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FEATURE ARTICLE

ENDANGERED SPECIES ACT UPDATE: SWEEPING REGULATIONS ALREADY ADOPTED, WITH MORE PROPOSED, WILL PROFOUNDLY ALTER IMPLEMENTATION OF THE ACT

By David C. Smith and Jennifer Lynch

The federal Endangered Species Act (ESA or the Act) has not escaped the Trump administration's mandate for regulatory streamlining and consolidation. Beyond voluntary actions by the administration, the U.S. Supreme Court fostered additional regulatory reforms. Though garnering relatively little attention, these adopted and proposed regulatory reforms impact some of the most crucial operative provisions of the Act.

Environmental Organizations and States Challenge ESA 'Regulatory Reform'—Calls for Injunction Rejected

In August 2019, the Trump administration finalized and adopted three packages of significant regulatory reforms. The reforms apply only prospectively and will not alter any designations of species already listed under the ESA.

Although the reforms are numerous, they fall into three general categories:

- Interagency cooperation under Section 7 of the ESA;
- Listing of species and designation of criterial habitat under Section 4 of the ESA; and
- Treatment of species listed as "threatened," as opposed to "endangered," under the ESA.

The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (together: the Services) are responsible for administering the ESA and promulgating its regulations.

Predictably, the reforms are now the subject of multiple lawsuits. The first, *Center for Biological Diversity v. Bernhardt*, was brought by a coalition of environmental groups that includes the Center for Biological Diversity, Sierra Club, and the Natural Resources Defense Council. The second, *State of California v. Bernhardt*, was brought by 17 states, the District of Columbia, and New York City. The third, *Animal Defense Fund v. U.S. Department of Interior et al.*, was brought by a single environmental plaintiff. Each suit was brought in the U.S. District Court for the Northern District of California, and all aim to block implementation of what they term "the Interagency Consultation Rule," "the Listing Rule," and "the 4(d) Rule."

Challenges to the Section 7 Interagency Consultation Rule

Section 7 prohibits any federal agency from funding or taking an action causing the "destruction or adverse modification" of the given species' designated "critical habitat." Prior to the reforms, "destruction or adverse modification" was defined as:

> . . .a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. . . .[including alterations] that alter the physical or biological features essential to the conservation of a species. . . .

The reforms clarify that adverse modifications are considered at the scale *of the entire critical habitat* designation. As such, even if a project would cause adverse effects to a *portion* of a designated critical habitat, such effects would not meet the definition

of "destruction or adverse modification" unless they went so far as to reduce the *overall* value of the critical habitat.

The suits argue this change will limit the circumstances under which a federal agency action would be deemed to destroy or adversely modify designated critical habitat in a way that is contrary to the text, purposes, and conservation mandate of the ESA.

Challenges to the Section 4 Listing Rule

Section 4 provides the process and standards for listing species for protection, designation of their protected habitat, and eventual delisting. Under the statutory terms of the ESA, economics are not a factor to be considered in making listing determinations. Section 4 also requires the Services to, at the time a species is listed, designate such species' "critical habitat," defined as areas "essential to the conservation of the species." The ESA provides for the Services to include both "occupied" and "unoccupied" acreage in the designation within specific parameters.

The reforms strike the phrase "without reference to possible economic or other impacts of such determination" from the ESA's implementing regulations. In addition, they limit the circumstances under which a species can be listed, change the factors to be considered when delisting a species, and limit the circumstances under which *unoccupied* habitat may be designated as critical habitat.

As with the Interagency Consultation Rule challenges, the suits claim that the Listing Rule reforms violate express provisions of the ESA, as well as its conservation purposes and mandate.

Challenges to the Section 4(d) Rule

Section 4 also identifies two categories of listed species: "threatened" and "endangered." An "endangered species" is one "in danger of extinction throughout all or a significant portion of its range." A "threatened" species is one "likely to become an endangered species within the foreseeable future." Under the statute, only species designated as "endangered" are subject to the protective prohibitions against "take" of a species established in Section 9. NMFS has observed that differentiation in its implementation of the ESA, applying the "take" prohibition only to species listed as "endangered." The FWS, however, adopted a blanket rule affording identical protections to species designated as "threatened" as to those designated as "endangered." The reforms repeal that blanket rule.

The suits allege that the 4(d) Rule removal of the blanket extension of Section 9 protections to threatened species is a "radical departure" from the FWS' longstanding practice, as well as claim this change violates the text of the ESA and its conservation purposes and mandate.

National Environmental Policy Act Challenges

The suits also allege violations of the National Environmental Policy Act (NEPA), which requires preparation of an Environmental Impact Statement (EIS) analyzing and disclosing the environmental consequences of any "major federal action significantly affecting the quality of the human environment." These include the adoption of the new or revised regulations, unless such adoption qualifies for an "exclusion" to the general rule requiring an EIS.

Prior to adopting the reforms, no EIS was prepared, the suits claim, in violation of NEPA.

Federal Defendants' Motions to Dismiss

In February 2020, the federal defendants filed motions to dismiss in each of the three suits. Each argued that the plaintiffs lack standing and the claims are not ripe for judicial review, on grounds none of the suits showed how any plaintiffs would be specifically and imminently injured by the reforms, given that the reforms apply only prospectively, and no protections currently applying to any species would be changed.

In May 2020, the District Court agreed with defendants as to the two suits brought by environmental group petitioners, finding that these suits failed to show how at least one identified member of the organizations would suffer harm, or, in the alternative, how the reforms would cause the organizations to divert more resources. However, in dismissing the suits the court granted petitioners the opportunity to amend and refile. Amended complaints in both lawsuits have since been filed. It remains to be seen if these revised complaints will withstand another motion to dismiss, if the defendants choose to file one.

The District Court disagreed with the defendants as to the suit brought by government agency plaintiffs. Finding the allegations of risk of harm to the

government agency plaintiffs' natural resources and economic interests sufficient to afford standing, and finding the claims constitutionally ripe, the court declined to dismiss the suit, and it will proceed to the merits.

What Qualifies as 'Habitat,' Above and Beyond Statutory 'Critical Habitat' for Purposes of the ESA?

As discussed above, the ESA defines "critical habitat" and requires that, usually, it be designated concurrent with a decision to list a species for protection under the Act. The U.S. Supreme Court recently noted, however, that "critical habitat" must necessarily be a subset of a larger category of "habitat" for a given species. While "critical habitat" has a relatively narrow definition as those areas "essential to the conservation of the species," "habitat," in general, must necessarily be broader but must also must have some limitations. Congress failed to provide a definition of "habitat" in the ESA, and the court called on the lower court or, more appropriately, the Services to craft one.

The issue arose in the widely watched case of *Weyerhaeuser Co. v. United States Fish & Wildlife Service*, 139 S.Ct. 361 (2018). The species at issue was the dusky gopher frog. Historically, the frog existed throughout coastal Alabama, Louisiana, and Mississippi. But at the time of listing, the frog was known to exist only in one pond in southern Mississippi.

The proposed designation of critical habitat for the frog included so-called "Unit 1," a 1,500-acre area in Louisiana owned by plaintiff Weyerhaeuser. Logging practices, among other things in the area including Unit 1, had left the physical and biological attributes incapable of supporting the frog. Nonetheless, the FWS designated the area as critical habitat stating that it could be converted to supportable habitat and finding it essential to the conservation of the frog.

The case garnered national attention. Critics stated that with sufficient resources (e.g., infinite amounts of land and money), almost any area could be made to be habitat for almost any species. They argued that the ESA did not require or even allow regulatory mandates requiring private parties to engage in such extraordinary measures to comply with the Act.

