Volume 29, Number 9
June 2020

CALIFORNIA LAND USE™
LAW & POLICY Reporter

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Subscription Rate: 1 year (11 issues) $845.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc.: President, Dr. Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

FEATURE ARTICLE

U.S. SUPREME COURT ISSUES *COUNTY OF MAUI* DECISION—FINDS 'FUNCTIONALLY EQUIVALENT' TEST GUIDES THE INQUIRY WHETHER AN NPDES PERMIT IS REQUIRED FOR GROUNDWATER POINT SOURCES THAT LINK TO WATERS OF THE U.S.

By Travis Brooks, Esq.

On April 23, in *County of Maui v. Hawaii Wildlife Fund,* the U.S. Supreme Court provided an answer to a question that long divided lower courts interpreting the federal Clean Water Act (CWA). There has never been any doubt that the CWA requires National Pollutant Discharge Elimination System permits (NPDES) for discharges of pollutants from point sources into waters of the United States (WOTUS). There has also never been any doubt that the CWA does *not* require a NPDES for discharges of pollutants from point sources into groundwater—states are primarily responsible to regulate such discharges. However, until recently, it was unclear if NPDES permits are required for discharges of pollutants from point sources that enter into groundwater and then migrate into WOTUS.

Background

In a 6-3 decision, the Supreme Court answered this question with a reasonable, but possibly difficult to apply "sometimes." The decision, authored by Justice Breyer can be distilled into what seems like a straightforward rule:

> . . .we conclude that the [CWA provisions requiring a NPDES permit] require a permit if the addition of the pollutants through groundwater is the functional equivalent of a direct discharge from a point source into navigable waters.

However, determining just what the "functional equivalent of a direct discharge" is under the Court's decision will likely vex courts, practitioners, and the regulated community for some time. To determine what discharges are "functionally equivalent" to a direct discharge into WOTUS, the Court created a murky test that depends on the application of at least seven, and maybe more, factors with little clear direction provided as to how to apply those factors. Ultimately it will be up to courts and perhaps the U.S. Environmental Protection Agency (EPA) to further hone and implement the Court's decision.

The Clean Water Act

In 1972, Congress enacted the CWA "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." The CWA had ambitious goals to eliminate the discharge of pollutants into navigable waters by 1985, and to ensure water quality in national waters so that all were "fishable" and "swimmable" by 1983. Although these goals were not met, federal and state efforts to improve nationwide water quality under the CWA continue. The CWA defines "navigable waters" as WOTUS, which can otherwise be understood as all "jurisdictional waters" over which the federal government has power to regulate under the CWA. Just what constitutes WOTUS subject to CWA regulation has itself been subject to much dispute, with the EPA promulgating multiple definitions of regulated waters in the last decade alone.

The CWA embodies the idea of a federal-state partnership where the federal government sets the agenda and standards for water pollution abatement, while states are primarily responsible to carry out day-to-day implementation and enforcement activities.

Moreover, while the CWA gives the federal government power to regulate discharges into WOTUS, states have generally been left to regulate and control discharges of pollution into groundwater.

In its relevant part, the CWA prohibits: "any addition of any pollutant to navigable waters from any point source" without a permit. The CWA defines the term "pollutant" broadly, as including a wide range of deposited materials including sewage, dredged materials, solid waste, chemical equipment, rock, dirt, sand, and so on. Point sources are defined as "any discernible, confined and discrete conveyance… from which pollutants are or may be discharged." As an example, these include "any container, pipe, ditch, channel, tunnel, conduit, or well." "Discharge of pollutant" is defined as "any addition of any pollutant to navigable waters [including navigable streams, rivers, the ocean or coastal waters] from any point source."

In the years preceding the *County of Maui* decision, lower federal courts were divided on one crucial point—how pollution discharges from a point source into groundwater that eventually reach WOTUS should be regulated. Leading up to the decision, courts had adopted three different methods of interpreting when discharges from point sources into groundwater discharge into navigable waters thus requiring a NPDES permit: 1) pollutants are added to navigable waters, thus requiring a NPDES permit only if they are discharged directly from a point source into jurisdictional waters, (*i.e.*, never when added into groundwater first), 2) pollutants are regulated where there is a direct hydrological connection between groundwater pollution and jurisdictional waters (*i.e.*, sometimes when added into groundwater first), and 3) pollutants into groundwater are regulated whenever a discharge of pollution into jurisdictional waters can be traced to what came out of a point source (*i.e.*, often when added into groundwater first). This split of authorities teed up the issue for the Court in *County of Maui*.

Factual and Procedural History of *County of Maui*

In the 1970s, the County of Maui (County) constructed the Lahaina Wastewater Reclamation Facility. The facility collects sewage from the surrounding area, partially treats it, and then pumps the treated water into four wells 200 or more feet below ground level. Very much of this partially treated water, or approximately 4 million gallons a day, enters a groundwater aquifer and then makes its way, over approximately half a mile or so, to the ocean.

In 2012, a number of environmental groups brought a citizen CWA lawsuit alleging that the County was discharging a pollutant into navigable waters (*i.e.* the Pacific Ocean) without having first obtained a NPDES permit. The U.S. District Court for Hawaii reviewed a detailed study of discharges from the sewer facility and found that a considerable amount of tainted water, pumped into the facility's wells, ended up into the ocean. Ultimately the District Court sided with the environmental groups, holding that because "the path [from the facility] to the ocean is clearly ascertainable…," the discharge into the wells was "functionally one into a navigable water." The District Court then granted summary judgment in favor of the environmental groups.

The County appealed the decision to the Ninth Circuit Court of Appeals, which affirmed the District Court, but articulated a *slightly different* standard for determining when a NPDES permit is required for discharges into groundwater. Under this standard, a NPDES permit is required when "pollutants are *fairly* traceable from the point source to a navigable water such that the discharge is the functional equivalent of a discharge into navigable water." The Ninth Circuit did not undergo any type of analysis of determining when, if ever, the connection of a point source and a navigable water is too tenuous or remote to give rise to liability, thus creating a very broad extension of the CWA's applicability.

The County petitioned for *certiorari* and the U.S. Supreme Court granted the petition.

The U.S. Supreme Court's Decision

The majority's 6-3 decision authored by Justice Breyer began by noting that the key question presented in the case concerned the statutory word "from." Breyer noted that at bottom, the parties disagreed "dramatically about the scope of the word 'from'" in the context of the CWA.

On one hand, the County argued that in order for a pollutant to be placed in national waters "from a point source," a point source must place pollutants directly into WOTUS without passing through intermediate conveyance such as groundwater or isolated surface water. On the other hand, the environmental groups argued that the permitting requirement applies

as long as a pollutant is "fairly traceable" to a point source, even if it traveled for a significant amount of time over a significant distance through groundwater to reach WOTUS.

The Majority Rejects the County and U.S. Solicitor General's Highly Restrictive Interpretation of the Clean Water Act

The County and the Solicitor General for the United States argued for a clear, "bright-line" test for point source pollution. Essentially in order to be liable, a point source must be "the means of delivering pollutants to a navigable water." Therefore, if "at least one nonpoint source (*e.g.*, unconfined rainwater runoff or groundwater" exists between the point source and the jurisdictional water, then the permit requirement does not apply. Put another way, a pollutant is "from" a point source, only if a point source is the last conveyance that conducted the pollutant to jurisdictional waters.

It is interesting to note that before supporting the County's arguments, the federal administration originally supported parts of the environmental group's arguments at the District Court level. Thus before the case reached the Supreme Court, the EPA maintained that the CWA's permitting requirement applies whenever discharges migrate into Waters of the United States with a "direct hydrological connection" to surface water. However, after seeking public comments in 2018 on whether it should change its interpretation, the EPA essentially "did a 180," issuing an interpretive statement in April of 2019 that "the best, if not the only" interpretation of the CWA was to exclude all releases of pollutants into groundwater from the NPDES requirement.

The majority took issue with this interpretation, and found that it would create a giant loophole in the CWA's regulations on point source pollution. To accept the County and the Solicitor General's interpretation of the CWA, a NPDES permit would not be required if there was any amount of groundwater between the end of a polluting pipe and jurisdictional waters. As the majority noted:

> . . .[i]f that is the correct interpretation of the [CWA], then why could not the pipe's owner, seeking to avoid the permit requirement, simply move the pipe back, perhaps only a few yards, so that the pollution must travel through at least some groundwater before reaching the sea?

What About *Chevron* Deference?

Neither the EPA nor the Solicitor general asked the court to apply *Chevron* deference to the EPA's interpretation of the EPA. In any event, the Court noted that though it will typically pay "particular attention to an agency's views" when interpreting a statute that the agency enforces, the Court simply would not follow the EPA's proposed interpretation which would create a loophole that would effectively eviscerate the basic purposes of the CWA. In other words: "to follow EPA's reading would open up a loophole allowing easy evasion of the statutory provision's basic purposes. Such an interpretation is neither persuasive nor reasonable."

Did Congress Intend to Exclude Discharges into Groundwater?

The Court looked to the structure of the CWA as a further basis to reject the County and Solicitor General's interpretation. Just because the CWA does not subject all pollution into groundwater to its permitting requirement, this *does not* indicate a clear congressional intent to exclude all discharges into groundwater from the CWA's permit requirement. If Congress intended to exclude all discharges into groundwater from the NPDES permitting requirement, it could have easily excluded point source pollution into groundwater as an one of the enumerated exemptions to permitting requirements, it did not do so. Moreover, the CWA expressly includes "wells" in its definition of "point source." As the court noted, in instances where wells were regulated point sources, such wells "most ordinarily would discharge pollutants through groundwater."

The Majority Rejects the Very Broad Reading of the CWA Argued by the Environmental Groups

Regarding the broad interpretation of the CWA pushed by the environmental groups, the Court noted that with modern science the CWA could have unreasonably wide reach. Under this interpretation, the EPA could likely assert permitting authority over the release of pollutants "many years after the release

of pollutants that reach navigable waters many years after their release….and in highly diluted forms." In the Court's view, Congress did not intend to require point source permitting if subject pollution was merely traceable to a point source. This could create circumstances where a permit was required in:

> . . .bizarre circumstances, such as for pollutants carried to navigable waters on a bird's feathers or,. . . .the 100-year migration of pollutants through 250 miles of groundwater to a river.

The environmental groups sought to address concerns that their standards extended the CWA permit requirement too broadly by proposing a "proximate cause" basis for determining when a permit is required. Under this test a polluter would be required to secure a permit that polluter's discharge from a point source proximately caused a resulting discharge into jurisdictional waters. The Court rejected the environmental groups' proposed proximate cause test noting that proximate cause derives from general tort law and is based primarily on its own policy considerations that would not significantly narrow the environmental groups broad reading of the CWA .

