Volume 13, Number 3
August/September 2020

CLIMATE CHANGE™

LAW & POLICY REPORTER

CONTENTS

Continued on next page

Publisher's Note:

Accuracy is a fundamental of journalism which we take seriously. It is the policy of Argent Communications Group to promptly acknowledge errors. Inaccuracies should be called to our attention. As always, we welcome your comments and suggestions. Contact: Robert M. Schuster, Editor and Publisher, 530-852-7222, schuster@argentco.com.

WWW.ARGENTCO.COM

Subscription Rate: 1 year (11 issues) $875.00. 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, Gala Argent; Vice-President and Secretary, Robert M. Schuster, Esq.

CCL

FEATURE ARTICLE

CALIFORNIA ENVIRONMENTAL QUALITY ACT CONSIDERATIONS WHEN EVALUATING IMPACTS TO BIOLOGICAL RESOURCES

By Robbie Hull, Scott Birkey, and Clark Morrison

One of the stated legislative policies underlying the California Environmental Quality Act (CEQA) is to:

> . . .[p]revent the elimination of fish or wildlife species due to man's activities, insure that fish and wildlife populations do not drop below self-perpetuating levels, and preserve for future generations representations of all plant and animal communities. (Pub. Res. Code § 21001(c).)

To meet this goal, CEQA requires local agencies to review, analyze, and mitigate a project's anticipated impacts on biological resources, including impacts to threatened and endangered species, habitats, and wetlands.

The CEQA statute and the CEQA Guidelines leave a lot of questions unanswered, however. Some of these questions are rooted in legal considerations, while others reflect the practical realities of trying to evaluate unpredictable and variable biological systems. For example: What issues should a local agency consider when a project has the potential to impact biological resources? To what extent do those impacts inform the need for either an Environmental Impact Report (EIR) or a Mitigated Negative Declaration (MND)? What is the appropriate scope of the CEQA document's analysis of impacts to biological resources? What are acceptable thresholds of significance, and what triggers a determination that an impact is significant? What constitutes adequate mitigation to offset a project's significant impacts to biological resources? In what circumstances can that mitigation be deferred until later?

This article attempts to address these and other issues that often arise when consultants and lawyers prepare and review the biological resources discussion and analysis in CEQA documents. Though not exhaustive, this article is intended to provide for your consideration some thoughts on these issues to help you navigate the nuances of the biological-resources evaluation in a CEQA document. We presume the reader has at least a good working knowledge of fundamental CEQA principles, but to help place some of these issues into context, we remind the reader of certain basic concepts that apply more generally to CEQA documents and evaluation of projects.

Biological Resources Impacts and the Level of CEQA Clearance Required

During its preliminary review process, a lead agency must determine the appropriate type of CEQA clearance required for a project. A key consideration at this stage in the process is whether an exemption can be used as the CEQA clearance for the project. The potential for impacts to biological resources is sometimes one of the main reasons a project may not be eligible for an exemption. For example, a commonly used exemption—the "Class 32 Infill Exemption"—specifically disallows the use of the exemption in the event the project site has "value as habitat for endangered, rare or threatened species." (14 CCR § 15332(c).)

Relatedly, practitioners should keep in mind that a project may not rely on a "mitigated categorical exemption" to avoid CEQA review. In the context of biological resources, this issue typically arises when

a project is in proximity to a sensitive environment or may have significant impacts on species or habitat and the applicant or lead agency seeks to incorporate mitigation into the project in order to make the project fit within an exemption.

For example, in *Salmon Protection & Watershed Network v County of Marin*, 125 Cal.App.4th 1098, 1102 (2004), Marin County approved the construction of a single-family home pursuant to the Class 3 categorical exemption for "New Construction or Conversion of Small Structures." The home, however, was in a protected "stream conservation area," pursuant to the County's General Plan designation for areas adjacent to natural watercourses and riparian habitat. (*Id.* at 1102-03.) In approving the project, the county imposed various mitigation measures, including construction limitations, a riparian protection plan, and erosion and sediment control, aimed at minimizing adverse impacts. (*Id.* at 1102-04.)

According to the Court of Appeal, the county erred in relying upon mitigation measures to grant a categorical exemption:

> Reliance upon mitigation measures (whether included in the application or later adopted) involves an evaluative process of assessing those mitigation measures and weighing them against potential environmental impacts, and that process must be conducted under established CEQA standards and procedures for EIRs or negative declarations. (*Id.* at 1108; *see also, Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster*, 52 Cal.App.4th 1165, 1198-1200 (1997) [operation and minor alteration of existing landfill not exempt, despite mitigation measures addressing leaking of pollutants].)

In a somewhat complicated twist to this principle, a project may include design or operational features that reduce or avoid environmental impacts while remaining eligible for a categorical exemption. In *Citizens for Environmental Responsibility v. State ex rel. 14th Dist. Ag. Assn.*, 242 Cal.App.4th 555, 570 (2015), the Court of Appeal held that a rodeo could rely on the Class 23 exemption for normal operations of existing facilities for public gatherings, despite the implementation of a manure management plan to minimize pollution to a nearby creek and the resulting indirect impacts to aquatic species. The court found that the management plan was not proposed as a mitigation measure for the rodeo project and, therefore, did not preclude the use of the Class 23 exemption. (*Id.*) Rather, it preexisted the project and was directed at preexisting concerns. (*Id.* at 570-71; *see also, Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, 1352-53 (2011) [dedication of left-hand turn lane as part of project design was not a mitigation measure].)

Another consideration to take into account are the CEQA Guidelines pertaining to "mandatory findings of significance." (14 CCR § 15065(a).) These Guidelines specifically refer to impacts to biological resources and specify that an EIR must be prepared in the event certain biological resources are impacted, subject to certain specific requirements. The Guidelines state:

> (a) A lead agency shall find that a project may have a significant effect on the environment and thereby require an EIR to be prepared for the project where there is substantial evidence, in light of the whole record, that any of the following conditions may occur:
> (1) The project has the potential to: . . . substantially reduce the habitat of a fish or wildlife species; cause a fish or wildlife population to drop below self-sustaining levels; threaten to eliminate a plant or animal community; substantially reduce the number or restrict the range of an endangered, rare or threatened species . . .
> (b)(2) Furthermore, where a proposed project has the potential to substantially reduce the number or restrict the range of an endangered, rare or threatened species, the lead agency need not prepare an EIR solely because of such an effect, if:
> (A) the project proponent is bound to implement mitigation requirements relating to such species and habitat pursuant to an approved habitat conservation plan or natural community conservation plan;
> (B) the state or federal agency approved the habitat conservation plan or natural community conservation plan in reliance on an Environmental Impact Report or Environmental Impact Statement; and
> (C)(1) such requirements avoid any net loss of habitat and net reduction in number of the affected species, or
> (2) such requirements preserve, restore, or enhance

sufficient habitat to mitigate the reduction in habitat and number of the affected species to below a level of significance.

Practitioners should keep these "mandatory findings of significance" standards and requirements in mind for projects where the key consideration is biological resources impacts. These CEQA Guidelines can serve as the touchstone for whether an exemption can be used, and whether the lead agency is required to prepare an EIR rather than a negative declaration or MND.

A benefit of these mandatory findings is that they specifically allow the lead agency to rely on the provisions of an approved Habitat Conservation Plan (HCP) in determining that biological impacts have been addressed. Given that the Guidelines require the HCP to have been reviewed in an EIR or Environmental Impact Statement (EIS), these benefits are probably limited to the regional HCPs and Natural Community Conservation Plans (NCCPs) that have been adopted in various counties in northern and southern California. Project-specific HCPs do not always generate the need for EIS- or EIR-level review. Moreover, they are rarely entered into prior to completion of CEQA review by the lead agency for the underlying project. Where such review has been conducted, however, a lead agency may rely on its provisions to obviate the need for EIR-level review at the local level. Moreover, projects within regional HCPs that have an aquatic focus may also benefit under the State of California's new wetlands policies, which provide streamlining for projects consistent with such HCPs where they serve as a "watershed plan."

The Substance of a Biological Resources Analysis

This section provides a discussion of how impacts to biological resources should be described, analyzed, and mitigated in a CEQA document.

Describing Biological Resources in the Project Description and Environmental Setting

An accurate, stable, and finite project description has been described as the "sine qua non" of a legally sufficient CEQA document. (*County of Inyo v. City of Los Angeles*, 71 Cal.App.3d 185, 193 (1977).) It should inform the public about the project's likely effect on the environment and ways to mitigate any significant impacts. Importantly, the project description must include a list of the permits and other approvals required for the project and a list of the agencies that will use the CEQA document in issuing those permits. (14 CCR § 15124.) Accordingly, if a project will require, for example, an incidental take permit or a wetland fill permit, the CEQA document must provide sufficient information for other governmental agencies to complete their decision-making processes as "responsible agencies" pursuant to CEQA. (14 CCR § 15096.) This may include, for example, a detailed discussion of any special-status species and their habitat located on or in the vicinity of the site, as well as any wetlands or other protected waters that exist and may be impacted by the project. In our experience, state agencies such as the California Department of Fish and Wildlife (CDFW) can be quite exacting in what they expect to see in a CEQA document in order for the agency to use that document as its own CEQA clearance for the issue of its permits. (*See, e.g., Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal.5th 918 (2017).)

Like the project description, the environmental setting should provide a complete and accurate description of the project setting, *i.e.*, the existing environmental conditions and surrounding uses, to establish the baseline for measuring environmental impacts resulting from the project. (14 CCR § 15125; *see also, San Joaquin Raptor/Wildlife Rescue Ctr. v County of Stanislaus*, 27 Cal.App.4th 713, 729 (1994) [finding EIR inadequate without "accurate and complete information pertaining to the setting of the project and surrounding uses"].) To satisfy this requirement, lead agencies generally should incorporate a detailed review of biological databases (most notably the California Natural Diversity Database, or CNDDB), on-site data gathering and, if necessary, project-specific studies to determine existing environmental conditions. (*See, e.g., North Coast Rivers Alliance v Marin Mun. Water District*, 216 Cal.App.4th 614, 644-45 (2013) [upholding EIR environmental setting based on database review and specific study to assess aquatic species].) As a practical matter, the level of this effort should be commensurate with the extent to which biological resources are a concern on the project site.

Thresholds of Significance for Impacts to Biological Resources

Once the project and environmental setting have been adequately described, the CEQA document must identify the environmental impacts likely to result from project development, followed by mitigation measures or project alternatives that will avoid or reduce these impacts. To determine whether mitigation is required, or if mitigation can reduce an impact to a level of insignificance, a lead agency must compare a project's impacts to thresholds of significance. (14 CCR § 15064.)

For biological resources, lead agencies often use the checklist from Appendix G of the CEQA Guidelines, which requires the lead agency to consider whether the project may:

- Have a substantial adverse effect, either directly or through habitat modifications, on any species identified as a candidate, sensitive, or special status species in local or regional plans, policies, or regulations, or by the California Department of Fish and Game or U.S. Fish and Wildlife Service?