Chief Justice Roberts authored the opinion of the Court. Starting from the legal premise that "[a]n area is eligible for designation as critical habitat under [the ESA] only if it is habitat for the species," Roberts noted that Congress failed to define "habitat." Accordingly, the Court remanded the matter for consideration of what is and is not "habitat" from which the subset of statutory "critical habitat" may be designated.

While Weyerhaeuser and the FWS ultimately settled their dispute, the Services subsequently defined "habitat" in a new rulemaking. The Services explain their approach to the proposed definition as follows:

> Under the text and logic of the statute, the definition of 'habitat' must inherently be broader than the statutory definition of 'critical habitat.' To give effect to all of section 3(5)(A), the definition of 'habitat' we propose is broad enough to include both occupied critical habitat and unoccupied critical habitat, because the statute defines 'critical habitat' to include both occupied and unoccupied areas.

The Services proffered two proposed definitions on which they sought public comment:

> • The physical places that individuals of a species depend upon to carry out one or more life processes. Habitat includes areas with existing attributes that have the capacity to support individuals of the species.
>
> • Alternatively:
> The physical places that individuals of a species use to carry out one or more life processes. Habitat includes areas where individuals of the species do not presently exist but have the capacity to support such individuals, only where the necessary attributes to support the species presently exist.

While conceptually broad enough to include both occupied and unoccupied habitat (as they must be within the statue's inclusion of both), the emphasis on "existing" and "presently exist" is inescapable. Both proposed versions of the rule reject the notion of extraordinary measures to create or re-establish absent habitat attributes.

The Services further elaborated on their rationale behind the proposed definitions:

> We solicit comment on these definitions, in particular on whether "depend upon" in the proposed definition sufficiently differentiates areas that could be considered habitat, or whether "use" better describes the relationship between a species and its habitat. We also solicit comment on the second sentence of the alternative definition. Though it is similar to the second sentence of the proposed definition, it expressly limits unoccupied habitat for a species to areas "where the necessary attributes to support the species presently exist," and explicitly excludes areas that have no present capacity to support individuals of the species. We invite comment on whether either definition is too broad or too narrow or is otherwise proper or improper, and on whether other formulations of a definition of "habitat" would be preferable to either of the two definitions, including formulations that incorporate various aspects of these two definitions.

The Services went on to garner comment as follows:

> While we have intentionally refrained from using within this proposed regulatory definition of "habitat" terms of art from other definitions in the Act to avoid potential confusion, including the phrase "physical or biological features" from the definition of "critical habitat," we propose "existing attributes" to include, but not be limited to, such "physical or biological features." We invite comment on this issue, including whether the words "existing attributes" are appropriate to include and whether they warrant further clarification or change or should be differently or further defined or explained.

Addressing specific components of any definition of "habitat," the Services included "food, water, cover, or space that individuals of a species depend upon to carry out one or more of their life processes." And habitats may only be applicable or of use to the species at some times of the year and not others, for example, seasonally used breeding areas or feeding areas.

As to the process for identifying a species' habitat relative to this rulemaking, the Services were clear that they do not mean to create or establish a new and additional regulatory step in the designation process. Rather:

> . . .[w]e expect that in the vast majority of cases that would be unnecessary, in light of the specific criteria of the statutory definition of 'critical habitat' . . . . Specifically, we interpret the statutory definition of 'critical habitat,' as it applies to occupied habitat, to inherently verify that an area meeting that definition is 'habitat.'

The Services went on to state, for areas not presently occupied by the species:

> In those fewer cases where unoccupied habitat is at issue, we would consider any questions raised as to whether the area is "habitat" in the context of the new regulatory requirements at § 424.12(b)(2) and document the determination whether the area is habitat. In this way, the proposed regulatory definition of "habitat" would not impose any additional procedural steps or change in how we designate critical habitat, but would instead serve as a regulatory standard to help ensure that unoccupied areas that we designate as critical habitat are "habitat" for the species and are defensible as such. With the addition of the regulatory definition of "habitat," the process of designating critical habitat will remain efficient by limiting the need to evaluate whether an area is "habitat" to only those cases where genuine questions exist.

As with the regulatory enactments discussed above, application of a definition of "habitat" will be prospective only and will not be applied to any existing listings or critical habitat designations. The public comment period for the proposed rulemaking closed on September 4, 2020.

The Services' Discretion to Exclude Qualifying Areas from Designated Critical Habitat

In *Weyerhaeuser*, the Supreme Court gave the Services an additional departure from seemingly long-settled ESA jurisprudence. For a law recognized as the most potentially sweeping and proscriptive in terms of limiting property rights, the ESA also includes one

of the most nearly boundless provisions for exercise of administrative discretion.

The topic here, again, is the designation of critical habitat. It is clear that in requiring the designation of critical habitat, Congress was allowing potentially dire and constraining restrictions relative to a given piece of property. Accordingly, Congress included a bit of an escape clause. As to any area qualifying as "critical habitat" under the Act, whether occupied or unoccupied, the respective Secretaries of the Services were vested with the discretion to exclude given areas from the designation based upon specified considerations. The Act's only limitation on the discretion to exclude is if such exclusion would result in the "extinction" of the species. This extraordinary authority is referred to as "4(b)(2) discretion."

In several instances, private property owners sued the Service for the failure of the Secretary to exercise their 4(b)(2) discretion to exclude a given area. Uniformly, however, the courts held that the Secretaries' discretion under § 4(b)(2) was so unbounded in the statute that a Secretary's decision not to exercise it was not even subject to judicial review.

In *Weyerhaeuser*, the Supreme Court rejected that principle. While it recognized the remarkable discretion inherent in § 4(b)(2), the High Court said such discretion was not subject to arbitrary or capricious refusal to even consider an exclusion in violation of the Administrative Procedures Act. Accordingly, in the interests of transparency, consistency, and predictability, the FWS circulated for public comment a proposed rule that would define the process by which the FWS would consider proposed 4(b)(2) exclusions of critical habitat. NMFS did not join in this proposed rulemaking, electing instead to continue its consideration under existing policies and regulations. The proposed rule circulated stated:

> We, the U.S. Fish and Wildlife Service (FWS), propose to amend portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions set forth a process for excluding areas of critical habitat under section 4(b)(2) of the Act, which mandates our consideration of the impacts of designating critical habitat and permits exclusions of particular areas following a discretionary exclusion analysis. We want to articulate clearly when and how FWS will undertake an exclusion analysis, including identifying a nonexhaustive list of categories of potential impacts for FWS to consider.

The critical consideration at the heart of § 4(b)(2) is whether the benefits of excluding a given area outweigh the benefit of inclusion, provided, again, that such exclusion would not result in the extinction of the species. While the "benefit of inclusion" is measured universally in terms of the conservation benefit to the species of including the area, the bases on which an exclusion may be justified are numerous.

The proposed rule is largely divided into two parts. The first addresses the Secretary's decision whether to even consider an exclusion from the critical habitat designation. The second defines the considerations and processes by which any consideration of an exclusion should be carried out.

Proposed paragraph (c)(1) reiterates that the Secretary has discretion whether to enter into an exclusion analysis under § 4(b)(2) of the Act. Proposed paragraph (c)(2) describes the two circumstances in which FWS will conduct an exclusion analysis for a particular area: Either 1) when a proponent of excluding the area has presented credible information in support of the request; or 2) where such information has not been presented, when the Secretary exercises his or her discretion to evaluate any particular area for potential exclusion.

