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ENVIRONMENTAL LIABILITY™
ENFORCEMENT & PENALTIES Reporter

FEATURE ARTICLE

CALIFORNIA ENVIRONMENTAL QUALITY ACT CONSIDERATIONS WHEN EVALUATING IMPACTS TO BIOLOGICAL RESOURCES

By Robbie Hull, Esq., Scott Birkey, Esq., and Clark Morrison, Esq.

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

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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 Al-*

liance 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 agencies 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.

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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 "reason-

ably 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. 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)

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.

Civil Enforcement Actions and Settlements—Air Quality

•July 23, 2020—The U.S. Environmental Protection Agency (EPA) announced a settlement with GReddy Performance Products, Inc., a motor vehicle parts manufacturer and distributor, for violating the Clean Air Act. EPA alleges the company manufactured and sold auto aftermarket parts known as defeat devices, which bypass or render inoperative required emissions control systems. GReddy Performance Products, based in Irvine, California, will pay a penalty of $60,000. Between 2016 and 2018, GReddy Performance Products sold 231 aftermarket exhaust systems designed to defeat the emissions control systems of gasoline-powered cars. These systems increase emissions of harmful pollutants, including nitrogen oxides (NOx), which are associated with health problems including heart and lung ailments like chronic bronchitis and asthma. Pollutants such as carbon monoxide, nitrogen oxide and particulate matter create poor air quality. Children, older adults, people who are active outdoors (including outdoor workers), and people with heart or lung disease are particularly at risk for health impacts due to exposure to these pollutants. Vehicles are a significant contributor to air pollution, and aftermarket defeat devices that disable emission controls exacerbate this problem. To address that, EPA has developed a National Compliance Initiative that focuses on stopping the manufacture, sale, and installation of defeat devices on vehicles and engines.

Civil Enforcement Actions and Settlements—Water Quality

•June 18, 2020—Pacific Seafood—Westport, LLC, has settled with the U.S. Environmental Protection Agency (EPA) over federal Clean Water Act violations at its Westport, Washington, crab and shrimp processing facility. Pacific Seafood—Westport, LLC, is part of a major global seafood processing operation that employs more than 3,000 people at 41 facilities in 11 states, including several offshore locations. According to settlement documents, EPA identified over 2,100 violations of the Westport facility's wastewater discharge permit during an unannounced inspection in 2017. EPA documented discharge limit violations, as well as violations related to monitoring frequency, incorrect sampling, and incomplete or inadequate reporting. As part of the settlement, the company agreed to pay a penalty of $190,000. In addition to paying the penalty, Pacific Seafood—Westport, LLC has launched a variety of new programs and implemented technologies to address compliance challenges at its Westport facility. By calculating the environmental impact of the violations, EPA expects to see the following environmental benefits as a direct result of the enforcement action taken:

•Fecal Coliform reduced by 17,995 lbs/year

•Biochemical Oxygen Demand (BOD_5) reduced by 256,564 lbs/year

•Total Suspended Solids (TSS) reduced by 115,845 lbs/year

•Oil & Grease (O&G) discharge reduced by 48,255 lbs/year

As part of the agreement, Pacific Seafood—Westport, LLC neither confirms nor denies the allegations contained in the signed Consent Agreement and Final Order.

•July 7, 2020—The United States and the state of Nebraska have reached a settlement with Henningsen Foods Inc. to resolve alleged violations of the federal Clean Water Act at the company's egg processing facility in David City, Nebraska. Under the terms of the settlement, the company will spend about $2 million in upgrades to reduce the amount of pollutants the facility sends to the David City wastewater treatment system. The company also agreed to pay a $827,500 civil penalty. Henningsen processes approximately 1.2 million eggs per day and is one of the largest egg processors in the state. The facility is subject to Clean Water Act regulations that prevent industries from overloading municipal wastewater treatment systems with industrial pollutants. According to the EPA, high loads of egg-processing waste and cleaning solution generated by Henningsen are sent to the David City wastewater treatment facility. Since at least 2014, this waste has caused both Henningsen and David City to violate the Clean Water Act on multiple occasions by discharging pollutants in excess of state and federal limits to Keysor Creek, which flows into the North Fork Big Blue River. These pollutants included ammonia and oxygen-depleting substances that are toxic to aquatic life and potentially harmful to people. Further, EPA alleges that Henningsen repeatedly failed to submit timely and accurate pollutant monitoring information required by law. As a result of this enforcement action, Henningsen has installed pretreatment equipment at its facility and agreed to operate and maintain it in order to reduce pollutants before they reach the David City wastewater treatment facility. The company will also continue to pay for its share of upgrades to the wastewater treatment facility to adequately treat Henningsen's wastewater, and will increase the frequency of its pollutant monitoring and reporting. The settlement is detailed in a Consent Decree that was filed with the United States District Court for the District of Nebraska on July 7, 2020, and will be subject to a 30-day public comment period before final court approval.

