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CALIFORNIA LAND USE™
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FEATURE ARTICLE

GOVERNOR NEWSOM RELEASES FINAL WATER RESILIENCE PORTFOLIO FOR CALIFORNIA'S WATER FUTURE

By Wesley A. Miliband, Esq. and Andrew D. Foley, Esq.

Governor Gavin Newsom released a final version of the Water Resilience Portfolio (Portfolio). The Portfolio represents the state's comprehensive effort to develop a coordinated strategy for the management of California's water resources over the coming years and even decades by focusing on approaches that can mitigate the increasing uncertainties and challenges associated with hydrological shifts in climate change. The resulting Portfolio outlines strategic actions and tactical directives for mitigation of the impacts of these conditions on wildlife preservation (including fisheries) and water supply reliability, while also seeking to balance complex and often competing regional, environmental and economic interests. Ultimately, development of the Portfolio is no easy undertaking nor is its anticipated implementation; however, necessity breeds innovation and the time is now to improve upon water resources management in this great state.

Background

Under Governor Brown and now Governor Newsom, the state has demonstrated a sense of urgency with respect to the critical but highly complex water management challenges posed by climate change, and frankly also implicated are political, policy, regulatory and technical issues that come into play when trying to preserve California's water rights regime while also establishing good public policy to ensure water supply reliability and health of fisheries and habitat. Hydrological shifts and temperature changes (both air and water) have exacerbated ongoing water management concerns such as flood and drought conditions, groundwater sustainability and water quality maintenance. Moreover, climate change has given rise to new concerns that complicate an already complex water management equation, particularly the threat of sea level rise to coastal communities and water infrastructure and headwater regions—namely, the state's mountain areas—having less predictability as to how much snow will fall and how much water content will actually be in the snow. Any attempt by the state to strategically address these threats must also balance that effort against the multi-faceted consideration associated with economic interests, increasing supply demands associated with population growth, limitations of current infrastructure and environmental conservation.

In response to these challenges, the Governor issued Executive Order No. N-20-19 (Order), calling for the creation of the Portfolio. The Order directs the California Natural Resources Agency, the California Department of Food and Agriculture and the California Environmental Protection Agency (collectively: Agencies) to collectively develop the portfolio by assessing the current state of affairs in California and recommending approaches that respond to projected future needs in the era of climate change. While reflecting overall goals generally consistent with existing state water policies developed under former Governor Brown's 2014 Water Action Plan, the Order called for broad reconsideration of the means by which the State would undertake to achieve those aims. After all, stating a general public policy is one thing, but developing a detailed plan with direction, or at minimum guidelines or criteria, for regional and local water agencies and water users to evaluate presents a whole different challenge.

Principles to Govern Preparation of the Portfolio

The Order specifically outlines principles to govern

the preparation of the Portfolio, which emphasize the importance of seeking multiple-benefit solutions, utilizing natural infrastructure, embracing novel solutions pursued outside California, promoting innovation and facilitating cooperation and coordination among federal, state and local agencies, as well as developing solutions that operate at the regional level.

In accordance with the Order, the Agencies conducted an extensive outreach effort in connection with the assessment and development of solutions that would be encompassed by the Portfolio. The Agencies not only sought input from the numerous government entities and agencies at all levels relevant to the state's water management, but also from a broader array of interested parties, such as sovereign tribes, environmental organizations, agricultural groups, business leaders and academic experts. The final Portfolio includes 14 new actions not contained in the draft plan released for public comment in January, reflecting input on the draft provided by more than 200 separate individuals and organizations. Generally, the revisions to the draft arising out of the outreach and comment process led to a final Portfolio with an increased emphasis on tribal interests and leadership, upper watershed health and cross-border water issues.

The Final Portfolio

As mandated by the Order, the Portfolio consists of assessment and action components. The assessment conducted under the direction of the Agencies gives a broad and comprehensive overview of current conditions and in the state, while further examining conditions and risk factors specific to ten distinct commonly-recognized hydrologic regions within the state. The solutions in the Portfolio reflect a continued focus on regional approaches supported by the state, and also provide specific direction to many of the key public agencies in order to clarify their role in carrying out the actions prescribed.

Assessment

Outlining Primary Needs and Threats

The Portfolio includes an overview of California's water system and uses, and defines particular threats to sustainable water management in the state. As noted, the effects of climate change are of particular long-term concern, presenting threats such as a potential for increasingly extreme and prolonged drought, flood and other weather conditions, as well as the potential impact of a rise in sea level on coastal communities and infrastructure. In some ways, the particular threats posed by climate change do not alter the ever-present challenges inherent developing effective water policy in California, but rather exacerbate the scale of those existing problems and the urgency of developing a plan to address areas of inefficiencies.

Such existing challenges include groundwater sustainability, vulnerable infrastructure, mitigation against drought and flood, population growth and environmental protection. The Portfolio stresses the state's reliance on water supply stored in groundwater basins (as compared to reservoir water), and depletion of those resources as a result of decades of over-pumping from the basins in many, but not all, areas. The sufficiency of major water conveyance infrastructure has long been of concern, particularly with the expectancy of a major earthquake in northern California that could imperil the levees supporting conveyance infrastructure in the Bay-Delta region that is essential to the water supply to over half of the state, and more recently reported to be concerns by some scientists that southern California is due for a large earthquake which also poses a significant threat to water infrastructure and supplies. Closely linked to these threats are significant risks to habitat, both wildlife and fisheries. Accordingly, the often-existing perception of human water resources needs being exclusive, or at least competing, with habitat needs are inextricably linked and bear a common interest for sustainability.

Comparison of Regional Vulnerabilities

Consistent with the terms of the Order, the assessment of current conditions and future needs examine the situation within the state broadly and more narrowly at the regional level. The Portfolio describes the particular circumstances present within ten distinct commonly-recognized hydrologic regions within the state. Specifically, the vulnerability of each region to specific was rated with respect to 12 separate risk categories outlined in the assessment, which included drinking water threats, water scarcity, beach conditions, water quality, flood, drought preparation, threats to local ecosystems, groundwater management challenges, sea level rise, affordability issues, agricul-

tural sustainability and significant reliance on aging state infrastructure.

Regions were given a rating between one to four in each category, with a higher number representing greater risk. The ratings reveal noteworthy stresses within key regions, including acute threats to drinking water sources, with five of the ten regions analyzed assigned the highest risk rating in that category, including the San Joaquin, South Lahontan, Central Coast, Tulare Lake and Colorado River regions. General water scarcity issues are considered most immediate in the San Joaquin, Central Coast and Tulare Lake regions. Risk of flooding was determined to be greatest in the Sacramento River, San Francisco, San Joaquin and Tulare Lake regions, with drought preparation deemed most severely limited in the North Coast, North Lahontan, South Lahontan and San Joaquin regions. According to the assessment, groundwater management challenges are greatest in the San Joaquin, Central Coast and Tulare Lake regions. Relatedly, agricultural sustainability risks were rated highest in the San Joaquin and Tulare Lake regions. These two regions, in addition to the Sacramento River region, also had the highest risk rating assigned to them with respect to their reliance on aging state infrastructure.

Low-risk grades assigned to regions are also worthy of note. For instance, drinking water supplies do not appear to be at risk in the North Coast and San Francisco regions, each of which were assigned the lowest vulnerability rating of 1 in that category. The San Francisco and South Coast regions also received the lowest vulnerability rating with respect to drought readiness. The Portfolio rated the risk from reliance on aging state infrastructure lowest in the North Coast, North Lahontan and Colorado River regions, and other than the three high-risk regions for this category noted above, no other region was assigned a risk rating higher than 2 in this category.

Notably, ratings assigned in certain categories reflect more of a shared vulnerability among regions. All regions were deemed to have significant vulnerability with respect to affordability challenges, excepting only the San Francisco region. All regions in which sea level rise was an applicable risk category received a rating of 3 or 4, reflecting high vulnerability. All regions were given a moderate or relatively high vulnerability rating for ecosystem vulnerability, with no single region assigned the lowest risk rating, and only one (Central Coast), assigned the highest. Lastly, water scarcity and impaired water quality appears to be at least a moderate threat in every region, with three regions given the highest vulnerability rating in the water scarcity category as noted above and one region (San Francisco) assigned the highest vulnerability rating to impaired water quality vulnerability.

In a general sense, the breadth of risk categories illustrates the range and complexity of issues the Portfolio confronts, while the variety among ratings assigned to different regions within those risk categories underscores the difficulty of developing a broad strategy at the state level that can adequately respond to the unique circumstances present in each region. Moreover, the results of the regional assessment detailed by the Portfolio appear to support the Order's emphasis on developing a plan involving coordinated regional solutions wherever possible. Indeed, a major theme of the strategic approach outlined by the Portfolio is programs administered regionally and supported at the state level, as further described below.

The assessment of broad and regional risks led to certain key insights described in the Portfolio, which guided the ultimate solutions presented in the document and described above.

Solutions

Informed by the assessment, the Portfolio describes over 100 distinct actions intended to address the challenges of sustainable, responsive water management and policy within the State. These solutions are primarily aimed at protecting the long-term viability of the State's water supply while promoting environmental sustainability.

Emphasis on Coordinated Regional Efforts with State Support

The Order and Portfolio make clear, both expressly and through the assessment data presented, that an effective state-wide policy cannot be a "one size fits all" approach. Accordingly, a core element of solutions outlined in the document involves coordinated efforts at the regional level bolstered by commitments and support at the State level.