The Services went on to state:

> We have not previously articulated our general approach to determining whether to exercise the discretion afforded under the statute to undertake the optional weighing process under the second sentence of 4(b)(2) of the Act. Although the Policy identified specific factors to consider if a discretionary exclusion analysis is conducted, it stopped short of articulating more generally how we approach the determination to undertake that analysis. We now propose to describe specifically what "other relevant impacts" may include and articulate how we approach determining whether we will undertake the discretionary exclusion analysis. We therefore propose paragraph (b) as set forth in the rule portion of this document.

Consistent with the first sentence of section 4(b)(2), proposed paragraph (b) sets out a mandatory requirement that FWS consider the economic impact,

impact on national security, and any other relevant impacts prior to designating an area as part of a critical habitat designation. These economic impacts may include, for example, the economy of a particular area, productivity, and creation or elimination of jobs, opportunity costs potentially arising from critical habitat designation, and potential benefits from a potential designation such as outdoor recreation or ecosystem services. The proposed regulations would provide categories of "other relevant impacts" that we may consider, including: Public health and safety; community interests; and the environment (such as increased risk of wildfire or pest and invasive species management). This list is not an exhaustive list of the types of impacts that may be relevant in a particular case; rather, it provides additional clarity by identifying some additional types of impacts that may be relevant. Our discussion of proposed new paragraph (d), below, describes specific considerations related to tribes, states, and local governments; national security; conservation plans, agreements, or partnerships; and federal lands.

At the crux of the determination whether to even entertain consideration of an exclusion from a critical habitat designation is the notion of "credible information." For purposes of these procedures, the proposed rule defines "credible information" as:

> . . .information that constitutes a reasonably reliable indication regarding the existence of a meaningful economic or other relevant impact supporting a benefit of exclusion for a particular area.

Conclusion and Implications

For the most part, the propose rule is not at all a radical departure from longstanding practice of the FWS. Rather, in light of the Supreme Court's ruling in *Weyerhaeser*, it seems the FWS hopes a codified procedure with greater transparency will help ensure the courts' ongoing deference to the Secretary's exertion of the broad 4(b)(2) discretion.

There is one notable exception. Historically, the FWS uniformly refused to consider a 4(b)(2) exclusion for any designation on federally owned land. This proposed rule expressly rejects that previous standard practice. Referencing private parties' use of federal lands, other regulatory protections on federal lands, and regulatory and economic burdens, the proposed rule makes clear that consideration of a 4(b)(2) exclusion of critical habitat will not be prohibited merely by virtue of the fact that it involves federally owned land.

As with all enactments discussed in this article, application of this proposed procedure applies prospectively only. The public comment period on this proposed rulemaking closed on October 8, 2020.

The lack of attention to these adopted and proposed regulatory enactments is striking given their sweeping scope and potential impacts on ESA implementation in the field. But as is always the case with tinkering with any aspect of the ESA, all will be subjected to judicial scrutiny, not to mention potential reversal with any change in Administration.

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REGULATORY DEVELOPMENTS

U.S. ARMY CORPS OF ENGINEERS PUBLISHES PROPOSAL TO REISSUE AND MODIFY CLEAN WATER ACT NATIONWIDE PERMITS

On September 15, 2020, the U.S. Army Corps of Engineers (Corps) published a notice of proposed rulemaking (Proposed Rulemaking) in which it expresses the desire to reissue existing federal Clean Water Act (CWA) Nationwide Permits (NWPs), conditions, and definitions, with modifications, prior to their original March 2022 expiration. The Proposed Rulemaking includes the elimination of a 300 linear foot limit for streambed losses under certain NWPs, and includes new NWPs related to certain mariculture activities, utility line activities currently authorized under an existing NWP; and water reclamation and reuse facilities. The Corps is also considering reissuing unchanged NWPs so that all NWPs expire at the same time. Interested parties have until November 16, 2020, to submit comments. [85 Fed. Reg. 57298 (Sept. 15, 2020).]

Background

The Corps issues NWPs to authorize specific activities under § 404 of the federal Clean Water Act (Section 404) and § 10 of the Rivers and Harbors Act of 1899 (Section 10). The CWA authorizes the Secretary of the Army (Secretary) to issue NWPs for any category of activities involving discharges of dredged or fill material into "waters of the United States" (WOTUS).

The categories of activities covered by NWPs must be similar in nature, cause only minimal adverse effects when performed separately, and have only minimal cumulative adverse effect on the environment. Once issued, NWPs are valid for up to five years and may be reissued, revoked, or modified. At present, there are 52 NWPs, which were issued in 2017 and are set to expire on March 18, 2022. Compliance with the terms and conditions of an NWP generally streamlines the authorization process for covered activities, reducing the burden on permittees associated with obtaining individual permits under the CWA.

The Secretary has delegated authority to the Chief of Engineers (and his or her designated representatives) to issue NWPs. There are eight Corps division offices and 38 district offices. Division engineers may modify, suspend, or revoke NWP authorizations on a regional or statewide basis for a specific geographic area, class of activity, or class of waters within their respective divisions. Proposed regional conditions are issued by the district offices.

In order for an activity to be covered by an NWP, both the activity and the permittee must satisfy all of the NWP's terms and conditions, including any regional conditions. Authorization under an NWP may be subject to certain requirements and limits, including pre-construction notification (PCN) requirements. PCNs are reviewed by District Engineers and allow for evaluation of certain proposed activities on a case-by-case basis. Some existing NWPs are also subject to a 300 linear foot limit for losses of stream bed, which excludes NWP coverage for otherwise covered activities that cause a loss of more than 300 linear feet of stream bed, unless this requirement is waived pursuant to NWP general conditions. Additionally, NWPs may be subject to a half-acre limit on the loss of waters of the United States, which excludes from NWP coverage those activities that result in a loss of more than a half-acre of stream bed and other non-tidal waters. The half-acre limit cannot be waived.

The Corps' Proposed Rulemaking

Several important changes appear in the Corps' proposal, particularly with respect to NWP limits related to streambed loss, new NWPs associated with utility lines and water reclamation and reuse facilities, and certain mariculture activities.

Removal of Linear Foot Limit Rule in Favor of Other Tools to Minimize Streambed Loss

The Corps proposes removing the 300 linear foot limit for the loss of streambed in favor of other tools present in existing NWPs, including regional conditions and the half-acre limit for loss of non-tidal wa-

ters of the United States. In the view of the Proposed Rulemaking, eliminating the 300 feet limitation would effectuate the primary purpose of having pre-authorized activities.

The proposed modifications would affect ten existing NWPs, including the following: NWP 29 (residential developments), 39 (commercial and institutional developments), 40 (agricultural activities), 42 (recreational activities), 43 (stormwater management facilities), 51 (land-based renewable energy generation facilities), and 52 (water-based renewable energy generation pilot projects).

Currently, these NWPs are subject to the half-acre limit. According to the Corps, the half-acre limit most accurately represents the amount of stream bed lost as a result of filling or excavation and the subsequent functions expected to be lost. Except for NWP 51 (land-based renewal energy generation projects), the NWPs listed above are also subject to a PCN requirement for all activities. NWP 51, on the other hand, requires PCN for losses of greater than one tenth-acre of waters of the United States (tenth-acre threshold).