•July 8, 2020—EPA and the Bogus Basin Recreational Association, Inc., have settled a Clean Water Act enforcement case stemming from alleged violations of construction stormwater permit requirements at the ski area and recreation complex located 16 miles northwest of Boise, Idaho. Bogus Basin is a 501(C)(3) non-profit organization which operates by a Special Use Permit on the Boise National Forest under the U.S. Department of Agriculture. EPA alleges violations took place at Bogus Basin's Stabilization Project, designed to support existing ski and recreation facilities. Construction included installing a retention dam, creating an in-stream 42-acre-foot water storage pond for snowmaking, and chair lift replacement. Concluded under an Expedited Settlement Agreement, the action included a penalty of $52,680. Expedited Settlement Agreements offer business and industry a faster, more streamlined process to resolve permit violations with monetary penalties commensurate to the severity of the violations.

•July 13, 2020—EPA and the U.S. Department of Justice announced an agreement with the City of Manchester that will result in significant reductions of sewage from the city's wastewater treatment systems into the Merrimack River and its tributaries. The State of New Hampshire joined the U.S. government as a co-plaintiff on this agreement, which also resolves alleged violations of the Clean Water Act by the City of Manchester. Under a proposed consent decree filed in the U.S. District Court for the District of New Hampshire, the City of Manchester has agreed to implement a 20-year plan to control and significantly reduce overflows of its sewer system, which will improve water quality of the Merrimack River. The plan is estimated to cost $231 million to implement. The Merrimack River is a drinking water source for more than 500,000 people, is stocked with bass and trout for fishing, is used for kayaking and boating and other recreational opportunities. The settlement addresses problems with Manchester's combined sewer system, which when overwhelmed by rain and stormwater, frequently discharges raw sewage, industrial waste, nitrogen, phosphorus and polluted stormwater into the Merrimack River and its tributaries. The volume of combined sewage that overflows from the Manchester's combined sewer system is approximately 280 million gallons annually, which is approximately half of the combined sewage discharge volume from all communities to the Merrimack River. Under the proposed consent decree, Manchester will implement combined sewer overflow (CSO) abatement controls and upgrades at its wastewater treatment facilities that are expected to reduce

the city's total annual combined sewer discharge volume by approximately 74 percent from approximately 280 million gallons to 73 million gallons. The two major components of the CSO abatement controls will disconnect Cemetery Brook in Manchester, the largest of the local five significant connected brooks, from the city's combined sewer system. Manchester will design and construct a new 2.5-mile drain for Cemetery Brook from Mammoth Road to the Merrimack River to convey both the brook's and storm drainage flows. The city will also design and construct projects to separate the combined sewers for areas adjacent to the Cemetery Brook drain. These drainage and sewer separation projects will together address the largest drainage basin in the city and produce the greatest volume of CSO reduction. The work under the proposed consent decree also includes the construction of a new drain and sewer separation in the Christian Brook drainage basin, which will remove the third largest brook from the wastewater collection system. The proposed consent decree also requires the city to implement a CSO discharge monitoring and notification program, which will include direct measurement of all discharges from six CSO outfalls estimated to be more than 99 percent of all of the city's total CSO discharge volumes. The city will be required to provide initial and supplemental notification to the public, including public health departments and downstream communities, with notification made through electronic means such as posting to the city's publicly available website and reasonable efforts to provide other notification. In addition to the 20-year control plan, the proposed settlement also requires the upgrades to improve the handling of solid waste at the wastewater treatment plant to reduce discharges of phosphorous.

•July 22, 2020—The EPA will take enforcement actions on Oahu and the Big Island to bring about the closure of three pollution-causing large-capacity cesspools (LCCs) and issue $268,000 in fines. Under the Safe Drinking Water Act, EPA banned LCCs in 2005.

EPA is authorized to issue compliance orders and/or assess penalties to violators of the Safe Drinking Water Act's LCC regulations. EPA actions to close LCCs owned by state and local government include:

Helemano Plantation: Located in central Oahu, the Helemano Plantation is owned by the Hawai'i Department of Land and Natural Resources and leased by the City and County of Honolulu (CCH). EPA identified two LCCs on this property which serve a restaurant, gift shop and farm. The cesspools must be closed by the end of this year. CCH has agreed to pay a $135,000 penalty.

Kainaliu Comfort Station: Located on the leeward side of the Big Island in Kealakekua, the Kainaliu Comfort Station is owned by Hawai'i County. The comfort station has a public toilet in its parking lot which discharges to an LCC. Hawai'i County has agreed to pay a $133,000 fine and close the cesspool by the end of this year.

Since the 2005 LCC ban, more than 3,600 LCCs in Hawai'i have been closed; however, many hundreds remain in operation. Cesspools collect and discharge untreated raw sewage into the ground, where disease-causing pathogens and harmful chemicals can contaminate groundwater, streams and the ocean. Groundwater provides 95% of all local water supply in Hawai'i, where cesspools are used more widely than in any other state.

In 2017, the state of Hawai'i passed Act 125, which requires the replacement of all cesspools by 2050. It is estimated that there are approximately 88,000 cesspools in Hawai'i. A state income tax credit is available for upgrading qualified cesspools to a septic system or aerobic treatment unit or connecting them to a sewer. The tax credit ends on December 31, 2020.