Perhaps most important, the Court noted that the environmental groups' broad reading of the CWA would essentially override Congress' clear intention to leave substantial authority and responsibility to the states to regulate groundwater and nonpoint source pollution. States, with federal encouragement, have already developed methods of regulating nonpoint source and groundwater pollution through water quality standards and otherwise. The environmental groups' interpretation of the CWA also conflicted with the legislative history related to CWA's adoption, which clearly indicated that Congress rejected an extension of the EPA's authority to regulate all discharges into groundwater.

The Court Adopts a Reasonable, Albeit Murky, Middle Ground Interpretation of the CWA

Finding problems with both of the above interpretations, the Court's majority landed at a third option that amounts to a reasonable, albeit murky middle ground. Justice Breyer fairly thoroughly examined the meaning of the word "from" within the context of the CWA with reference to everyday use of the word in how we refer to immigrants and travelers from Europe and even how meat drippings from a pan or cutting board into gravy. Ultimately, the standard the Court adopted was "significantly broader" than the "total exclusion of all discharges through groundwater" pushed by the County and the Solicitor General, but also meaningfully more narrow than that pushed by the environmental groups.

As noted above, the Court described its rule as follows:

> . . .[w]e hold that the [CWA] requires a permit when there is a direct discharge from a point source into navigable waters or when there is the *functional equivalent of a direct discharge*.

This means that the addition of a pollutant falls within the CWA's regulation:

> When a point source directly deposits pollutants into navigable waters or when the discharge reaches the same result through roughly similar means.

The majority opinion makes clear that "time and distance" will typically be the most important factors when determining whether a discharge into groundwater or another receptor is the "functional equivalent" of a discharge into jurisdictional waters.

Justice Breyer noted that there were some difficulties in applying its rule because it does not provide a clear direction to courts and agencies as to how to deal with "middle instances" where the facts do not clearly indicate a discharge is or is not "functionally equivalent" to a direct discharge. However Justice Breyer noted that "there are too many potentially relevant factors applicable to factually different case for the Court now to use more specific language."

The majority then provided a non-exclusive list of seven factors that may be relevant depending on the circumstances of a particular case:

- Transit time of the pollutant;
- Distance traveled;
- The nature of the material through which the pollutant travels;
- The extent to which the pollutant is diluted or

chemically changed as it travels;

- The amount of pollutant entering the navigable waters relative to the amount of pollutant that leaves the point source;

- The manner by or area in which the pollutant enters the navigable waters, and;

- The degree to which the pollution has maintained a specific identity.

Importantly, the Supreme Court's opinion did *not* provide much guidance as to how to balance and apply the above factors except that "[t]ime and distance will be the most important factors in most cases, but not necessarily every case."

Ultimately, the majority opinion reflects a concern that a rule categorically excluding application of the CWA in instances where point sources pollute groundwater, would result in potentially widespread evasion of CWA permitting requirements. If the Court were to adopt the County's interpretation of the CWA, what would stop polluters from simply adjusting their point source pipes so that they drained onto the beach or other area so that it enters groundwater instead of directly into WOTUS, thus averting federal regulation? On the other hand, accepting the environmental group's broad interpretation of the CWA would expand the NPDES permitting program to many, if not most instances where point source pollution enters groundwater. This would clearly upset the framework of federal *and* state regulation of water pollution depending on where it is deposited.

Ultimately, the opinion reflects a practical view of the CWA and its incorporation of the word "from" with reference to point sources and jurisdictional waters. Here, although most sewage treatment facilities in the country that discharge effluent into jurisdictional waters require a NPDES permit up to CWA standards, the County was effectively adding 4 million gallons a day of pollutants into the Pacific Ocean without a NPDES permit. In the Court's view, those additions of such pollutants into waters of the United States that look and feel like the addition of pollutants into waters of the United States, even if they must pass through some groundwater over a short distance and time to get there, must require an NPDES permit. The wells below the Lahaina Wastewater Reclamation Facility were one of those instances.

Justice Thomas' Dissent

Justice Thomas penned a dissent to the opinion to which Justice Gorsuch joined. Justice Alito filed his own dissent. Both dissenting opinions included their own esoteric arguments about the meaning of the word "from," but ultimately came down to the justices' restrictive reading of federal regulatory authority under the CWA and an emphasis on the CWA's intent to leave regulation of groundwater pollution to the states.

The Thomas and Gorsuch dissent focused on the CWA's use of the word 'addition' to reference the regulated pollutants "from" a point source into navigable waters. After reviewing various definitions of the word "addition" which Justice Thomas noted means to "augment" or "increase" or to "join or unite," Thomas concluded that "[t]he inclusion of the term "addition" to the CEWA indicates that the statute excludes anything other than a direct discharge."

In other words, the only point source pollution that requires an NPDES permit is that pollution that discharges *directly* from the point source to Waters of the United States. Justice Thomas also highlighted the uncertainty that the Court's functional equivalent test would create, with seven non-exhaustive factors, and no clear rule when or how to apply them. Moreover, Thomas was persuaded by CWA's underlying state and federal delegation of authority.

Justice Alito's Dissent

Justice Alito posited a similar position to Justice Thomas, stating that the CWA only required NPDES permits for direct additions of pollutants into federal waters. However, Alito pointed out that given the CWA's broad definition of a "point source" which includes ditches and channels, and any "discernable, confined and discrete conveyance… from which pollution may be discharged," a shortened pipe that added pollution to a beach, would then likely enter into some discrete channel on the beach that would meet the definition of a "point source" subject to regulation under the CWA. This reading of the CWA in Justice Alito's opinion was more manageable and ready for uniform application throughout the country than the one promulgated by the Court. Justice Alito also referenced the CWA's delegation of state and fed-

eral authority to regulate different types of pollution. He also took issue what he thought was an overly complicated and less workable standard enunciated by the majority.

Conclusion and Implications

What do we make of all this? If courts, practitioners, or the regulated community were looking for a clear answer as to which discharges from point sources that migrate through groundwater into WOTUS require an NPDES permit, the *County of Maui* decision likely left them disappointed. There is no question the fact-dependent and purpose driven test enunciated by the Court will result in some uncertainty as the decision is refined and clarified by lower courts. However, as the Supreme Court noted, the "functionally equivalent" test is not altogether different than the standard the EPA has tried to apply for more than 30 years by seeking to require NPDES permits for "some (but not all) discharges through groundwater." Ultimately, the Court's decision may have been the most appropriate "middle-ground" interpretation of CWA language that is fundamentally ambiguous and difficult to apply in the real world.

Time will tell whether or not the EPA tries to add some clarity to the Supreme Court's standard by adopting a rule defining "functional equivalency." In this regard, the results of the 2020 presidential election may have a meaningful impact on the way the "functionally equivalent" test is formulated and applied.

In any event, the regulated community should consider the implications of this decision. If entities own facilities that deposit pollutants into groundwater or other areas that may ultimately reach Waters of the U.S., such entities should consider whether it makes sense to pre-emptively seek an National Pollutant Discharge Elimination System permit and thus avoid liability concerns going forward.

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LAND USE NEWS

GOVERNOR NEWSOM ISSUES EXECUTIVE ORDER THAT SUSPENDS CERTAIN NOTICING DEADLINES UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Recently, California Governor Gavin Newsom issued an Executive Order suspending various timeline aspects of the California Environmental Quality Act (CEQA). This will be relevant to all CEQA practitioners in the areas of land use and water law.

Background

The COVID-19 global pandemic has resulted in extensive federal, state and local legislation touching various topics, from government relief to eviction moratoriums. In California, these mandates have also impacted some of the rules that would typically apply to matters governed by the California Environmental Quality Act. On April 22, 2020, Governor Gavin Newsom issued Executive Order N-54-20, which includes provisions that *suspend* the filing, posting, notice, and public access requirements related to certain notices under CEQA for a period of 60 days. This suspension does not apply to provisions governing the time for public review.

CEQA Provisions Suspended

The specific CEQA provisions that are subject to Executive Order N-54-20's 60-day suspension are below.

- Public Resources Code § 21092.3—requiring that notices relating to the preparation and availability of an Environmental Impact Report (EIR) to be posted by the county clerk for 30 days, and requiring a notice of intent to adopt a negative declaration to be posted for 20 days.

- Public Resources Code § 21152—governing local agency requirements for filing notices of determination and notices of exemption.

- CEQA Guidelines § 15062, subds. (c)(2) and (c)(4)—governing a public agency's filing of a notice of exemption for projects that are exempt from CEQA.

- CEQA Guidelines § 15072, subd. (d)—requiring notice of intent to adopt a negative declaration or mitigated negative declaration to be posted at the office of the county clerk for at least 20 days.

- CEQA Guidelines § 15075, subds. (a),(d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which there has been a negative declaration or mitigated negative declaration prepared. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

- CEQA Guidelines § 15087, subd. (d)—requiring that a notice of availability of a draft environmental impact report for public review be posted at the office of the county clerk for at least 30 days.

- CEQA Guidelines § 15094, subds. (a), (d), and (e)—requiring the lead agency to file a notice of determination within five days of deciding to approve a project for which an environmental impact report was approved. This section also requires the notice of determination to be posted by the county clerk for at least 30 days.

Use of Electronic Means

Section 8 of Executive Order N-54-20 will also allow certain notice requirements under CEQA to be satisfied through electronic means in order to allow public access and involvement consistent with COVID-19 public health concerns. The order's electronic noticing provisions are as follows:

> In the event that any lead agency, responsible agency, or project applicant is operating under

any of these suspensions, and the lead agency, responsible agency, or project applicant would otherwise have been required to publicly post or file materials concerning the project with any county clerk, or otherwise make such materials available to the public, the lead agency, responsible agency, or project applicant (as applicable) shall do all of the following:

a) Post such materials on the relevant agency's or applicant's public-facing website for the same period of time that physical posting would otherwise be required;

b) Submit all materials electronically to the State Clearinghouse CEQAnet Web Portal; and

c) Engage in outreach to any individuals and entities known by the lead agency, responsible agency, or project applicant to be parties interested in the project in the manner contemplated by the Public Resources Code § 21100 *et seq*. and California Code of Regulations, Title 14, § 15000 *et seq*.

Tribal Consultations

Executive Order N-54-20 also has a provision regarding CEQA's tribal consultation process. Under the § 9 of the order, the timeframes set forth in Public Resources Code §s 21080.3.1 and 21082.3, within which a California Native American tribe must request consultation and the lead agency must begin the consultation process relating to an Environmental Impact Report, Negative Declaration, or Mitigated Negative Declaration under CEQA, are suspended for 60 days.