Modifying 'Mitigation' General Condition

Additionally, the Corps is proposing to modify the "Mitigation" general condition (GC) applicable to NWPs to require compensatory mitigation for losses greater than one-tenth of an acre of stream bed that require PCN. However, the Proposed Rulemaking gives District Engineers discretion to waive the requirement upon written determination that another form of mitigation is more environmentally appropriate. According to the Corps, this additional requirement will have a similar effect of encouraging minimization of stream bed impacts authorized by NWPs. The Corps is also considering an alternative hybrid approach that would continue to quantify the above NWPs in linear feet when the activities authorized would result only in the loss of stream bed, as opposed to losses of stream bed plus other non-tidal waters.

Modifying Nationwide Permit 12—Utility Line Activities

The Corps has also proposed modifying NWP 12 (utility line activities) to authorize only oil or natural gas pipeline activities, separating out other activities currently authorized under NWP 12 into two new proposed NWPs: one authorizing electric utility lines and telecommunication activities (NWP C) and another authorizing utility line activities for water and other substances that are not petrochemicals (NWP D). Proposed new NWPs C and D would be subject to the half-acre limit and require PCN when a Section 10 permit is required or the tenth-acre threshold is triggered.

New Nationwide Permit Authorizing Discharges of Dredge or Fill Material Associated with Water Reclamation

The Corps is also proposing to add a new NWP authorizing discharges of dredged or fill material associated with water reclamation and reuse facilities (NWP E). This would include authorization for ecological infrastructure such as vegetated areas enhanced to improve water infiltration and constructed wetlands to improve water quality. The NWP would authorize temporary fills, including the use of temporary mats, necessary to construct a water reuse project and attendant features. The NWP would not authorize discharges into non-tidal wetlands adjacent to tidal wetlands. Proposed new NWP E would be subject to the half-acre limit and PCN would be required for all activities prior to commencing activity. According to the Corps, certain activities associated with water reclamation and reuse facilities can be authorized, subject to the half-acre limit, by existing NWPs, including NWPs 29 (residential developments), 39 (commercial and industrial developments), 40 (agricultural activities), and 42 (recreational facilities). However, the Corps notes that this may not be obvious to the public or may be confusing and is therefore seeking comments on whether to add new proposed NWP E or make it clear in existing NWPs that water reclamation and reuse facilities may be attendant features under the applicable existing NWPs.

Seaweed and Finfish Mariculture

The Corps' remaining proposals for new NWPs would authorize seaweed mariculture activities (NWP A) and finfish mariculture activities (NWP B) not currently authorized by existing NWPs. These NWPs would authorize such activities in the navigable waters of the United States and permit seaweed and finfish mariculture structures attached to the seabed

on the outer continental shelf. The proposals include provisions on "multi-trophic species mariculture" activities as an alternative to creating a separate NWP authorizing those activities. This would allow flexibility in proposed new NWPs A and B, the Corps contends, allowing operators to propagate additional species, such as mussels, on the permitted structures. These new NWPs would not, however, authorize "land-based" seaweed farming or finfish mariculture activities such as the construction of ponds to produce catfish or tilapia. Proposed new NWPs A and B would be subject to PCN requirements for all activities and certain geographically based restrictions.

Other Proposed Modifications

In addition to these and other modifications, the Corps proposes modifying several NWP GCs, including GCs 13 (removal of temporary fills), 17 (tribal rights), 18 (endangered species), 20 (historic properties), 25 (water quality), and 32 (pre-construction notification).

Conclusion and Implications

Nationwide Permits streamline the authorization for categories of activities that have minimal adverse effects on WOTUS and the environment, and reduce permitting hurdles for projects that would otherwise require individual permits for covered project activities. The Corps' Proposed Rulemaking to modify and reissue existing permits prior to their original expiration has the potential to clarify and further streamline authorized activities for projects currently in the works. The Corps' ultimate determinations and decisions with regard to these proposals may affect the overall planning and feasibility of projects, especially projects with activities for which NWP authorization was formerly unavailable. Interested parties may submit comments to the Corps by the November 16, 2020 comment deadline and check with district offices about proposed regional conditions and comment deadlines. For more information, *see:* https://www.federalregister.gov/documents/2020/09/15/2020-17116/proposal-to-reissue-and-modify-nationwide-permits (Geremy Holm, Steve Anderson)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ADOPTS EMERGENCY REGULATIONS INCREASING FEES FOR IRRIGATED LANDS REGULATORY PROGRAM

The California State Water Resources Control Board (SWRCB) has increased fees on agricultural water users subject to the state's Irrigated Lands Regulatory Program (ILRP). The SWRCB finds the increase necessary to fund additional staff positions established under the program.

Program Background

The ILRP was established by the SWRCB in 2003 and falls within the SWRCB's Water Rights Program (Water Rights Program). The purpose of the ILRP is to regulate irrigation runoff from agricultural lands, in order to mitigate impairment to surface water and groundwater from pesticides, fertilizers, salts, pathogens and sediment. The SWRCB has found that at high concentrations, unmitigated pollutants can harm aquatic life and render water supplies unusable for drinking or agricultural purposes.

Fee Structure Background

For many years, funding for the ILRP was provided entirely by California tax revenues, until it recently shifted to a fee-based program funded directly by ILRP agricultural stakeholders. During that time, the Water Rights Program, inclusive of the ILRP, has expanded, requiring more staff both at the state level and at the nine regional water quality control boards that are tasked with monitoring and enforcing program compliance.

The SWRCB's authority in determining fees for the Water Rights Program is limited. Its fees, which are approved in September of each year, are a function of the Governor's annual budget, as approved by the California State Legislature, which determines the staffing and the budget for the Water Rights Program. Water Rights Program fees reflect costs that the SWRCB determines must be passed on stakeholders, including ILRP participants.

Fiscal Year 2020-21 Adopted Budget

The Governor's January 2020 budget proposal—presented prior to the COVID-19 pandemic—provided for additional Water Rights Program staff positions. In response to the pandemic, these positions were cut from the Governor's May Revised Budget as the state cut billions of dollars of funding for various programs. Somewhat surprisingly, the final budget adopted in June, re-incorporated these positions, which the SWRCB indicates prompted the required increase in fees.

California *Water Code* § 1525 requires the SWRCB to adopt, by emergency regulation, a schedule of fees to recover the costs incurred in connection with the Water Rights Program. It also requires the board to adjust the fees annually to conform to the amounts appropriated by the Legislature.

Total budgetary expenditures for FY 2020-2021 are $30.4 million. To cover expenditures and ensure a 5 percent reserve for FY 2020-2021, the SWRCB approved a 6 percent fee increase for all fee payers within the Water Rights Program, including those agricultural fee-paying stakeholders funding the ILRP.

A Collaborative Approach Moving Forward

Stakeholder momentum has been gathering in calling for a more collaborative approach that would streamline the ILRP, cut down on staffing costs and ease the burden for stakeholders. Agricultural ILRP participants have proposed processes and concepts that would provide for individual water rights holders, utilities, and districts to work directly with board staff in order to reduce program staff costs. Implementing these concepts would include stakeholders assuming a role in what are currently regulatory duties such as monitoring and reporting. Additional ideas include consolidating reporting requirements for programs with overlapping functions, and allowing agricultural water users with established track records for water quality program compliance to report less frequently. The SWRCB has expressed an interest in considering these innovative and collaborative approaches.

Conclusion and Implications

The fact that the extensively reduced state budget for fiscal year 2020-2021 included increases in State Water Resources Control Board staffing to administer California's Water Rights Programs reflects recognition of the importance the state and its policy makers place on protecting water quality and resource management. It is simultaneously encouraging to hear that the SWRCB is willing to consider ways to creatively and collaboratively reduce costs to fee-paying agricultural stakeholders who fund the ILRP, particularly during a time of continued economic uncertainty.