A primary recommendation of the Portfolio is the diversification of regional supply, citing the danger of relying too greatly on individual sources of supply due

to the projected reduction of snowpack and potential for extreme drought conditions in the coming years. The Portfolio notes that diversification will vary by region, but provides several general examples of how water supply might be diversified within a region, including the promotion of higher use efficiency and waste elimination as well as recycled water programs. Additionally, the Portfolio suggests desalination as a potentially beneficial option where feasible.

The Portfolio further identifies a number of specific proposals for how state agencies can support the regional supply diversification effort. The Portfolio recommends that agencies work with local water districts to promote conservation. This aspect could become challenging from a practical and legal set of perspectives, as conservation mostly is a necessity a "new way" of managing the resource the long-term sustainability, but local agencies often become confronted with realities that strong conservation reduces water demand but not to the same extent for operational and maintenance needs, thus requiring in some instances water rate increases despite customers doing the "right thing" by trying to conserve their water use. Hence, a local challenge throughout the state to conserve the stream of water while still needing to preserve the stream of revenue.

Building on Progress, Policies and Programs

Another common theme among the solutions offered by the Portfolio is an effort to build on previous efforts and otherwise maximize the implementation of certain existing laws, regulations and water programs in the state, in order to realize their usefulness in addressing various needs.

For example, the state is now pursuing the Delta Conveyance Project, which is to a large extent an iteration, albeit a separate project, from California WaterFix, more commonly known as the "twin tunnels" project during Governor Brown's tenure. Also ongoing are the Salton Sea Management Plan, Integrated Regional Water Management Program, efficiency programs ("Make Conservation a Way of Life" laws, State Water Efficiency and Enhancement Programs), among various others identified in the Proftfolio.

In addition to the above-referenced programs, the Portfolio evidences an overall goal of streamlining processes and coordination of interests relating to California water management. Many such actions involve the reduction of permitting and other legal hurdles that hinder the development of projects and other initiatives that the Portfolio contemplates as part of California's water resilience strategy.

Technological and Analytical Efforts

Ongoing monitoring and modeling of relevant conditions represents another clear priority of the Portfolio generally, particularly with respect to environmental protection efforts. If effectively implemented, such efforts would generally facilitate the collection of precise and reliable information, which information will be critical to developing and enhancing a level of responsiveness to the complex challenges addressed by the Portfolio.

Many recommended actions involve the development of technologies and analytical tools beyond what is currently available. For instance, the Portfolio calls for the development of new programs to detect and manage invasive species disrupting ecosystems, as well as programs to protect and manage threatened wildlife habitats and species. Other key innovations and improvements recommended in the Portfolio include tools for monitoring infrastructure and technologies for promoting efficient water use.

Responsible Agencies

The Portfolio also provides some detail on the means of implementation for the proposals and solutions described. Such detail includes clarification of the roles envisioned for a number of the agencies that will be central to the implementation of the Portfolio's strategies. In addition to the Agencies charged with developing the Portfolio, relevant agencies include the State Water Resources Control Board (SWRCB), Department of Water Resources (DWR), California Department of Fish and Wildlife (CDFW), Delta Stewardship Council and the Regional Water Quality Control Boards (RWQCBs).
Many of the Portfolio actions require participation by multiple agencies. For example, both DWR and the SWRCB are described as key agencies with respect to the implementation of the "Make Conservation a Way of Life" laws and the Sustainable Groundwater Management Act (SGMA), funding of multiple-benefit groundwater recharge programs, support for aquifer enhancement initiatives and development of desalination technologies, among others. The Agencies continue to be jointly tasked with outreach

efforts to various stakeholders for the development of voluntary solutions promoting resilience, which appears to be an extension of the outreach conducted by the Agencies during the Portfolio's development. CDFW is to work with partner agencies on a number of initiatives, such as expanding the use of the Regional Conservation Investment Strategies developed in 2017 guiding water project mitigation needs, eradicating a South American rodent species threatening important Central Valley wetlands and levees, as well as developing analytical tools related to the identification of functional ecosystem flows and modeling for assessing streamflow depletion caused by groundwater pumping. In other contexts, a single agency will be charged with taking the lead.

State Programs

The Portfolio also summarizes some of the state water programs and which will play a role in the execution of the Portfolio's strategies, generally and as part of the support to be provided by the state in connection with regional efforts. The programs are classified under broad categories including monitoring and modeling, management, climate change, flood, planning, environment, State Water Project and funding.

In the end, by whatever measure one chooses to utilize, the Portfolio is bold, innovative and detailed to state clear policy from this State Administration on how to ensure the state, and all of its water users, continue to have a clean and reliable water supplies available for use over the long term.

Conclusion and Implications

Because the Portfolio calls for broad strategies and solutions, clarification regarding the implementation of those actions is essential given the number of public entities and other stakeholders involved. Accordingly, the Portfolio identifies the agency or agencies associated with the implementation of many of the recommended actions. In addition, the Portfolio describes some of the key state programs that will play a role, thus creating expectations and even accountability for performance and ultimately success of the Portfolio and California's future for water resource management. The Portfolio is an extensive look to the future of California resources.

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LAWSUITS FILED OR PENDING

STATE ATTORNEYS GENERAL CHALLENGE TRUMP ADMINISTRATION'S REVAMP OF THE NATIONAL ENVIRONMENTAL POLICY ACT

In July 2020, the Council on Environmental Quality adopted sweeping revisions to its longstanding 1978 regulations detailing implementation of the National Environmental Policy Act (NEPA). In late August 2020, several states and local government entities brought an action against the council alleging that the agency's newly adopted regulations violated *NEPA* and the Administrative Procedure Act. As this article went to press, a motion seeking to enjoin implementation of the Final Rule on NEPA was made before the court. [*States of California, et al. v. Council on Environmental Quality, et al.*, Case No. 3:20-cv-06057 (N.D. Cal. 2020).]

Background

Enacted on January 1, 1970, the National Environmental Policy Act is a federal law that promotes the protection of the environment and established the President's Council on Environmental Quality (CEQ or Council). NEPA was developed at a time of heighted awareness and growing concern about the environment in response to a series of high-profile environmental crises in the late 1960s, such as the Cuyahoga River fire. As a result, NEPA has been described as the foundation for many state-level environmental protections across the country and is often referred to as the "Magna Carta" of United States environmental law. *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 193 (D.C. Cir. 1991).

To ensure that the policies outlined by NEPA are "integrated into the very process of decision-making," NEPA outlines "action-forcing" procedures. *Andrus v. Sierra Club*, 442 U.S. 347, 349-50. These procedures require federal agencies to prepare a detailed environmental review or Environmental Impact Statement (EIS) for major federal actions significantly affecting the quality of the environment, including those impacting regulated waters. *Id.* In short, NEPA requires federal agencies to make well-informed and transparent decisions based on a thorough review of environmental and public health impacts, and input from states, local governments, and the public.

In 1978, CEQ promulgated regulations that have guided the implementation of NEPA for more than 40 years. These longstanding regulations have directed federal agencies, and in some situations, state agencies and local governments involved in major Federal actions significantly affecting the environment, on how to comply with NEPA's procedural requirements and its environmental protection policies. *See,* 40 C.F.R. pt. 1500 (1978) (1978 regulations). These regulations have remained largely unchanged with the exception of two minor amendments enacted in 1986 and 2005.

In 2017, President Donald Trump issued Executive Order 13,807, which called for revisions to the NEPA regulations, to expedite infrastructure projects and boost the economy. In response to this Executive Order, CEQ announced a plan to overhaul the 1978 regulations, including a list of topics that might be addressed by the rulemaking process, and taking public comments. *Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act*, 83 Fed. Reg. 28,591 (June 20, 2018) (Advance Notice). On January 10, 2020, CEQ released its proposal (Proposed Rule) to revise the 1978 regulations, which included revisions that would significantly alter the current implementation of NEPA.

After the publication of the Proposed Rule, CEQ provided 60 days for the public to review, analyze, and submit comments. During this timeframe, interested parties submitted over 1.1 million comments, a significant portion of which opposed the Proposed Rule. Four months after the close of the comment period, the Final Rule was published in the *Federal Register* on July 16, 2020. The Final Rule adopted a majority of the changes outlined by the Proposed Rule's revisions to the 1978 Regulations.

In response to the publication of the Final Rule, several states and local government entities filed a lawsuit against CEQ in the U.S. District Court for

the Northern District of California, alleging that CEQ's adoption of the Final Rule violated NEPA and the Administrative Procedure Act (APA).

The NEPA Claims

An agency does not have authority to promulgate a regulation that is "plainly contrary to the statute." *Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or.*, 515 U.S. 687, 703 (1995). Plaintiffs allege that the Final Rule violates NEPA by adopting provisions that, both individually and collectively, conflict with NEPA's overriding purposes of environmental protection, public participation, and informed decision-making. Specifically, the Final Rule may potentially restrict the number of projects subject to detailed environmental review, while also limiting the scope of environmental effects to be considered by federal agencies when conducting NEPA review. For example, if a project could potentially impact a local water source, the conducting agency may be required to consider only direct impacts of the imposed action on the water source, rather than future/cumulative actions. According to plaintiffs, these two changes directly conflict with NEPA's goal of applying the statute to the "fullest extent possible" and addressing the "long-range character of environmental problems." *See*, 42 U.S.C. §§ 4311, 4322. As a result, according to plaintiffs, the Final Rule should be set aside because it is plainly contrary to NEPA.

Additionally, NEPA requires federal agencies to prepare an EIS for "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). CEQ is a federal agency subject to NEPA. An EIS must discuss:

> . . .the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable committed of resources involved in the proposed action. *Id.*

Under CEQ's 1978 regulations, a "major Federal action" included "new or revised agency rules [and] regulations." 40 C.F.R. § 1508.18(a) (1978). As a result, plaintiffs allege that CEQ was required, but failed to address the Final Rule's significant environmental impacts and reasonable alternatives to the Final Rule in an EIS or, at a minimum, an Environmental Assessment (EA). Given CEQ's failure to prepare an EA or EIS, the states argue that the Final Rule should be declared unlawful and set aside.