Conclusion and Implications

In addition, Executive Order N-54-20 encourages lead agencies, responsible agencies, and project applicants to pursue additional methods of public notice and outreach as appropriate for particular projects and communities.

Governor Newsom's Executive Order of April 22, 2020 predominantly suspends certain important deadlines. This 60-day suspension periods imposed by Executive Order N-54-20 are set to expire on June 22, 2020. It will be important for CEQA practitioners to review all the temporary changes made as deadlines and notice requirements play a crucial role in compliance. Executive Order N-54-20 may be accessed online at the following link: https://www.gov.ca.gov/wp-content/uploads/2020/04/N-54-20-COVID-19-4.22.20.pdf

(Nedda Mahrou)

REGULATORY DEVELOPMENTS

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS PERMANENT MONTHLY WATER USE REPORTING REQUIREMENTS

Building upon its emergency regulations imposed during the incredible drought years of 2014 and 2017, the California State Water Resources Control Board (SWRCB) recently made permanent regulations mandating urban water suppliers to track and report monthly water usage.

Background

During California's recent historic drought, the SWRCB adopted emergency regulations that required California's largest water suppliers—those with more than 3,000 connections or supplying more than 3,000 acre-feet of water annually—to track and report monthly water usage. These urban water suppliers collectively represent the state's 400 largest water suppliers and serve approximately 90 percent of the state's population. The regulations were put into effect generally from July 2014 through November 2017, in an effort to maximize water conservation throughout the state. Many considered those efforts largely successful. Between June 2015 and March 2017 California's urban water suppliers collectively conserved 22.5 percent water use compared to prior years, enough to supply approximately one-third state's population for one year.

In late 2017, the SWRCB modified the reporting mandates and generally transitioned toward voluntary reporting. Notwithstanding that transition, more than 75 percent of water suppliers have continued to report their monthly water usage voluntarily. In May 2018, the Governor signed into law water efficiency legislation that authorized the SWRCB to issue permanent mandatory monthly water use requirements on a non-emergency basis.

Monthly Reporting Requirements

The new SWRCB regulation requires water suppliers to report residential water use, total potable water production, measures implemented to encourage water conservation and local enforcement actions. Specifically, the regulation requires reporting of the following:

- The urban water supplier's public water system identification number(s);
- The urban water supplier's volume of total potable water production, including water provided by a wholesaler, in the preceding calendar month;
- The population served by the urban water supplier during the reporting period;
- The percent residential use that occurred during the reporting period;
- The water shortage response action levels.

The SWRCB considers these measures as part of the state's long-term plan to prepare California for future droughts. The regulation increases transparency and access to important and timely water data, and in a format consistent with reporting provided since 2014.

In adopting the regulation, the Chairman of the SWRCB stated:

> As we continue to see, the quality, timeliness, and gathering of data are critical to managing California's water in the 21st century. Urban monthly water use data have driven enduring, widespread, public awareness and understanding of water use, conservation and efficiency in our state.

The regulation now moves to the Office of Administrative Law for review and is expected to take effect October 1, 2020.

Conclusion and Implications

The recently adopted regulation will likely assist policy makers in making important and better-informed water resources management decisions

moving forward. It will also help water managers and Californians working together to monitor statewide and local water usage conditions and improve effectiveness in responding to future water shortage challenges. Though reporting is once again mandatory, with more than 75 percent of water suppliers already voluntarily reporting water usage during the past three years, many are observing what appears to be a post-drought culture change among stakeholders who have taken greater ownership and responsibility in achieving water conservation. This recent move could potentially strengthen that dynamic and continue to yield increased conservation results. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2020/pr04212020_swrcb_adopts_water_conserv_rpt_req.pdf
(Chris Carrillo, Derek R. Hoffman)

LAWSUITS FILED OR PENDING

CALIFORNIA OBTAINS TEMPORARY HALT TO CURRENT CENTRAL VALLEY PROJECT OPERATIONS TO PROTECT STEELHEAD

On April 21, the State of California filed a preliminary injunction in the U.S. District Court for the Eastern District of California requesting that the District Court enjoin the U.S. Bureau of Reclamation's current operation of the federal Central Valley Project (CVP). The court granted the preliminary injunction in part on May 12 to protect steelhead populations through May 31, 2020. Current CVP operations were evaluated by recently adopted Biological Opinions that determined the Bureau's proposed CVP operations would not jeopardize the existence of legally protected species. California legally challenged those Biological Opinions as violating state and federal law. Therefore, California requested in its preliminary injunction that the CVP be operated pursuant to Biological Opinions adopted in 2009 until the merits of its underlying challenge to the recently adopted Biological Opinions was resolved. The 2009 Biological Opinions concluded that CVP operations, as then proposed, would jeopardize the existence of protected species, and provided reasonable and prudent alternatives for CVP operations that would not jeopardize protected species. [*California Natural Resources Agency v. Ross*, Case No. 1:20-cv-00426 (E.D. Cal.).]

Background

The federally operated Central Valley Project, which is operated by the U.S. Bureau of Reclamation (Bureau) in conjunction with the California State Water Project (SWP), is the nation's largest water conveyance network. The CVP and SWP move water from Northern California through the Sacramento-San Joaquin Delta (Delta) south through the Central Valley and into southern California.

The CVP is operated pursuant to federally adopted Biological Opinions which are issued by the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS). A Biological Opinion indicates whether a proposed federal action, such as the operation of the CVP, will likely jeopardize the continued existence of flora and fauna protected by the federal Endangered Species Act (ESA) or adversely modify designated critical habitat. The ESA establishes liability for the "taking" of listed species, unless a permit or authorization for incidentally taking species is obtained. If a Biological Opinion determines that a proposed action would jeopardize the existence of a protected species, the Biological Opinion is deemed to be a "jeopardy" opinion. If not, a Biological Opinion is deemed a "no jeopardy" opinion. For jeopardy opinions, the federal agency responsible for the project must comply with reasonable and prudent alternatives identified in a Biological Opinion to avoid liability under the ESA. Even for "no jeopardy" opinions, a federal agency may operate a project pursuant to a reasonable and prudent measures. Separate from the ESA, California has also enacted environmental protections for species of *flora* and *fauna* through the California Endangered Species Act (CESA).

In late 2019, FWS and NMFS each issued no jeopardy Biological Opinions for proposed CVP operations, determining that the long-term operation of the CVP was not likely to threaten the continued existence of endangered species listed under the ESA. In reaching these conclusions, FWS and NMFS considered funding, habitat restoration, and rearing measures for endangered species proposed as part of CVP operations. These Biological Opinions replaced those issued in 2009 for CVP and State Water Project operations, which were "jeopardy" opinions and imposed reasonable and prudent alternatives for operating the CVP. Additionally, while FWS and NFMS were preparing the new Biological Opinions, the Bureau adopted an Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA) for the long-term operation of the CVP, as identified in a Biological Assessment that the Bureau prepared under NEPA.

Concerned about the potential impacts CVP operations may have on endangered species, California filed suit in February 2020, alleging that the Biological Opinions violated the federal ESA, CESA, and

the federal Administrative Procedure Act (APA). California's lawsuit also included alleged violations of NEPA, namely, that the Bureau's EIS failed to take a "hard look" at the environmental consequences of its proposed action, as required by NEPA.

The District Court's Ruling

The purpose of a preliminary injunction is to preserve the relative position of the parties until the merits of a lawsuit can be resolved. California's preliminary injunction sought to halt CVP operations pursuant to the recently adopted Biological Opinions—which California legally challenged under state and federal law—and asked the court to order that the Bureau operate the CVP in accordance with the 2009 Biological Opinions until the court resolved the merits of California's claims. To obtain a preliminary injunction, California was required to show that it: 1) was likely to succeed on the merits; 2) would likely suffer irreparable harm if the preliminary injunction was not granted; (3) prevailed in a balancing of the equities; and 4) showed that the injunction is in the public interest.

Likelihood of Success on the Merits

First, California contended that it was likely to prevail on the merits of its claims, because the Bureau's operation of the CVP violated the ESA and CESA. In particular, California argued that the 2019 Biological Opinions failed to include sufficiently detailed "guardrails" for federal operations or definite measures to enhance a species' health. Accordingly, California argued that the "no jeopardy" conclusion in both Biological Opinions was unsupported, and therefore was arbitrary and capricious under the APA.

Similarly, California argued that CESA, which is state law, applied to the Bureau because federal statutes require that the Bureau comply with state water laws. In particular, California contended that CESA applied to the use of water in California as it affects species, including pursuant to permits issued by the California State Water Resources Control Board for the operation of the CVP. Because CVP operations under the Biological Opinions impact species protected by CESA, California argued that the Bureau was "taking" protected species without authorization and was therefore violating CESA.

Finally, California argued that the Bureau was violating NEPA because its EIS failed to take a "hard look" at the environmental consequences of its proposed action. Specifically, California alleged that the Bureau's EIS was "tainted" by the inclusion of protective measures that are disallowed by NEPA, such as conservation hatchery programs assessed by the EIS. California also contended that the Bureau did not adequately analyze the impact on salmonid species during high flow events that would correspond with higher pumping rates by the CVP, because it did not model the impact of maximum pumping rates during such events and assumed that such pumping would only occur for limited periods of time during certain years. Finally, California argued that the Bureau's EIS did not provide for mitigation measures on species impacts from CVP operations, as required by NEPA. For instance, California asserted that the Bureau only proposed to monitor longfin smelt populations during certain operational stages, which did not itself qualify as a mitigation measure. For these and related reasons, California argued that the Bureau's EIS violated NEPA, and that California would prevail on this claim for purposes of obtaining a preliminary injunction.

Irreparable Harm

To satisfy the second prong of the preliminary injunction requirements, California argued that it would suffer irreparable harm, primarily in the form of increased mortality of endangered species and the loss of their habitat. In particular, California cautioned that Delta smelt, longfin smelt, and Central Valley steelhead would suffer population and habitat declines as a result of CVP operations, particularly during dry years. For instance, under critically dry conditions in the Delta, California warned that Delta smelt habitat would be reduced, including rearing habitat, and that the already reduced Delta smelt population would be further imperiled. Similarly, longfin smelt and Central Valley steelhead could be increasingly entrained by CVP operations given greater water exports from the Delta under current CVP operations, thus leading to greater population declines that, according to California, might not be remedied. Accordingly, California contended that it had satisfied the irreparable harm standard required to obtain a preliminary injunction.