(Chris Carrillo, Derek R. Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT AFFIRMS DISTRICT COURT ORDER VACATING THE DELISTING OF THE YELLOWSTONE GRIZZLY POPULATION AND REMANDING FOR FURTHER CONSIDERATION

Crow Indian Tribe v. United States, 965 F.3d 662 (9th Cir. 2020).

The U.S. Fish and Wildlife Service (FWS) issued a final rule removing the grizzly bear population in the Greater Yellowstone Ecosystem from the threatened species list under the federal Endangered Species Act (ESA). Following cross-motions, the U.S. District Court granted summary judgment on behalf of plaintiffs, vacating the final rule and remanding to the FWS for further consideration. The FWS and intervenor states appealed, and the Ninth Circuit Court of Appeals affirmed with one exception.

Factual and Procedural Background

This case arises from efforts by the FWS to delist the grizzly bear in the Greater Yellowstone Ecosystem of Idaho, Montana, and Wyoming. In 2007, following success brought about by the Grizzly Bear Recovery Plan, the FWS issued a rule declaring the Yellowstone grizzly population a "distinct population segment" under the ESA, declaring it no longer threatened, and removing it from protection. That action resulted in a lawsuit, with the Ninth Circuit ultimately finding that the FWS arbitrarily concluded that declines of whitebark pine (an important food source for grizzlies) were unlikely to threaten the Yellowstone grizzlies and remanding for further consideration.

Five years later, the FWS published a Conservation Strategy for the Grizzly Bear in the Greater Yellowstone Ecosystem, which outlined the manner in which the Yellowstone grizzly would be managed and monitored upon delisting. The FWS then accompanied that Conservation Strategy with a second delisting rule, which found that the decline of the whitebark pine would not pose a substantial threat to the Yellowstone grizzly. This second delisting decision again drew a lawsuit by environmental and tribal groups.

The D.C. Circuit's Decision in *Humane Society*

In the midst of this second lawsuit, the D.C. Circuit considered a case in which the FWS similarly had created a distinct population segment and delisted it. That case, *Humane Society v. Zinke*, 865 F.3d 585 (D.C. Cir. 2017), involved the Western Great Lakes gray wolf. After concluding that the FWS' position that the ESA allows it to simultaneously create and delist a distinct population segment was reasonable, the D.C. Circuit found that such action required the FWS to look at the effect of partial delisting on the portion of the species that would remain listed (remnant species).

District Court Grants Summary Judgment/ Vacates the Rule

Following cross motions for summary judgment in this case, the District Court granted summary judgment on behalf of plaintiffs, vacated the rule, and remanded to the FWS for further proceedings. The FWS appealed aspects of the remand requiring the study of the effect of the delisting on the remnant grizzly population and further consideration of the threat of delisting to long-term genetic diversity of the Yellowstone grizzly. Three states in the region, as well as a number of private hunting and farming organizations, intervened on the government's behalf and appealed other aspects of the District Court's order involving issues pertaining to recalibration.

The Ninth Circuit's Opinion

Appellate Jurisdiction

The Ninth Circuit first addressed appellees' claim that the court lacked jurisdiction to consider any

issue on appeal because the remand order was not appealable. In support of their argument, appellees principally relied on two cases, *Natural Resources Defense Council v. Gutierrez*, 457 F.3d 904 (9th Cir. 2006), and *Alsea Valley Alliance v. Department of Commerce*, 358 F.3d 1181 (9th Cir. 2004). The *Gutierrez* case involved an agency's attempt to challenge only the reasoning supporting a District Court ruling and not the relief granted. Here, by contrast, the Ninth Circuit found that the FWS did challenge the scope of the remand order and thus did not seek an advisory opinion.

Under *Alsea Valley*, a District Court's remand order of an agency's rulemaking is a final order as to the government and therefore appealable, although it may not be final as to private parties whose positions on the merits would be considered during proceedings on remand. Thus, under *Alsea*, the District Court's order was final at least as to the FWS. The Ninth Circuit found, however, that it also had jurisdiction to consider the issues raised by intervenors because, unlike in *Alsea*, those issues had been resolved by the District Court and could not be taken into account in the proceedings upon remand.

Merits of the Appeal

On the merits, the Ninth Circuit first considered the issue of whether the FWS needed to make a fuller examination of the effect that delisting the Yellowstone grizzlies would have on the remnant grizzly population. While it agreed with the District Court that further examination of the remnant population was necessary to determine whether there was a sufficiently distinct and protectable remnant population such that the delisting of the distinct population segment would not further threaten existence of the remnant, it found that extensive review under § 4(a) of the ESA was not required. It thus vacated the portion of the order calling for a "comprehensive review" of the remnant population and vacated for the District Court to order further examination.

The Ninth Circuit next considered the District Court's order to ensure the long-term genetic diversity of the Yellowstone grizzly. Finding that there were no concrete, enforceable mechanisms in place to ensure long-term genetic health of the grizzly, the Ninth Circuit concluded that the District Court had correctly concluded that the rule was arbitrary and capricious in that regard. Remand to the FWS therefore was required.

Finally, the Ninth Circuit found that the FWS' decision to drop a commitment to recalibration in the conservation strategy violated the ESA because it was the result of political pressure by the states rather than having been based on the best scientific and commercial data. On this basis, the District Court properly ordered the FWS to include a commitment to recalibration. The Ninth Circuit also rejected the intervenor's argument that, because the states had committed to using the current population estimator for the foreseeable future, a commitment to recalibration would be unnecessary and speculative.

Conclusion and Implications

The case is significant because it includes a substantive discussion of relatively novel issues resulting from a decision by the FWS to simultaneously create and delist a distinct population segment under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/07/08/18-36030.pdf
(James Purvis)

NINTH CIRCUIT FINDS BUREAU OF LAND MANAGEMENT NOT REQUIRED TO PREPARE NEW EIS PRIOR TO OFFERING AND APPROVING NEW OIL AND GAS LEASES IN ALASKA

Northern Alaska Environmental Center v. U.S. Dept. of the Interior, 965 F.3d 705 (9th Cir. 2020).

In *Northern Alaska Environmental Center v. U.S. Dept. of the Interior* the Ninth Circuit affirmed the U.S. District Court's summary judgment in favor of the U.S. Bureau of Land Management (BLM) holding that BLM was not required to prepare a new environmental document under the National Environmental Policy Act (NEPA) (42 U.S.C., § 4321 *et seq.*) prior to its 2017 offer and sale of oil and gas leases in the National Petroleum Reserve-Alaska (Reserve).

Factual and Procedural History

The National Petroleum Reserve-Alaska comprises over 23 million acres of land, of which BLM manages 22.6 million acres, and is located along the north coast of Alaska. In 2012, BLM published a combined Integrated Activity Plan and Environmental Impact Statement (collectively: 2012 EIS) designed to determine the appropriate management of all BLM-managed lands in the Reserve.

BLM anticipated that the 2012 EIS would meet NEPA's requirements for the initial oil and gas lease sale. As to subsequent lease sales, the 2012 EIS stated that BLM would prepare an administrative determination of NEPA adequacy (DNA) to see whether the 2012 analysis remained adequate.