- Have a substantial adverse effect on any riparian habitat or other sensitive natural community identified in local or regional plans, policies, regulations or by the California Department of Fish and Game or US Fish and Wildlife Service?

- Have a substantial adverse effect on federally protected wetlands as defined by Section 404 of the Clean Water Act (including, but not limited to, marsh, vernal pool, coastal, etc.) through direct removal, filling, hydrological interruption, or other means?

- Interfere substantially with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors, or impede the use of native wildlife nursery sites?

- Conflict with any local policies or ordinances protecting biological resources, such as a tree preservation policy or ordinance?

- Conflict with the provisions of an adopted Habitat Conservation Plan, Natural Community Conservation Plan, or other approved local, regional, or state habitat conservation plan?

Other common examples of significance thresholds include the mandatory findings of significance discussed above or local regulations and plans created for species protection. Ultimately, lead agencies have significant discretion when devising significance thresholds, but their decisions must be supported by substantial evidence. (*See, Save Cuyama Valley v. County of Santa Barbara,* 213 Cal.App.4th 1059, 1068 (2013) [Appendix G's thresholds of significance "are only a suggestion" (alterations omitted)]; *Protect the Historic Amador Waterways v. Amador Water Agency,* 116 Cal.App.4th 1099, 1111-12 (2004) [setting aside EIR for failure to adequately discuss impacts of stream flow reduction]; *San Bernardino Valley Audubon Soc'y v County of San Bernardino,* 155 Cal.App.3d 738, 753 (1984) [setting aside project approval based on inconsistency with general plan policy protecting rare plants].)

Analysis of Biological Resources

When analyzing project-related impacts to determine if they exceed defined significance thresholds, lead agencies may use a variety of methods, provided that the chosen method is supported by substantial evidence. For example, an agency may employ protocol-level, species-specific surveys adopted or recommended by wildlife agencies to determine whether protected species or habitat exists on the project site. Or, a lead agency may use broader, reconnaissance-level studies to assess biological resources. (*See, Gray v County of Madera,* 167 Cal.App.4th 1099 (2008) [county not required to follow CDFW study protocols for California Tiger Salamander], 1124-25; *Association of Irritated Residents v County of* Madera, 107 Cal. App.4th 1383, 1396 (2003) ["CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required."])

Though CEQA does not require an agency to conduct all possible tests or surveys, additional tests or surveys may be necessary if previous studies are insufficient. In particular, lead agencies should beware of outdated studies and information. In *Save Agoura Cornell Knoll v. City of Agoura Hills,* 46 Cal.App.5th

665, 692-93 (2020), the Court of Appeal set aside a project approval based, in part, on a CDFW comment letter, which noted that botanical surveys older than two years may be outdated. CDFW also commented that surveys should be performed in conditions that maximize detection of special-status resources, to the extent feasible. (*Id.*) Surveys performed in a drought, for example, "may overlook the presence or actual density of some special status plant species on the [p] roject site." (*Id.* at 692.)

One important fact to consider is that CEQA's scope of review related to biological resources is quite broad. For example, the CEQA Guidelines broadly define "endangered, rare or threatened species" that must be evaluated in a CEQA document. (14 CCR § 15380.) The definition states:

> (a) "Species" as used in this section means a species or subspecies of animal or plant or a variety of plant.
>
> (b) A species of animal or plant is:
>
> (1) "Endangered" when its survival and reproduction in the wild are in immediate jeopardy from one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, disease, or other factors; or
>
> (2) "Rare" when either:
>
> (A) Although not presently threatened with extinction, the species is existing in such small numbers throughout all or a significant portion of its range that it may become endangered if its environment worsens; or
>
> (B) The species is likely to become endangered within the foreseeable future throughout all or a significant portion of its range and may be considered "threatened" as that term is used in the Federal Endangered Species Act.
>
> (C) A species of animal or plant shall be presumed to be endangered, rare or threatened, as it is listed in:
>
> (1) Sections 670.2 or 670.5, Title 14, California Code of Regulations; or
>
> (2) Title 50, Code of Federal Regulations Section 17.11 or 17.12 pursuant to the Federal Endangered Species Act as rare, threatened, or endangered.
>
> (D) A species not included in any listing identified in subdivision (c) shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).
>
> (E) This definition shall not include any species of the Class Insecta which is a pest whose protection under the provisions of CEQA would present an overwhelming and overriding risk to man as determined by:
>
> (1) The Director of Food and Agriculture with regard to economic pests; or
>
> (2) The Director of Health Services with regard to health risks.

As such, the scope of a CEQA document's evaluation of a project's impacts to biological resources typically go far beyond impacts to species listed under the federal or California Endangered Species Act as threatened or endangered.

This result is particularly noticeable with respect to plant species. Largely because of this expansive review, CEQA documents include an analysis of plant species based on the well-known ranking system established by the California Native Plant Society (CNPS), which is a non-governmental organization that has made its own determinations as to threats to plant species. Although the use of the CNPS ranking system in CEQA documents is generally accepted in the industry, CEQA's definition of special-status plant species does not reference the ranking system and thus, arguably the use of this system is not predicated on any actual legal foundation. Notably, some plant species identified as "rare, threatened, or endangered" (Rare Plant Rank 1B) by the California Native Plant Society are not listed as threatened or endangered under the federal or California Endangered Species Act.

Mitigation Measures for Impacts Related to Biological Resources

To satisfy CEQA's requirements that significant environmental impacts must be mitigated, lead agen-

cies must set forth and identify feasible mitigation measures. (Pub. Res. Code §§ 21002.1(a), 21100(b)(3); 14 CCR § 15126.4.) Significant case law exists regarding the concept of mitigation in the context of biological resources. Based on that case law, several themes are apparent.

Deferral

Generally, deferring the formulation of a mitigation measure is not allowed. However, deferral can be appropriate if it is impractical or infeasible to fully formulate the mitigation measure during the CEQA review process, provided that the agency commits itself to specific performance criteria for future mitigation. (14 CCR § 15126.4.) For example, a lead agency is not required to identify the exact location of off-site mitigation, provided that it adequately analyzes project-related impacts and imposes specific mitigation, i.e., preservation or creation of replacement habitat at a specific ratio. In such an event, the agency is entitled to rely on the results of future studies to fix the exact details of the implementation of the mitigation measures it identified in the EIR. (*California Native Plant Society v. City of Rancho Cordova*, 172 Cal.App.4th 603, 622 (2009); *see also, Endangered Habitats League, Inc. v. County of Orange*, 131 Cal.App.4th 777, 793-96 (2005) [enumeration of possible future mitigation options, including on- and off-site habitat preservation at specific ratios was not improper].)

Deferral also may be allowed if future mitigation is dependent on permits required by other regulatory agencies. For biological resources, this typically involves incidental take permits, Clean Water Act § 404 permits, and other similar species and habitat-related permitting requirements. (*See, e.g., Clover Valley Foundation v. City of Rocklin*, 197 Cal.App.4th 200, 237 (2011) [requirement that project obtain all necessary federal and state permits from Army Corps of Engineers and CDFW for impacts to protected bird habitat was permissible].) But, even when it is expected that another agency will impose mitigation measures on a project, the project's CEQA document must still commit itself to mitigation, identify the methods the agency should consider and possibly incorporate, and indicate the expected outcome. (*See, Rialto Citizens for Responsible Growth v. City of Rialto*, 208 Cal.App.4th 899, 944-46 (2012) [holding that formal consultation with USFWS was appropriate, and that proposed methods, including avoidance, minimization, and purchase of off-site habitat, ensured impacts would be mitigated].)

With respect to permits issued by other agencies, and specifically permits protecting special-status species, CEQA does not require that a lead agency reach a legal conclusion on whether a "take" is expected to occur as a result of the project. A finding that a project will not significantly impact biological resources does not "limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute." (*Association of Irritated Residents v County of Madera*, 107 Cal.App.4th 1383, 1397 (2003).) Accordingly, a lead agency may disagree with federal or state wildlife agencies regarding the possible take of a species. Such a disagreement will not invalidate an EIR if the agency's conclusion is supported by substantial evidence in the record.

Relatedly, CEQA does not require that a lead agency compel a project applicant to obtain a federal or state take permit to mitigate impacts to species. (*Id.*) However, if project impacts to protected species are expected to be significant, CEQA imposes upon the lead agency an independent obligation to incorporate feasible mitigation measures which reduce those impacts.

Treatment of Unlisted Species

Pursuant to CEQA Guidelines 15380(d):

> . . .[a] species not included in any [federal or state] listing … shall nevertheless be considered to be endangered, rare or threatened, if the species can be shown to meet the criteria in subdivision (b).

In *Sierra Club v. Gilroy City Council*, 222 Cal.App.3d 30, 47 (1990), the court considered whether CEQA Guideline 15380 requires a lead agency to make specific findings as to whether an unlisted species may be considered rare or endangered. The court held that there is no mandatory duty to do so, as CEQA Guideline 15380 was intended to be directory rather than mandatory, and the ultimate authority to designate a plant or animal species as rare or endangered is delegated to the state and federal governments. (*Id.*) However, in that case, the court also noted that the lead agency extensively considered the potentially rare species and incorporated significant mitigation measures to assure its continued viability.

(*Id.*) Accordingly, lead agencies should carefully consider impacts to unlisted species, particularly when presented with significant evidence that they may be rare or otherwise in jeopardy.

Replacement Habitat and Conservation Easements

CEQA Guideline 15370(e) provides that mitigation may include:

> . . .[c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of resources in the form of conservation easements. (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 278 [conserving habitat at a 1:1 ratio]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794 [on- or off-site habitat preservation at 2:1 ratio].)

Conservation easements over lands set aside as mitigation for impacts to biological resources is often a key element of preserving these lands in perpetuity, thereby justifying their mitigating effect.

There is, however, a growing split of authority on the adequacy of conservation easements as mitigation, at least in the context of easements related to impacts to agricultural resources. Some local governments in California take the position that, because conservation easements merely protect existing land from future conversion, but do not truly replace or offset the loss of converted land, the easements do not reduce project impacts on land conversion. In *King and Gardiner Farms v. County of Kern*, 45 Cal. App.5th 814, 875-76 (2020), the court found that:

> . . .the implementation of agricultural conservation easements for the 289 acres of agricultural land estimated to be converted each year would not change the net effect of the annual conversions. At the end of each year, there would be 289 fewer acres of agricultural land in Kern County.

By contrast, in *Masonite Corp. v. County of Mendocino*, 218 Cal.App.4th 230, 238 (2013), the court concluded that:

> ACEs [agricultural conservation easements] may appropriately mitigate for the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources. . . .ACEs preserve land for agricultural use in perpetuity.