•July 22, 2020—The U.S. Department of Justice and the EPA have entered into a Consent Decree (CD) with Pacific Energy South West Pacific, Ltd. (Pacific Energy) related to that company's violations of the Clean Water Act. Under the CD, Pacific Energy will pay $300,000 in a civil penalty and will take action to protect Pago Pago Harbor by eliminating unauthorized wastewater discharges from the American Samoa Terminal. Pacific Energy also will take steps to return the terminal to compliance with Clean Water Act sampling and reporting requirements. Pacific Energy operates a major bulk fuel terminal in Pago Pago that stores large quantities of petroleum fuel for distribution on American Samoa. The terminal routinely generates industrial wastewater by draining water that has separated from the fuel in its tanks. This industrial wastewater is then comingled with stormwater and discharged to Pago Pago Harbor.

Under the Clean Water Act, the terminal is required to have a National Pollutant Discharge Elimination System (NPDES) permit and meet the requirements of that permit. Pacific Energy had an NPDES permit from 2010 through 2015 but did not conduct regular wastewater sampling or meet the permit's other requirements. Pacific Energy allowed its NPDES permit to expire in 2015 and then operated without a permit—in violation of the Clean Water Act and of a related 2016 EPA administrative order—until November 1, 2019, when its current NPDES permit became effective. Pacific Energy's unmonitored discharge of pollutants such as oil, grease and other toxic pollutants to Pago Pago Harbor may have damaged water quality and harmed the chemical, physical, and biological balance of the Harbor. Many Samoans fish and recreate in Pago Pago Harbor, which is home to important cultural and environmental resources, including nearly 200 species of coral.

•July 27, 2020—EPA has announced an agreement with Pacific Seafood-Eureka, LLC over violations of the federal Clean Water Act. The settlement requires the company to pay a $74,500 penalty after an EPA inspection found the company was discharging wastewater in violation of local and federal standards into the City of Eureka's sewer system and Humboldt Bay's Eureka Slough. Pacific Seafood-Eureka, part of the Pacific Seafood Group headquartered in Portland, Oregon, operates a seafood processing facility at its Eureka location. During a 2018 inspection with the North Coast Regional Water Quality Control Board and Eureka's Public Works Department, EPA found the company discharged wastewater directly to the Eureka Slough waterway without the appropriate permit. EPA conducted its inspection after the City of Eureka issued several notices of violations to the facility. The facility also discharged wastewater to the city of Eureka's sanitary sewer in violation of pretreatment standards. Violations associated with operation and maintenance of the facility's pretreatment system were identified, including: wastewater from the indoor shrimp processing area was bypassing the facility's pretreatment system; the facility lacked adequate secondary containment in the indoor bulk chemical storage area and outdoor chemical storage area; wastewater from the de-shelling process was observed entering a storm drain; and the company was discharging the water used to rinse off oysters and crabs directly into the Eureka Slough. The company addressed all of these compliance issues.

•August 14, 2020—EPA, the U.S. Department of Justice and the California Department of Toxic Substances Control (DTSC) have reached a $56.6 million settlement with Montrose Chemical Corporation of California, Bayer CropScience, Inc., TFCF America, Inc., Stauffer Management Company LLC, and JCI Jones Chemicals, Inc. for further cleanup work of contaminated groundwater at the Dual Site Groundwater Operable Unit of the Montrose Chemical Corp. and Del Amo Superfund Sites (also known as the Dual Site) in Los Angeles County, California. This work will include operating and maintaining the primary groundwater treatment system for the remedy selected in the 1999 Dual Site cleanup plan. The settlement also includes payment to EPA of $4 million in past costs, another payment of costs incurred by DTSC, and payment of EPA's and DTSC's future oversight costs. Groundwater at the Dual Site is contaminated with hazardous substances from industrial operations, including chlorobenzene from the former Montrose facility where DDT was manufactured, benzene from the Del Amo facility where synthetic rubber was manufactured, and trichloroethylene (TCE) related to several facilities. This settlement specifically addresses the chlorobenzene plume, which refers to the entire distribution of chlorobenzene in groundwater at the Dual Site and all other contaminants that are commingled with the chlorobenzene. Cleanup activities will involve pumping the groundwater in the chlorobenzene plume and treating it to federal and State of California cleanup standards identified in the 1999 remedy. The treated water will then be reinjected into the aquifer outside of the contaminated groundwater area. The objective is to contain a zone of groundwater contamination surrounding source areas (also known as the 'containment zone') and clean up the chlorobenzene plume outside of that zone. Containment will occur soon after pumping operations begin, and cleanup of groundwater beyond the containment zone is expected to take approximately 50 years to complete. In addition, EPA will pursue settlements with other parties to conduct cleanup work selected for the benzene and TCE plumes in the Dual Site cleanup plan.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•June 17, 2020—EPA has ordered OCCS, Inc., located in Stanton, California, to stop selling Sanitizer/Quat Solution Ready to Use and Quat Solution Ready to Use Cleaner, both unregistered antimicrobial disinfectants being distributed and sold in violation of the Federal Insecticide, Fungicide and Rodenticide Act. The makers of Sanitizer/Quat Solution Ready to Use falsely label the product as a registered disinfectant by including on the label an EPA registration number which has been assigned to another registered pesticide. At some point, OCCS changed the label on the illegal product and relabeled the Sanitizer/Quat Solution Ready to Use product into Quat Solution Ready to Use Cleaner. The new product's label removes the EPA registration number but includes a statement that an EPA registered product is the main "cleaning agent" used in the product. EPA has issued the 'Stop Sale' order to prevent the company from continuing to distribute or offer for sale these unregistered antimicrobial disinfectants. The products have been available for sale on different online marketplaces. Public health claims can only be made regarding antimicrobial disinfectant products that have been properly tested and are registered with the EPA. The agency will not register a disinfectant until it has been determined that it will not pose an unreasonable risk when used according to the label directions.