In 2013, the BLM published a Record of Decision (ROD). BLM subsequently offered oil and gas leases on 1-2 million acres of the Reserve each year through 2016. In connection with each offering, BLM prepared a DNA concluding that the 2012 EIS remained adequate to meet the requirements of NEPA and no further NEPA documentation was required.

In 2017, BLM issued a call for nominations and comments on all unleased tracts for the 2017 lease sale. Plaintiffs submitted a joint comment letter contending, in part, that BLM was required to prepare a new, "site-specific" NEPA analysis in connection with the 2017 lease sale. BLM, however, issued a DNA evaluating the adequacy of the 2012 EIS with respect to the 2017 lease offering, which concluded the 2017 offering was part of the preferred alternative analyzed in 2012 and that no new information or circumstances substantially changed the prior analysis.

Plaintiffs disagreed and filed a complaint alleging BLM had conducted the 2017 lease sale without complying with NEPA. Specifically, the complaint alleged two causes of action: 1) that BLM failed to prepare a NEPA analysis; and 2) BLM failed to take a "hard look" at environmental impacts.

While BLM was soliciting bids for the available tracts, the United States Geological Survey (USGS) published an updated assessment that estimated the amount of technically recoverable oil in the Reserve to be 8.7 billion barrels. The complaint highlighted the updated USGS assessment. After plaintiffs filed the complaint, BLM issued a revised DNA explaining that agency found the updated USGS assessment unusable information because it did not provide an estimate of economically recoverable resources and because it included land outside of the Reserve.

On cross-motions for summary judgment, the District Court held that BLM was not required to prepare a new NEPA document for the 2017 lease sale. The court concluded that the 2012 EIS was the required NEPA document and a parcel-specific analysis was not required until BLM reviewed actual exploration and development proposals.

This appeal followed.

The Ninth Circuit's Decision

The Ninth Circuit reviewed the District Court's grant of summary judgment *de novo* and then moved on to the issues at hand.

Statute of Limitations

As a threshold matter, the court considered whether the 60-day statute of limitations set forth in the Naval Petroleum Reserves Production Act (NRPA) (42 U.S.C. § 6506(a)(n)(1) barred plaintiffs' claims. To do so, the court concluded that its task was to resolve whether the analysis in the 2012 EIS covered BLM's 2017 lease offering. The court held that the proper inquiry is whether the initial EIS defined its scope as including the subsequent action.

The court noted that the dispute in this matter is not whether an EIS must be prepared for a decision to approve an oil and gas lease—but rather, whether an EIS had already been prepared for this matter. The court rejected plaintiffs' claim that a single NEPA document cannot be both a programmatic and site-specific finding that nothing in NEPA or relevant case law precludes an agency from using a single document to undertake both programmatic-level analysis and site-specific analysis.

Concluding that the 2012 EIS could be used as the analysis for the 2017 lease offering, the court next considered the level of site-specificity that NEPA requires. The court found that the detail NEPA requires in an EIS is dependent on the nature and scope of the proposed action and therefore a fact-specific analysis. Because the court had already concluded that the 2012 EIS covered future lease sales, the NRPA statute of limitations barred it from considering whether the 2012 EIS included the precise degree of site specificity. While the court agreed that some site-specific analysis was required for the 2017 lease sale, it was not persuaded that the 2012 EIS could not be interpreted to cover the 2017 action.

Subsequent Actions

Next the court considered what type of NEPA analysis is required for a future action. The court declined both parties' contention that the relevant inquiry is whether the previous EIS adequately analyzed the impacts of the subsequent action. The court's concern with this approach was that it may, in some situations, render the statute of limitations meaningless—particularly where a previously studied action remains to occur after expiration of the limitations period. Nor was the court satisfied with simply applying the statute of limitations to bar any inquiry into whether the initial EIS was adequate.

Instead, the Ninth Circuit looked to whether the initial EIS purported to be the EIS for a subsequent action, i.e., whether the 2012 EIS provided an accurate description of the proposed action as inclusive of future lease offerings. The court stated that "in deciding whether a previous EIS is the EIS for a subsequent action, we find it appropriate to rely on the EIS' defined scope."

Using that framework, the court concluded the 2017 action was within the scope of the action proposed in the 2012 EIS. The 2012 EIS provided that future lease sales might require only administrative determination of NEPA adequacy, which the court found implied that future leases were considered as part of the analyzed action. Similarly, because the EIS did not describe future lease sales as future actions further implied that future lease sales were components of the action analyzed in the 2012 EIS. Finally, that the 2012 EIS stated that it "will entirely fulfill the NEPA requirements for the first lease sale" suggested to the court that all lease sales were within the scope of the subject action.

Conclusion and Implications

The Ninth Circuit thus affirmed District Court's grant of summary judgment in favor of BLM. Because it concluded that the 2012 EIS was the EIS for the 2017 lease sale, the court held that the NPRA statute of limitations prevented it from inquiring into whether the 2012 EIS took a sufficiently hard look at the impacts of the 2017 action—and therefore plaintiffs' second claim was barred. Moreover, any contention that BLM failed to meet its obligation to analyze new circumstances or new information was waived because plaintiffs did not assert a cause of action that supplemental analysis was required based on the new USGS assessment.

This case provides an interesting foil to supplemental or subsequent environmental review requirements under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 *et seq.*). As is seen in the court's analysis, NEPA does not have the same substantive mandates required by CEQA in determining when supplemental or subsequent review is required. The Ninth Circuit's opinion is available online at:
https://www.californialandusedevelopmentlaw.com/wp-content/uploads/sites/33/2020/09/Northern-Alaska-Environmental-Center-v.-U.S.-Department-of-Interior.pdf
(Christina Berglund)

NINTH CIRCUIT UPHOLDS ENVIRONMENTAL IMPACT STATEMENT AND SUBSEQUENT EIS FOR RELOCATION OF 8,000 U.S. MARINES REQUIRED BY TREATY WITH JAPAN

Tinian Women Association v. U.S. Department of the Navy, ___F.3d___, Case No. 18-16723 (9th Cir. Sept. 18, 2020).

In a September 18, 2020 decision, the U.S. Court of Appeals for the Ninth Circuit ruled that the U.S. Navy did not violate the National Environmental Policy Act (NEPA) when it prepared three separate Environmental Impact Statements (EIS) associated with the relocation of 8,000 U.S. Marines from Japan to Guam and the construction of multiple live-fire training facilities. The court found that the troop relocation and training facilities were not "connected actions" requiring inclusion in the same EIS. Moreover, the court found that although the troop relocation and training facilities should have been analyzed as "cumulative" impacts in a single EIS, the Navy could analyze these impacts in a third EIS that it was

preparing. Finally, the court held that the plaintiffs lacked standing on their claims that the Navy failed to analyze alternative relocation sites for the troops because the court lacked the ability to redress these claims because the troop relocation was required by a treaty.

Factual and Procedural History

In 2009, the United States and Japan entered into the U.S.-Japan Alliance Agreement whereby the United States agreed to relocate an approximately 8,000 U.S. Marines from bases in Japan to Guam to reduce the burdens on local Japanese communities.

In July of 2010, the Navy prepared an Environmental Impact Statement that analyzed the environmental impacts of this move. In addition to analyzing the impacts of moving the 8,000 troops, the relocation EIS analyzed the impacts of the introduction of several training facilities, including one live-fire training complex on the island of Guam and four training ranges on the island of Tinian. Two months later, the Navy published its 2010 Record of Decision (ROD) that declared its intent to proceed with the relocation to Guam and associated training facilities on Tianian. The Navy deferred its decision to construct a live-fire training facility on Guam until it completed an analysis under the National Historic Preservation Act.