The APA Claims

The Administrative Procedure Act provides that a court shall "hold unlawful and set aside" agency action that is arbitrary and capricious without the observance of procedure required by law or in excess of statutory authority. 5 U.S.C. § 706(2). Pursuant to the APA, in promulgating a regulation an:

> . . .agency, must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. *Motor Veh. Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983).

Plaintiffs allege that in promulgating the Final Rule, CEQ failed to provide a rational explanation for its changes to its longstanding NEPA interpretations and policies, relied on factors Congress did not intend for CEQ to consider, and offered explanations that ran counter to the evidence before the agency. Similarly, plaintiffs allege that CEQ lacked the statutory authority to implement certain provisions of the Final Rule, such as defining "major Federal action" to exclude an agency's failure to act, directly contradicting the 5 U.S.C. § 551(13). Plaintiffs also allege that CEQ failed to properly follow the APA's notice and comment requirements by failing to respond significant comments. As a result, plaintiffs argue that the Final Rule should be ruled unlawful and set aside on these grounds, in addition to the NEPA ground discussed above.

Conclusion and Implications

The Final Rule marks a significant alteration of the current NEPA scheme that will likely alter the environmental analysis undertaken for future federal and federalized projects, including those related to water. This suit led by a variety of state and local governments is the latest in a line of legal challenges of the Final Rule. In early August, a coalition of environmental groups led by the Natural Resources Defense Council, filed suit against the administration, chal-

lenging the rollback of environmental protections as outlined by the Final Rule. Ultimately, it remains to be seen if these legal proceedings will result in a rollback of the changes outlined in the Final Rule. The lawsuit can be found online here: https://oag.ca.gov/system/files/attachments/press-docs/%5B1%5D%20Complaint%20for%20Declaratory%20and%20Injunctive%20Relief.pdf.

Editor's Note:

On September 22, 2020, the California Attorney General issued a 60-day notice of intention to sue the CEQ, along with several other states, on a new cause of action in relation to the NEPA Final Rule—violation of the federal Endangered Species Act. For the notice of intention, *see:* https://oag.ca.gov/sites/default/files/Notice%20Letter%20to%20CEQ.pdf.pdf. (Geremy Holm, Miles Krieger, Steve Anderson)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECT'S CLAIMS THAT ENVIRONMENTAL REVIEW WAS REQUIRED OF PROSPECTIVE MINE PROJECT AFTER BLM APPROVED MINERAL EXPLORATION PLAN

Chilkat Indian Village of Klukwan et al. v. U.S. Bureau of Land Management et al., *Unpub.*, Case No. 19-35424 (Aug. 28, 2020).

In an *unpublished* decision, the Ninth Circuit Court of Appeals rejected a tribal village and environmental groups' challenge to an Environmental Assessment (EA) by the U.S. Bureau of Land Management (BLM) when it approved a mining exploration project in southeastern Alaska. Specifically, plaintiffs challenged the BLM's approval of the mining exploration plan for not analyzing environmental impacts of mine development and extraction if applicants located valuable minerals. The court rejected these claims, holding that: 1) an Environmental Impact Statement (EIS) was not required to analyze prospective mining activity because BLM approval of mine exploration plan did not amount to an "irreversible and irretrievable commitment" by BLM to permit a mine development and extraction; 2) that the Environmental Assessment for the mine exploration plan did not need to analyze mine development and extraction as a "cumulative impact"; and 3) that the EA did not need to analyze a future mine as a "connected action" under the National Environmental Policy Act (NEPA).

Factual and Procedural Background

The Chilkat Indian Village of Klukwan and several conservation groups brought a lawsuit against the BLM in 2017 for violating the National Environmental Policy Act when it approved a mining exploration operations plan proposed by a Canadian mining firm. The exploration project was for an area in southeastern Alaska named the "Palmer Project lands." Under federal law, BLM can grant exploration licenses to private companies to explore BLM land for potentially valuable mineral resources. If such resources are discovered, the exploring company often obtains ownership rights to mine and extract such resources.

Plaintiffs alleged that the BLM failed to prepare an EIS of for prospective future mine development resulting from BLM's approval of the mining exploration plan, and similarly failed to consider such mining and extraction in the EA the BLM performed.

The U.S. District Court for Alaska denied each of plaintiff's claims.

The Ninth Circuit's Decision

The Ninth Circuit also rejected each of the plaintiff's claims, discussed individually, below.

An Environmental Impact Statement Was Not Required

First, the court ruled that an EIS was not required to consider the environmental impacts of the future development of a on the Palmer Project lands. As the court noted:

> . . .[a]n EIS is intended to apprise decision makers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options.

Under NEPA, an agency must consider all of the environmental impacts of a project "at the agency's point of commitment," in other words environmental impacts must be studied at:

> . . .the point at which it irreversibly and irretrievably commits federal land to activities that could have a significant impact on the environment.

As the court noted, an EIS:

> . . .must include a statement regarding any irreversible and irretrievable commitments of

> resources which would be involved in the proposed action should it be implemented.

Plaintiffs argued that by approving operations plans for mine exploration, BLM lost its authority to preclude Constantine Metal Resources from developing hard rock mineral mines at the project site. When valuable minerals are found, under the Federal Land Policy and Management Act (FLPMA), plaintiffs argued the BLM would lose its ability to remove the affected areas from the General Mining Act, thus precluding BLM's ability to prevent mining activities in affected areas.

However, according to the court:

> The record containe[ed] insufficient evidence to conclude that BLM's commitments [were] either irreversible or irretrievable. For example, the record contains no indication that BLM cannot still successfully petition the Secretary [of the Interior] to withdraw [the lands subject to mine exploration] under the FLPMA.

The court agreed that BLM's approval of a mining exploration plan increased the likelihood that the mining firm would discover minerals that would limit the Secretary of the Interior's ability to prevent mining on the property. However, it found that plaintiffs had failed to demonstrate that such a discovery was imminent, nor that BLM's approval of an exploration plan amounts to an "irreversible and irretrievable commitment of the Palmer Project lands to future mine development."

Ultimately, the court found that BLM did not violate NEPA's timeliness requirements by failing to examine the environmental impacts of a future mine on the Palmer Project lands.

Failure to Consider Future Mining Impacts As Cumulative in the EA

Regarding the Environmental Assessment for BLM's approval of the mine exploration plan, the court held that BLM did not act arbitrarily by failing to consider the impacts of future mining activity as "cumulative" to those examined in the Environmental Assessment. As the court noted, NEPA requires an EA to "consider the cumulative impacts of an action under consideration." However:

> . . .[i]f the agency does not have enough information to permit meaningful consideration and the parameters of a future project are unknown. . .the court has found that the agency does not act arbitrarily by excluding those projects from its analysis of the cumulative impact.

Here, the court noted that plaintiffs failed to point to any reliable study or projection of future mining on the Palmer Project lands in the record. While the record included some data demonstrating general plans for expanding mining, this data alone did not require a cumulative impacts analysis in the EA for the exploration plan.

Development of a Future Mine Was Not a 'Connected Action' to be Addressed in the EA

Finally, the court also held that BLM did not err by determining that development of a future mine on the Palmer Project lands was not a "connected action" that must be considered in the EA. To determine whether actions are connected, courts apply an "independent utility" test to decide whether multiple actions are so connected as to mandate consideration in a single EA. The court noted that the critical question in making this determination is whether each of the two projects would have taken place with or without the other. Here, the record indicated mineral exploration projects such as the operations plans approved by BLM, often move forward even when a mine is never developed.

Conclusion and Implications

Although *Chilkat Indian Village* is an *unpublished* decision, it will likely guide BLM decision-making with regard to the scope of environmental analysis required when approving operations plan for hard rock mineral exploration. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2020/08/28/19-35424.pdf.
(Travis Brooks)

NINTH CIRCUIT FINDS PROJECT FOR REMOVAL OF FIRE-DAMAGED TREES DID NOT FALL WITHIN NEPA CATEGORICAL EXCLUSION FOR ROAD REPAIR

Environmental Protection Information Center v. Carlson, 968 F.3d 985 (9th Cir. 2020).

An environmental organization filed a lawsuit challenging the U.S. Forest Service's determination that a project for removal of fire-damaged trees near roads fell within the scope of the National Environmental Policy Act's (NEPA) categorical exclusion for road repair and maintenance. After the U.S. District Court denied the organization's motion for a preliminary injunction, the Ninth Circuit Court of Appeals reversed, finding that the project did not fall within the scope of the exclusion.

Factual and Procedural Background

In July 2018, the Ranch Fire burned more than 400,000 acres in northern California, including almost 300,000 acres in the Mendocino National Forest. After the fire, the Forest Service approved the "Ranch Fire Roadside Hazard Tree Project," which authorizes the Forest Service to solicit bids from private logging companies for the right to fell and remove large fire-damaged trees up to 200 feet from the side of roads in the National Forest. The primary purpose of the project was to reduce current and potential safety hazards along roads in the National Forest.

Rather than preparing an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) pursuant NEPA, the Forest Service relied on a categorical exclusion for the "repair and maintenance of roads, trails, and landline boundaries." Plaintiff Environmental Protection Information Center (EPIC) challenged that action, contending that the project would not qualify for the categorical exclusion. Because logging already had begun in certain areas and the Forest Service had finalized bidding on another area, EPIC sought a preliminary injunction. The District Court denied that motion, and EPIC then appealed.