While this split of authority generally pertains to mitigation for the loss of agricultural land, it may be relevant to mitigation for the loss of habitat land. Notably, CDFW and other natural resource agencies in the state routinely rely on this form of mitigation to offset impacts to biological resources. On-site or off-site preservation of comparable habitat, coupled with a conservation easement or other form or development restriction, is a typical form of mitigation included in many permits issued by both the state and federal natural resource agencies.

In-Lieu Fees

Impacts to biological resources are sometimes mitigated using in-lieu fees, either in conjunction with or independent of habitat restoration. The court in *California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1055 (2009), however, cautions that an in-lieu fee system will only satisfy the duty to mitigate if the fee program itself has been evaluated under CEQA, or the in-lieu fees are evaluated on a project-specific basis. There, El Dorado County adopted by ordinance a rare plant impact fee program for use by developers to mitigate project impacts, which certain developers relied on in preparing an MND, rather than an EIR. (*Id.* at 1029.) After petitioners challenged the adequacy of the fee program, the court set aside the project MND, finding that:

> . . .[b]ecause the fee set by the ordinance have never passed a CEQA evaluation, payment of the fee does not presumptively establish full mitigation for a discretionary project. (*Id.* at 1030; *see also, Save Agoura Cornell Knoll v. City of Agoura Hills*, 46 Cal.App.5th 665, 701-02 (2020) [in-lieu fee payment for oak tree planting inadequate to mitigate project impacts; the MND did not provide any evidence that the off-site tree replacement program was feasible].)

Mitigation Cannot Violate Other Laws

Perhaps it goes without saying, but mitigation measures, even those with laudable species protection and conservation goals, may not violate other laws.

In *Center for Biological Diversity v. Dept. of Fish & Wildlife*, 62 Cal.4th 204, 231-32 (2015), for example, the court held that while the CDFW generally may conduct or authorize the capture and relocation of a fully protected species as a conservation measure, it could not as the lead agency rely in a CEQA document on the prospect of capture and relocation as mitigation for a project's adverse impacts. There, the Fish and Game Code expressly permitted capture and relocation as part of an independent species recovery effort. (*Id.* at 232.) However, outside of a species recovery program, those same actions were considered a take of the species: "[m]itigating the adverse effect of a land development project on a species is not the same as undertaking positive efforts for the species' recovery." (*Id.* at 235.)

Battle of the Experts

Litigation regarding the effectiveness of proposed mitigation measures often involves a battle of expert opinions. In these cases, the survival of the proposed mitigation, and the project's CEQA clearance, may depend on the type of CEQA document used for the project. An EIR is subject to the deferential "substantial evidence" standard of review, limiting the court's review to whether there is any substantial evidence in the record supporting the EIR. (*See, National Parks & Conservation Assn. v. County of Riverside*, 71 Cal. App.4th 1341, 1364-65 ["Effectively, the trial court selected among conflicting expert opinion and substituted its own judgment for that of the County. This was incorrect."].) For MNDs, however, courts apply the "fair argument" standard, which only requires that the petitioner demonstrate there is substantial evidence in the record supporting a fair argument that the proposed project may have a significant effect even after mitigation measures are considered. (*See, California Native Plant Society v. County of El Dorado*, 170 Cal.App.4th 1026, 1060 (2009) ["Where the views of agency biologists about the ineffectiveness of MND's plant mitigation measure conflicted with those of the expert who reviewed the project for the developer, the biologists' views were adequate to raise factual conflicts requiring resolution through an EIR."].)

How Biological Resources Might Inform Subsequent CEQA Analysis

Under Public Resources Code § 21166 and CEQA Guideline 15162, a project may require subsequent environmental review if new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. In the context of biological resources, new information is often an issue when a species is newly listed as threatened or endangered. In *Moss v County of Humboldt*, 162 Cal.App.4th 1041 (2008), for example, the court held that the new listing of the Northern California coastal coho salmon as a threatened species was not new information requiring additional review, as there was no evidence that the species' habitat was located on or near the project site. (*Id.* at 1064-65.) In contrast, the newly listed coastal cutthroat trout did constitute new information, as evidence suggested the species was linked to a creek on the project site. (*Id.* at 1065.) As such, the court required that the lead agency undertake supplemental review with respect to the project's environmental impacts on the newly listed coastal cutthroat trout.

Conclusion and Implications

This article addresses only the tip of the proverbial iceberg. Over CEQA's 50-year history, much has been said about how lead agencies should approach impacts to biological resources. We hope this article has been helpful in identifying some of the key themes that we've seen in our practice as consultants and lawyers alike struggle (at times) to capture the nuances associated with impacts to biological resources and mitigation to offset those impacts.

Robert Hull is an associate at the law firm of Cox, Castle & Nicholson, LLP, and is a member of Land Use and Natural Resources practice group. Robbie's work focuses on all aspects of land use, natural resources and environmental law.

Scott Birkey is a partner at Cox, Castle & Nicholson. Scott is a land use and natural resources lawyer who handles entitlement, compliance, and litigation matters for residential and commercial developers, educational and health-care institutions, and public agencies throughout California. Scott has successfully represented developers in obtaining all forms of land use entitlements, including securing development agreements, vesting and tentative maps, annexations, General Plan amendments, rezoning, site development permits, and other land use approvals. Scott was a long-serving member of the Editorial Board of the *California Land Use Law & Policy Reporter* and Co-chairs the annual conference that backs that reporter.

Clark Morrison is a partner at Cox, Castle & Nicholson. Clark has over 30 years of experience in the permitting and development of large and complex development projects. Clark's areas of experience include all State and Federal laws affecting the development of real property. Clark, along with Scott Birkey, is co-author of the book, *Natural Resource Regulation in California*, the States leading treatise on natural resources law and agency permitting. Clark sits of the Advisory Board for the *California Law Use Law & Policy Reporter*.

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Warming Pathways from COVID-19 Recovery Plans

The ongoing COVID-19 health crisis has led to mandatory and voluntary reductions in industrial capacity and travel throughout the world. These behaviour changes in have been shown to correlate with changes in emissions; as fewer people are traveling for work or leisure; air emissions have decreased. Some of the air pollutants that have experienced reduced emissions are greenhouse gases (GHGs), which lead to climate warming. GHGs, however, are not the only pollutants that influence climate warming. Emissions of other pollutants, such as nitrous oxides (NO_x), sulfur dioxide (SO_2) and particulate matter (PM), have also declined due to COVID-19 shelter-in-place policies, but have more complex relationships with climate. For example, NO_x is a short-lived pollutant that turns into tropospheric ozone (O_3), a climate warmer, when it reacts with light and organic gases. On the other hand, SO_2 and PM emissions can reflect light and act as climate cooling agents. From a climate perspective, therefore, it is insufficient to understand only how emissions are changing.

A team of researchers lead out of the University of Leeds in the United Kingdom set out to understand not only how the near-term climate has been warmed as a result of COVID-19 shelter-in-place policies, but also the long-term warming effects of three potential COVID-19 recovery plans. To understand how air pollutant emissions have changed during the COVID-19 pandemic, the researchers supplement previously published data with global mobility data from Google and Apple and observational data from air quality monitoring stations. From the data, the team estimates that emissions of GHG, NO_x, and SO_2 have decreased by approximately 30 percent, 30 percent, and 20 percent, respectively. Interestingly, the cooling effect associated with the reductions of NO_x emissions is roughly cancelled by the same magnitude of warming estimated for the reductions of SO_2 emissions, with the balance resulting in a slightly warmed climate in the near term. The team then developed three long-range models for potential COVID-19 recovery policies: Fossil-Fueled Recovery, Moderate Green Stimulus, and Strong Green Stimulus. When each scenario is modelled for warming potential, only the Strong Green Stimulus, which assumes global net zero CO_2 emissions by 2050, has the potential to prevent the 2050 temperature rise above 1.5°C recommended by the United Nations Intergovernmental Panel on Climate Change.

Such findings underline the necessity for environmentally conscious action from regulatory agencies in the economic recovery from COVID-19. Additionally, this study serves as a reminder that the relationship between warming, air quality and emissions is not straightforward; reducing SO_2 emissions, for example, may be counter-productive for climate cooling though necessary for maintaining health air.

See: Forster, P. M., et al. Current and future global climate impacts resulting from COVID-19. Nature Climate Change, 2020; https://doi.org/10.1038/s41558-020-0883-0

Climate, Public Health, and Economic Benefits of Wide-Spread Electric Vehicle Adoption

From the Prius to the Tesla, hybrid and electric vehicles (EVs) have become increasingly popular over the past 20 years as a way for individuals to reduce their environmental impact. Although widespread use of EVs is seen as a promising greenhouse gas (GHG) mitigation measure, the U.S. Bureau of Transportation Statistics estimates that only 2.1 percent of all light-duty vehicles (passenger cars) on the market in 2019 were hybrid or all-electric. According to the U.S. Environmental Protection Agency (EPA), 29 percent of the U.S.'s GHG emissions are from transportation sources, with 60 percent of these emissions coming from light-duty vehicles. The current level of EV adoption is far from where it needs to be in order to meaningfully reduce GHG emissions.

A new study from Peters et.al. of Northwestern University models the climate change and public health benefits if the U.S. were to instantaneously

replace between 25 percent and 75 percent of the on-road fleet with all-electric vehicles. While EVs themselves do not emit GHGs such as CO_2, the carbon-intensity of the electricity source used to power EVs must be considered when calculating the overall reduction in CO_2. The study thus modeled the following six scenarios on a state-by-state basis: 25 percent and 75 percent electrification, each under three power generation scenarios (all combustion, current electric grid mix, double the current fraction of carbon-free generation sources). At 25 percent EV adoption and current grid conditions, CO_2 emissions would decrease by 242 million tons per year. Under the more ambitious scenario of 75 percent EV adoption and cleaner grid conditions, CO_2 emissions would decrease by 725 million tons per year. Across the six scenarios, the reductions represent between 18 and 66 percent of 2014 nation-wide emissions from light-duty vehicles. As noted by the authors, EV and battery technology will improve over time, becoming more efficient and requiring less electricity. There will thus be an additional reduction in CO_2 emissions relative to current predictions simply due to decreased EV electricity demand. On the other hand, the researchers acknowledge that they had not accounted for life cycle emissions of the batteries, which may decrease the net CO_2 reduction by up to 5 percent. Nevertheless, using a social cost of carbon (SCC) of $48 per ton, these emissions reductions could avoid between $11.6 and $38.2 billion in damages.

In addition to assessing the CO_2 reduction and corresponding economic benefit, the study also analyzed the public health benefits of reduced $PM_{2.5}$ and ground-level ozone (O_3) emissions. The $PM_{2.5}$ emission reduction is highly dependent on the power generation scenario (i.e., percent of combustion-generated vs. zero-carbon electricity). $PM_{2.5}$ is known to cause a range of chronic health conditions, with thousands of premature deaths each year attributed to air pollution. The study found that while $PM_{2.5}$ and O_3 reductions vary by geographic region and seasonal pollutant changes, air-pollution related premature mortality decreased under all scenarios when aggregated on a national basis: up to ~3000 deaths could be avoided per year. However, it should be noted that on the local level, the increased electricity demand could lead to a net increase in $PM_{2.5}$ emissions if the EV adoption in that locality is not enough to offset the power generation demands. This raises broader environmental justice questions, such as the fact that the detrimental health impacts of combustion power generation may be felt by communities not experiencing the positive results of EV adoption. The study illustrates that from climate, health, and economic perspectives, the benefits (and unintended consequences) of EV adoption are fully intertwined with the decarbonization of the electric grid.