In February 2012, the Navy issued an additional notice of intent to prepare a supplemental EIS (SEIS) for the live-fire training facility on Guam. In 2015, the Navy issued a Record of Decision for the SEIS that approved the construction of a live-fire training range complex on Guam.

At some point between 2012 and 2015, the Navy began formulating yet another EIS for an additional live-fire range and other training facilities throughout the Northern Mariana Islands (NMI EIS). The Navy received several comments and was still in the process of revising the NMI EIS when the Ninth Circuit reached its decision in *Tinian Women Association*.

Plaintiffs, the Tinian Women Association (TWA) filed suit challenging the original EIS and the SEIS. Specifically the suit alleged that the Navy violated the National Environmental Policy Act and the Administrative Procedure Act (APA) by failing to consider: 1) the impact of all "mission essential training for Guam-based marines," and 2) stationing alternatives beyond Guam and the Northern Mariana Islands. The U.S. District Court granted summary judgment on the first claim and dismissed TWA's second claim.

The Ninth Circuit's Decision

The court's decision can be broken down into two parts, the court's analysis of TWA's challenges to the impact analyses in the EIS and SEIS, and TWA's claims regarding the Navy's alleged failure to analyze project alternatives.

Challenges to EIS Impact Analyses

In its appeal TWA alleged that the EIS for troop location and the SEIS for a live-fire facility on Guam were "connected actions" that must be assessed in a single EIS. TWA also argued that because the proposed training sites included in the NMI EIS will magnify the environmental effect of relocating Marines to Guam, these "cumulative impacts" must be assessed in the single EIS.

The court began by noting its standard of review was to uphold the agency's action unless it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

Regarding TWA's first claim, the court noted that TWA was correct that connected actions must be considered in a single EIS. Under NEPA, actions are connected if they:

> . . .automatically trigger other actions which may require Environmental Impact Statements, cannot or will not proceed unless other actions are taken previously or simultaneously, or are independent parts of a larger action and depend on the larger action for their justification.

However, the court noted that NEPA does not require an agency to treat actions as connected if they have "independent utility and purpose." When one of multiple actions might:

> . . .reasonably have been completed without the existence of the other, the two actions have independent utility and are not connected for NEPA's purposes.

This is true even when one action "might benefit from the other's presence."

Ultimately, the court concluded that the troop relocation and the placing of training facilities on Tinian were not connected for the purposes of NEPA Environmental Impact Statements. The court noted that the Navy had its own separate and distinct rationales for both the troop relocation and the placement of training facilities.

Next, the court recognized that an EIS must consider cumulative impacts. A cumulative impact:

> . . .is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency. . .or person undertakes other actions.

The court found that TWA met its low burden to require the EIS to incorporate an analysis of cumulative impacts. However, the agencies can consider the cumulative impacts in a subsequent EIS, and avoid re-opening a previously prepared EIS, when the agency "has made clear it intends to comply with those requirements and the court can ensure such compliance."

Here, because the Navy had already issued a notice of intent to complete the NMI EIS, the Navy had "impliedly promised" to consider the cumulative effects of subsequent actions in the NMI EIS, and the "Navy should be held to that promise." The court held that the Navy's decision to defer consideration of cumulative impacts was not an error.

Challenge to the EIS' Failure to Analyze Alternatives beyond Guam and the CNMI

The TWA also alleged that the Navy failed to consider stationing alternatives beyond Guam and the CNMI for the marines locating out of Japan. However the court decided that this claim failed because TWA failed to demonstrate Article III standing.

Article III standing required TWA to establish: 1) that it suffered an injury in fact that is concrete and particularized, and actual or imminent, 2) that the injury was traceable to the challenged conduct, and 3) that the injury is likely to be redressed by a favorable court decision.

The court found that TWA had met the first two requirements above, but failed to demonstrate that any injuries that TWA might suffer from the relocation of marines could be redressed by a favorable court decision. This was because the U.S.-Japan Joint Alliance agreement required 8,000 troops to be transferred from Japan to Guam, and nothing short of an amendment of this treaty would change the relocation. Thus, the court lacked the power to redress TWA's alleged injuries and TWA lacked standing on these claims.

Conclusion and Implications

This case highlights the difficulty plaintiffs often face when claiming that two seemingly connected projects are "connected" under NEPA and thus require inclusion in the same Environmental Impact Statement, especially if there is an argument that both projects have their own independent utility. The case also involved an interesting nuance developed in case law where federal agencies are not required to reopen prior Environmental Impact Statements that failed to analyze cumulative impacts where such cumulative impacts can be analyzed in a later Environmental Impact Statement. The court's opinion is available here: https://www.courthousenews.com/wp-content/uploads/2020/09/MilitaryBuildupGuam-9CA.pdf (Travis Brooks)

RECENT CALIFORNIA DECISIONS

SECOND DISTRICT COURT AFFIRMS A WORKPLACE VIOLENCE RESTRAINING ORDER AGAINST A PERSON WHO THREATENED A CITY ATTORNEY EMPLOYEE DURING CITY COUNCIL MEETINGS

City of Los Angeles v. Armando Herman, ___ Cal.App.5th ___, Case No. B298581 (2nd Dist. Aug. 10, 2020).

The Second District Court of Appeal in *City of Los Angeles v. Armando Herman* held that a workplace violence restraining order against a member of the public for threats against a deputy city attorney during city council meetings: 1) was based on a credible threat of violence likely to recur; 2) was directed at specific prior threatened conduct not protected by the First Amendment; and (3) was not obtained in violation of due process rights.

Factual and Procedural Background

Armando Herman regularly attends city council meetings in both the Cities of Los Angeles and Pasadena. Herman has been removed from meetings more than 100 times. Herman and Los Angeles deputy city attorney Strefan Frauble have known each other for several years through these meetings.

At a series of three city council meetings in April and May 2019, Herman directed angry statements towards Frauble designed to intimidate Frauble. At an April 17, 2019 Los Angeles city council meeting, Herman in a threatening manner said "F___ Mr. Fauble" and stated that "everyone should know" Fauble's address in Pasadena, which Herman then publicly disclosed.

On April 29, 2019, during the public comment period at a Pasadena city council meeting, Herman in an angry and threatening manner disclosed Fauble's home address and the floor of his apartment. Herman submitted multiple public speaker cards with a swastika, Ku Klux Klan hoods, Fauble's name and home address, and the words "F___ you Edward Fauble."

On May 1, 2019, Herman was disruptive at another meeting of the Los Angeles city council and was escorted out of the meeting. Before leaving, Herman stated loudly and in a threatening manner, "f___ you Fauble. I'm going back to Pasadena and f___ with you."

On May 7, 2019, the City of Los Angeles (City) filed a petition for a workplace violence restraining order against Herman under Code of Civil Procedure § 527.8. The petition was supported by a declaration from Fauble. The petition sought an order precluding Herman from harassing, threatening, contacting, or stalking Fauble or disclosing the address of Fauble's residence, and requiring Herman to stay at least ten yards away from Fauble while attending city council and committee meetings.

The trial court granted the requested temporary restraining order and scheduled a hearing on whether to make the order permanent. At the hearing, Fauble testified and Herman was given the opportunity to ask Fauble questions and to offer evidence and argument.

Herman testified that when he made the statements at the city council meetings, he was upset about a change in the city council rules and with his own homelessness. He denied intending to threaten Fauble. Herman said that the Nazi symbolism was to say that he was "living in a holocaust."