The Ninth Circuit's Decision

When deciding whether to issue a preliminary injunction, a court considers whether the requesting party has shown: 1) that it is likely succeed on the merits; 2) that it is likely to suffer irreparable harm in the absence of the preliminary relief; 3) that the balance of equities tips in its favor; and 4) that an injunction is in the public interest.

Likelihood of Success on the Merits

The Ninth Circuit first addressed the likelihood of EPIC prevailing on the merits, noting that "repair" and "maintenance" are common words with well-understood ordinary meanings. The court also noted that the exclusion provides examples, including: grading, resurfacing, and cleaning the culverts of roads; grading a road; clearing the roadside of brush without the use of herbicides; and resurfacing the road to its original condition. While the exclusion notes that "repair and maintenance" is not limited to these examples, the court inferred that other examples should be similar in character to the examples.

Within that context, the Ninth Circuit framed the issue as whether a commercial logging project that includes felling large, partially burned "merchantable" trees—including 100-and 111-foot trees located 150 and 166 feet from roads, as well as taller trees even farther away—is "repair and maintenance" within the meaning of the exclusion. While it agreed that felling a dangerous dead or dying tree next to a road would come within the scope of the exclusion, it found that the project would allow for the felling of many more trees than that. An exclusion of such limited scope, the court concluded, could not reasonably by interpreted to authorize a project that allows commercial logging of large trees up to 200 feet away from either side of hundreds of miles of Forest Service roads.

Irreparable Harm

The Ninth Circuit next considered the likelihood of irreparable harm, noting that ongoing harm to the environment constitutes irreparable harm warranting an injunction. The court also referenced an affidavit from one of EPIC's members, which stated that the member's enjoyment of the National Forest would be diminished if extensive logging were to occur, as

would be allowed under the project, and attached two research articles addressing the effects of logging on post-fire landscapes.

Balance of Equities and the Public Interest

Finally, the Ninth Circuit considered the balance of equities and the public interest (the court noted that when the government is a party, it considers the balance of equities and the public interest together). The Forest Service contended that these factors favored it rather than EPIC because the harm suffered by EPIC and its members was minor, as the area covered by the project comprised only 1.6 percent of the total area, and the project sought to reduce the threat to public safety and to preserve the long-term forest health."

While the court agreed that public safety and forest health were important factors, it was not persuaded that safety actually would be put at risk by granting the relief EPIC sought. In particular, the court found that the project would allow the felling of trees that are of such a distance that their tips would never come close to the edge of the road, even if the trees fell toward the road at a 90-degree angle. Further, commercial logging companies working under the project would not fell hazardous trees smaller than 14 inches diameter at breast height, even if those trees are next to the road."

In light of its analysis of the above factors, the Ninth Circuit concluded that EPIC would succeed on the merits of its claim; that it would suffer irreparable, though limited, harm; and that it has demonstrated that the balance of equities and the public interest weigh in its favor. It therefore reversed and remanded for further proceedings. The opinion also includes a dissent that would have found in favor of the Forest Service.

Conclusion and Implications

Here, the Ninth Circuit found that the Forest Service should not have categorized the tree-cutting and removal project as a categorical exclusion to the mandates of NEPA. The case is significant therefore not only for its discussion of categorical exclusions, but also for its substantive analysis of issues pertaining to injunctive relief in the context of NEPA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/08/03/19-17479.pdf. (James Purvis)

RECENT CALIFORNIA DECISIONS

CALIFORNIA SUPREME COURT HOLDS COUNTY'S BLANKET CLASSIFICATION OF WELL CONSTRUCTION PERMIT ISSUANCES AS MINISTERIAL VIOLATES CEQA

Protecting Our Water and Environmental Resources v. County of Stanislaus, ___Cal.5th___, Case No. S. 251709 (Aug. 27, 2020).

The CaliforniaSupreme Court in *Protecting Our Water and Environmental Resources v. County of Stanislaus* found that the County of Stanislaus (County) had violated the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq*.) by making a "blanket classification" that all permits issued under Chapter 9.36 of its groundwater well permitting ordinance, other than those requiring a variance, were "ministerial." The Court found the practice unlawful under CEQA because, ". . . while many of its decisions are ministerial. . . some of County's decisions may be discretionary."

Factual and Procedural Background

In 1968, the California Department of Water Resources (DWR) issued Water Resources Bulletin No. 74, Water Well Standards: State of California. As revised and supplemented, Bulletin No. 74 has been described as a "90-page document filled with technical specifications for water wells."

Under Water Code § 13801, subdivision (c), counties are required to adopt well construction ordinances that meet or exceed the standards in Bulletin No. 74. Many counties have incorporated the bulletin's standards into their well permitting ordinances.

In 1973, the County of Stanislaus enacted Chapter 9.36 of its County Code regulating the location, construction, maintenance, abandonment, and destruction of wells that might affect the quality and potability of groundwater. Many of the permit standards in Chapter 9.36 incorporate by references standard set forth in Bulletin No. 74, including Standards 8.A, 8.B, and 8.C.

Standard 8.A addresses the distance between proposed wells and potential sources of contamination such as storm sewers, septic tanks, feedlots, *etc*. It requires that all wells "be located an adequate horizontal distance" from those sources and provides specific separation distances that are "generally" considered to be adequate—but allows an agency to increase or decrease suggested distances, depending on circumstances.

Standard 8.B provides that "[w]here possible, a well shall be located up the ground water gradient from potential sources of pollution or contamination." Under Standard 8.C, "[i]f possible, a well should be located outside areas of flooding."

Chapter 9.36 of the County Code also allows for variance permits to be issued by the County Health Officer authorizing an exception to any provision of Chapter 9.36 "when, in his/her opinion, the application of such provision is unnecessary." When authorizing a variance, the health officer may prescribe "such conditions as, in his or her judgment, are necessary to protect the waters of the state."

In 1983, the County adopted its CEQA regulations generally classifying *all* well construction permits as ministerial projects absent a variance permit. In 2014, the County amended Chapter 9.37 of the County Code to prohibit the unsustainable extraction and export of groundwater. Chapter 9.37 requires that permit applications also satisfy Chapter 9.36.

Since 2014, the County has had a practice of treating all non-variance permit approvals as ministerial. Plaintiffs sued the County, alleging "a pattern and practice" of approving well permits without CEQA review. Plaintiffs asserted that all permit issuance decisions under Chapter 9.36 are discretionary because the County can:

> . . .deny [a] permit or require changes in the project as a condition of permit approval to address concerns relating to environmental impacts.

The trial court ruled that the County's approval of all non-variance permits was ministerial. The Court

of Appeal reversed, concluding that issuance of well construction permits is a discretionary decision, but acknowledged that many of the decisions the County may make under Chapter 9.36 would be ministerial. Nevertheless, the appellate court found that the County's compliance determination under Standard 8.A involved sufficient discretionary authority to make the issuance of all permits under Chapter 9.36 discretionary—which would trigger CEQA compliance.

The Supreme Court granted the County's petition for review.

The Supreme Court's Decision

The Supreme Court began its inquiry by distinguishing discretionary projects from ministerial projects. A project is discretionary if the government can shape the project in any way which could respond to any of the concerns which might be identified" during an environmental review. The Court noted that when a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary.

De Novo Review

In setting forth the standard of review, the Supreme Court articulated that because the County's position that the permits were regardless of the circumstances is based on the County's legal interpretation of Chapter 9.36, the Court reviews that interpretation *de novo*.

Standard 8.A Confers County Discretion to Deviate from General Standards

The Court concluded that the plain language of Standard 8.A authorizes the County to exercise judgment or deliberation when it decides to approve or disapprove a permit. Although the standard sets out distances generally considered adequate, individualized judgments may be required. For example, Standard 8.A notes that an:

> . . .adequate horizontal distance may depend on '[m]any variables' and '[n]o set separation distance is adequate and reasonable for all conditions.

The Court acknowledged that the standard does provide a list of minimum suggested distances, but notes that Standard 8.A expressly provides that "[l]ocal conditions may require greater separation distances." Moreover, if, in the opinion of the enforcing agency adverse conditions exist, Standard 8.A requires that the suggested distance be increased, or special means of protection be provided. Finally, approval of lesser distances may be allowable by the enforcing agency on a "case-by-case basis." The Supreme Court concluded that the language in Standard 8.A confers significant discretion on the County to deviate from these general standards depending on the circumstances. Such permit issuance cannot therefore be classified as ministerial.

Limited Discretion is Not the Same Thing As Lacking Discretion

The Supreme Court rejected the County's argument that permit issuance is ministerial because under Standard 8.A the County may only adjust the location of a well to prevent groundwater contamination. Chapter 9.36 does not allow the County to address other environmental concerns or impose other measures that might prevent groundwater contamination, such as regulating pesticides or fertilizers. In response, the Court stated that "[j]ust because the agency is not empowered to do everything does not mean it lacks discretion to do anything." That the County has the authority to require a different well location, or deny the permit, is sufficient to make the issuance of the permit discretionary.

The Appropriate Remedy

The Supreme Court, however, disagreed with the appellate court that permits issued under Chapter 9.36 are always a discretionary project. The fact that an ordinance contains provisions that allow an agency to exercise independent judgment in some instances does not mean that all permits are discretionary. The Court observed that sometimes the discretionary provisions are not relevant to a particular permit. For example, Standard 8.A only applies when there is contamination source near a proposed well.