See: U.S. Department of Energy, Energy Vehicle Technologies Office, Oak Ridge National Laboratory, *Transportation Energy Data Book*, Edition 38.1, table 6.2, available at https://tedb.ornl.gov/data/ as of May 5, 2020.

See: Peters, D. R., Schnell, J. L., Kinney, P. L., Naik, V., & Horton, D. E. (2020). Public Health and Climate Benefits and Tradeoffs of U.S. Vehicle Electrification. *GeoHealth*, 4, e2020GH000275. https://doi.org/10.1029/2020GH000275

Biomimicry for Low-Carbon Hydrogen Fuel Production

Scientists use biomimicry to recreate the models and systems in nature to inspire solutions to complex problems. One such model in nature that is often studied in biomimicry is photosynthesis. Photosynthesis is the process by which plants convert solar energy to create sugar ($C_6H_{12}O_6$) and oxygen (O_2) from carbon dioxide (CO_2) and water (H_2O).

Researchers at the Israel Institute of Technology are developing a photocatalyst system that uses photosynthesis to breakdown water into low-carbon hydrogen fuel instead of sugar. The photocatalyst system, which shines light on rod-shaped nanoparticles to break down water molecules. The light interacts with the water molecules to create two reactions, one with positive charges that creates oxygen and one with negative charges that creates hydrogen. To create hydrogen, the reactions must occur simultaneously. Otherwise, the reactions do not create sufficient chemical energy to split the water molecule to generate hydrogen fuel.

The goal of the research is to improve the process of splitting water molecules, thereby making the conversion of solar energy to hydrogen more efficient and cost effective for creating hydrogen fuel. The researchers improved the process in a few ways. First, they created heterostructures which combined multiple semiconductors with varying metal and metal

oxide catalysts. The team's most efficient structures achieved a 100 percent conversion of sunlight to hydrogen using cadmium-selenide, platinum, and cadmium sulfide. However, this did not support the oxidation reaction and hydrogen fuel could not be produced. To complete the oxidation reaction, they added benzylamine, which can be oxidized into benzaldehyde. This resulted in the conversion of solar energy into chemical energy with an efficiency of 4.2 percent. The researchers are also using artificial intelligence to search for alternative chemical substances to benzylamine that could further improve the oxidation reaction. Future research will return to biomimicry to research ways to combine plant cell membranes with nanoparticles to improve water oxidation.

See: American Chemical Society. "Converting solar energy to hydrogen fuel, with help from photosynthesis." ScienceDaily. ScienceDaily, 17 August 2020. www.sciencedaily.com/releases/2020/08/200817104305.htm

Research was presented at the American Chemical Society (ACS) Fall 2020 Virtual Meeting & Expo.

Impacts of Stratospheric Aerosol Geoengineering on West African Summer Monsoon Season

In West Africa, the summer monsoon season has direct impacts on agricultural productivity, water supply, and hydroelectric energy generation. As a result, summer monsoon precipitation feeds into the economies of the region, highlighting the importance of water resources. Climate change is expected to introduce changes to the hydrologic cycle globally, impacting precipitation spatially and temporally. In the West African regions specifically, this change could lead to numerous impacts including increased vulnerability of water resources, negative health impacts and agricultural failures. Stratospheric aerosol geoengineering (SAG) has been proposed as a method to reduce the impacts of global warming, when applied alongside more conventional approaches. SAG artificially limits the amount of solar radiation that can reach the Earth's surface, thereby reducing average global temperature. However, the impacts of SAG on the global hydrological cycle are still not fully understood.

A study prepared for the American Geophysical Union by Da-Allada et al. aims to explore the impacts of SAG on West Africa summer monsoon (WASM) precipitation, and to understand the root causes of any WASM precipitation changes. Da-Allada et al. utilized the Whole Atmosphere Community Climate Model (CESM1) and stratospheric aerosol injection at four different locations to maintain global average surface temperatures at present day levels under the Representative Concentration Pathway (RCP) 8.5 scenario. The study focuses on three major regions, the Northern Sahel (NSA), Southern Sahel (SSA), and Western Africa Region (WAR).

Da-Allada et al. found that SAG impacted WASM precipitation differently across the three regions. In the NSA, WASM rainfall remained unchanged from present day precipitation rates. In the SSA and WAR, WASM rainfall decreased by roughly 4 percent and 11 percent, respectively. It is important to note that only the rainfall decrease in the WAR is statistically significant. As a result, Da-Allada et al. determined that the implementation of SAG in the Sahel regions (NSA and SSA) was effective, whereas in the WAR it was overly effective. The decrease in WASM precipitation experienced in the WAR can be explained by the reduction of the land-sea thermal contrast in the lower troposphere. This leads to weakened monsoon circulation and a shift of monsoon precipitation in the northward direction. Moving forward, this analysis can be applied to other tropical regions to better understand how rainfall is impacted by SAG.

See: Da-Allada, C. Y., Baloïtcha, E., Alamou, E. A., Awo, F. M., Bonou, F., Pomalegni, Y., et al. (2020). Changes in west African summer monsoon precipitation under stratospheric aerosol geoengineering. Earth's Future, 8, e2020EF001595. https://doi.org/10.1029/2020EF001595

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

COUNCIL ON ENVIRONMENTAL QUALITY PUBLISHES FINAL RULE UPDATING NEPA'S IMPLEMENTING REGULATIONS

The Council on Environmental Quality (CEQ) recently published a final rule updating the National Environmental Policy Act's (NEPA) implementing regulations. Among other things, the updated regulations are intended to promote a more timely and efficient NEPA review process, streamline the development of federal infrastructure projects, and promote better federal decision-making. The new regulations, however, have also prompted concerns voiced by some in the environmental community.

Background

NEPA was signed into law by President Nixon on January 1, 1970. The purpose of NEPA is to:

> . . .foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. (42 U.S.C. § 4331(a).)

To that end, NEPA requires that federal agencies undertaking a "major" federal action that significantly affect the quality of the human environment to prepare detailed statements on their actions' environmental effects, any such adverse effects that cannot be avoided if the proposed action is implemented, alternatives to the proposed action, the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. (*Id.* at § 4332(C).)

NEPA does not, however, mandate specific outcomes, rather it requires "Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes." (85 Fed. Reg. 43304-01, 43306.) Thus, in very general terms, federal agencies comply with NEPA by: 1) preparing an Environmental Assessment of their proposed actions; and 2) preparing an Environmental Impact Statement if the Environmental Assessment concludes that the action may have significant effects on the environment. (*See generally*, 40 C.F.R. § 1501.4(c).)

NEPA also established the CEQ and empowered it to administer the implementation of the statute. (42 U.S.C. §§ 4332(B), 4342, 4344.) In 1977, President Carter directed the CEQ to issue implementing regulations for NEPA, and the CEQ did so in 1978. (85 Fed. Reg. 43304-01, 43307. Since then, the CEQ has only once issued substantive amendments to those regulations. (*Id.*)

President Trump Directs the CEQ to Make Changes

In 2017, President Trump directed the CEQ to issue such regulations as it deemed necessary to, among other things, enhance interagency coordination of environmental review and authorization decisions, ensure that interagency environmental reviews under NEPA are conducted efficiently, and require that agencies reduce unnecessary burdens and delays in applying NEPA. (*Id.* at 43312.) In accordance with this directive, CEQ issued an advance notice of proposed rulemaking on June 20, 2018. (*Id.*) The CEQ's notice of proposed rulemaking was published in the *Federal Register* on January 10, 2020.

Discussion and Summary of Key Elements of the Final Rule

The Final Rule published on July 16, 2020, contains numerous changes to NEPA's implementing regulations. (*See generally* 85 Fed. Reg. 43304-01.)

Definitions

Among the most significant are changes to the regulatory definitions of "Effects," "Cumulative Impacts," and "Major Federal Action." Under the new definition of "Effects," effects must be "reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives[.]"

(*Id.* at 43343.) Thus, under the definition, a but-for causal relationship will be insufficient to make an agency responsible for the environmental effects of a major federal action under NEPA. (*Id.*) CEQ's explanation of this definition indicates that it is similar to the test of proximate causation applied in tort law. (*Id.*) The Final Rule also completely eliminates the definitions of, and references to, "cumulative impacts" from NEPA's implementing regulations. CEQ has explained that it has eliminated this definition to:

> . . .focus agency time and resources on considering whether the proposed action causes an effect rather than on categorizing the type of effect. . .[and because]. . .cumulative effects analysis has been interpreted so expansively as to undermine informed decision making, and led agencies to conduct analyses to include effects that are not reasonably foreseeable or do not have a reasonably close causal relationship to the proposed action or alternatives. (*Id.* at 43343-43344.)

Finally, the new regulations clarify that "Major Federal Actions" do not include projects where, due to "minimal Federal funding or minimal Federal involvement" the agency lacks control over the outcome of a project. (*Id.* at 43347.)

Deadlines and Page Limits

The new regulations also set deadlines and page limits that govern the development of environmental documents. Under the Final Rule, federal agencies must issue Environmental Assessments within one year of deciding to prepare such a document, and Environmental Impact Statements must be issued within two years. (*Id.* at 43327.) Similarly, the Final Rule now sets a 75-page limit for Environmental Assessments, a 150-page limit for typical Environmental Impact Statements, and a 300-page limit for Environmental Impact Statements of "unusual" scope or complexity. (*Id.* at 43352.) However, all of these deadlines and page limits may be extended if approved by a senior agency official. (*Id.*)

Prohibition on 'Irreversible and Irretrievable' Commitments of Resources

Finally, while NEPA prohibits the "irreversible and irretrievable" commitment of resources which would be involved in a proposed action before the environmental review process is complete (42 U.S.C. § 4332(C)(v), the Final Rule clarifies that non-federal entities may take actions necessary to support an application for federal, state, tribal, or local permits or assistance. (85 Fed. Reg. 43304-01, 43336.) Such actions may include, but are not limited to, the acquisition of interests in land and the purchase of long lead-time equipment. (*Id.* at 43370.)