Balancing the Equities and the Public Interest

California also argued that the balance of the equities and the public interest support issuing a preliminary injunction. California argued that current CVP operations will result in permanent environmental harms, and thus tipped the balance of the equities as well as the public interest in favor of its position. Because environmental impacts could be permanent—such as the extinction of the Delta smelt—and would otherwise be significant, California contended that any economic harm incurred by defendants in the lawsuit could not outweigh the equities and public interest favoring California's position.

Conclusion and Implications

On May 12, the court granted California's preliminary injunction in part, and denied the remainder as moot. Specifically, the court enjoined current CVP export operations in the South Delta and reinstated a specific action with the reasonable and prudent alternative from the 2009 NMFS Biological Opinion from May 12 through May 31, 2020, on the ground that operations carried out pursuant to current CVP operations would irreparably harm threatened Central Valley steelhead. Because the remainder of California's motion was denied as moot, the impact of the court's order was limited to the month of May, and the limited injunction would not apply to the duration of California's underlying lawsuit. Whether the State of California or other parties will file further applications for preliminary injunction during the pendency of the action is not yet known. Plaintiffs motion for preliminary injunction is available online *at*: https://oag.ca.gov/system/files/attachments/press-docs/Memorandum%20in%20support%20of%20Preliminary%20Injunction.pdf.
(Miles Krieger, Steve Anderson)

CALIFORNIA LAND USE™ LAW & POLICY Reporter

RECENT FEDERAL DECISIONS

DISTRICT COURT FINDS NATIONWIDE PERMIT FOR KEYSTONE XL PIPELINE PROJECT VIOLATES THE ENDANGERED SPECIES ACT

Northern Plains Resource Council v. U.S. Army Corps of Engineers, ___F.Supp.3d___, Case No. CV-19-44-GF-BMM (D. Mt. Apr. 15, 2020, *amended* order May 11, 2020).

The U.S. District Court for the District of Montana recently declared that the U.S. Army Corps of Engineers (Corps) violated the federal Endangered Species Act (ESA) when it reissued Nationwide Permit 12 (NWP 12), a streamlined general permit used to approve the Keystone XL pipeline and other pipelines and utility projects pursuant to § 404(e) of the federal Clean Water Act. On April 15, 2020, the court determined the Corps did not properly evaluate NWP 12 under the ESA when it determined that reissuance of the permit would have no effect on listed species or critical habitat. Further, the Corps' decision not to initiate formal programmatic consultation with the U.S. Fish and Wildlife Service and National Marine Fisheries Service (the Services) in reissuing NWP 12 was also "arbitrary and capricious in violation of the Corps' obligations under the ESA." The court's order completely vacated the NWP 12 permit. In a subsequent order dated May 11, 2020, the court narrowed the *vacatur* to apply only to projects for the construction of new oil and gas pipelines, but not routine maintenance, inspection, and repair activities on existing projects. Thus, the court's order "prohibit[s] the Corps from relying on NWP 12 for those projects that likely pose the greatest threat to listed species."

Factual and Procedural Background

Plaintiffs include six environmental organizations that sued the Corps alleging violations of the Endangered Species Act, the National Environmental Policy Act (NEPA), and the federal Clean Water Act (CWA) following its reissuance of NWP 12 in 2017. The Corps issued NWP 12 for the first time in 1977.

Section 404 of the CWA requires any party seeking to construct a project that will discharge dredged or fill material into jurisdictional waters to obtain a permit. The Corps oversees the permitting process and issues both individual permits and general nationwide permits to streamline the process. The discharge may not result in the loss of greater than one-half acre of jurisdictional waters for each single and complete project. For linear projects like pipelines that cross waterbodies several times, each crossing represents a single and complete project. Projects that meet NWP 12's conditions may proceed without further interaction with the Corps.

Under § 7(a)(2) of the ESA, the Corps is required to ensure any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any listed species or destroy or adversely modify designated critical habitat. The Corps must determine "at the earliest possible time" whether its action "may affect" listed species and critical habitat. If the action "may affect" listed species or critical habitat, the Corps must initiate formal consultation with the Services. No consultation is required if the Corps determines that a proposed action is not likely to adversely affect any listed species or critical habitat. Formal consultation begins with the Corps' written request for consultation under ESA § 7(a)(2) and concludes with the Services' issuance of a Biological Opinion whether the Corps' action likely would jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

On January 6, 2017 the Corps published its final decision reissuing NWP 12 and other nationwide permits. The Corps determined that NWP 12 would result in "no more than minimal individual and cumulative adverse effects on the aquatic environment" under the CWA, and that NWP 12 complied with both the ESA and NEPA. The Corps did not consult with the Services based on its "no effect" determination, as the ESA does not require consultation if the proposed action is determined to not likely adversely affect any listed species or critical habitat.

Following the Corps' final decision, Plaintiffs challenged the Corps' determination not to initiate programmatic consultation with the Services under ESA § 7(a)(2) to obtain a Biological Opinion.

The District Court's Decision

The court considered plaintiffs' claim that the Corps acted arbitrarily and capriciously in reaching its "no effect" determination, and that the Corps should have initiated programmatic consultation with the Services when it reissued NWP 12. The court analyzed whether the Corps "considered the relevant factors and articulated a rational connection between the facts found and the choice made."

Reissuance of the Nationwide Permit Impacted Listed Species and Habitat

First, the court determined "resounding evidence" existed that the Corps' reissuance of NWP "may effect" listed species and their habitat. The court quoted statements by the Corps itself in its final determination documents acknowledging the many risks of authorized discharges by NWP 12. The Corps noted that activities authorized by past versions of NWP 12 "have resulted in direct and indirect impacts to wetlands, streams, and other aquatic resources" including "permanent losses of aquatic resource functions and services." Further, the Corps acknowledged that utility line construction "*will* fragment terrestrial and aquatic ecosystems" and that fill and excavation activities cause wetland degradation and losses. The court concluded that "[t]he types of discharges that NWP 12 authorizes 'may affect' listed species and critical habitat, as evidenced in the Corps' own Decision Document." Thus, under the ESA's low threshold for § 7(a)(2) consultation, "[t]he Corps should have initiated Section 7(a)(2) consultation before it reissued NWP 12 in 2017." The court also cited plaintiffs' expert declarations which demonstrated that reissuance of NWP 12 may affect endangered species, including pallid sturgeon populations in Nebraska and Montana, and the endangered American burying beetle. The declarations added to the "resounding evidence" in support of the conclusion that the Corps' actions "may affect" listed species or critical habitat.

Circumvention of the Consultation Process

Next, the court addressed the Corps' argument that it was authorized to circumvent § 7(a)(2) consultation requirements for programmatic consultation with the Services by relying on project-level review or General Condition 18, which provides that a nationwide permit does not authorize an activity that is "likely to directly or indirectly jeopardize the continued existence of a" listed species or that "will directly or indirectly destroy or adversely modify the critical habitat of such species." The court noted that a federal court previously concluded that the Corps should have consulted with the Services when it reissued NWP 12 in 2002. Further, the Corps had a history of consultation when it reissued NWP 12 in 2007 and 2012.

The court concluded that the Corps could not circumvent the consultation requirements of the ESA by relying on project-level review because "[p]rogrammatic review of NWP 12 in its entirety . . . provides the only way to avoid piecemeal destruction of species and habitat." By contrast, project-level review, "by itself, cannot ensure that the discharges authorized by NWP 12 will not jeopardize listed species or adversely modify critical habitat." Similarly, General Condition 18, "fails to ensure that the Corps fulfills *its* obligations under ESA Section 7(a)(2) because it delegates the Corps' initial effect determination to non-federal permittees." Thus, the Corps could not delegate its duty to determine whether NWP authorized activities will affect listed species or critical habitat.

Conclusion and Implications

In the end, the District Court concluded that the Corps' "no effect" determination and resulting decision to forego programmatic consultation "proves arbitrary and capricious in violation of the Corps' obligations under the ESA." The court vacated NWP 12 and enjoined the Corps from authorizing activities thereunder. In its amended order, the court limited the scope of its order to the construction of new oil and gas pipelines.

This case emphasizes the low threshold for § 7(a)(2) consultation for any activity that "may affect" listed species and critical habitat, and the need to comply with the ESA's procedural consultation requirements. The District Court's decision is available online at: https://ecf.mtd.uscourts.gov/doc1/11112687968.
(Patrick Skahan, Rebecca Andrews)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT FINDS FILING OF FACIALLY VALID NOTICE OF DETERMINATION TRIGGERED LIMITATIONS PERIOD FOR BRINGING CEQA CLAIMS

Coalition for an Equitable Westlake/Macarthur Park v. City of Los Angeles, ___Cal.App.5th___, Case No. B293327(2nd Dist. Apr. 2, 2020).

Plaintiff filed a petition for writ of mandate seeking to set aside various land use approvals by the City of Los Angeles (City), including related determinations and documents approved under the California Environmental Quality Act (CEQA). The City and project applicants filed a demurrer, contending that plaintiff's claims were barred by the statute of limitation and for failure to exhaust administrative remedies. The Superior Court sustained the demurrer without leave to amend. The Second District Court of Appeal affirmed, finding that the City's filing of a Notice of Determination (NOD) triggered the 30-day limitations period for bringing CEQA claims.

Factual and Procedural Background

The Lake on Wilshire Project is a mixed-use project consisting of a hotel, a residential tower, and a multi-purpose center with a theater. On March 3, 2017, the City's deputy advisory agency approved a vesting tentative tract map and certified a Mitigated Negative Declaration (MND) for the project. On March 15, the City filed a NOD advising the public that on March 3 the advisory agency had approved the project. Among other things, the NOD contained the following language:

> Public Resources Code Section 21152(a) requires local agencies to submit this information to the County Clerk. The filing of this notice starts a 30-day statute of limitations on court challenges to the approval of the project pursuant to Public Resources Code Section 21167.

No action was taken by any member of the public to challenge project approval within 30 days. On October 12, 2017, the City's planning commission approved conditional use permits and made other approvals relating to the project. In connection with these actions, the planning commission found that the project was assessed in the MND, and that no subsequent environmental impact report, negative declaration, or addendum was needed. A determination letter showed a mailing date of November 1, 2017, with an appeal deadline of November 21, 2017. Around November 21, two tenants of an existing building on the project site appealed the planning commission's decision, which the city council denied on January 31, 2018.

On March 2, 2018, plaintiff Coalition for an Equitable Westlake/Macarthur Park filed a petition for writ of mandate, challenging the approval of the MND as violating CEQA. In response, the City and project applicants filed a demurrer. On August 20, 2018, the Superior Court sustained the demurrer on the grounds that plaintiff's claims were time-barred under CEQA for failure to seek writ relief within 30 days after the NOD was filed on March 15, 2017, and that plaintiff had failed to exhaust administrative remedies. The court also denied leave to amend. Plaintiff then appealed.