The Supreme Court concluded by reversing the Court of Appeal holding that all permit issuances under Chapter 9.36 are discretionary but finding that plaintiffs were not entitled to a declaration to that

effect nor an injunction requiring the County to treat all permit issuances as discretionary. Rather, the Court held that plaintiffs were entitled to a declaration that the County's blanket ministerial categorization is unlawful:

> Accordingly, classifying all issuances as ministerial violates CEQA. Plaintiffs are entitled to a declaration to that effect. But they are not entitled to injunctive relief at this stage, because they have not demonstrated that *all* permit decisions covered by the classification practice are discretionary.

Conclusion and Implications

In light of this decision, a local agency that categorically classifies the issuance of a particular permit as ministerial may want to review its permitting ordinance to ensure that it complies with the Supreme Court's holdings. When an ordinance contains standards which, if applicable, give an agency the required degree of independent judgment, the agency may not categorically classify the issuance of permits as ministerial. But the agency may classify a particular permit as ministerial and develop a record in support of that classification. The court's opinion is available here: https://www.courts.ca.gov/opinions/documents/S251709.PDF.
(Christina Berglund)

FOURTH DISTRICT COURT FINDS IMPERIAL IRRIGATION DISTRICT WATER ALLOCATION PROGRAM INVALID BUT NOT A 'TAKING' OF WATER RIGHTS

Abatti v. Imperial Irrigation District,
52 Cal.App.5th 236 (4th Dist. 2020), as modified on denial of reh'g (Aug. 5, 2020), review filed (Aug. 24, 2020).

In a years-long dispute over water allocations among irrigation district water users in the Imperial Valley, the Fourth District Court of Appeal recently issued an opinion in *Abatti v. Imperial Irrigation District* addressing the limited nature of Imperial Irrigation District (IID) landowner rights to receive water service and the parameters within which IID may adopt programs allocating limited water supplies while recognizing statutory priorities and conservation mandates.

Background

As summarized in the Opinion, IID is the sole source of fresh water for the Imperial Valley in southern California, all of which comes from the Colorado River. Approximately 97 percent water distributed by IID is used for agricultural purposes. IID is a party to various judgments, settlement agreements and related agreements—some dating back many decades—governing allocation of Colorado River water supplies. Under one such agreement—the 2003 Quantification Settlement Agreement (QSA)—IID's entitlement to Colorado River supplies was capped at 3.1 million acre-feet, subject to an overrun policy requiring conservation and net returns to the water system in event of overuse.

As part of implementing the QSA, IID imposed land fallowing and water use efficiency conservation measures and developed programs to allocate its water resources during shortage conditions. In 2013, the IID board of directors (IID Board) adopted an "equitable distribution plan" (EDP), which unlike previous plans, provided for an annual apportionment that would not require the presence of a water shortage as a precondition and was intended to be permanent. Under the EDP and related IID Board actions, water would be allocated first to non-agricultural users, with remaining amounts allocated among farmers. Agricultural allocations would be made according to a combination of farmers' historical use and a distributed allocation of total water on a per-acre basis. Farmers would also be able to share, buy and sell water through a clearinghouse.

Plaintiff and appellant Abatti and his family have been farming in the Imperial Valley for more than a century. As a recipient and user of IID water, Abatti filed a petition for writ of mandate and related claims in the Imperial County Superior Court challenging

the EDP and related IID actions. Abatti objected to EDP allocation prioritization and asserted claims for declaratory relief, an uncompensated taking of Abatti's claimed water rights, and a breach of fiduciary duty. Abatti asserted that the farmers possess water rights entitling them to receive water from IID sufficient to meet their reasonable irrigation needs and that such water rights derive from amounts historically used to irrigate their crops. IID contended that while agricultural users possess a right to water *service*, that right is not quantified and is also not a water right in the traditional common law sense. IID further asserted that the EDP was consistent with IID's obligation to distribute water equitably to all of its while fulfilling its other obligations such as conservation and operating within its Colorado River entitlement.

Trial Court Proceedings

The trial court struck Abatti's breach of fiduciary duty and taking claims, and allowed the remaining claims to proceed. In 2017, the trial court issued a writ of mandate directing IID to repeal the EDP. In its statement of decision, the trial court determined the parties' water rights, including finding that, based on historical use, farmers own the equitable and beneficial interest in the district's water rights, which are appurtenant to their lands and is a constitutionally protected property right. It found that IID abused its discretion by prioritizing non-agricultural water users ahead of agricultural users, by violating both "no injury" rules applicable to water transfers and appurtenancy rules, and by the methodology IID selected to apportion agricultural water among farmers.

The trial court also determined ruled that Abatti's claims were not time barred or estopped by a prior validation action. Finally, the judgment entering declaratory relief also expressly prohibited IID from prioritizing any non-domestic water users over farmers, from apportioning agricultural water without consideration for historical use, and from entering into contracts that guarantee water to any non-domestic or non-agricultural water users during shortage conditions.

IID appealed from the judgment and writ of mandate, and Abatti appealed from the dismissal of his breach of fiduciary duty and taking claims. Many *amicus* briefs were filed in support of both parties.

The Court of Appeal's Decision

In the lengthy opinion, the court first explained in significant detail the complex geographical, historical and legal context pertaining to the management and regulation of the Colorado River water system, often referred to as the Law of River. The court explained that, as an irrigation district, IID holds its various water rights in trust for the benefit of its users, and is responsible for managing its water supply not only for irrigation but also for other beneficial uses.

The court observed that IID obligations included managing water resources in accordance with many complex and in some ways competing principles, including requirements that water be used reasonably and beneficially, that it must be conserved and that IID must comply with obligations imposed under the Law of the River including historic drought and water shortage conditions.

The Court of Appeal rejected Abatti's contentions and the trial court's findings regarding the nature of the farmers' water rights. The court held that farmers within the district:

> . . .possess an equitable and beneficial interest in [IID's] water rights, which is appurtenant to their lands, and that this interest consists of a right to water *service*. (emphasis added).

The court found that IID allocation programs did not comprise water "transfers" and did not therefore implicate no injury rules.

The court observed that in accordance with statutory law and applicable case law, IID retains discretion to modify water service consistent with its duties to manage and distribute water equitably for all categories of IID water users. The court concluded that the trial court correctly found that IID abused its discretion in the way it prioritized water users in the EDP, but that the trail court erred to the extent that it found any other abuse of discretion by IID in its adoption of the EDP. The Court of Appeal found that the trial court erred and overreached in granting declaratory relief by prescribing specific methodologies to prioritize allocations, which the court deemed a usurpation IID's authority and discretion.

Breach of Duty and 'Taking' Claims

Finally, the Court of Appeal found that the trial

court properly dismissed Abatti's breach of fiduciary duty and taking claims, largely on the basis that Abatti failed to demonstrate elements of damages and the existence of a water right being taken without compensation. Specifically, as to the breach of fiduciary duty, the Court of Appeal stated:

> The superior court determined that Abatti failed to allege facts establishing damages that would support his claims. We construe this as a finding that Abatti did not sufficiently plead damages for purposes of his breach of fiduciary duty claim. Even assuming that the District had a fiduciary duty to Abatti and that the EDP somehow breached that duty, we conclude that Abatti's failure to adequately plead damages is a sufficient basis to sustain the demurrer.

As to the takings claim specifically, the Court of Appeal stated:

> As we have determined, *ante*, Abatti possesses a right to service, and changes to service do not necessarily impede or diminish that right. Assuming that injuries from such changes could support a claim for damages, one would still have to sufficiently allege them. Abatti simply speculates that the 2013 EDP could harm farmers. . . .Even in alleging that the 2013 EDP has the effect of taking water from him, Abatti does not assert that he has *actually* been denied any water. Neither potential harms, nor counsel's hypothetical arguments, suffice to establish compensable damages.

A 'Limited' Opinion

The court emphasized the limited scope of its conclusions and their applicability to the parties, facts and issues before the court. The court affirmed the judgment as to the ruling that IID abused its discretion in how it apportioned water in the EDP, and as to the dismissal of Abatti's breach of fiduciary duty and taking claims.

The court otherwise reversed the trial court judgment and directed the Superior Court to enter a new and different judgment granting Abatti's petition on the *sole* ground that IID's failure to provide for equitable apportionment among categories of water users constituted an abuse of discretion and denying the petition on all other grounds, including as to declaratory relief.

Conclusion and Implications

The *Abatti* case demonstrates the complex and multi-layered regulatory regime within which IID operates in managing and allocating its water resources. Water providers throughout California face similar challenges and complexities, particularly in times of drought and in response to new and ever-increasing regulations and mandates. Though the Fourth District Court of Appeal emphasized the narrow scope of its findings, the published Opinion addresses many interesting issues that have broader relevance for California water law and policy. The court's original and modified opinions are available online at: https://www.courts.ca.gov/opinions/documents/D072850M.PDF.

(Derek R. Hoffman)

SIXTH DISTRICT COURT FINDS CANNABIS DISPENSARY'S VIOLATION OF COUNTY LAND USE REGULATIONS DID NOT JUSTIFY SEIZURE OF STATE-LEGAL PLANTS

Granny Purps v. County of Santa Cruz et al.,
___Cal.App.5th___, Case No. 16CV018999, (6th Dist. Aug. 5, 2020).

On August 5, 2020, the Sixth District Court of Appeal provided some clarity regarding the relationship between individual property rights and law enforcement actions to enforce land use and zoning regulations. The court held that the Santa Cruz County Sheriff's (County) office did not have authority when enforcing local land use and zoning laws, to seize non-criminal property—here more than 2,000 marijuana plants allegedly grown in compliance with state law. However, The court rejected the dispensary's claims that it was entitled to recovery under inverse condemnation, finding that such a claim

had never been successfully brought against a public entity in its criminal law enforcement efforts.