Conclusion and Implications

The CEQ's Final Rule is more than 70-pages along and contains many more changes in addition to those described above. Although interests such as the U.S. Chamber of Commerce support the new regulations, numerous environmental groups have already challenged the CEQ's adoption of the Final Rule on both substantive and procedural grounds. These lawsuits filed in the U.S. District Courts for the Western District of Virginia (*Wild Virginia, et al. v. Council on Envtl. Quality, et al.*, Case No. 3:20-cv-00045) and the Northern District of California (*Alaska Comty. Action on Toxics, et al. v. Council on Envtl. Quality, et al.*, Case No. 20-cv-05199) are in the earliest stages of litigation, and it is unclear if they will succeed. For more information on the changes to NEPA, *see:* https://www.whitehouse.gov/ceq/nepa-modernization/ (Sam Bivins, Meredith Nikkel)

U.S. BUREAU OF RECLAMATION RELEASES DRAFT ENVIRONMENTAL IMPACT STATEMENT ON THE PROPOSED RAISING OF ANDERSON RANCH DAM ON THE BOISE RIVER

Discussions concerning new/additional reservoir storage capacity in the Boise River Basin have been occurring for decades. Drought has made the need more urgent. But, with the golden age of dam building well in the past, questions over who, how, and how much (including cost) repeatedly surface with no clear answers. Over the last several years, however, the U.S. Bureau of Reclamation (Bureau) and other stakeholders have focused their attention on potentially raising Anderson Ranch Dam on the South Fork of the Boise River to yield additional water storage in the Boise River Reservoir system. Conversations have progressed to feasibility studies and, most recently, the release of a draft Environmental Impact Statement (DEIS) on July 31, 2020.

The Boise River Reservoir System and Population Growth

The current Boise River Reservoir system includes three facilities: Arrowrock Dam, Anderson Ranch Dam, and Lucky Peak Dam. Together, the facilities yield approximately 1 million acre-feet when full. The system is jointly operated for beneficial use water storage (*e.g.*, irrigation and other uses) and for flood control (Arrowrock and Anderson Ranch are owned and operated by the Bureau, while Lucky Peak is owned and operated by the U.S. Army Corps of Engineers).

Idaho water users and the Bureau have discussed potential storage opportunities in the Boise Basin for decades, the potential Twin Springs dam site being the most elusive unicorn of all proposals. But, renewed focus on the Boise Basin began in the early 2000s, and accelerated with the completion of a 2016 study funded by the Idaho Water Resource Board addressing and projecting future water supply sources and needs (surface and groundwater) largely in light of the ever-increasing (explosive at times) population growth in the Boise Basin downstream of Lucky Peak Dam in particular. The City of Boise sits approximately six miles downstream of the dam, and the larger Treasure Valley (from Boise to Ontario, Oregon) is home to many (if not all) of the fastest growing cities in Idaho and, in some cases, the nation.

Proponents of additional reservoir storage capacity also point to climate change as another driver. Over time, models predict that more of the Boise Basin's precipitation will fall as rain with less snowpack, and balancing changing hydrologic regimes with future flood control needs suggest that additional storage is one potential answer.

The Dam Raise Preferred Alternative and Potential Feasibility

Ultimately, the Bureau and the Idaho Water Resource Board seek to leverage federal WIIN Act authority and funding, to raise Anderson Ranch Dam by six feet (from the present full pool elevation of 4,196 feet to 4,202 feet), to yield approximately an additional 29,000 acre-feet of water storage opportunity. Obviously, raising the pool elevation and storing more water will have its effects; environmental, altered shoreline/additional inundation, altered recreational opportunities and need to relocate facilities, *etc*. Not to dismiss these issues, but they can likely be solved and engineered around. The real question (to water user stakeholder interests anyway) is the reliability and utility of the additional storage space, and at what cost. Unfortunately, Anderson Ranch Reservoir is the largest "bucket" on the system (existing live storage capacity of 413,100 acre-feet) on the smallest "spigot" (the South Fork of the Boise River, as opposed to Arrowrock and Lucky Peak, which are located downstream of the confluence of the Middle and South Forks).

From a hydrologic perspective, the water right application supporting the proposed dam raise is already junior to (behind in priority) two other ambitious projects (one a 200 cfs permit owned by Elmore County, and the other an off-stream pump-back hydroelectric generation and related storage project by Cat Creek Energy, LLC). During the Elmore County application proceedings, water availability analyses projected that meaningful water would be available for diversion roughly 60 percent of years. The Bureau's DEIS projects a full fill probability for the 29,000 acre-feet of additional space to occur only 38 percent of years given the proposed, senior-priority Elmore County and Cat Creek Energy projects. Consequently, in the best of cases it seems probability

of filling the space is 60 percent if the Elmore County and Cat Creek Energy projects are not completed, and 40 percent if they are.

Given these probabilities, the DEIS estimates average annual delivery of wet water in the new space to equal 11,020 acre-feet. Of that amount, the project proposes reserving 1,102 acre-feet for federal fish and wildlife needs, leaving 9,918 acre-feet for annual average use downstream.

From a cost perspective, how much is an acre-foot of water in the new space, and who can afford to pay for it (including consideration of the fact that refill probabilities are far less than 100%)? The most likely end users of any additional storage water supply are irrigators and DCMI stakeholders (those like municipalities and potable water supply entities who supply Domestic, Commercial, Municipal, and Industrial water to their consumers).

On the irrigation side, the DEIS projects that the "Irrigator Willingness to Pay" value tops out at $105 per acre-foot in 2025 dollars. The DEIS projects that the "DCMI Willingness to Pay" value tops out at $748 per acre-foot.

Conclusion and Implications

At a projected/estimated base capital construction cost of $83,300,000, the irrigation use values seemingly suggest that DCMI users are the ones who can best shoulder, and make sense of, the costs involved in the project unless initial project costs and ongoing O&M can be tempered over many years of term repayment contracts or other methods. It remains to be seen what options are available even presuming that the Idaho Water Resource Board's pending application for water right permit is approved as a threshold matter.

In sum, more storage in the Boise River Basin continues to be a collective goal. Whether more storage pencils out from a cost-benefit perspective remains a legitimate question.
(Andrew J. Waldera)

RIO GRANDE COMPACT COMMISSIONERS GRANT EMERGENCY PERMISSION UNDER THE RIO GRANDE COMPACT TO RELEASE STORED WATER IN NEW MEXICO'S EL VADO RESERVOIR

In mid-July, the States of Texas and Colorado took the historic step of granting New Mexico and the Middle Rio Grande Conservancy District permission to release up to 38,000 acre-feet of stored water in El Vado Reservoir. The water is held in storage under the Rio Grande Compact. El Vado Reservoir, an earthern dam, impounds flows from the Rio Chama in Northern New Mexico.

Earlier this summer, the Middle Rio Grande Conservancy District was forced to cease irrigation deliveries due to naturally low Rio Grande flows. New Mexico began its 2020 irrigation season amidst increasing *drought conditions*. The lack of significant snowpack in high mountain elevations resulted in less actual water available statewide. Precipitation throughout New Mexico is well below normal. In addition, the water content in the snowpack is low. Flows in New Mexico's two major river basins, the Rio Grande and the Pecos, are below normal.

Background

As neighboring states and partners to several interstate compacts (the Pecos River Compact, the Rio Grande Compact, and the Canadian River Compact), New Mexico and Texas share a long water history. As the downstream state, Texas' focus remains on ensuring New Mexico meets its various Compact delivery requirements. Under the Rio Grande Compact, New Mexico is required to deliver a certain amount of water to Elephant Butte Reservoir in southern New Mexico each year. In the event New Mexico accrues a water debt, it must reserve an equal amount of water in storage in El Vado Reservoir to ensure the water debt will be paid.

In dividing the waters of the Rio Grande between Colorado, New Mexico and Texas, the Compact maximizes the beneficial use of the water among all states without impairment of any beneficial uses under the conditions that prevailed in 1929. (Water is also delivered from Elephant Butte Reservoir to

Mexico pursuant to an international accord). While Colorado and New Mexico can increase their storage, Texas is assured that no matter what actions are taken above Elephant Butte Reservoir, if available, 790,000 acre-feet will be released to the lands below Elephant Butte Reservoir. However, based on Reservoir levels, during drought conditions Colorado and New Mexico may be required to release water from storage and may be precluded from increasing the amount of water in storage. The application of these Compact requirements during a drought depends, inter alia, on the accrued debit/credit status of each state. Unlike some compacts, the Rio Grande Compact acknowledges the variability of the hydrograph and allows accruals of credits and debits.

As with most compacts, the 1938 Rio Grande Compact was developed out of a shared desire to remove all causes of present and future controversy with respect to the use of the waters of the Rio Grande. The Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande among Colorado, New Mexico and Texas by establishing delivery amounts due at specific gauges. The last gauge for delivery in the Rio Grande Compact is Elephant Butte Reservoir, which feeds Caballo Reservoir right below it. Because of siltation and other practical problems, the gauge was moved to the outflow at Caballo Reservoir. The Compact allocates water among the three states, and in the case of the downstream state, Texas, guarantees water by use of a set of indexing stations whereby when "x" quantity of water passes a station, then "y" must reach the lower point. The Compact, however, is silent about what happens below Elephant Butte Reservoir.

In July, significantly, all three Rio Grande Compact Commissioners from Texas, Colorado and New Mexico had to agree to allow New Mexico to release storage water under the Compact. In a typical year, the stored debit water in El Vado Reservoir is not released until late in the year when it can flow to Elephant Butte without experiencing major evaporation or irrigation loss.

Drought Prompts the Emergency Decision

The emergency decision to use the El Vado Reservoir storage was the result of what water managers predicted was certain to be extensive drying of the Rio Grande south of Albuquerque, New Mexico's largest metropolitan area this summer. Emergency permission to use the stored water has been granted only one other time, back in the 1950s. The release ensures water continues to flow in key stretches of the Rio Grande for endangered species and irrigators. The historic nature of the emergency grant of permission to use the stored water under the Compact is underscored by the fact that New Mexico and Texas are in ongoing litigation over delivery requirements under the Compact.

Water managers predicted 2020 would develop into a challenging water year due to drought forecasts. New Mexico is experiencing severe drought despite relatively normal snowpack during the winter of 2019-2020. Multiple factors account for New Mexico's current drought conditions. For example, despite last winter's normal snowpack, the 2019 nearly nonexistent monsoon season caused low soil moisture levels throughout New Mexico. When the snowpacks began to melt in early spring, the runoff failed to reach the rivers due to the parched soils soaking up moisture from the runoffs.

Covid Exacerbates the Situation with Increased Demand

The challenge was quickly exacerbated last spring with the onslaught of COVID-19 and the ongoing public health crisis. Comparing data from January 1 through July 31, the Albuquerque metro area has experienced an increase of approximately 1.2 billion gallons in water use from 2019 to 2020. Due to people working from home, residential water use is on the rise, up 11 percent in 2020. Data from other western cities such as Tucson, Las Vegas and San Antonio reflect similar pandemic related rising water use trends.