The Court of Appeal's Decision

Generally, when a local agency approves or determines to carry out a project subject to CEQA, it must file with the county clerk's office a NOD within five working days of the approval or determination. If the agency adopts an MND, the NOD must include a number of items, including but not limited to, an identification of the project, a statement that the MND was adopted pursuant to the provisions of CEQA, a statement indicating whether mitigation measures were made a condition of the approval of the project, and the identity of the person who is either undertaking a project supported in some way by a public agency or receiving a permit or other entitlement from a public agency.

Under CEQA, any lawsuit alleging noncompliance with CEQA must be filed within 30 days after filing of a facially valid NOD (if an agency does not file a NOD, a 180-day statute of limitations begins to run from the date of project approval). While there are some exceptions, for instance where the NOD is invalid on its face or is filed before a decision-making body has approved the project, these exceptions are limited. These rules are in place to put strict limits on the time during which projects may be challenged.

The Mitigated Negative Declaration Challenge Was Time-Barred

Applied to the facts of the case, the Court of Appeal found plaintiff's lawsuit challenging the MND to be time-barred because it had not been filed within 30 days of March 15, 2017, when the NOD had been filed. Instead, plaintiff waited almost a year before filing its petition on March 2, 2018. The Court of Appeal also found that plaintiff had not made any credible claim that the NOD was defective or that the CEQA determination otherwise preceded the City's project approval.

Remaining Claims Rejected on the Basis of a Lack of Timeliness

The Court of Appeal also rejected plaintiff's other claims that: 1) the planning commission (not the deputy advisory agency) had responsibility under the municipal code for project approval and associated CEQA review; 2) even if the advisory agency had authority to approve the project, it had no express authority from the municipal code to make CEQA findings; 3) the agency's CEQA decisions were not properly appealable to an elected body, as required by CEQA; and 4) authority to approve the project, if vested with the agency, was improperly separated from authority for CEQA approval, which was vested with the city council. The Court of Appeal rejected all of these claims, finding that plaintiff confused the *timeliness* of a lawsuit with the *merits* of a lawsuit. Because plaintiff had not brought suit in a timely manner, it therefore was precluded from raising substantive arguments about the agency's scope of authority.

> Having failed to fit into a recognized exception to the rule that a properly filed NOD triggers a 30-day statute of limitations, the Coalition makes a number of arguments purporting to attack the validity of the NOD based on Agency's authority to make CEQA findings. . . .In making these arguments, the Coalition 'confuses the *timeliness* of a lawsuit with its *merits*.' (*Stockton*, *supra*, 48 Cal.4th at p. 501.) We are not persuaded by the Coalition's arguments that the Agency's decision-making authority, or the structure of the Project and CEQA approvals, impacts our analysis of whether the NOD triggered the statute of limitations.

Conclusion and Implications

The case is significant because it involves a substantive discussion of CEQA's statute of limitations following the filing of a NOD. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B293327.PDF.
(James Purvis)

SECOND DISTRICT COURT UPHOLDS CEQA ENVIRONMENTAL IMPACT REPORT FOR OIL REFINERY PROJECT

Communities for a Better Environment v. South Coast Air Quality Management District, ___Cal.App.5th___, Case No. B293327 (2nd Dist. Apr. 2, 2020).

Plaintiff Communities for a Better Environment filed suit against the South Coast Air Quality Management District (SCAQMD), alleging that an Environmental Impact Report (EIR) for a change to the thermal operating limit of a heater in an oil refinery was inadequate under the California Environmental Quality Act (CEQA). Plaintiff attacked the EIR in four main respects, which the superior court rejected. Following an appeal by plaintiff, the Court of Appeal affirmed.

Factual and Procedural Background

Tesoro owns and operates two adjacent oil refining

facilities in Carson and Wilmington, which date from the early 1900s. The project at issue in this case is referred to as the Los Angeles Refinery Integration and Compliance Project and would involve both facilities. As the name implies, the purpose of the project would be to improve the integration of the two facilities and to comply with air quality regulations.

The project itself would have three components. The first component would involve shutting down a major pollution source called the Wilmington Fluid Catalytic Cracking Unit. It also would install new pipelines and physically modify certain equipment. The second component would involve the installation of new storage tanks. Increased storage tank capacity would mean oil tankers could make fewer trips, which would decrease shipping costs and air pollution.

The third component, which is the portion of the project primarily attacked in plaintiff's lawsuit, would change the thermal operating limit of a heater that heats petroleum going into the "Wilmington Delayed Coker Unit." The particular heater has 36 burners, each of which has a maximum output of 8.4 million British thermal units (Btu) per hour. Thus, the maximum heat release for the heater as a whole is 302.4 million Btu per hour. This "maximum heat rate" is contrasted with the "guaranteed heat rate," which is the rate at which the heater's manufacturer guarantees the heater will operate. That rate is 7 million Btu per hour, for a total guaranteed heat rate of 252 million Btu per hour.

The difference in these rates is important because the heater previously had a federal air pollution permit keyed to a guaranteed rate of 252, even though Tesoro has operated the heater above this rate when it had to perform certain tasks. The third component of the project proposed rewriting the heater's permit in terms of the maximum rate of 302.4 instead of the guaranteed rate of 252 to align with standard industry and agency practice. This has three notable aspects:

1) the change would be on paper only—no physical changes to the heater would be made;

2) the agency simultaneously would impose a new permit limitation on air pollution from the heater to maintain levels that would be generated if the heater never operated above 252 Btu per hour;

3) by raising the thermal operating limit, the coker could potentially process a heavier blend of crude or could increase throughput through the coker by 6,000 barrels per day.

In connection with the permit approval process, SCAQMD prepared an EIR for the proposed project. Following approval of the permits and certification of the EIR in spring 2017, plaintiff brought suit in June 2017, alleging that the EIR was inadequate. The trial court rejected plaintiff's claims, and an appeal then followed.

The Court of Appeal's Decision

Baseline for Air Quality Analysis

The Court of Appeal first addressed plaintiff's claim that the baseline used to measure the project's impact on air pollution was too high. The project used a near-peak or 98th percentile method, that is, it was based on the refinery's worst air pollution emissions during a two-year interval before the project. This approach then excluded the top two percent of the data to rid the analysis of outliers, resulting in a 98th percentile method. The SCAQMD conducted its analysis by comparing these actual pre-project near-peak emissions with projected peak emissions after the project, so as to measure and control the worst effects of air pollution. Based on this method, the agency concluded that the project would have the beneficial effect of reducing air pollution.

Rejecting plaintiff's claim that an average-value baseline should have been used, the Court of Appeal found that substantial evidence supported the agency's use of the 98th percentile baseline, which followed the practice of the federal Environmental Protection Agency, and that it was rational to care most about the worst effects of air pollution. In so doing, the Court of Appeal rejected various arguments by plaintiff regarding the decision to use the 98th percentile threshold, including claims that: 1) federal regulatory goals differed from state regulatory purposes; 2) the 98th percentile ignores existing environmental conditions; 3) whether the U.S. Environmental Protection Agency (EPA) uses a percentile approach is immaterial to what the agency should have done under state law; and 4) the "normal" baseline is based on average conditions. The Court of

Appeal found all of these claims to lack merit.

Pre-Project Composition of Crude Oil

The Court of Appeal next addressed plaintiff's claim that the agency failed to obtain information about the pre-project composition of the crude oil the refinery processes, and instead only found that the crude oil input would remain within the refinery's "operating envelope." The court rejected this argument, finding that there was no need for the EIR to detail input crude oil composition, as that information was not material to assessing the project's environmental impact. The Court of Appeal further found that the EIR gave a stable and logical explanation of why the coker will not in fact process a heavier slate of crude following the project: it is constrained by upstream and downstream equipment that would require physical modification, and that physical modification will not occur.

Increase of Throughput by 6,000 Barrels per Day

The Court of Appeal next addressed plaintiff's claim that, without knowing exactly how the agency figured that throughput through the coker could be increased by 6,000 barrels per day, CEQA's information purpose was undermined because those who did not engage in the administrative process could not understand and critique this calculation. In particular, the court found this argument to have been forfeited because the exact issue had not been presented to the agency during the administrative process. As such, it could not be presented for the first time in litigation.

Absence of Information Pertaining to Volumes of Crude Oil

Finally, the Court of Appeal addressed plaintiff's claim that the EIR failed to disclose two numbers: 1) the existing volume of crude oil the refinery processes as a whole; and 2) the refinery's unused capacity. The court rejected this claim, finding that these numbers were not material to the EIR's goal of evaluating the project's air pollution impacts. No law, the Court of Appeal further explained, requires a report to include unnecessary data. Cross-checks and verifications also are not needed if, as was the case here, substantial evidence supports the agency's analysis.

Conclusion and Implications

CEQA cases, in analysis by the court of the adequacy of an EIR can be fact intensive and highly technical in nature. This case was no different but is significant because it involves a substantive discussion of number of CEQA issues, including in particular an agency's determination of a baseline. The decision is available online at: https://www.courts.ca.gov/opinions/documents/B294732.PDF.
(James Purvis)

SECOND DISTRICT COURT UPHOLDS CONSTITUTIONALITY OF CITY OF EL MONTE'S RENT CONTROL ORDINANCE FOR MOBILEHOME PARKS

El Rovia Mobile Home Park, LLC v. City of El Monte, 48 Cal.App.5th 113 (2nd Dist. 2020).

This case arises from an action by a mobilehome park owner (El Rovia), who sought a petition for writ of administrative *mandamus* to challenge the City of El Monte's (City) determination of base rent under its mobilehome rent control ordinance. Specifically, El Rovia argued that the base rent year should have been 2015 (not 2012, the year identified in the rent control ordinance and utilized by the City). The Court of Appeal for the Second Judicial District, on April 23, found that the City's selection of an earlier base year for the mobilehome rent control, rather than year rent control ordinance at issue was enacted, was reasonable, constitutional. The court further held that the City ordinance was factually supported because it allowed the City to determine the value of a fair rental return for park owners.

Factual and Procedural Background

In 2012 and 2013, the City enacted two rent control ordinances, which established rent control for two large mobilehome parks in the City by placing a

moratorium on rent increases at the two parks. Then, in 2015, the city council approved Ordinance No. 2860, which replaced the earlier rent control ordinances and extended rent control to all mobilehome parks in the City, regardless of size. The ordinance states that no rent can be charged in excess of the rent in effect as of July 1, 2015, unless the City authorizes the increase through an application process. Important for this case, the ordinance identifies 2012 as the *base year* for rent and rebuttably presumes the net operating income received by the park owner in 2012 was fair and reasonable.