•July 2, 2020—EPA announced a settlement with Waste Management of Wisconsin, Inc. (WMWI) that will include enhanced monitoring for hazardous waste near the Metro Landfill in Franklin, Wis., and a $232,000 fine to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA). WMWI, a subsidiary of Waste Management, Inc., owns and operates the Metro Recycling and Disposal Facility (Metro Landfill), in Franklin, Wis. The Metro Landfill is licensed by the State of Wisconsin to accept non-hazardous municipal, commercial, industrial, and special wastes for disposal, but is not authorized to treat, store, or dispose of hazardous waste. EPA alleged that WMWI improperly disposed of hazardous electric arc furnace dust from a steel casting foundry at the Metro Landfill on at least 10 days. The dust was contaminated with chromium, a hazardous waste and known human carcinogen. Under the terms of the settlement, WMWI has agreed to conduct leachate and groundwater monitoring, and update its waste management plan and training program. The settlement also includes a civil penalty of $232,000.

•July 9, 2020—EPA and the U.S. Department of Justice announced a settlement with J.R. Simplot Company and its subsidiary, Simplot Phosphates LLC (Simplot), involving Simplot's Rock Springs, Wyoming, manufacturing facility. This settlement resolves allegations under the Resource Conservation and Recovery Act (RCRA) at the facility, including that Simplot failed to properly identify and manage certain waste streams as hazardous wastes. The settlement requires Simplot to implement process modifications designed to enable greater recovery and reuse of phosphate, a valuable resource. The settlement also requires Simplot to ensure that financial resources will be available when the time comes for environmentally sound closure of the facility. Simplot's Rock Springs facility manufactures phosphate products for agriculture and industry, including phosphoric acid and phosphate fertilizer, through processes that generate large quantities of acidic wastewater and a solid material called phosphogypsum. The phosphogypsum is deposited in a large pile known as a gypstack, and acidic wastewater is also routed to the gypstack. The gypstack at the Wyoming facility is fully lined and has a capacity to hold several billion gallons of acidic wastewater. This settlement also resolves alleged violations of the Emergency Planning and Community Right-to-Know Act (EPCRA) for Simplot's failure to report certain quantities of toxic chemicals in accordance with EPCRA standards. Under the settlement, Simplot agrees to implement specific waste management measures valued at nearly $20 million. Significantly, these measures include extensive new efforts to recover and reuse the phosphate content within these wastes and avoid their disposal in the gypstack. The settlement also includes a detailed plan setting the terms for the future closure and long-term care of the gypstack. The settlement requires Simplot to immediately secure and maintain approximately $126 million in dedicated financing to ensure that funding for closure and long-term care will be available when the facility is eventually closed. Simplot also agrees to submit revised EPCRA Form R reports (Toxic Re-

lease Inventory) for 2004 to 2013 to include estimates of certain metal compounds manufactured, processed, or otherwise used at the facility. Simplot will also pay a $775,000 civil penalty to resolve both the RCRA and EPCRA claims.

•July 14, 2020—EPA and the U.S. Department of Justice announced a proposed settlement between the United States and 16 parties that will require the design and implementation of cleanup actions in the southwestern portion of the Wells G&H Superfund Site, known as Operable Unit 4 (OU4) or the "Southwest Properties" (SWP), in Woburn, Massachusetts. The proposed settlement, if approved by the federal court, will require cleanup measures on the southwestern portion of this Superfund site. The cleanup being made possible through this settlement agreement will protect human health and the environment by addressing unacceptable risks in site soils, wetlands, and groundwater. Under the proposed consent decree, three current or former owners or operators of parcels within the SWP, 280 Salem Street LLC; ConAgra Grocery Products Company, LLC, as successor-in-interest to Beatrice Company; and Murphy's Waste Oil Service, Inc. are responsible for performing the cleanup work at the site. In addition, 13 arrangers for disposal of hazardous substances at the SWP will be required to make payments into a trust fund, to be used by the settling defendants performing the cleanup to help finance that work. Settling defendants will make payment into a trust fund. The work includes excavation and off-site disposal of contaminated soil, non-aqueous phase liquid (NAPL), NAPL-impacted soil, and wetland sediment; backfilling soil and NAPL excavations; construction of impermeable caps; pumping and treating contaminated groundwater; wetland restoration; operation and maintenance; long-term monitoring; five-year reviews; and institutional controls. EPA estimates that the remedial work will cost approximately $19.1 million.