Conclusion and Implications

The recent decision by the Rio Grande Compact Commissioners to grant New Mexico emergency authorization to release stored water in El Vado Reservoir to prevent significant drying of the Rio Grande is an historic decision reflecting the states' shared commitment to upholding best water management practices on a regional scale on a shared river. The decision to not allow significant stretches of the Middle Rio Grande to dry this summer ensured protection of endangered species like the Rio Grande silvery minnow and the farmers in the Middle Valley

upstream of Elephant Butte Reservoir. Many water managers along the Rio Grande view the decision to help New Mexico as a positive sign of collaboration during these unprecedented times.
(Christina J. Bruff)

CALIFORNIA'S REGIONAL WATER BOARD DELAYS VOTE ON HUNTINGTON BEACH DESALINATION PLANT PROPOSAL

Two decades after its inception, Poseidon Water's Huntington Beach Desalination Plant proposal (Project) recently came again before the Santa Ana Regional Water Quality Control Board (RWQCB) for permit approval. After two days of public hearings, the RWQCB elected to delay its vote to mid-September 2020 on whether to issue a permit to discharge Project water brine byproduct to the ocean along the Orange County coast. The RWQCB also requested Poseidon Water incorporate additional environmental mitigation measures into the Project's design.

Background

As described in Project documents, Poseidon Water's Huntington Beach Desalination Plant is a $1 billion, 50 million-gallon-per-day seawater desalination facility that, if built, would become one of the country's largest seawater desalination plants. The Project would draw 106 million gallons per day of seawater off the Huntington Beach coast through an offshore intake pipe. It would create 50 million gallons of potable water per day, which is enough to support 450,000 people. The Project would also produce 56 million gallons per day of brine concentrate, twice as salty as the ocean, which would be released back to the ocean via a 1,500 foot discharge pipe. The Project has a proposed 50-year lifespan. The Project proposes to mitigate environmental impacts by restoring 5.7 acres of the Bolsa Chica wetlands, enhancing water circulation and paying for the inlet dredging.

Regional Water Quality Control Board Permit

California's Regional Water Boards administer the U.S. Environmental Protection Agency's Clean Water Act, National Pollutant Discharge Elimination System (NPDES) program. Through the NPDES program five-year operating permits are issued regulating discharges to protected water sources. The RWQCB first issued the Project's NPDES permit in 2006 and again in 2012. With those permits expired, Poseidon Water is before the RWQCB seeking a reissuance of the Project's NPDES permit.

Issues Raised During Public Hearings

The Project has been a long-standing controversial proposal since its inception in 1998. Issues that have been historically raised, and which were echoed during the recent public hearings, include: 1) the cost of the water, 2) the need for the water, and 3) the environmental impacts and mitigation measures associated with the facility.

Water produced from the Project will be among the most expensive in the state at $2,250 an acre-foot. This cost is twice as high as treated imported supplies from the Metropolitan Water District of Southern California, which is currently $1,100 an acre-foot and significantly higher than current groundwater costs of approximately $600 an acre-foot. The Orange County Water District, which has signed a nonbinding term sheet to buy the Project's annual deliveries of 56,000 acre-feet, estimates household water bills will rise $3 to $6 a month.

Orange County Water District's service area receives 77 percent of its water from local groundwater supplies and 23 percent from imported supplies derived from northern California and the Colorado River. If approved, the Project would supplant approximately half of the imported water demand transported to north and central Orange County.

At the public hearings, dozens of stakeholders supported the Project, including trade union representatives and county business groups. Dozens also spoke against the proposal, including a coalition of more than 20 environmental groups and neighbors of the Project.

RWQCB members asked whether Orange County needs the costly supply. They questioned the use of the relied upon data gauging the Project's potential harm to marine life and they expressed doubts about

whether the Project's wetland restoration plans meet state environmental requirements to offset that harm. At the hearing's conclusion, the RWQCB elected to postpone their decision. The delay came as a result of RWQCB staff, in response to RWQCB members concerns, agreeing to revise the permit agreement with Poseidon Water to include requirements that the company perform more environmental restoration to mitigate for the Project's environmental impacts. The RWQCB anticipates returning to the issue at its September 17, 2020 meeting.

If the RWQCB issues the NPDES permit, the Project will seek permitting from the California Coastal Commission.

Conclusion and Implications

It is unclear if the Regional Water Quality Control Board's recent postponement will delay the Project significantly. What is clear is that the Project highlights the complexities of developing a desalination facility, with concerns surrounding the high cost of water and environmental impacts balanced against the benefits of creating a local supply of water at a time when California water policy encourages localities to reduce their dependency on imported water sources.

(Chris Carrillo, Derek R. Hoffman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

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

•On August 6, 2020, the U.S. Department of Justice (U.S. DOJ) announced that the District Court for the Eastern District of Pennsylvania sentenced David Dunham, owner of Smarter Fuel LLC in Wind Gap, Pennsylvania and co-owner of Greenworks Holdings LLC of Allentown, Pennsylvania, to seven years in prison followed by a three-year term of supervised release and ordered him to pay $10,207,000 in restitution for defrauding multiple federal agencies and customers. Following a four-week trial, Dunham was convicted of conspiracy to commit wire fraud and defraud the United States, wire fraud, filing false tax documents, and obstruction of justice. From 2010 to 2015, Dunham fraudulently applied for, received, and sold renewable fuel credits for producing biofuels that he, in fact, did not produce and, in many instances, had never possessed in the first place. Dunham also sought and received millions of dollars from the Internal Revenue Service (IRS) and the U.S. Department of Agriculture (USDA) based on the same falsehoods. Over that time, Dunham obtained nearly $50 million in fraudulent revenue. In carrying out the fraud, Dunham used his businesses, Smarter Fuel, which he owned, and Greenworks Holdings, which he operated with his co-defendant Ralph Tomasso, who previously pled guilty to conspiracy to defraud federal programs. The evidence at trial also showed that Dunham engaged in multiple cover-ups designed to hide his crimes from authorities. These included altering his accounting records the day before an IRS audit in 2010 and providing a USDA auditor with dozens of falsified records, which Dunham had ordered an employee to produce, during a 2012 audit.

•On July 13, 2020, the U.S. Environmental Protection Agency (EPA), the U.S. DOJ, and the State of Texas announced a settlement with E.I Du Pont de Nemours and Company to resolve alleged hazardous waste, air, and water violations at the company's former La Porte, Texas chemical manufacturing facility. In 2014, the La Porte facility was the site of a chemical accident where the release of nearly 24,000 pounds of methyl mercaptan resulted in the death of four workers and forced the company to permanently close the chemical manufacturing plant in 2016. As part of a separate settlement in 2018, Du Pont paid a $3.1 million civil penalty for violating EPA's chemical accident prevention program. Under the current settlement, Du Pont will pay a $3.195 million civil penalty to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), and the Clean Air Act (CAA). The alleged RCRA violations include failure to make hazardous waste determinations; treatment, storage, or disposal of hazardous waste without a permit; and failure to meet land disposal restrictions. The alleged CWA violations include failure to fully implement the facility's oil spill prevention plan. The alleged CAA violations include failure to comply with applicable emission standards at the biological water treatment unit at the facility. After the chemical plant closure in 2016, Du Pont has continued to operate a wastewater treatment system on site and under this settlement will perform sampling and analysis to determine the extent of any existing soil, sediment, or groundwater contamination within or around impoundments remaining on site which may contain wastes from the chemical plant. Du Pont will perform this work pursuant to Texas' Risk Reduction Program and perform any necessary cleanup.

•On July 10, 2020 Peter Margiotta, the former president and CEO of Custom Carbon Processing, Inc., was sentenced to 18 months in prison, three years of supervised release, and fined $50,000 for his actions related to an explosion that injured three workers at the Custom Carbon's oil process-

ing plant in Wibaux, Montana. In September 2019, a jury found Margiotta guilty of all three counts in an indictment, including conspiracy, Clean Air Act – general duty and Clean Air Act – knowing endangerment. Custom Carbon Processing constructed the Michels Disposal Well and Oil Reclamation Facility in Wibaux, Montana in 2012. The construction was done in ways that allowed extremely hazardous hydrocarbon vapors and air pollutants to be released into the air. On July 4, 2012, Margiotta directed the opening of the plant before implementing appropriate electrical wiring, ventilation, and other safety measures. On that date, the project manager emailed Margiotta that "[t]he control panels must be moved asap with the explosion proof wiring. We also run the risk of killing someone, not only our operators but also customers." Margiotta also directed employees to accept shipments of highly volatile and flammable natural gas condensate or drip gas into the operations in a purported effort to help thin and process the slop oil at the plant. Margiotta disregarded repeated warnings from the plant's foreman that the natural gas condensate was not effective in thinning the slop oil and instead was creating a dangerous situation because of its highly volatile and flammable nature. On December 29, 2012, the plant accepted a delivery of natural gas condensate. During the offloading of the condensate, hazardous and flammable vapors from the condensate filled the plant building and spread out the open bay doors where the truck delivering the condensate was located. The vapors reached an ignition source, triggering an explosion that injured three employees and extensively damaged the plant and the truck and trailer involved in the delivery.

•On August 5, 2020, EPA announced a settlement agreement with New England Industrial Uniform Rental Service, Inc., an industrial laundry in West Springfield, Massachusetts that launders business uniforms and industrial shop towels. EPA alleges that the company's operations resulted in emissions of volatile organic compounds (VOCs). New England Industrial Uniform Rental Service did not apply for an air permit from the Massachusetts Department of Environmental Protection and had not implemented reasonably available control technology (RACT) at the facility as required by the Massachusetts Department of Environmental Protection. The company will pay a penalty of $51,700. Until recently, New England Industrial Uniform Rental Service also laundered print towels, which caused most of the facility's air emissions. Under the settlement the company has been prohibited from laundering print towels after June 30, 2020 and will implement best practices for the laundering of shop towels that contain oils and grease. New England Industrial Uniform Rental Service will also obtain an air permit with specified VOC emissions limits and RACT requirements.

•On July 22, 2020, EPA announced a settlement with a laminating and coating facility in North Smithfield, Rhode Island for failing to comply with the terms of its CAA permit. The facility is currently owned by Customs Coatings, Inc. and formerly owned by Dartex Coatings, Inc. EPA alleges that Dartex failed to properly capture emissions of VOCs at the facility as required by its permit. Dartex has paid a penalty of $317,000 and constructed an enclosure around the laminating line. Custom Coatings will also install and operate a thermal oxidizer designed to capture VOC emissions from the facility. Custom Coatings planned operations are expected to contain fewer chemicals than those used in Dartex's past coating processes.

•In July 2020, the California Air Resources Board (CARB) announced that it had settled with Flagship, Inc. of Elkhart, Indiana for importing, delivering, and offering for sale or selling uncertified vehicles into California. Flagship is a Ford Authorized Specialty Vehicle Manufacturer that modified Model Year 2016 and 2017 Ford F150 trucks with Exempted Aftermarket Parts prior to vehicle transfer to the ultimate purchaser. CARB field inspections discovered the issue, with the subsequent investigation finding 50 uncertified vehicles introduced into California in violation of California law. Flagship will pay a penalty of $250,000.