Factual and Procedural Background

Granny Purps operated a medical marijuana dispensary in Santa Cruz County that grew and provided medical marijuana to its 20,000 members. Granny Purps alleged that it did so in full compliance with state laws governing the production and distribution of medical marijuana.

Santa Cruz County's cannabis ordinance prohibits medical cannabis growers from cultivating any more than 99 plants. In June of 2015, County Sheriffs found Granny Purps to be growing plants well in excess of the County ordinance, seizing 2,200 plants.

In 2016, Granny Purps sued the County asserting claims for monetary damages for conversion, trespass, and inverse condemnation. Granny Purps also brought a cause of action for writ of mandate, injunctive relief, and specific recovery of property.

The County responded with a demurrer on the grounds that Granny Purps' complaint failed to state a cause of action and that Granny Purps' claims for damages were time barred by the Government Claims Act. The trial court sustained the demurrer without leave to amend, and entered judgment for defendants.

The Court of Appeal's Decision

Before the Sixth District Court of Appeal, the County argued that demurrer was appropriate for two reasons: 1) the claims seeking return of the cannabis plants could not succeed because Granny Purps was in violation of the County's cannabis ordinance, and 2) that the claims for damages were barred by the statute of limitations.

Plant Seizure and Plant Return

The court began with the County's first argument and Granny Pup's claims that the County could not lawfully seize cannabis grown in compliance with state law. The court cited a long line of cases holding that state medical marijuana laws do not limit local governments' abilities to make land use decisions. Accordingly, a local government can adopt a zoning ordinance prohibiting medical marijuana dispensaries or medical cannabis cultivation altogether. Courts have held such local land use regulations do not conflict with state laws allowing medical marijuana cultivation because of the narrow scope of the relevant state laws, which merely create an exception to criminal laws regulating the possession and use of marijuana. As the court noted, an exception from state criminal laws does not preempt local land use regulations.

As the court described, a government agency cannot retain property without providing due process of law and someone whose property is seized wrongfully can bring a cause of action seeking its return. However, the right to recover property is not absolute. One exception to this rule, which the County relied on, is that in the case of property that is *per se* illegal (*i.e.* contraband), the government can retain such property whether it was lawfully seized or not.

The County argued that its ordinance was a health and safety ordinance and not a zoning ordinance, thus providing some authority to seize the plants. However the court found that it did not matter how the County characterized its ordinance, the words of the ordinance restrict the manner in which land can be used, meaning it was effectively a zoning ordinance. Moreover, the classification of the ordinance was not important and a "valid local ordinance restricting the number of marijuana plants that can be cultivated does not change the status of medical marijuana under state criminal law or could it" as any such attempt would be pre-empted.

Ultimately, the court overturned the demurrer for the causes of action seeking return of the seized marijuana. While limits on law enforcement's power to seize lawful medical marijuana do not prevent local jurisdictions from enforcing valid zoning ordinances, this does not give law enforcement a right to permanently seize lawful property.

The court upheld the lower court's demurrer as to the causes of action for trespass, conversion, and inverse condemnation for reasons not relevant here.

Inverse Condemnation

With respect to Granny Purp's inverse condemnation claims, the court held that the cause of action failed to state a valid claim. Inverse condemnation has never been applied to require a public entity to compensate a property owner for property damage caused by law enforcement efforts to enforce criminal laws, in other words:

. . .[t]he complaint contains no allegation indi-

cating the marijuana was taken for public use or damaged in connection with a public work of improvement, so it does not state a cause of action for inverse condemnation.

Conclusion and Implications

The *Granny Purps* decision provides clarity regarding the relationship between individual property rights and local agencies' authority to enforce local land use and zoning laws. When enforcing local land use and zoning laws, local agencies do not have authority to seize state property lawfully held by an entity in violation of local land use and zoning regulations. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/H045387.PDF.
(Travis Brooks)

THIRD DISTRICT COURT FINDS PLACER COUNTY'S ACTION TO ABANDON A PUBLIC ROAD EASEMENT RELIED ON INCORRECT EIR IN CONDUCTING SUBSEQUENT REVIEW

Martis Camp Community Association v. County of Placer, 53 Cal.App.5th 569 (3rd Dist. 2020).

Owners of property in a residential subdivision brought an inverse condemnation claim against Placer County (County) and filed petitions for writ of mandate against the County and the adjacent community, challenging the County's partial abandonment of public easement rights in a road linking the subdivision and the adjacent community on alleged Ralph M. Brown Act and California Environmental Quality Act (CEQA) claims. After the trial court sustained the County's demurrer to inverse condemnation and denied the petitions, the subdivision owners appealed. The Court of Appeal affirmed in part and reversed in part, finding that the owners were entitled to relief on their CEQA cause of action.

Factual and Procedural Background

In 2015, Placer County partially abandoned public easement rights in Mill Site Road, a road connecting two residential subdivisions: Martis Camp and the Retreat at Northstar (Retreat). As originally planned, the connection between the subdivisions was intended for emergency access and public transit vehicles only. At the time of approval, environmental review for subdivisions assumed there would be no private vehicle trips between the subdivisions, and Martis Camp residents wishing to access the Northstar-at-Tahoe Ski Resort (Northstar) would use State Route 267. In or around 2010, however, Martis Camp residents began using the connection as a shortcut to Northstar.

In 2014, after efforts to have County officials stop Martis Camp residents from using the emergency access road failed, the Retreat owners filed an application requesting that the County board of supervisors (Board) abandon the public's right to use Mill Site Road. The Board approved the partial abandonment in 2015, thereby restricting use of Mill Site Road to Retreat property owners and emergency and transit vehicles, consistent with the prior planning documents. In response, Martis Camp Community Association and three Martis Camp property owners brought suits against the County, as defendants, and Retreat property owners and their homeowners association, as real parties in interest.

Issues on Appeal

In 2018, the trial court sustained the County's demurrer to inverse condemnation and denied the petitions. On appeal, plaintiffs raised four issues. First, they contended that the trial court erred in concluding there was no violation of the Ralph M. Brown Act when the County approved changes to the conditions of approval for the Martis Camp or Retreat projects without a properly noticed meeting. Second, they claimed the trial court erroneously denied the petitions because the County violated the statutory requirements for abandonment. Third, they argued the trial court erroneously denied the petitions because the County violated CEQA when approving the abandonment. Fourth, they asserted the trial court improperly sustained a demurrer to the inverse condemnation claim.

The Court of Appeal's Decision

Alleged Brown Act Violations

The Court of Appeal first addressed plaintiffs' claim that the County violated the Brown Act by fundamentally altering conditions of approval for the Retreat or Martis Camp projects without prior notice to the public. This argument was based on the fact that, in 2011 and 2012, the director of the County community development resource agency (CDRA) found that the project conditions of approval would not prohibit Martis Camp residents from using Mill Site Road as a means of ingress/egress. The court disagreed, finding that the conditions of approval always limited use of the emergency access road to emergency/transit uses. It therefore concluded that the act of formally overruling the CDRA director's prior enforcement letters was not a "distinct item of business" that needed to be included on the agenda.

Abandonment of Mill Site Road

The Court of Appeal next addressed the claim that the County's decision violated the statutory requirements for abandonment. The court disagreed with the plaintiffs, first concluding that a legislative finding that a road is unnecessary cannot be defeated simply by showing that people would use the road if it were not abandoned. If something is not "needed," the Court of Appeal explained, this means that it is not required, which is different from saying that something is not wanted or desired by individual citizens. The fact that some Martis Camp residents were using Mill Site Road as a connection between Martis Camp and Northstar therefore did not preclude the Board from finding that the road was not a necessary part of the public transportation network, particularly given that the road was not planned, designed, or approved to accommodate such use.

The court also rejected claims that: by reserving easements for transit/emergency access and public utility services, the County conceded that Mill Site Road is necessary for some public use; the County improperly allowed Retreat owners to continue to use the road to access their properties; and the Board violated the abandonment statutes by requiring an irrevocable offer of dedication by which the County could reacquire the public road easements in Mill Site Road under certain conditions. With respect to each issue, the court found that the County had acted properly, and plaintiffs had not cited any authority contravening the actions taken by the Board.

Finally, the Court of Appeal disagreed with plaintiffs' claim that the findings as to the public interest were irrelevant because they focused on whether Mill Site Road was intended to function as a public road and ignored that the road was, in fact, functioning as a public road. The court found the Board properly recognized that Mill Street Road was never intended to be used as a means for Martis Camp residents to access their community, such finding was relevant to address plaintiffs' claim that Mill Street Road is necessary due to Martis Camp residents' use of the road as a shortcut to Northstar, and the Board's findings regarding the public interest otherwise were supported by substantial evidence.

Alleged CEQA Violations

The Court of Appeal next addressed plaintiffs' CEQA claims, finding that the County incorrectly considered abandonment of the road as a change to the Martis Camp project, when in fact it modified the Retreat project. While the court acknowledged the County's rationale for preparing an addendum to the Martis Camp Environmental Impact Report (EIR), as the practical effect was to restore traffic patterns to what was evaluated in the Martis Camp EIR, the court found the County could not analyze a change in one project (*i.e.*, the Retreat project) by relying on analysis from an EIR prepared for a different project (*i.*e., the Martis Camp project). The County therefore was required to evaluate whether a subsequent or supplemental EIR would be required based on the Retreat project EIR.

The Court of Appeal, however, rejected plaintiffs' claim that the environmental baseline should have reflected that Martis Camp residents were using Mill Street Road as a shortcut to access Northstar. The court disagreed, finding that plaintiffs conflated CEQA's rules governing initial review of a project with the rules governing supplemental review. When a lead agency considers whether to prepare a subsequent EIR, the court found, it may limit its consideration to effects not considered in connection with the earlier project. Nonetheless, because it found the County had proceeded under the incorrect EIR, the court did not reach the issue of whether the County used an appropriate baseline.