•July 13, 2020—EPA, the U.S. Department of Justice, and the state of Texas have announced a settlement with E.I. Du Pont de Nemours and Company (DuPont) to resolve alleged hazardous waste, air, and water violations at its 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, DuPont paid a $3.1 million civil penalty for violating EPA's chemical accident prevention program. Under this settlement agreement, DuPont will pay a $3.195 million civil penalty. This settlement resolves alleged violations of the Resource, Conservation and Recovery Act (RCRA), the Clean Water Act (CWA) and the Clean Air Act (CAA) from DuPont's past chemical manufacturing operations. 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 and alleged CAA violations include failure to comply with applicable emissions standards at its Biological Water Treatment unit. Even though the facility closed in 2016, DuPont continues to operate a wastewater treatment system on site and, as a result of 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 closed chemical manufacturing plant. DuPont will perform this work pursuant to Texas' Risk Reduction Program and perform any necessary cleanup. The Consent Decree was lodged on July 9, 2020 in the United States District Court for the Southern District of Texas.

•July 15, 2020—EPA has reached a settlement with PMR Properties LLC for alleged violations of lead-based paint regulations under the federal Toxic Substances Control Act. The company manages and leases approximately 400 residential housing units in Nebraska, Iowa and Missouri. According to EPA, PMR Properties was aware of lead-based paint hazards in some of its properties but failed to notify tenants of the potential danger. Under the terms of the settlement, which was filed with EPA on July 14, 2020, PMR Properties agreed to pay a $40,800 civil penalty and certified that it is in compliance with the law. EPA also alleges that PMR Properties received information from the Iowa Department of Public Health that state inspections of certain properties demon-

strated positive test results for lead, and that PMR Properties failed to notify tenants of these known lead hazards or provide the reports before they were obligated under contract to lease the units.

• August 10, 2020—EPA announced a settlement with Mercer Foods, LLC, involving the production and distribution of an active ingredient, Pseudomonas chlororaphis, used in pesticides for organic farming. The production facility and the ingredient produced were both unregistered, in violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The company has agreed to pay a $51,905 civil penalty. The case was referred to EPA by California's Department of Pesticide Regulation (DPR) after California's Stanislaus County responded to a pesticide incident in August 2019. In this incident, five workers reported being sent to urgent care after exhibiting symptoms of pesticide exposure after having worked with the active ingredient. Pseudomonas chlororaphis may be harmful if inhaled, absorbed through skin, or swallowed. Mercer Foods has signed a certification statement assuring EPA that the company is no longer producing any ingredients regulated by FIFRA. (Andre Monette)

RECENT FEDERAL DECISIONS

EPA'S RANKING OF HAZARDOUS WASTE SITE FOR INCLUSION ON NATIONAL PRIORITIES LIST SURVIVES CHALLENGE IN THE D.C. CIRCUIT

Meritor, Inc. v. U.S. Environmental Protection Agency, 966 F.3d 864 (D.C. Cir. 2020).

The successor in interest to a polluting industrial operator challenged the listing of a site on the National Priorities List, asserting the U.S. Environmental Protection Agency (EPA) acted arbitrarily and capriciously in failing to account for mitigation measures and in using residential health benchmark to analyze whether human health was at risk from air contamination within industrial buildings.

Background

Between 1966 and 1985, Rockwell International Corporation manufactured wheel covers at a facility in Grenada, Mississippi (Rockwell Facility or Rockwell Site), which borders a residential neighborhood, as well as a creek and agricultural land. In 1985, Rockwell International sold the Rockwell Facility to another company and subsequently Rockwell International spun off its automotive division into a separate corporation called Meritor, Inc. As a result, while "Meritor never owned or operated the [Rockwell] Site[,]" it took on the liabilities of Rockwell, including those associated with the Rockwell Site. Rockwell's manufacturing activities at the facility "produced hazardous substances, including toluene, trichloroethylene (TCE), and cis-1,2-dichloroethene ("DCE"), which were stored on site" leading to the development of a plume of toluene and TCE collecting in the soil and groundwater under and around the Rockwell Facility, which was first identified via a 1994 investigation.

CERCLA and the National Priorities List

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. §§ 9601 *et seq.*, CERCLA) directs the EPA "to address the growing problem of inactive hazardous waste sites throughout the United States" (*Eagle-Picher Indus., Inc. v. EPA*, 759 F.2d 922, 925 (D.C. Cir. 1985)) by developing "criteria for determining priorities among releases or threatened releases" of hazardous waste. 42 U.S.C. § 9605(a)(8)(A). The resulting "National Priorities List" or "NPL" orders contaminated sites by "the relative risk or danger they pose to the public health, public welfare, or the environment," thereby "identif[ying] those hazardous-waste sites considered to be the foremost candidates for environmental cleanup." *CTS Corp. v. EPA*, 759 F.3d 52, 55 (D.C. Cir. 2014); 42 U.S.C. § 9605(a)(8)(B). The EPA uses the Hazard Ranking System set forth in 40 C.F.R. Part 300, App. A "to evaluate whether, and to what degree, a site poses a risk to the environment or to human health and welfare."

The Rockwell Facility

Post-1994, studies established "the continued presence of hazardous waste" at the Rockwell Facility, "which has in turn harmed air quality in the area." A 2016 EPA study identified elevated indoor concentrations of toluene, TCE, and DCE in the "main production building" and a Meritor-commissioned 2017 study "found heightened levels of toluene and TCE beneath the surface."