•In July 2020, CARB announced a settlement with Onyx Enterprises Int'l, Corp. for emissions violations related to the sale of non-exempted add-on or modified vehicle parts in California. Onyx operates several auto parts websites and is headquartered in Cranbury, New Jersey. Onyx advertised, sold, and offered for sale add-on or modified vehicle parts without legal exemptions to California's anti-tampering laws. Such parts replace or modify vital original

emission components and manufacturer specified engine-operating conditions, and thus must be evaluated by CARB to demonstrate the vehicle's continued emissions compliance, in violation of California law. Under the settlement, Onyx will pay a $250 per unit penalty, resulting in a total penalty of $281,000. Onyx has agreed to provide half of the total penalty toward a supplemental environmental project. (Allison Smith)

JUDICIAL DEVELOPMENTS

RADICALLY REVISED AGENCY INTERPRETATION OF ITS OWN CLEAN AIR ACT REGULATION REJECTED BY THE TENTH CIRCUIT

Sierra Club v. U.S. Environmental Protection Agency, 964 F.3d 882 (10th Cir. Jul. 2, 2020).

Jettisoning a straightforward application of its own regulation, the EPA argued that operating permits for emitting sources issued under the federal Clean Air Act need only incorporate the terms and conditions of any previously-issued facility-specific preconstruction permits—rather than all applicable requirements of a state's implementation plan. Concluding no deference was due the agency, the Tenth Circuit Court of Appeals rejected this argument and held the regulation's unambiguous language requires that operating permits incorporate all of the applicable provisions of state implementation plans.

Background

Under Title I of the Clean Air Act, "the EPA sets national air quality standards and provides oversight and enforcement" and the states "must develop implementation plans and submit them to the EPA for approval." 42 U.S.C. § 7409. Pursuant to their State Implementation Plans (SIPs), states conduct "New Source Review" (NSR), a preconstruction permit process for "many industrial sources of pollution." NSR differs for "major' or "minor" sources of pollution. Major NSR is required if a new or modified source would emit pollutants above certain thresholds. Only minor NSR if emission would fall below the applicable thresholds. Minor NSR entails "only the barest of requirements." *Luminant Generation Co. v. EPA*, 675 F.3d 917 (5th Cir. 2012).

Separately, state-issued Clean Air Act Title V operating permits "must include the various statutory limitations on emissions that apply to a given source." 42 U.S.C. § 7661c(c). A Title V permit "must consolidate all of the information that the source needs to comply with the Clean Air Act," so that a Title V permit will include both "self-executing" requirements such as "New Source Performance Standards," as well as any separately-issued "permit for Prevention of Significant Deterioration" setting for "source-specific limitations." *See, Envtl. Integrity Project v. EPA*, 960 F.3d 236, 243 (5th Cir. 2020). On renewal, a Title V operating permit must "ensure 'compliance with' all of the 'applicable requirements.'" 42 U.S.C. § 7661c(a); 40 C.F.R. 70.7(a)(1)(iv). Title V permits are subject to review by EPA, and third parties may petition the EPA to object to issuance or renewal of a Title V operating permit.

PacifiCorp sought NSR under Title I for a proposed modification of its "Hunter Plant" beginning in 1997, while simultaneously seeking the initial Title V operating permit for the Plant. When the initial Title V operating permit was issued in 1998, it incorporated the state of Utah's determination that only minor NSR was required for the modification. The Title V operating permit was required to be renewed "in 2003 and every five years thereafter." PacifiCorp applied for renewal in 2001, but the state did not act on that application for 14 years, and only did so after the Sierra Club successfully litigated the issue. The renewed permit carried forward the determination that only minor NSR was required for the 1997-1999 modifications. The Sierra Club petition the EPA "to object" to the Title V renewal, arguing in part that the modifications should have triggered major NSR requirements. EPA denied the petition without reaching the issue of whether or not the modifications required major NSR. Instead, the EPA decided that the "applicable requirements" states must incorporate into Title V renewal permits are limited to "the terms and conditions" of a previously-issued final preconstruction permit, and that EPA's review is limited "to whether the title V permit has accurately incorporated those terms and conditions."

The Tenth Circuit's Decision

In construing the regulatory definition of "applicable requirements," the Tenth Circuit rejected the applicability of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), pursuant to which deference is due an agency interpretation of its own regulation "unless it

is 'plainly erroneous or inconsistent with the regulation.'" Applying "traditional tools of construction" to examine the regulation's "text, structure, history, and purpose," the Court determined the regulatory definition is not "genuinely ambiguous." 40 C.F.R. § 70.2 states:

> Applicable requirement means *all* of the following as they apply to emissions units in a part 70 source ...:
> (1) *Any* standard or other requirement *provided for in the applicable implementation plan* approved ... by EPA ....
> (2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking ….
> (Emphasis provided by the court.) Focusing on subsection (1), the court concluded that "the 'applicable implementation plan'" at issue "here is Utah's, and Utah's implementation plan requires major NSR. Given the need to comply with Utah's implementation plan, the regulatory definition of 'applicable requirement' unambiguously includes major NSR requirements." (Internal citations omitted.)

Court Rejects EPA's Reading of the Regulation

The court rejected the EPA's alternative readings of the regulation. The agency argued that the more specific reference to "[a]ny term or condition of any preconstruction permits" should be read as a limitation on the more general reference to "[a]ny standard or other requirement provided for in the applicable implementation plan" in subsection (1), so that once a preconstruction permit has been issued for a source "applicable requirements" are limited to the preconstruction permit terms and conditions. But the court pointed out that subsections (1) and (2) are followed by an additional eleven subsections, the last two of which are joined by "and"—"creating a *syndeton*, which is equivalent to including 'and' between each item." Citing Scalia & Ganer, *Reading Law: The Interpretation of Legal Texts* 118 (2012). Further, subsection (2) is not rendered "redundant" by subsection (1), as Title I permits may include facility-specific requirements that do not appear in a state's implementation plan.

Looking to EPA's Intent

Next, the Court of Appeals considered evidence of the EPA's intent at the time the regulatory definition was adopted, concluding that the EPA "intended to broadly use the term 'applicable requirements' to "refer[] to compliance with all of the requirements of the state's implementation plan." The EPA's 1991 Guidance "instructed state regulators that "each permit" had to contain provisions for "applicable requirements," defined as:

> . . .limits and conditions to assure compliance with all the applicable requirements *under the Act, including requirements of the applicable implementation plan*. (Emphasis added by the court.)

The court rejected the EPA's current reliance of "snippets from the regulation's preamble. The preamble cannot override the unambiguous meaning of the regulatory language." And even if it were to consider the preamble, the court concluded that, too, would support its reading of the definition, as the preamble instructs that Title V permits are intended to bring together all of the "'*existing* substantive requirements applicable to regulated sources.'" Quoting Lydia N. Wegman, Environmental Protection Agency, EPA White Paper for Streamlined Development of Part 70 Permit Applications 1 (July 10, 1995) (emphasis added by the Court). Title I's requirement for major NSR is an existing, not a new, substantive requirement.

Conclusion and Implications

The broad landscape of administrative law often seems to consist of unbroken fields of deference to agency interpretations. But that deference reaches its limits when confronted with an abrupt U-turn from a decades' long, stable and straightforward regulatory application. In the end, the court founds "We conclude that the EPA's interpretation of 'applicable requirements' in the Hunter Order conflicts with the unambiguous regulatory definition. We thus vacate the Hunter Order and remand to the EPA for further consideration of the petition." The opinion of the Tenth Circuit Court of Appeals is available online at: https://www.ca10.uscourts.gov/opinions/18/18-9507.pdf
(Deborah Quick)

DISTRICT COURT FINDS NRDC LACKS STANDING TO SUE OVER EPAS DELAY IN EMERGENCY RULEMAKING ON MONITORING AND REPORTING

National Resources Defense Council v. Bodine,
___F.Supp.3d___, Case No. 20 CIV. 3058 (CM) (S.D. N.Y. July 8, 2020).

The U.S. District Court for the Southern District of New York recently granted the U.S. Environmental Protection Agency (EPA) summary judgment and dismissed a complaint that alleged EPA unreasonably delayed in responding to a petition requesting an emergency rule to require written notice from any entity that suspends monitoring and reporting because of the COVID-19 pandemic.

Factual and Procedural Background

On March 26, 2020, EPA issued a Temporary Enforcement Policy (Policy) regarding EPA's enforcement of environmental obligations during the COVID-19 pandemic. The Policy was issued without advance notice to the public after EPA received numerous inquiries from regulated entities concerned by the risk of civil penalties sought by the EPA due to their inability, despite their best efforts, to comply with environmental obligations during the COVID-19 pandemic. The Policy was retroactive to March 13, 2020, with no end date specified originally, but was later amended to August 31, 2020 by the EPA.

The Policy provided that EPA would exercise enforcement discretion for noncompliance of environmental obligations, particularly monitoring and reporting, by regulated entities resulting from the COVID-19 pandemic, provided entities followed the steps required in the Policy. Notably, the Policy required regulated entities to document the specific nature and dates of the noncompliance, to maintain this information internally and make it available to the EPA upon request, and to return to compliance with its monitoring and reporting obligations as soon as possible. The Policy applies to nearly every industry in the country: chemical manufacturing, power plants, refineries, mining, factory farms, and every other federally regulated source of pollution.

Under the Administrative Procedure Act (APA), an interested person may petition EPA for the issuance, amendment, or repeal of a rule. EPA is required to conclude a matter presented to it within a reasonable time.

On April 1, 2020, the NRDC, along with 14 other environmental justice, public health, and public interest organizations, petitioned the EPA for the issuance of an emergency rule which would require any entity that suspends monitoring and reporting because of the COVID-19 pandemic to provide written notice to the relevant state and to EPA immediately (Petition). On April 16, 2020, NRDC filed their Complaint for Declaratory and Injunctive Relief. (https://www.nrdc.org/sites/default/files/complaint-epa-non-enforcement-20200416.pdf)

On April 29, 2020, NRDC filed a motion for summary judgment. EPA cross moved for summary judgment, challenging NRDC's standing and denying that is unreasonably delayed in responding to the Petition.

The District Court's Decision

The court focused its analysis on whether plaintiffs had standing. Plaintiffs argued they had standing in their own right and that they had associational standing.

Standing in Their Own Right

To establish standing on its own behalf, an organization must meet the same standing test that applies to individuals and demonstrate: 1) injury in fact, 2) a causal connection between the injury and the complained-of conduct, and 3) a likelihood that the injury will be redressed by a favorable decision. Plaintiffs argued that they had standing in their own right based on "informational injury," because the Policy degraded the integrity of environmental monitoring data, thereby harming plaintiffs in their educational and advocacy efforts. The court rejected this argument.

To establish "an injury in fact" based on an informational injury, plaintiffs must demonstrate that: 1) the law entitles the plaintiff to that information; and 2) it suffers, by being denied access to that information, the type of harm Congress sought to prevent by requiring disclosure. Here, the court determined that

plaintiffs' standing argument failed because they were not legally entitled to the information they sought from the EPA.