Inverse Condemnation

Finally, the Court of Appeal addressed plaintiff's claim that the trial court improperly dismissed their inverse condemnation claim on the grounds that the Martis Camp homeowners, as nonabutting property owners, could not allege a compensable taking because their property does not directly abut Mill Site Road. The court agreed with the trial court, concluding that the homeowners could not allege a claim for abutter's rights simply because they were granted a nonexclusive easement for ingress and egress over all the subdivision's roads. The abandonment also did not interfere with their easement over the subdivision's streets or otherwise render their homesites inaccessible.

Conclusion and Implications

The case is significant because it contains a substantive analysis of a variety of land use issues, including in particular the law of abandonment and subsequent environmental review under CEQA. The decision is available online at: https://www.courts.ca.gov/opinions/documents/C087759.PDF.
(James Purvis)

THIRD DISTRICT COURT FINDS MOOT CEQA–LAND USE CHALLENGE TO BUILDING PERMIT FOR ALREADY COMPLETED STORAGE FACILITY EXPANSION

Parkford Owners for a Better Community v. County of Placer,
___Cal.App.5th___, Case No. C087824 (3rd Dist. Aug. 26, 2020).

The Third District Court of Appeal in *Parkford Owners for a Better Community* dismissed as moot an appeal of the trial court's decision: 1) that a building permit for expansion of an existing storage facility was ministerial and thus exempt from environmental review under the California Environmental Quality Act (CEQA); and 2) that a challenge to the building permit based on an alleged violation of a conditional use permit applicable to the property was barred by the applicable statute of limitation. The appeal was deemed moot because the storage facility expansion was already completed and occupied by the date of trial, without any violation of a court order or indication of bad faith in proceeding with the construction.

Factual and Procedural Background

Treelake Storage is located within the Treelake Village (Village) planned unit development in Granite Bay and has been in operation for more than 20 years. A conditional use permit for the Village (CUP-1006) was approved by the Placer County board of supervisors (County), in 1987 along with an Environmental Impact Report (EIR). Modifications were made to the Village Master Plan regarding lot sizes and further subdivision of certain lots were made in September 1998, with an accompanying Addendum to the Village initial EIR. A final subdivision map for the Village was recorded in April 1999.

One of the conditions of CUP-1006 was for the development of boat and recreational storage for the benefit of Village residents only within a power line easement area. That condition was modified in 1993 to allow for mini storage as an appropriate use. In 1996 that condition was again modified to remove the residents only restriction, accompanied by a traffic study showing a negligible impact of allowing nonresident use and a CEQA exemption verification.

In February 1997 Treelake Storage was approved by the County design review commission (DRC) and in August 1997 the County building department (Department) issued a building permit. In September 1998, a building permit was issued for Phase II of the construction. After construction of Treelake Storage was completed, the Department issued a certificate of occupancy in 1999.

In April 2001 and again in August 2004, the DRC reviewed and approved two additional phases of construction to expand Treelake Storage's facilities. The Department issued building permits for each phase of expansion and certificates of occupancy were issued in 2002 and 2005 respectively after construction was completed.

This case involves the Department's October 2016 building permit following August 2016 DRC approval for the most recent phase of Treelake Storage facilities expansion: a 28,240 square-foot building and associated utilities. After completion of construction, the Department issued a certificate of occupancy in October 2017.

In February 2017, petitioner filed a verified petition for writ of mandate alleging: 1) issuance of the challenged building permit was a discretionary act subject to the requirements of CEQA, and therefore the County was required to prepare an adequate EIR prior to issuing the permit; and 2) CUP-1006 did not authorize construction of a large commercial storage facility, and in any event, CUP-1006 expired in 2002.

In March 2017, petitioner sought a temporary restraining order (TRO) to stay the construction, claiming irreparable harm if construction was not halted. The TRO was denied by the trial court, which found that petitioner did not demonstrate why a TRO was suddenly necessary under the applicable "irreparable harm" standard, approximately six months after construction began.

At the Trial Court

In April 2017, the trial court denied petitioner's motion for preliminary injunction, finding that petitioner failed to show either possibility of prevailing on the merits or interim harm. With respect to interim harm, because the storage facility construction was near completion, the trial court found that the limited harm from allowing construction to be complete would be outweighed by the public safety risk that would be created from the incomplete facilities which were not yet structurally sound and without an operational fire sprinkler system.

In April 2018, the trial court denied the CEQA cause of action because it was premised on the claim that CUP-2016 expired and was no longer valid. The trial court rejected that claim, noting that the County Code provides that a CUP granted for a planned residential development does not expire and instead runs with the land, where such CUP has been implemented through the recordation of a final subdivision map, as occurred in 1999 in this case. Because CUP-1006 authorized use of the property for commercial storage, and because the County Code provides no discretionary standards in the issuance of the building permit challenged in this case, petitioner failed to rebut the general presumption that issuance of a building permit is ministerial and not subject to CEQA.

In a subsequent motion for judgment on the pleadings, the trial court held that the second cause of action based on violation of California Planning and Zoning Law was barred under the 90-day statute of limitations contained in Government Code § 65009 and dismissed the case without leave to amend.

The Court of Appeal's Decision

On appeal, respondents repeated their arguments raised in their opposition brief at trial that petitioner's claims were rendered moot by the completion of construction and the certificate of occupancy. Although petitioner in its reply brief at trial argued that its claims were not moot by completion of construction because the County could still modify the project, impose mitigation measures or require that the property be restored to its original condition, petitioner failed to address the mootness issue on appeal.

General Mootness Principles

California courts follow common law principles to only decide justiciable controversies. A controversy is no longer justiciable when, because of events that occur during the case, the court can no longer grant an effectual relief under the mootness doctrine. (*Wilson & Wilson v. City Council of Redwood City,* 191 Cal. App.4th 1559 (2011), 1574 (*Wilson*); *Santa Monica Baykeeper v. City of Malibu,* 193 Cal.App.4th 1538, 1547 (2011) (*Santa Monica Baykeeper*).) There may be exceptions to application of the mootness doctrine when important issues of broad public interest are likely to reoccur. (*Bakersfield Citizens for Local Control v. City of Bakersfield,* 124 Cal.App.4th 1184, 1203-1204 (2004).)

In *Wilson*, the completion of construction during a case claiming failure to prepare an EIR was determined to moot a request to set aside or rescind agency actions authorizing the project and to moot a request to require preparation of an EIR. However, the mootness doctrine will not apply against public policy to provide environmental review under CEQA when construction is completed in bad faith in violation of a court order to prepare an EIR. (*Woodward Park Homeowners Assn. v. Garreks, Inc.*, 77 Cal.App.4th 880, 889 (2000). (*Woodward Park*).)

No Evidence of Bad Faith or Evasion of Law

The Court of Appeal held that the case was analogous to the situation in the *Wilson* case, where a development project was completed during the course of a reverse validation action. In *Wilson*, the plaintiff had not sought an injunction to stop work on the project, despite challenging the project on the basis that an EIR was needed with respect to an amended development agreement.

The Court of Appeal distinguished the case from the bad faith situation in *Woodward Park*, where there was a court order to prepare an EIR and the project was rushed to completion during the pending appeal.

The Court of Appeal concluded that bad faith could not be shown in the case given that Treeland Storage had operated since 1999 and had expanded the facility twice before without any indication that the building permits triggered environmental review under CEQA or the Planning and Zoning Law. The project was already almost complete when petitioner filed its untimely challenge to the project in the case. Petitioner failed to brief the Court of Appeal on the mootness issue and thus failed to raise any potential public interest exceptions.

Conclusion and Implications

This opinion by the Third District Court of Appeal reiterates that when a project is completed pending review of a CEQA challenge, without any court order to stop construction, the appeal generally becomes moot, in the absence of any public interest exception. This opinion also illustrates the importance of a factual showing that the conduct in completing construction demonstrates an absence of bad faith, in order to counter any environmental public interest exception to mootness in CEQA cases. https://www.courts.ca.gov/opinions/nonpub/C087824.PDF. (Boyd Hill)

THIRD DISTRICT COURT AFFIRMS STATE WATER BOARD'S AUTHORITY TO REGULATE UNREASONABLE WATER USE THROUGH TEMPORARY EMERGENCY REGULATIONS AND CURTAILMENT ORDERS

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

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

Background

Plaintiff/appellant Stanford Vina Ranch Irrigation Company (Stanford Vina) diverts water for agricultural uses from Deer Creek, a tributary to the Sacramento River. Stanford Vina is entitled to use 66% of the flow of Deer Creek and holds both riparian and pre1914 appropriative water rights.

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

In 2014, California was in the midst of one of the most severe droughts on record. Extreme drought conditions threatened to dewater high priority streams during critical migration periods for threatened and endangered fish species. In response,

then-Governor Jerry Brown declared a drought state of emergency and signed urgency legislation that included authority for the SWRCB to adopt emergency regulations. Those emergency regulations included, among other provisions, Board authority to prevent waste and unreasonable use of water, to promote water conservation, and to require curtailment of certain surface water diversions. The SWRCB thereafter began promulgating regulations implementing in-stream flow requirements for Deer Creek and other surface water courses.

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

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

Procedural History

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

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

The Court of Appeal's Decision

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

Validity of the Challenged Regulations

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

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

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

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

- Section 1058.5: The Board is authorized to adopt

emergency regulations to prevent 'unreasonable use, unreasonable method of use, or unreasonable method of diversions' during severe drought conditions.