That same year, Meritor installed a sub-slab depressurization system below the Rockwell Facility's main building. The depressurization system was designed to reduce the intrusion of contaminated air into the building by creating a pressure differential between the building and the underlying soil. Despite improvements in air quality following the installation of this system, the degree of contamination within the main building continued to exceed ambient levels

In 2018, the EPA added the Rockwell Facility and "surrounding areas" to the NPL "based on the hazardous subsurface intrusion of toluene, TCE, and DCE." 83 Fed. Reg. at 46,411.

Meritor's Challenge to the Hazard Ranking System

Meritor challenged the EPA's application of the Hazard Ranking System to rank the severity of "subsurface intrusion" of "noxious vapors from the soil into occupied buildings." Specifically, Meritor criticized the agency for "failing to account for the company's mitigation efforts," *i.e.*, installation of the sub-slab depressurization system, and using the "residential health benchmark" in its analysis of "the 'targets' of the hazardous waste, meaning who will suffer exposure, whether humans, animals, natural resources, or sensitive environments."

The D.C. Circuit's Decision

Remediation Efforts Made

Meritor argued that the Hazard Ranking System regulations "strips away the EPA's discretion to disregard remedial measures" such as the sub-slab depressurization when analyzing "the 'likelihood of release' of hazard waste into the environment" and in its "targets" analysis, by which the agency "accounts for populations and sensitive environments located near the contaminated area."

Distinguishing prior D.C. Circuit cases that analyzed the prior 1982 version of the Hazard Ranking System (*Eagle-Picher Indus., Inc. v. EPA*, 822 F.2d 132, 149 (D.C. Cir. 1987) and *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1306–1307 (D.C. Cir. 1991)), Meritor cited "to two portions of the Hazard Ranking System that expressly account for the presence of mitigation measures." Meritor's first pointed to that portion of the current regulations that accounts for "whether a mitigation system has been installed" when assessing "the *potential* for exposure" under the "likelihood of release" analysis. The Court of Appeal dismissed this argument as irrelevant because:

> . . .the EPA had no occasion to evaluate the potential for exposure (and so to consider Meritor's installation of a sub-slab depressurization system) because the agency documented an actual, observed exposure at the site.

Rather, when exposure has been established the regulations require that the EPA "automatically assign[] the maximum score of 550 for the 'likelihood of release' component without regard to mitigation measures."

Target Analysis

As for the "target" analysis, the court noted that the EPA's exclusion of consideration of the sub-slab depressurization system "resulted in a *lower or equal* overall score for the 'targets' metric." Fundamentally, the court rejected Meritor's argument that:

> . . .the regulations' sporadic references to mitigation systems in some factors implicitly mandate the consideration of mitigation systems at every step and for every factor in the analysis.

Rather, "the Hazard Ranking System's selective inclusion and omission of mitigation systems as a consideration suggests 'that the omission' of any reference to mitigation systems in other 'context[s] was deliberate.'" Quoting *Council for Urological Interests v. Burwell*, 790 F.3d 212, 221 (D.C. Cir. 2015).

Meritor also faulted the EPA's use of a "residential health benchmark" in its "targets" analysis. The targets analysis examined the relative health risks faced by the people occupying the buildings at the Rockwell Facility. "[T]he EPA relies on an exposure scenario 'consistent with a residential individual … across all … pathways[,]" *i.e.*, oral, inhalation or other exposure to carcinogens, "'as this is most protective.'" Meritor argued the EPA should have instead employed an "industrial, rather than residential, health benchmark because the employees did not reside at the Rockwell Facility full time." But as the court pointed out, the regulations require that the residential health benchmark be weighted by "dividing the number of people" exposed "by three if they are full-time workers and by six if they are part-time workers," thereby "account[ing] for the worker's reduced hours of exposure relative to residents."

Conclusion and Implications

A big fact that seems like it *should* change the entire calculus—here, voluntary installation of an effective mitigation measure—didn't. A close reading of the applicable regulations defeated these claims, because crediting the petitioner's theories would have entailed "amend[ing] rather than apply[ing] the exist-

ing regulatory scheme." The D.C. Circuit's July 28, 2020 opinion is available online at: https://www.cadc.uscourts.gov/internet/opinions.nsf/4B3CE37E780788EA852585B30050D1D9/$file/18-1325-1853718.pdf.
(Deborah Quick)

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. July 2, 2020).

Jettisoning a straightforward application of its own regulation, the U.S. Environmental Protection Agency (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 incorpo-

rated 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.

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)

CLEAN WATER ACT CITIZEN SUIT DISMISSED BY THE DISTRICT COURT AS TIME-BARRED AND PROCEDURALLY DEFICIENT

South Side Quarry, LLC v. Metropolitan Sewer District,
___F.Supp.3d___, Case No. 3:18-CV-706-DJH-RSE (W.D. Ky. July 14, 2020).