Associational Standing

Next, the court addressed whether plaintiffs established "associational standing" based on injury to its members. To establish associational standing, plaintiffs must show: 1) its members would otherwise have standing to sue in their own right; 2) the interests it seeks to protect are germane to the organization's purpose; and 3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. EPA did not challenge plaintiffs' showing on the second and third factors. EPA argued that plaintiffs lacked associational standing because they did not show injury in fact or a likelihood that the injury will be redressed by a favorable decision.

Injury in Fact

EPA argued that plaintiffs' members did not have standing to sue in their own right because plaintiffs' members did not establish they suffered a sufficiently concrete injury. The court applied a two-pronged test for concreteness: 1) whether the statutory provisions at issue were established to protect plaintiffs' concrete interests (as opposed to purely procedural rights), and if so, 2) whether the specific procedural violations alleged in this case actually harm, or present a material risk of harm to, such interests. Here, the court reasoned that plaintiffs' failed the first condition because the alleged violation at issue—unreasonable delay under the APA—was established to protect procedural rights. As to the second prong, the court determined that the procedural violation alleged by Plaintiffs –EPA's purported delay in responding to the Petition—did not actually harm plaintiffs' members or presents a material risk of doing so. The court distinguished a fear of facing an increase in exposure to a risk of environmental harm, as opposed to actual exposure to pollution. In addition, the plaintiffs failed to provide any evidence that pollution had in fact increased by entities who did or did not monitor and report during the COVID -19 pandemic.

Redressability and Fairly Traceable to the Alleged Violation

EPA also argued that plaintiffs' alleged injuries were not traceable to EPA's conduct in not yet responding to the Petition. The court reasoned that the delay of fifteen days between filing the Petition and filing the complaint was not the cause of the environmental harms that plaintiffs alleged. Plaintiffs argued that in the absence of reporting, their members would not know whether they were being exposed to more pollution and a greater risk. The court rejected this argument, reasoning that the Policy itself expressly requires regulated entities to contact EPA or an authorized state if impacts by COVID-19 "may create an acute risk or imminent threat to human health or the environment" *before* deciding to suspend monitoring, rather than after. The court determined that plaintiffs failed to show their alleged injury was fairly traceable to the delay in responding to the Petition, rather than to the circumstances and challenges presented by the COVID-19 pandemic itself:

> Plaintiffs have neither established that they have suffered a sufficiently concrete injury nor that that alleged injury is fairly traceable to EPA's purported delay in responding to the Petition. Therefore, it is unnecessary to address whether it would be redressed by the only relief I could offer in this instance, ordering the EPA to respond to the Petition.

Conclusion and Implications

In this case, the District Court ultimately rejected a challenge to EPA's Temporary Enforcement Policy. However more instructive, perhaps, was the court's thorough analysis of standing. The court's opinion is available online at: http://nsglc.olemiss.edu/casealert/july-2020/nrdc.pdf
(Berenise Bermudez, Rebecca Andrews)

CALIFORNIA COURT OF APPEAL AFFIRMS STATE WATER BOARD'S AUTHORITY TO REGULATE UNREASONABLE WATER USE THROUGH TEMPORARY EMERGENCY REGULATIONS AND CURTAILMENT ORDERS

Stanford Vina Ranch Irrigation Company v. State of California, 50 Cal.App.5th 976 (3rd Dist. 2020).

The California Court of Appeal recently upheld a determination that the State Water Resources Control Board's (SWRCB or Board) possesses broad authority to issue temporary emergency regulations and curtailment orders which establish minimum flow requirements, regulate unreasonable use of water, and protect threatened fish species during climate change exacerbated drought conditions.

Background

Plaintiff/appellant Stanford Vina Ranch Irrigation Company (Stanford Vina) diverts water for agricultural uses from Deer Creek, a tributary to the Sacramento River. Stanford Vina is entitled to use 66 percent of the flow of Deer Creek and holds both riparian and pre-1914 appropriative water rights.

Two species of anadromous fish, Chinook salmon (fall run and spring run) and steelhead trout migrate from the Pacific Ocean to Deer Creek each year to spawn. The spring Chinook salmon and steelhead trout are listed as a threatened species under the California Endangered Species Act and the federal Endangered Species Act. Federal and state agencies have concluded that Deer Creek has "high potential" for supporting viable populations of both spring-run salmon and steelhead trout. The water diversion structures operated by Stanford Vina on Deer Creek were alleged to have the potential to dewater Deer Creek during low flow periods and to also negatively affect the outmigration of juvenile spring-rule salmon and steelhead trout.

Drought

In 2014, California was in the midst of one of the most severe droughts on record. Extreme drought conditions threatened to dewater high priority streams during critical migration periods for threatened and endangered fish species. In response, then-Governor Jerry Brown declared a drought state of emergency and signed urgency legislation that included authority for the SWRCB to adopt emergency regulations. Those emergency regulations included, among other provisions, Board authority to prevent waste and unreasonable use of water, to promote water conservation, and to require curtailment of certain surface water diversions. The SWRCB thereafter began promulgating regulations implementing in-stream flow requirements for Deer Creek and other surface water courses.

Specifically, the regulations declared that any diversion reducing flows beneath drought emergency minimums would be a per se waste and unreasonable use in violation of Article X, § 2 of the California Constitution. The emergency regulations barred water from being diverted from Deer Creek and other specific streams during the effective period of any SWRCB curtailment orders issued pursuant to the regulations.

On June 5, 2014, the Board issued the first curtailment order for Deer Creek, which directed all water rights holders to immediately cease or reduce their diversions in order to maintain the drought emergency minimum flows specified by the regulation. Between June 2014 and October 2015, the Board issued three more curtailment orders to Deer Creek water users.

Procedural History

Stanford Vina filed suit against the SWRCB in October 2014 asserting causes of action for inverse condemnation and declaratory relief over the temporary emergency regulations. Stanford Vina argued that the emergency regulations and curtailment orders were unreasonable, violated due process requirements, and amounted to a taking of vested water rights without just compensation.

The trial court concluded that the Board possessed quasi-legislative authority to adopt the challenged emergency regulations without first holding an evidentiary hearing. It found that under the extreme drought conditions, the Board rationally determined that allowing diversions to reduce flows below the minimum amounts necessary for fish migrations and survivability would be an unreasonable use of water. The trial court also rejected Stanford Vina's taking

argument and rule of priority argument and entered judgment against Stanford Vina on all causes of action.

The Court of Appeal's Decision

In its recent published opinion, the Third District Court of Appeal affirmed the trial court's decision and held that the Board has broad authority to regulate the unreasonable use of water. This authority, the court found, included the right to adopt regulations, establish minimum flow requirements to protect the migration of threatened fish species during drought conditions, and to declare unreasonable diversions of water would cause in-stream flows to fall below levels needed by those fish. Because different standards of review apply to the Board's quasi-legislative rule making power and its quasi-adjudicative enforcement actions, the court addressed the validity of the challenged regulations and challenged curtailment orders separately.

Validity of the Challenged Regulations

The Court of Appeal determined that the emergency regulations were within the Board's regulatory authority in furtherance of its constitutional and statutory mandate to prevent waste and unreasonable uses of water and consistent with Article X, § 2 of the California Constitution and Water Code §§ 100, 275, 1058, and 1058.5:

- Section 100: Provides in relevant part that 'the right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.'

- Section 275: The Board is authorized to 'take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.'

- Section 1058: The Board is authorized to 'make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties.'

- Section 1058.5: The Board is authorized to adopt emergency regulations to prevent 'unreasonable use, unreasonable method of use, or unreasonable method of diversions' during severe drought conditions.

The court further held that adoption of the regulations was not arbitrary, capricious, or lacking in evidentiary support.

The court then concluded that, contrary to Stanford Vina's arguments, the Board was not required to hold an evidentiary hearing before making a "reasonableness determination" as to plaintiff's use of water. According to the court, neither the due process clauses of the federal or California Constitutions, nor article X, § 2 of the California Constitution, require the Board to hold an evidentiary hearing prior to adoption of a regulation governing reasonable water use.

Citing heavily to and expanding upon *Light v. State Water Resources Control Bd.*, 226 Cal. App. 4th 1463 (2014) (*Light*) and the line of reasonable use cases before it, the Court of Appeal also concluded that the Board's authority included the direct regulation of riparian and pre-1914 appropriative water rights holders without first holding an evidentiary hearing, and the ability to adopt curtailment orders that notified the affected water rights holders the emergency regulations were put into effect.

Validity of the Challenged Curtailment Orders

The Court of Appeal next analyzed whether the SWRCB had properly implemented the emergency regulations by issuing the challenged curtailment orders. Contrary to Stanford Vina's assertion, the court found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations regardless of its status as a senior riparian and that it held pre-1914 water rights. Thus, the court applied the substantial evidence standard of review in assessing the validity of the curtailment orders.

Upon review of the record, the court found that substantial evidence supported the SWRCB's conclusion that curtailed diversions would have caused or threatened to cause the flow of water in Deer Creek

to fall below the emergency minimum flow requirements. The court further held that the curtailment orders were not a taking of the company's water rights, because the mere regulation of the use and enjoyment of a property right for the public benefit is a permissible exercise of the state's police power and does not amount to a taking under eminent domain. Therefore, the Board had acted within its authority to determine that diversions from Deer Creek threatened to violate the emergency regulations minimum flow requirements constituted an unreasonable use of water.

Taking Claim

The court further rejected the argument that the curtailment orders were a taking of private property without just compensation since it found that Stanford Vina possessed no vested right to divert water from Deer Creek in contravention of the emergency regulations. Along those lines, the court dismissed any claims that the regulations and curtailment orders impermissibly interfered with a prior judicial degree declaring its water rights, because rights declared by a judicial decree are subject to the rule.

Conclusion and Implications

The *Stanford Vina* decision is an interesting and consequential case among those pertaining to the applicability and use of the reasonable use doctrine—especially in light of drought and climate change. Whereas in *Light* the court acknowledged that the curtailment and regulation of riparian and pre-1914 water users would be pursuant to local programs and not by the State Water Resources Control Board itself, the Third District Court of Appeal in this case found that the Board may, under certain circumstances itself declare diversions unreasonable and issue curtailment orders to cease all diversions of water without first holding an evidentiary hearing. While the SWRCB authority during the unique circumstances of an extraordinary multi-year drought is made more-clear by the court's opinion, it leaves unanswered whether a similar approach would work during less extreme circumstances. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C085762.PDF
(Paula Hernandez, Derek R. Hoffman)

CLIMATE CHANGE™
LAW & POLICY REPORTER

Climate Change Law & Policy Reporter
Argent Communications Group
P.O. Box 1135
Batavia, IL 60510-1135

CHANGE SERVICE REQUESTED

FIRST CLASS MAIL
U.S. POSTAGE
PAID
AUBURN, CA
PERMIT # 108