree preservation program also lacked sufficient detail or any showing that they would actually mitigate the project's impacts on the site's oak trees. Accordingly, the court found that an EIR was required to analyze the project's impacts on Oak Trees.

Attorney's Fee Award

Last, the court upheld the trial court's award of $142,148 in attorney's fees to petitioners under the private attorney general statute (Code of Civ. Proc. § 1021.5.). Appellants claimed that petitioners could not collect attorney fees because they did not furnish proper notice on the attorney general of their suit within ten days of filing their action. The court rejected this claim because appellants did furnish the attorney general with the original petition within five days, although they did not furnish the attorney general with their first amended petition until approximately one month before the trial court hearing. The court noted with respect to the first amended petition, strict compliance with CEQA's ten-day notice rule was not an absolute bar to collect attorney's fees. The court also found that real party Gelfand could be held liable for attorney's fees even though he was not the applicant or the property owner. The court concluded that because Gelfand "was a real party who pursued a direct interest in the project that gave rise to the CEQA action. . . ." he was liable for petitioners' attorney's fees.

Conclusion and Implications

This case is a clear illustration of how difficult it is to defend Negative or Mitigated Negative Declarations under the "fair argument" standard, especially when faced with any meaningful project opposition or indication that a project could result in significant impacts. Under the "fair argument" standard, a local agency's approval of a project with an ND/MND will not be upheld if there is any substantial evidence in the record giving rise to a fair argument that a project might have a significant environmental impact. This is true regardless of whether competing evidence is presented. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/B292246.PDF.
(Travis Brooks)

NEW JERSEY APPELLATE COURT UPHOLDS BEST MANAGEMENT PRACTICES BASED STORMWATER DISCHARGE PERMIT UNDER THE CLEAN WATER ACT

Delaware Riverkeeper Network, et al. v. New Jersey Department of Environmental Protection, Case No. A-1821-17T3 (N.J. Super.Ct.App. Mar. 18, 2020).

The Superior Court of New Jersey Appellate Division recently upheld a municipal stormwater discharge permit that incorporated best management practices as effluent limitations.

Factual and Procedural Background

On November 9, 2017, the New Jersey Department of Environmental Protection (NJDEP) renewed a Tier A Municipal Separate Storm Sewer System (MS4) general permit [under the federal Clean Water Act], which became effective on January 1, 2018. The MS4 permit required best management practices as a form of effluent monitoring, but did not require permittees to directly monitor the mass and volume of pollutants in effluent. Shortly after the MS4 Permit became effective, environmental organizations (Appellants) filed suit. Appellants argued 1) the MS4 permit did not include effluent limits and monitoring as required by federal law; 2) the NJDEP's inclusion of best management practices (BMPs) rather than effluent limitations violated applicable law; 3) the permit requirements were not "clear, specific, and measurable," and did not provide for meaningful review; and 4) the NJDEP violated federal law by issuing a permit without public involvement.

The Appellate Court's Decision

New Jersey law limits the scope of review of an administrative agency determination. Courts may not reverse the judgment of an administrative agency absent a finding that the decision was arbitrary, capricious, or unreasonable, or not supported by substantial credible evidence in the record as a whole. However, courts are not bound by an agency's determination of a statute or of a strictly legal issue.

Effluent Monitoring

Appellants first argued that the MS4 Permit was unlawful because it did not include effluent monitoring to measure the mass and volume pollutants or end-of-pipe numerical effluent monitoring, as required by federal regulations. The court rejected this argument, reasoning that the MS4 Permit required BMPs and specifies the monitoring necessary to ensure compliance with those BMPs. Citing to federal regulations, the court found that federal law did not require end-of-pipe numeric effluent monitoring. Instead, federal law provides that effluent monitoring can include, among other things,

> BMPs to control or abate the discharge of pollutants when . . . the practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the Clean Water Act.

The court upheld the MS4 Permit against this challenge because effluent limitations can take the form of BMPs.

Effluent Limits

Appellants next argued that the MS4 Permit was unlawful because it included BMPs in lieu of effluent limits. However, as the court explained, the overarching federal law for MS4s is broad and flexible and does not require numeric effluent limitations; BMPs are appropriate. The court further reasoned that NJDEP reviewed compliance evaluations, annual reports and certifications, supplemental questionnaires, input from outreach sessions, and municipal stormwater audits, and explained its reasons for choosing to implement BMPs rather than numeric effluent limitations. Accordingly, the inclusion of BMPs instead of effluent limits did not violate applicable law.

Monitoring to Assess Compliance

Appellants also argued that the MS4 Permit failed to specify monitoring requirements sufficient to assess compliance, in violation of applicable law. The court, however, pointed to several different monitoring requirements in the MS4 Permit. In determining

whether the language was sufficiently "clear, specific, measureable and enforceable," as applicable law requires, the court explained that the EPA defines "clear, specific, measureable and enforceable" broadly, intentionally "giving Tier A municipalities some flexibility." Ultimately, the court concluded that the MS4 Permit contained sufficient monitoring requirements, and that the requirements were clear, specific, measureable and enforceable.

Public Involvement

Finally, Appellants claimed that the MS4 Permit was unlawful because it was issued without the public's involvement, as the law requires. The court reasoned that public involvement can take many forms, and includes, among other things, serving as a citizen representative or volunteer, or attending public hearings. With respect to the MS4 Permit, the court noted that it both provided for and encouraged public participation, and was lawfully approved.

Conclusion and Implications

This case affirms that best management practices can constitute effluent limitations under federal law when the best management practices are clear, specific, measurable, and enforceable. This case also provides an example of the deference afforded to administrative agencies in making decisions. The court's opinion is available online at: https://njcourts.gov/attorneys/assets/opinions/appellate/published/a1821-17a1889-17.pdf?c=34K.

(Alexander Gura, Rebecca Andrews)

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