The U.S. District Court for the Western District of Kentucky recently dismissed a citizen suit brought under the federal Clean Water Act because the statute's 60-day notice requirement was not met. The Clean Water Act's notice requirement is a "jurisdictional prerequisite to bringing suits against private defendants under the [Act]" and must "include sufficient information to permit the recipient to identify the specific standards, limitation, or order alleged to have been violated."

Factual and Procedural Background

In 2012, plaintiff Jason Lee Stanford purchased Vulcan Quarry (the quarry), a large inactive quarry now filled with water. Since 1998, the quarry has been part of a drainage system designed to prevent flooding in the area. Defendant Metropolitan Sewer District (MSD) is the quarry's sponsor and is required to maintain it. MSD does so through a "flowage" easement, which allows MSD:

> . . .the perpetual right, power, privilege and easement to permanently overflow, flood and submerge the land . . . [provided] that any use of the land shall be subject to Federal and State laws with respect to pollutants.

Separately, MSD also acquired discharge permits from Kentucky's Department of Environmental Protection (KDEP), which allow it to mitigate its ongoing problem with sanitary sewer overflows by maintaining a plan to minimize unauthorized discharge from certain combined sewage overflow locations.

Upon acquiring the quarry, Stanford and his business, South Side Quarry, LLC, (”the plaintiffs") filed a motion to show cause in 2013 against MSD, asserting that MSD should be held in civil and criminal contempt for violating the terms of the easement and diverting excessive stormwater into the quarry. The motion was denied; however, litigation surrounding the property continued.

In 2018, the plaintiffs filed suit again, this time claiming that MSD was utilizing the quarry as "a permanent settling pond/septic system/filtration system" in violation of both its KDEP permit and the CWA. Before filing suit, plaintiffs sent a notice of intent to MSD, KDEP, and the U.S. Environmental Protection Agency (EPA) conveying their intent to pursue a CWA citizen suit. The notice alleged that MSD violated its KDEP and NPDES permits by exceeding the volume of water that the permits allow MSD to route over and through the quarry. In their complaint, the plaintiffs alleged that MSD added two distinct pollutants to the quarry: 1) wastewater in an amount that exceeded the relevant permits and 2) sewage. The complaint also alleged numerous other state-law claims.

MSD moved to dismiss the case for failure to state a claim, arguing that the statute of limitations for claims brought under the CWA had lapsed and that the plaintiffs further failed to give the requisite notice as required by the CWA. With MSD's motion, the threshold issue before the court became whether the plaintiffs alleged with sufficient clarity a claim for which relief could be granted.

The District Court's Decision

Under the CWA, a citizen suit "comes to life" when five elements are present: 1) a pollutant must be 2) added 3) to navigable waters 4) from 5) a point source. Additionally, citizen-suit plaintiffs must raise their claims in accordance with the CWA's five-year statute of limitations and 60-day pre-suit notice requirement.

MSD did not take issue with the substantive validity of plaintiffs' claims, and the court likewise concluded that the plaintiffs properly asserted that MSD added sewage to the quarry and added wastewater in an amount that exceeded the relevant permits. The court then moved to MSD's argument regarding the procedural validity of plaintiffs' claims.

In this analysis, the court first clarified the difference between plaintiffs' allegations from the June 2013 motion to show cause and the October 2018

complaint by emphasizing the difference between stormwater and wastewater. While the 2013 motion established that plaintiffs were aware of pollution caused by excess *stormwater*, the 2013 motion did not show plaintiffs were aware of pollution caused by excess *sewage*. Thus, only the plaintiffs' claims regarding stormwater pollution would be time-barred by the CWA's five-year statute of limitations.

Notice and 'Sewage' As a Pollutant

With regard to sewage, however, the court explained the CWA's "strict notice requirement" was not met because "the [notice] letter [was] devoid of any allegation that MSD permitted sewage to enter the quarry." Indeed, plaintiffs' notice letter "only refer[red] to 'floodwater' and 'stormwater' as sources of pollution." So, while the letter properly explained how MSD allegedly violated the CWA when MSD exceeded the effluent standards or limitations of its KDEP permit, "[p]laintiffs' notice letter fail[ed] to identify sewage as a pollutant." Thus, the notice letter was deficient because it did not "effectively put MSD on notice that plaintiffs intended to sue MSD for polluting the quarry with sewage."

Conclusion and Implications

This case emphasizes the importance of both the CWA's 60-day notice requirement, as well as the specificity with which claims must be brought under the CWA—in this case, verbiage as to "stormwater" versus "sewage." Parties seeking relief under the CWA must give notice with sufficient information to allow defendants to identify all pertinent aspects of its alleged violations without extensive investigation. (Melissa Jo Townsend, Rebecca Andrews)

DISTRICT COURT DISMISSES CLEAN WATER ACT FOR PRE-SUIT NOTICE DEFICIENCY AND CONCLUSORY STATEMENTS IN COMPLAINT

Stevens v. St. Tammany Parish Government, *et al*, ___F.Supp.3d___, Case No. 20-928 (E.D. La. July 23, 2020).

The U.S. District Court for the Eastern District of Louisiana recently dismissed a federal Clean Water Act citizen suit due to an insufficient pre-suit notice and insufficient allegations to support plaintiffs' right to relief.