El Rovia purchased the El Rovia Mobile Home Park (the Park) in 2013, before the City enacted the rent control ordinance. At that time, rent at the Park was in the low $200s per month price range. However, just one month after the ordinance was passed, El Rovia was charging rents as high as $550 per month, per space. In 2016, El Rovia submitted a petition for a base year rent adjustment to increase rent for the Park's 76 units to $665 per month. Although the City agreed that the Park's space rents were below market value, it nevertheless found that the lawful fair rental value for the 2012 base year was $525 per month. El Rovia appealed this decision to an administrative law judge, who agreed with the City's findings. El Rovia then sought a writ of administrative mandamus, claiming that the base rent year should have been 2015, not 2012, and the base rent should be $665, not $525. The trial court denied the writ.

The Court of Appeal's Decision

No Error in The City's Selection of 2012 as Base Rent Year

On appeal, El Rovia argued that the lawful base year for the determination of base rent adjustments should have been 2015, not 2012, and that the City's use of 2012 as the base year violates the holding in *Vega v. City of West Hollywood,* 223 Cal.App.3d 1342 (1990) (*Vega*). In *Vega*, a city enacted a rent control ordinance that set the rent charged at an earlier fixed date (the base date rent) as the starting point for fixing maximum rents. There, the California Supreme Court found that based on constitutional concerns, "a property owner must be permitted ... to start rent calculations with a base date rent similar to other comparable properties." The Court's holding created a two-step process:

> After [1] base date rents are established which reflect general market conditions, then [2] the Commission should apply and maintain the net operating income formula of the [o]rdinance.

Thus, El Rovia's suit essentially presented a claim for a *Vega* determination of the base year rent for the Park.

Here, the City's ordinance clearly identified 2012 as the base year for initial rent determinations. But El Rovia argued that the City was constitutionally required to establish 2015 as the base year. The Court of Appeal began its analysis with the established principle that the City should be given broad discretion in selecting the base year under its rent control legislation:

> Mobile home rent control ordinances are accorded particular deference as rational curative measures to counteract the effects of mobilehome space shortages that produce systematically low vacancy rates and rapidly rising rents.

Further, "fair return is the constitutional measuring stick by which every rent control board decision is evaluated." This standard evaluates whether the rent control ordinance results in an impermissible confiscatory taking:

> While a fair return is constitutionally required, 'the state and federal Constitutions do not mandate a particular administrative formula for measuring fair retur. . . . [Citations.] Thus, 'rent control laws incorporate any of a variety of formulas for calculating rent ceilings.' [Citations.] 'Under broad constitutional tolerance, California cities may enact various forms of residential rent control measures to satisfy the just, fair and reasonable rent standard. [Citation.] Public administrative bodies, charged with implementing and enforcing rent control measures, are not obliged by either state or federal constitutional requirements to employ any prescribed formula or method to fix rents.

Here, the court found that the City's selection of 2012 as the base year was reasonable, constitutional,

and factually supported by the record. Citing to *Vega*, the court noted that rent control ordinances typically use:

> . . .the rent charged on a fixed prior date 'as a starting point for the fixing of maximum rents on the theory that it approximates the rent that would be paid in an open market without the upward pressures that the imposition of rent control is intended to counteract.'

The court rejected El Rovia's argument that under *Vega* or any other rule of law, the City was required to select 2015 as the base year. To the extent El Rovia argued that using 2012 as a base year was unfair, El Rovia LLC failed to produce any evidence that this was the case.

In the City, the year 2012 preceded the enactment of any of the three rent control ordinances, the first of which was limited to the two larger parks:

> [I]t is sensible to now use 2012 as a base year for all parks in the City, because that year predates when any park in the City was subject to rent control and when the general market could be expected to react.

By using 2012 as the base year, the City was able to consider all the mobilehome parks in the City, none of which were under rent control at the time. This was critical to the City's assessment of comparable properties (all mobilehome parks) in its determination of whether "exceptional circumstances" existed to depart from the actual rent charged in the base year of 2012. Thus, because the City was in a rent control-free environment in 2012, the City's use of 2012 as the base year was reasonable.

Conclusion and Implication

This case highlights the point that mobilehome rent control ordinances are accorded particular deference as curative measures to counteract the effects of mobilehome space shortages. In order to help protect against rapidly rising rents, it is within a city's prerogative and legislative authority to determine what rent control scheme it will adopt for mobilehomes and to decide what base year to employ in its rent control ordinance. Therefore, California cities may enact various forms of residential rent control measures to satisfy the just, fair and reasonable rent standard; and in the absence of an unconstitutional and confiscatory taking, the courts are not authorized to interfere with the actions of the local rent boards.

The opinion may be accessed online at the following link: https://www.courts.ca.gov/opinions/documents/B295640M.PDF.
(Nedda Mahrou)

THIRD DISTRICT COURT ADDRESSES THE FAIR HEARING ARGUMENT IN DENIAL OF CONDITIONAL USE PERMIT— FINDS BIAS PLAYED A ROLE IN THE DENIAL

Petrovich Development, LLC v. City of Sacramento,
___Cal.App.5th___, Case No. C087283 (3rd Dist. May 8, 2020).

In *Petrovich Development, LLC* the Third District Court of Appeal affirmed an order granting a petition, which challenged the City of Sacramento's decision to deny a conditional use permit, on the basis that petitioner had not received a fair hearing due to the bias of one city council member's actions demonstrating bias.

Factual and Procedural Background

In September 2010, the city council approved land use and zoning entitlements for a mixed-use development, which included a shopping center zone in the southern commercial area. In September 2014, petitioner applied for a conditional use permit to construct and operate a gas station in the shopping center zone. A local neighborhood association submitted a series of letters in opposition to the proposed gas station due to concerns regarding traffic, health and safety, land use, and aesthetics.

On June 11, 2015, the planning commission con-

sidered the conditional use permit and voted 8-3 to approve the application. The neighborhood association appealed the decision to the city council.

Subsequently, on June 29, 2015, the union representing grocery store employees wrote to the city attorney expressing concerns regarding a particular councilmember's statements made at a meeting of the neighborhood association and seeking legal guidance as to whether that councilmember should recuse himself from deciding the appeal. The city attorney responded that the union had "'not established an unacceptable probability of actual bias" on the part of the councilmember and he was therefore not required to recuse himself.

On November 3, 2015, an advisor to the mayor sent a quick update to the mayor indicating that the councilmember "is confident that he has the votes (if not a unanimous one) to deny the approval." On November 10, 2015, at a city council proceeding, in addressing statements made that he had talked to other councilmembers who had indicated they would follow his lead in voting, the councilmember stated "I never said that I've talked to all councilmembers." On that same day, the councilmember sent an email related to the project to the major entitled "talking points" suggesting that he intended to vote no on the conditional use permit. On November 12-13, 2015, the president of the neighborhood association sent identically worded emails to city councilmembers that made points similar to the "talking points" that had been previously sent to the mayor. On November 16, 2015, the mayor's advisor sent an email that included a document discussing the sequencing of the upcoming hearing, including how the vote would go. Throughout this period leading up to the hearing, the councilmember also exchanged multiple text messages with the neighborhood association president.

The hearing was held on November 17, 2015. At the end of public comments, the councilmember in question made a motion to deny the conditional use permit for the gas station. The mayor called on a second councilmember, who after his comments, seconded the motion. The city council, including the mayor, voted 7-2 to deny the conditional use permit.

Petitioner filed a petitioner for writ of mandate and complaint for declaratory and injunctive relief against the city and the neighborhood association to rescind the denial of the conditional use permit—alleging that the city council was "improperly influenced" and "wrongfully deprived" petitioners of their right to a fair and impartial hearing.

Considering the facts as a whole, the trial court found that in the days prior to the hearing the councilmember had demonstrated an "'unacceptable probability of actual bias.'" The court granted the petition and ordered the city to rescind the decision on the conditional use permit and hold a new hearing.

The Court of Appeal's Decision

The Third Appellate District reviewed the city's actions *de novo* stating that the ultimate question of whether the city's decision was unlawful or procedurally unfair are questions of law. The court next set forth the legal standard—when acting in an adjudicatory capacity, like the city council did here, the decisionmakers must be neutral and unbiased. Petitioner is not required to show actual bias but must prove with concrete facts that there is an unacceptable probability of actual bias on the part of the decisionmaker. Within that legal framework, the appellate court found that petitioner had met its burden.

The court agreed with the trial court that the councilmember's membership in the neighborhood association, his statements quoted in the letter to the city attorney, and that he lived in the residential neighborhood next to the proposed gas station were not concrete facts sufficient to establish bias.

The Path to Bias

Nevertheless, the court found that the councilmember's actions in the days leading up to the hearing and vote "crossed the line into advocacy against the project." The court found that the councilmember's denial that he had not spoken to all his colleagues was a "negative pregnant" constituting an admission that he had spoken to some of them. It further relied on the statement made by the mayor's advisor that the councilmember was "confident" he had a majority to deny the conditional use permit. The court held that the final vote by a majority to deny the conditional use permit confirmed both the advisor's statement and the councilmember's denial.

Moreover, the court found that the correspondence between the councilmember and the mayor transmitting the "talking points" suggested "behind-the-scenes advocacy" as did the orchestration of how the presentation at the hearing would proceed. The

"sequencing" of the hearing included in the mayoral advisor's email, *i.e.*, a motion to deny the permit made by the councilmember and seconded by another named councilmember and carried by majority vote (including the mayor) is precisely what occurred at the hearing. Additionally, elements of the councilmember's "talking points" were the substance of the neighborhood association's letters opposing the project that were sent to other members of the city council. Finally, the court found the fact that the councilmember himself made the motion to reverse the planning commission's decision was the most "compelling indication of probable bias" because it had been planned out and documented in the mayoral advisor's email that showed how the sequence was planned.

Taken together, the court held that these were "concrete facts" establishing that the councilmember demonstrated bias:

> As a threshold matter, we conclude . . .that Councilmember Schenirer's membership in the Sierra Curtis Neighborhood Association did not establish bias. "[B]ias in an administrative adjudicator must be established with concrete facts rather than inferred from mere appearances." (*citations omitted*). . . . Equally, Councilmember Schenirer's statement quoted in the letter from UFCW 8 - Golden State to the city attorney, i.e., that a gas station does not fit in the development as originally proposed, did not disqualify him from voting on the issue. . . . In the same vein, that Councilmember Schenirer lived in the Curtis Park residential neighborhood adjacent to the proposed gas station was not a disqualifying fact. . . .However, in the run up to the City Council hearing and vote, Councilmember Schenirer crossed the line into advocacy against the project. . . .There was evidence that Councilmember Schenirer was counting—if not securing—votes on the City Council against the gas station and communicating an "update" on that score to Mayor Johnson. . . . His denial a week before the hearing that he had not spoken to *all* his colleagues about voting against the gas station. . .was a "negative pregnant" that constituted an admission that he had spoken to less than all of them on the subject. . . . Councilmember Schenirer prepared a compilation of facts that amounted to a presentation against the gas station. . . .The only conceivable purpose for this list was to assist advocacy in opposition to the gas station. . . .These "concrete facts" establish that Councilmember Schenirer was biased. He took affirmative steps to assist opponents of the gas station conditional use permit and organized the opposition at the hearing. Councilmember Schenirer acted as advocate, not a neutral and impartial decisionmaker.