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

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

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

Validity of the Challenged Curtailment Orders

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

Upon review of the record, the court found that substantial evidence supported the SWRCB's conclusion that curtailed diversions would have caused or threatened to cause the flow of water in Deer Creek to fall below the emergency minimum flow requirements. The court further held that the curtailment orders were not a taking of the company's water rights, because the mere regulation of the use and enjoyment of a property right for the public benefit is a permissible exercise of the state's "police power" and does not amount to a taking under eminent domain. Therefore, the Board had acted within its authority to determine that diversions from Deer Creek threatened to violate the emergency regulations minimum flow requirements constituted an unreasonable use of water.

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

Conclusion and Implications

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

FIRST DISTRICT COURT FINDS COUNTY AUTHORITY COMPLIED WITH CEQA FOR WASTE COMPOSTING FACILITY AT EXISTING TRANSFER STATION

Stein et al. v. Alameda County Waste Management Authority, Case No. A154804, *Unpub.* (1st Dist. Aug. 17, 2020).

In *unpublished* decision the First District Court of Appeal upheld the trial court's finding that the Alameda County Waste Management Authority (County Waste) complied with the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000) in approving a waste composting facility at an existing transfer station.

Factual and Procedural History

The Davis Street Transfer Station (DSTS) located in the City of San Leandro (City) accepts municipal solid waste and other permitted material from residences and businesses throughout Alameda County. Historically, after sorting the material, the waste would be transferred to landfills or other recovery and recycling facilities.

In 1998, the City adopted an Initial Study/Mitigated Negative Declaration (IS/MND) and issued a Conditional Use Permit authorizing the DSTS to accept up to 5,600 tons-per-day (tpd) of waste materials.

In 2011, the City adopted another Initial Study/Negative Declaration (IS/ND) evaluating the impacts of an organics recovery facility for composting and waste diversion at the DSTS. The project included the separation and recovery of organics, composting, and anerobic digestion. For these operations, the 2011 IS/ND identified a building footprint of approximately 260,000 square feet and described the composting facility as designed to process up to 1,000 tpd of food waste, green waste, and mixed organics with 250-350 tpd composted on site.

In 2017, the project applicant submitted a revised application, which included an automated organic materials recovery facility, a composting facility, and a digester facility (Project). All three components of the Project would operate inside enclosed buildings consistent with the building footprint analyzed in the 2011 IS/ND.

In February 2017, County Waste adopted an ordinance amending its countywide waste management plan to include the Project. Prior to adopting the ordinance, County Waste concluded that there had been no changes to the Project since the 2011 IS/ND and no further CEQA review was required.

Petitioners disagreed and filed suit alleging that an increase in the volume of material to be processed, composted, and digested onsite constituted a substantial change or new or increased environmental effects. The trial court disagreed finding no substantial evidence to support a fair argument that a change in the composting and digestion process may have an environmental impact and therefore no further environmental review was required.

This appeal followed.

The Court of Appeal's Decision

The appellate court found that several of petitioners' arguments were directed at the "wisdom, desirability, efficiency, or effectiveness" of the Project and summarily dispensed with those claims by explaining that whether the Project is the most technologically sophisticated, economically sensible, or optimally efficient is not the proper focus of CEQA.

Issue of the Need for an Addendum to the Initial Study/Negative Declaration

With respect to whether County Waste was required to prepare an addendum to the 2011 IS/ND, as asserted by petitioners, the court found that the issue was "doubly-barred" as it had not been properly exhausted at either the administrative level or in the trial court. The court noted that it had read the transcripts and digitally searched hundreds of pages of comments in the administrative record for the word "addendum" and found that it was not used once.

The court also rejected petitioners' argument that County Waste had failed to consider alternatives finding that petitioners misunderstood the law. The court explained that consideration of alternatives where a project has already been the subject of environmental review is not an opportunity to revisit the

merits of the Project and cautioned against straying beyond the reasonable scope of CEQA.

Distinguishing the *Sundstrom* Decision

Petitioners claimed that the Project introduced previously unstudied and potentially significant environmental effects with respect to air quality. The court disagreed. The court first addressed petitioners' reliance on *Sundstrom v. County of Mendocino*, 202 Cal.App.3d 296 (2016) to support its argument that the scope of the fair argument standard should be expanded under the circumstances presented in this matter. The court distinguished *Sundstrom* because unlike that case, here, no one had challenged the initial environmental document (the 2011 IS/ND) as inadequate.

Air Quality/Oder Impacts

The court then considered the evidence presented by petitioners to support their claims of new air quality and odor impacts. The court criticized petitioners for their failure to explain the technical evidence in a manner that may be understood by the court and stated that it was "not obliged either to match [petitioner's] scientific knowledge or to acquire a complete understanding of the technology." The court further found petitioners' evidence related to a different waste facility did not establish the existence of substantial evidence supporting a fair argument of a significant environmental impact for this Project. Neither did one petitioner's background as an air quality expert persuade the court. While expert opinion can constitute substantial evidence to support a fair argument, the court emphasized that petitioner's opinion was unsupported by facts and therefore failed to rise to the level of substantial evidence under CEQA. Finally, the court held that the record lacked evidence supporting petitioners' claim that the Project had changed from the 2011 IS/ND so that the composting process was no longer entirely indoors.

Volume of Material

With respect to whether the volume of material to be composted on site had increased from that approved in the 2011 IS/ND, the court stated that it was not an issue that demanded resolution because an increase in amount or volume that the Project would process "is not a per se environmental impact, as CEQA defines that term." The court noted that the Project, as approved, is required to comply with the applicable air quality district's regulations including guidelines for composting facilities and that the Project is required to operate within the conditions contained in the use permit issued by the City of San Leandro. There was therefore no fair argument that the Project would result in new odor and air quality impacts not previously analyzed in the 2011 IS/ND.

Conclusion and Implications

The court affirmed the trial court judgment holding that petitioners had not identified substantial evidence supporting a fair argument of new or substantially more severe environmental impacts than was the case when the IS/ND was adopted by the City of San Leandro in 2011. While an *unpublished opinion*, this case offers another example of application of CEQA's subsequent review provisions which has been an important issue since the Supreme Court's decision in *Friends of College of San Mateo Gardens v. San Mateo County Community College District*, 1 Cal.5th 937 (2016).

The court's decision is available online at: https://www.courts.ca.gov/opinions/nonpub/A154804.PDF. (Christina Berglund)

LEGISLATIVE UPDATE

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

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

Environmental Protection and Quality

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

AB 2323 was introduced in the Assembly as an urgency statute on February 14, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

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

AB 3279 was introduced in the Assembly on February 21, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

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

SB 974 was introduced in the Senate on February 11, 2020, and, most recently, on September 9, 2020, was enrolled and presented to the Governor.

•SB 995 (Atkins)—This bill would extend the authority of the Governor under the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 to certify projects that meet certain requirements for streamlining benefits provided by that act related to compliance with the California Environmental Quality Act and streamlining of judicial review of action taken by a public agency, and further provide that the certification expires and is no longer valid if the lead agency fails to approve a certified project before January 1, 2025.

SB 995 was introduced in the Senate on February 12, 2020, and, most recently, on August 31, 2020, was in the Senate with concurrence pending on the Assembly's amendments to the bill.

Housing / Redevelopment

•AB 2345 (Gonzalez)—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: 1) three incentives or concessions for projects that include at least 12 percent

of the total units for very low income households; 2) four and five incentives or concessions for projects in which greater percentages of the total units are for lower income households, very low income households, or for persons or families of moderate income in a common interest development.

AB 2345 was introduced in the Assembly on February 18, 2020, and, most recently, on September 15, 2020, was enrolled and presented to the Governor.

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

AB 2405 was introduced in the Assembly on February 18, 2020, and, most recently, on September 11, 2020, was enrolled and presented to the Governor.

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

AB 3234 was introduced in the Assembly on February 21, 2020, and, most recently, on September 15, 2020, was enrolled and presented to the Governor.

•SB 902 (Wiener)—This bill would require a local planning agency to include in its annual report to the Department of Housing and Community Development outlining, among other things, the number of housing development applications received and the number of units approved and disapproved in the prior year, whether the city or county is a party to a court action related to a violation of state housing law, and the disposition of that action.

SB 902 was introduced in the Senate on January 30, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

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

SB 1079 was introduced in the Senate on February 19, 2020, and, most recently, on September 9, 2020, was enrolled and presented to the Governor.

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

SB 1120 was introduced in the Senate on February 19, 2020, and, most recently, on August 31, 2020, was in the Senate with concurrence pending on the Assembly's amendments to the bill.

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

SB 1410 was introduced in the Senate on February 20, 2020, and, most recently, on August 20, 2020, was held under submission in the Committee on Appropriations.

Public Agencies

•AB 2028 (Aguiar-Curry)—This bill would amend the Bagley-Keene Open Meeting Act, except for closed sessions, to require that a notice of a

public meeting of a state agency, board or commission include all writings or materials provided for the noticed meeting to a member of the State body by staff that are in connection with a matter subject to discussion or consideration at the meeting, and require these writings and materials to be made available on the internet at least ten days in advance of the meeting.

AB 2028 was introduced in the Assembly on January 30, 2020, and, most recently, on September 1, 2020, was ordered to the inactive file by unanimous consent.

Zoning and General Plans

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

AB 2421 was introduced in the Assembly on February 19, 2020, and, most recently, on September 11, 2020, was enrolled and presented to the Governor at 3:00 p.m.

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

AB 3153 was introduced in the Assembly on February 21, 2020, and, most recently, on June 23, 2020, was referred to the Committee on Governance and Finance.

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

SB 1138 was introduced in the Senate on February 19, 2020, and, most recently, on September 1, 2020, was ordered to the inactive file.
(Paige Gosney)

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