Factual and Procedural Background

On March 17, 2020, Terri Lewis Stevens, Craig Rivera and Jennifer Rivera (plaintiffs) brought suit against St. Tammany Parish Government (STPG) and the Louisiana Department of Environmental Quality (LDEQ) for violations of the Clean Water Act (CWA) and a Louisiana Pollutant Discharge Elimination System (LPDES) permit. In the initial complaint, plaintiffs alleged that sanitary sewer overflows, along with other pollutants, spilled from STPG's drainage ditches and onto their property before being discharged into various waters of the United States. Plaintiffs alleged LDEQ failed to enforce the applicable Louisiana state laws and LPDES permit.

On April 27, 2020, prior to receiving an answer from LDEQ and STPG, plaintiffs filed the First Amended Complaint (FAC). In the FAC, plaintiffs sought additional remedies specific to LDEQ's lack of enforcement of the CWA. Plaintiffs also added more claims against LDEQ, including Fifth and Fourteenth Amendment violations and unconstitutional takings of their property.

On May 12, 2020, STPG filed a motion to dismiss plaintiffs' complaint and the FAC, pursuant to Federal Rules of Civil Procedure Rule 12(b)(6). LDEQ filed a motion to dismiss for lack of jurisdiction. On June 3, 2020, plaintiffs filed for permission to file a Second Amended Complaint (SAC), prior to STPG and LDEQ's response to the initial complaint of March 17.

On June 20, 2020, Plaintiffs dismissed LDEQ without prejudice. On June 23, 2020, the court heard oral arguments for the remaining STPG motion to dismiss.

The District Court's Decision

STPG argued that plaintiffs' complaint and FAC should be dismissed on the doctrine of *res judicata* and that plaintiffs failed to provide adequate pre-suite

notice. Plaintiffs moved to dismiss STPG's motion on the grounds that the SAC rendered STPG's motion moot.

Determining the Mootness of STPG's Motion to Dismiss

To determine whether the SAC rendered STPG's pending motion to dismiss moot, the court considered whether the SAC would cure the alleged defects. Here, the court found that the SAC did not cure the alleged defects because it added very little new information. Accordingly, the court determined that STPG's motion to dismiss was not moot.

STPG's *Res Judicata* Claim

The court next considered STPG's motion to dismiss on the doctrine of *res judicata*. The court began by noting that STPG had not yet answered the initial complaint filed on March 17, 2020. Typically, *res judicata* is plead in answer to a complaint and not in a motion before an answer. However, when *res judicata* is apparent in the pleadings, a dismissal may be appropriate. Here, the court found that *res judicata* was apparent in plaintiffs' complaints and supplemental documents because plaintiffs repeatedly referenced the state court litigation. The court determined that since the *res judicata* was apparent in the pleadings, it was appropriate for STPG to assert the defense before answering plaintiffs' complaint.

The court then turned to applicable law regarding *res judicata* in Louisiana. The court found that if a valid final judgment was in favor of the defendant, and the same parties are involved in subsequent litigation, all causes of action existing at the time of the judgment are barred from future causes of action if they arise out of the same transaction.

Plaintiffs previously filed suit in the 22nd Judicial District Court for the state of Louisiana against STPG for the same conduct. After five years of litigation, the state court issued a final judgment in favor of STPG. While the judgment was on appeal, plaintiffs brought suit in the U.S. District Court for the Eastern District of Louisiana. Here, the court determined that the state court judgment was finalized and in favor of STPG. Additionally, the parties in both the state court litigation and the present litigation were identical. Finally, the court noted that plaintiffs' allegations arose out of the original complaint in the state court litigation and that no new allegations had been made since. The court concluded by holding that all but the CWA claims were barred from proceeding before the court.

Pre-Suit Notice

The court next considered whether plaintiffs pre-suit notice was adequate. STPG argued that under Rule 12(b)(6), plaintiffs did not state a claim because they did not provide the required pre-suit notice under the CWA and they failed to specify evidence of a CWA violation. The CWA requires notice to be given to a defendant before filing suit. The notice must be specific and contain the type of violation, the person(s) responsible for the violation, the location and date(s) of the violation, along with the full name, address and telephone number of the person giving notice.

Here, STPG argued that plaintiffs' pre-suit notice was vague and overly broad. The court determined that the notice was inadequate because it lacked the specific effluent standard or limitation being violated, the person or persons responsible for the alleged violation, and the date(s) of the violation.

Alternatively, the court reasoned that even if plaintiffs satisfied the pre-suit notice requirement, they still failed to state a CWA claim in their subsequent pleadings. The court noted plaintiffs' inference that the runoff from STPG's discharge would end up in waters of the United States, along with the assumption that permit noncompliance was an automatic violation of the CWA, was insufficient.

Conclusions and Implications

This case highlights the importance of an adequate pre-suit notice and adequate pleading under the federal Clean Water Act. Parties wishing to bring suit under the Clean Water Act must provide a detailed pre-suit notice to violating parties and avoid inferences in their complaints. The court's opinion is available online at: https://www.govinfo.gov/content/pkg/USCOURTS-laed-2_20-cv-00928/pdf/USCOURTS-laed-2_20-cv-00928-0.pdf
(Marco Antonio Ornelas, Rebecca Andrews)

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