Based on these facts the court found that petitioner had not received a fair hearing.

Conclusion and Implications

The Third District Court of Appeal's opinion reaffirms that municipal decisionmakers when acting in a quasi-adjudicatory capacity must neutral and unbiased. The opinion further sheds light on what a court may consider "concrete facts" establishing bias. It is a cautionary tale to all municipal decisionmakers that, unlike policymaking in their legislative capacity, when functioning in an adjudicatory capacity, a councilmember must have no conflict of interest, cannot prejudge the specific facts, and must be free of prejudice for or against a project or party. The court's ruling is available online at: https://www.courts.ca.gov/opinions/documents/C087283.PDF.
(Christina Berglund)

FOURTH DISTRICT REVERSES TRIAL COURT'S AWARD OF COMPENSATION FOR INVERSE CONDEMNATION

Ruiz v. County of San Diego,
___Cal.App.5th___, Case Nos. D074654, D075355 (4th Dist. Mar. 17, 2020; *Pub.* Apr. 7, 2020).

In *Ruiz* the Fourth District Court of Appeal reversed the trial court order awarding plaintiff compensation for inverse condemnation—finding that even viewing the evidence most favorably to plaintiff, the evidence was insufficient to sustain a judgment on such a theory of liability.

Factual and Procedural Background

In 1990, plaintiff purchased a single-family home in San Diego County. Historically, a drained surface waters across the property and into a lake. At some point prior to development of the subdivision, the stream was improved with above-ground concrete lined channels. In 1959, as part of constructing the residential development, the above-ground concrete channel was replaced with underground reinforced concrete pipe. In the case of plaintiff's property, however, the developer buried corrugated metal pipe (plaintiff's pipe) on top of the existing concrete-lined channel.

Plaintiff's pipe, while privately-owned, connects and is a continuation of the storm drain system. It is also considered part of the natural watercourse, *i.e.*, the stream. The county did not design, construct, install, or maintain the pipe. In 1959, the county rejected the developer's offer to dedicate an easement to the plaintiff's pipe. Nevertheless, a "fair amount" of water in the drainage system originates from property within the City of San Diego and the county and drains into underground pipes (both publicly- and privately-owned), through plaintiff's pipe ultimately discharging near a freeway.

In December 2014 and again in January 2016, the property at issue flooded because the bottom of plaintiff's pipe had rusted away. After the 2016 flood, plaintiff repaired the pipe and the property has not flooded since.

Plaintiff sued the county for trespass, nuisance, inverse condemnation and declaratory relief. Plaintiff alleged the county: 1) had acted unreasonably in discharging water through his pipe without inspecting or maintaining the pipe; and 2) that by using the pipe, the county had "taken an easement over that drainage facility" such that the county was required to maintain the pipe.

The trial found that county had implicitly accepted a drainage easement as a result of its continuous use of allowing public water from the county's drains and inlets to flow through plaintiff's pipe. It awarded plaintiff the cost of repairing the metal pipe plus other damages and dismissed plaintiff's claims for trespass and nuisance. Subsequently, the court awarded plaintiff attorney's fees and costs.

This appeal followed.

The Court of Appeal's Decision

The issue on appeal, as framed by the Fourth District Court, was:

> . . .whether a privately owned storm drain pipe located on private property, for which a public entity had rejected an offer of dedication, nevertheless becomes a public improvement because 'public water' drains through it.

As a mixed question of fact and law, the appellate court reviewed the trial court's determination of the historical facts for substantial evidence and reviewed *de novo* the applicable law and application of that law to the facts.

Issue of Implied Acceptance of Dedication

With respect to whether the county impliedly accepted the dedication of the pipe by conduct, the court relied on the Supreme Court's decision in *Locklin v. City of Lafayette*, 7 Cal.4th 327 (1994), to conclude that mere use of the pipe as part of the public drainage system without evidence that the county exerted "control" or "maintenance" did not transform plaintiff's pipe into a public work. The court also looked to appellate court decisions in *DiMartino v. City of Orinda*, 80 Cal.App.4th 329 (2000) and *Ullery v. County of Contra Costa*, 202 Cal.App.3d 562 (1988) as both had similar fact patterns to the instant case—finding that both cases stand for the proposition that a privately-owned drain pipe on private

property does not become a public work simply because "public water" drains through it. Rather, the public entity must do something "more" to impliedly accept an offer of dedication. To answer the question of "how much more," the court looked to *Marin v. City of San Rafael,* 111 Cal.App.3d 591 (1980) where the court held that plaintiffs' damages due to failure of a storm drain pipe under their home resulted from the city's maintenance and use of the public improvement. In that case, however, the city was "substantially involved" in installing the privately-owned pipe as it was installed under the supervision of the city engineer.

Within that legal framework, the court rejected plaintiff's theories of liability holding that use of plaintiff's pipe as part of the drainage system, without more, did not make it a public improvement or constitute implied acceptance of a drainage easement. The record contained undisputed evidence that the county had done nothing to demonstrate dominion or control over plaintiff's pipe. There was no evidence that a county employee participated in the planning, construction, maintenance, inspection or repair of the pipe, nor did the county have any access to the pipe. The court found plaintiff's reliance on a single, isolated comment by the county supervisor recommending that plaintiff not completely block upstream flow was insufficient to demonstrate the dominion and control necessary to support a finding of implied acceptance of dedication.

Certain Facts Regarding the Water Pipe

The court further rejected factual assertions made by plaintiff. For example, plaintiff contended that most of the water flowing through the pipe originated in the county. The court found that the record showed otherwise. Plaintiff's own expert conceded that there was no way of apportioning the amount of water contributed to the drainage system between the city and the county. The expert further failed to support plaintiff's argument on appeal that the pipe beneath the home replaced a natural watercourse. The court found plaintiff was not in a position to discredit its own expert on lack of foundation grounds—where at trial the expert testified that plaintiff's pipe is in the natural watercourse.

Addressing the Allegation of a 'Public Work or Improvement'

With respect to plaintiff's legal arguments, the court distinguished plaintiff's reliance on *Skoumbas v. City of Orinda,* 165 Cal.App.4th 783 (2008) finding that that decision expressly declined to address the issue at hand, *i.e.*, whether a public agency's use of a privately-owned pipe impliedly accepts an offer of dedication previously expressly rejected.

Plaintiff also argued that its privately-owned pipe is a public improvement, as a matter of law, based on the California Constitution, which defines a public improvement to include "water-related … facilities or infrastructure." The court disagreed finding that plaintiff's argument conflates the definition of "public work or improvement" with that of "public use." The court held that Article I, section 19 of the California Constitution does not use the term "public work or improvement" in establishing inverse condemnation liability.

Did the County's Actions Create and Unreasonable Risk of Harm to Property?

Finally, the court found that there was no evidence to support a finding that the county had acted unreasonably in failing to ensure that it was not damaging plaintiff's pipe. The court stated that plaintiff misframed the issue—which was not whether the county unreasonably failed to maintain the pipe but rather whether the county's ownership, operation or control of its property created an unreasonable risk of harm to plaintiff's property. Here, the county did not "own" the pipe and the evidence, from plaintiff's expert, establishes that because of the many homes in the area, water from those private properties alone was enough to cause the pipe to rust and fail.

Because the court reversed the compensation award, the award of attorney's fees and costs was also reversed.

Conclusion and Implications

The appellate court's decision provides a detailed analysis and application of inverse condemnation case law with respect to public use of private property, which may be useful in considering these issues. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D074654.PDF
(Christina Berglund)

LEGISLATIVE UPDATE

This Legislative Update is designed to apprise our readers of potentially important land use legislation. When a significant bill is introduced, we will provide a short description. Updates will follow, and if enacted, we will provide additional coverage.

We strive to be current, but deadlines require us to complete our legislative review several weeks before publication. Therefore, bills covered can be substantively amended or conclusively acted upon by the date of publication. All references below to the Legislature refer to the California Legislature, and to the Governor refer to Gavin Newsom.

Coastal Resources

•**AB 2619 (Stone)**—This bill would establish the Program for Coastal Resilience, Adaptation, and Access for the purpose of funding specified activities intended to help the state prepare, plan, and implement actions to address and adapt to sea level rise and coastal climate change.

AB 2619 was introduced in the Assembly on February 20, 2020, and, most recently, on May 14, 2020, was re-referred to the Committee on Appropriations.

•**SB 1100 (Atkins)**—This bill would amend the California Coastal Act of 1975 to include, as part of the procedures the Coastal Commission is required to adopt, recommendations and guidelines for the identification, assessment, minimization, and mitigation of sea level rise within each local coastal program, as provided, and require the Commission to take into account the effects of sea level rise in coastal resource planning and management policies and activities.

SB 1100 was introduced in the Senate on February 19, 2020, and, most recently, on May 12, 2020, had its referral to the Committee on Natural Resources and Governmental Organization rescinded as a result of the shortened 2020 legislative calendar.

Environmental Protection and Quality

•**AB 1907 (Santiago)**—This bill would, until January 1, 2029, exempt from environmental review under CEQA certain activities approved by or carried out by a public agency in furtherance of providing emergency shelters, supportive housing, or affordable housing, as each is defined.

AB 1907 was introduced in the Assembly on January 8, 2020, and, most recently, on May 13, 2020, had its first hearing in the Committees on Natural Resources and Housing and Community Development canceled at the request of its author, Assembly Member Santiago.

•**AB 2262 (Berman)**—This bill would require each sustainable communities strategy included as part of a regional transportation plan required under existing law to also include a zero-emission vehicle readiness plan, as specified.

AB 2262 was introduced in the Assembly on February 14, 2020, and, most recently, on May 5, 2020, was re-referred to the Committee on Transportation.

•**AB 2323 (Friedman; Chiu)**—This bill would require, in order to qualify for the California Environmental Quality Act exemption in Public Resources Code § 21155.4 for certain residential, employment center, and mixed-use development projects meeting specified criteria, that the project is undertaken and is consistent with either a Specific Plan prepared pursuant to specific provisions of law or a community plan. In addition, this bill would repeal Government Code § 65457, which provides, among other things, that an action or proceeding alleging that a public agency has approved a project pursuant to a Specific Plan without having previously certified a supplemental environmental impact report for the specific plan, when required, to be commenced within 30 days of the public agency's decision to carry out or approve the project.

AB 2323 was introduced in the Assembly as an urgency statute on February 14, 2020, and, most recently, on May 4, 2020, was re-referred to the Committee on Appropriations.

•**AB 2991 (Santiago)**—This bill would extend the authority of the Governor to certify a project for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency under the Jobs and Economic Improvement Through Environmental Leadership

Act of 2011 from January 1, 2020, to January 1, 2025, and provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2026.

AB 2991 was introduced in the Assembly on February 21, 2020, and, most recently, on May 20, 2020, was re-referred to the Committee on Appropriations.

AB 3054 (Salas)—This bill would amend the California Environmental Quality Actto: 1) require a plaintiff or petitioner, in an action or proceeding brought pursuant to CEQA, to disclose the identity of a person or entity that contributes $1,000 or more toward the plaintiff's or petitioner's costs of the action or proceeding; 2) identify any pecuniary or business interest related to the project or issues involved in the action or proceeding of those persons or entities 3) authorize a court to, upon request of the plaintiff or petitioner, withhold public disclosure of a contributor if the court finds that the public interest in keeping that information confidential clearly outweighs the public interest in disclosure; and 4) authorize a court to use the disclosed information to determine whether the financial burden of private enforcement supports the award of attorneys' fees.

AB 3054 was introduced in the Assembly on February 21, 2020, and, most recently, on April 24, 2020, was referred to the Committee on Natural Resources.

AB 3279 (Friedman)—This bill would amend the California Environmental Quality Act to, among other things: 1) require that a court, to the extent feasible, commence hearings on an appeal in a CEQA lawsuit within 270 days of the date of the filing of the appeal; 2) reduce the time in which the petitioner must file a request for a hearing from within 90 to within 60 days from the date of filing the petition; 3) reduce the general period in which briefing should be completed from 90 to 60 days from the date that the request for a hearing is filed; and, 4) authorize a plaintiff or petitioner to prepare the record of proceedings only when requested to do so by the public agency.

AB 3279 was introduced in the Assembly on February 21, 2020, and, most recently, on May 14, 2020, was re-referred to the Committee on Appropriations.

AB 3335 (Friedman)—This bill would amend the California Environmental Quality Act provisions allowing for limited CEQA review of certain transit priority projects to require that all parcels within the project have no more than 50 percent, rather than 25 percent, of their area farther than 1/2 mile from the transit stop or corridor.

AB 3335 was introduced in the Assembly on February 21, 2020, and, most recently, April 24, 2020, was referred to the Committee on Natural Resources.

SB 974 (Hurtado)—This bill would exempt from the California Environmental Quality Act certain projects that benefit a small community water system that primarily serves one or more disadvantaged communities, or that benefit a non-transient non-community water system that serves a school that serves one or more disadvantaged communities, by improving the small community water system's or nontransient non-community water system's water quality, water supply, or water supply reliability, or by encouraging water conservation.

SB 974 was introduced in the Senate on February 11, 2020, and, most recently, on May 13, 2020, was set for hearing in the Committee on Environmental Quality on May 29, 2020.

Housing / Redevelopment

•**AB 2345 (Gonzalez)—**This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) three incentives or concessions for projects that include at least 12 percent of the total units for very low income households; 2) four and five incentives or concessions for projects in which greater percentages of the total units are for lower income households, very low income households, or for persons or families of moderate income in a common interest development.

AB 2345 was introduced in the Assembly on February 18, 2020, and, most recently, on May 26, 2020, was re-referred to the Committee on Appropriations.

•**AB 2405 (Burke)—**This bill would require local jurisdictions to, on or before January 1, 2022, establish and submit to the Department of Housing and Community Development an actionable plan to house their homeless populations based on their latest point-in-time count.

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on May 21, 2020, was re-referred to the Committee on Appropriations.

•**AB 2580 (Eggman)**—This bill would authorize a development proponent to submit an application for a development for the conversion of a structure with a certificate of occupancy as a motel, hotel, or commercial use into multifamily housing units to be subject to a streamlined, ministerial approval process, provided that development proponent reserves at least 20 percent of the proposed housing units for persons and families of low or moderate income.

AB 2580 was introduced in the Assembly on February 20, 2020, and, most recently, on May 26, 2020, was re-referred to the Committee on Appropriations.

•**AB 3107 (Bloom)**—This bill, notwithstanding any inconsistent provision of a city's or county's General Plan, Specific Plan, zoning ordinance, or regulation, would require that a housing development in which at least 20 percent of the units have an affordable housing cost or affordable rent for lower income households be an allowable use on a site designated in any element of the general plan for commercial uses.

AB 3107 was introduced in the Assembly on February 18, 2020, and, most recently, on May 21, 2020, was re-referred to the Committee on Appropriations.

•**AB 3155 (Rivas)**—This bill would amend the Subdivision Map Act to, among other things, authorize a development proponent to submit an application for the construction of a small lot subdivision that meets certain specified criteria, including that the subdivision is located on a parcel zoned for multifamily residential use, consists of individual housing units that comply with existing height, floor area, and setback requirements applicable to the pre-subdivided parcel, and that the total number of units created by the small lot subdivision does not exceed the allowable residential density permitted by the existing general plan and zoning designations for the pre-subdivided parcel.

AB 3155 was introduced in the Assembly on February 21, 2020, and, most recently, on May 26, 2020, was re-referred to the Committee on Appropriations.

•**AB 3234 (Gloria)**—This bill would amend the Subdivision Map Act to specify that no tentative or final map shall be required for the creation of a parcel or parcels necessary for the development of a subdivision for a housing development project that meets specified criteria, including that the site is an infill site, is located in an urbanized area or urban cluster, and the proposed site to be subdivided is no larger than five acres, among other requirements.

AB 3234 was introduced in the Assembly on February 21, 2020, and, most recently, on May 19, 2020, was re-referred to the Committee on Appropriations.

•**SB 1079 (Skinner)**—This bill would authorize a city, county, or city and county to acquire a residential property within its jurisdiction by eminent domain if the property has been vacant for at least 90 days, the property is owned by a corporation or a limited liability company in which at least one member is a corporation, and the local agency provides just compensation to the owner based on the lowest assessment obtained for the property by the local agency, subject to the requirement that the city or county maintain the property and make the property available at affordable rent to persons and families of low or moderate income or sell it to a community land trust or housing sponsor.

SB 1079 was introduced in the Senate on February 19, 2020, and, most recently, on May 26, 2020, was re-referred to the Committee on Appropriations.

•**SB 1120 (Atkins)**—This bill would amend the Subdivision Map Act to extend the limit on the additional period for the extension for an approved or conditionally approved tentative tract map that may be provided by ordinance from 12 months to 24 months.

SB 1120 was introduced in the Senate on February 19, 2020, and, most recently, on May 28, 2020, was re-referred to the Committee on Appropriations.

•**SB 1410 (Gonzalez)**—This bill would establish a Housing Accountability Committee within the Housing and Community Development Department and set forth the committee's powers and duties, including reviewing appeals regarding multifamily housing projects that cities and counties have denied or subjected to unreasonable conditions that make the project financially infeasible, vacating a local decision if the committee finds that the decision of the local agency was not reasonable or consistent with meeting local housing needs, and directing the local agency in such case to issue any necessary approval or permit for the development.

SB 1410 was introduced in the Senate on February 20, 2020, and, most recently, on May 27, 2020, was re-referred to the Committee on Appropriations.

Public Agencies

•**AB 2028 (Aguiar-Curry)**—This bill would amend the Bagley-Keene Open Meeting Act, except for closed sessions, to require that a notice of a public meeting of a State agency, board or commission include all writings or materials provided for the noticed meeting to a member of the State body by staff that are in connection with a matter subject to discussion or consideration at the meeting, and require these writings and materials to be made available on the internet at least ten days in advance of the meeting.

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on May 13, 2020, was re-referred to the Committee on Appropriations.

•**SB 931 (Wieckowski)**—This bill would amend the Ralph M. Brown Act to require a legislative body to email a copy of the agenda or a copy of all the documents constituting the agenda packet if so requested.

SB 931 was introduced in the Senate on February 5, 2020, and, most recently, on April 2, 2020, was re-referred to the Committee on Governance and Finance.

Zoning and General Plans

•**AB 2421 (Quirk)**—This bill would revise the definition of "wireless telecommunications facility", which are generally subject to a city or county discretionary permit and required to comply with specified criteria as distinguished from a "collocation facility", to include, among other equipment and network components listed, "emergency backup generators" to emergency power systems that are integral to providing wireless telecommunications services.

AB 2421 was introduced in the Assembly on February 19, 2020, and, most recently, on May 12, 2020, was re-referred to the Committee on Appropriations.

•**AB 2988 (Chu, Chiu)**—This bill would amend the Planning and Zoning Law to make supportive housing a use by right in zones where emergency shelters are permitted and, by expanding the locations in which, and sizes of, supportive housing that qualify as a use by right, would expand the exemption for the ministerial approval of projects under the California Environmental Quality Act.

AB 2988 was introduced in the Assembly on February 21, 2020, and, most recently, on May 20, 2020, had its first hearing in the Committee on Housing and Community Development canceled at the request of its author, Assembly Members Chu and Chiu.

•**AB 3153 (Rivas)**—This bill would amend the Planning and Zoning Law to require a local jurisdiction, as defined, notwithstanding any local ordinance, general plan element, specific plan, charter, or other local law, policy, resolution, or regulation, to provide, if requested, an eligible applicant of a residential development with a parking credit that exempts the project from minimum parking requirements based on the number of non-required bicycle parking spaces or car-sharing spaces provided subject to certain conditions.

AB 3153 was introduced in the Assembly on February 21, 2020, and, most recently, on May 18, 2020, was re-referred to the Committee on Appropriations.

•**SB 1138 (Wiener)**—This bill would amend the Planning and Zoning Law to, among other things, revise the requirements of the General Plan housing element in connection with identifying zones or zoning designations that allow residential use, including mixed use, where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit. If an emergency shelter zoning designation where residential use is a permitted use is unfeasible, the bill would permit a local government to designate zones for emergency shelters in a non-residential zone if the local government demonstrates that the zone is connected to amenities and services that serve homeless people.

SB 1138 was introduced in the Senate on February 19, 2020, and, most recently, on May 26, 2020, was re-referred to the Committee on Appropriations. (Paige Gosney)

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