The trial court granted the permanent restraining order. The court concluded that the evidence showed a credible threat of violence. The evidence included videos of the city council meetings showing Herman "very agitated, very angry"; Herman's disclosure of Fauble's home address; Herman's statement to Fauble that "I'm going to go back to Pasadena and f___ with you"; and Herman's drawings of KKK and Nazi symbols, in light of prior statements by Herman indicating a belief that Fauble is Jewish.

The trial court also found that Herman's threats were likely to recur in the absence of a restraining order, citing the recent change in Herman's attitude toward Fauble.

The trial court tailored the restraining order as specific as possible to protect Mr. Fauble but not to hamper Mr. Herman's First Amendment right to speak at city meetings for his personal causes. Thus, the court allowed Herman to continue to attend public city meetings but required him to stay at least ten

yards away from Fauble and to not further disseminate Fauble's home address.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court findings of a credible threat of violence and of irreparable harm because there was substantial evidence that Herman's threatening conduct was reasonably likely to recur. The Court of Appeal rejected Herman's claims that the trial court order violated his First Amendment right of free speech, because the order was directed at specific prior threatening conduct that was not protected by the First Amendment. The Court of Appeal found that Herman was accorded sufficient due process in the trial court hearing.

Workplace Violence Restraining Orders

Code of Civil Procedure § 527.8 allows an employer to obtain a restraining order for an employee who has:

> suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace. (§ 527.8, subd. (a).)
>
> A "credible threat of violence" includes a:
>
> . . .course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose. (§ 527.8, subd. (b)(2).)
>
> After a hearing, if a judge:
>
> . . .finds by clear and convincing evidence that the respondent engaged in unlawful violence or made a credible threat of violence, an order shall issue prohibiting further unlawful violence or threats of violence. (§ 527.8, subd. (j).)

Review of the Order under the Substantial Evidence Standard

The Court of Appeal reviews a trial court workplace violence restraining order under the substantial evidence standard of review. (*City of San Jose v. Garbett*, 190 Cal.App.4th 526 , 538 (2010).) Under the substantial evidence standard of review, all factual conflicts and questions of credibility are resolved in favor of the prevailing party. If there is substantial evidence in support of the trial court's order, the judgment is affirmed, regardless of conflicting evidence.

Under the substantial evidence standard, judgment must be affirmed if Herman's statements would have placed "a reasonable person in fear for his or her safety," regardless of Herman's subjective intent. (§ 527.8, subd. (b)(2); *Garbett, supra*, 190 Cal.App.4th at pp. 538–539.)

The evidence was sufficient under this standard. Herman's threats were credible. Herman's repeated disclosure of Fauble's home address served "no legitimate purpose." (§ 527.8, subd. (b)(2).) A reasonable person could conclude that Herman disclosed Fable's address so that Fauble would know Herman could find Fauble's residence.

The threatening context of these disclosures is further shown by Herman's direct threat that he would "go back to Pasadena [where Fauble lives] and f___ with" him. The circumstances of the threats, including Herman's angry demeanor, supported the trial court's conclusion that the threats could reasonably be viewed as serious.

A reasonable viewer could also conclude that Herman's threats were personal. Herman drew hateful Nazi and KKK symbols on public speaker cards along with insults directed at Fauble, and Herman had previously indicated a belief that Fauble is Jewish.

Herman's repeated threats, and the recent change in his attitude toward Fauble, supported the trial court's conclusion that Herman's conduct was reasonably likely to recur in the absence of a restraining order.

Constitutional First Amendment Claim

Section 527.8, subdivision (c) precludes a court from issuing a restraining order that prohibits speech or other activities "that are constitutionally protected." Herman argued that the order violates his right to freedom of speech under the First Amendment to the United States Constitution.

An injunction that issues against unlawful specific patterns of speech does not constitute a "prior restraint" of speech. (*Aguilar v. Avis Rent A Car System, Inc.*, 21 Cal.4th 121, 140 (1999).) The trial correctly found that Herman's threatening statements toward

Fauble were credible threats of violence not constitutionally protected. "True threats" are not constitutionally protected speech. (*People v. Lowery* (2011) 52 Cal.4th 419, 424.) A true threat is a "serious expression of an intent to commit an act of unlawful violence rather than an expression of jest or frustration." (*Id.* at p. 427; *Virginia v. Black* (2003) 538 U.S. 343, 359.)

As discussed above, the trial court concluded that Herman's threatening statements would "place a reasonable person in fear for his safety." If a threat would cause intimidation, fear or disruption to a reasonable person it falls outside the protection of the First Amendment. (*Black, supra*, 538 U.S. at pp. 359–360; *Lowery, supra*, 52 Cal.4th at p. 427.)

Most of the prohibitions in the order—such as to refrain from violence, stalking, and assault, and the requirement that Herman remain ten feet away from Fauble at meetings—concerned conduct rather than speech. The portions of the order that did apply to speech—i.e., the prohibition against threats of violence and against disseminating Fauble's home address—were based upon specific prior threatening conduct not protected by the First Amendment.

Conclusion and Implications

This opinion by the Second District Court of Appeal establishes a balance between speech and conduct that is designed to advocate for political purposes and that which is intended to intimidate and cause fear in public meetings. Narrowly tailored workplace violence restraining order can be used to keep public meetings from becoming forums for abuse of public officials. Although evidence of harmful intent is not required, evidence of anger or of steps taken to carry out threats will be important to demonstrate that the conduct or speech is a credible threat of violence. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B298581.PDF (Boyd Hill)

FIRST DISTRICT COURT FINDS CITY'S 'SLAPP' MOTION FAILED TO SHOW THAT DEVELOPER'S LAWSUIT AROSE FROM PROTECTED ACTIVITY

Oakland Bulk and Oversized Terminal, LLC v. City of Oakland, 54 Cal.App.5th 738 (1st Dist. 2020).

A developer brought an action against the City of Oakland (City) alleging various causes of action. The City filed a demurrer, a standard motion to strike, and a special motion to strike on "SLAPP" grounds. The Superior Court overruled the demurrer in part, sustained it in part with leave to amend, and denied the SLAPP motion without prejudice in light of a pending amendment of the complaint. After the City immediately appealed, the Court of Appeal reversed, finding that while the Superior Court was not required to rule on the SLAPP motion before ruling on the demurrer and standard motion to strike, the SLAPP motion lacked merit because the claims did not arise from any protected activity.

Factual and Procedural Background

The City of Oakland entered into various agreements with Oakland Bulk and Oversized Terminal, LLC (Developer) for the development of land at the former Oakland Army Base. Among other things, the project was to include a bulk shipping terminal for the transfer of certain commodities, including coal. After the subject of coal became public, it activated interest groups, leading to the passage of an ordinance banning coal handling and storage in the City and a resolution applying the ordinance to the terminal. The Developer filed suit in federal court, which ultimately held that the City's resolution breached the terms of a development agreement between the City and the Developer. The federal court enjoined the City from relying on the resolution.

The Developer then filed suit against the City, alleging 12 causes of action, including three for breach of contract and seven for tort. The City filed a demurrer and a standard motion to strike, followed weeks later by a special motion to strike on "SLAPP" (*i.e.*, Strategic Lawsuits Against Public Participation) grounds that sought to strike the complaint in part. The motions were heard at the same time, during

which the court observed that the SLAPP motion "might be premature." The hearing dealt primarily with the demurrer, which the court overruled in part and sustained it in part, with leave to amend. A few days later, the court entered an order on the SLAPP motion, denying it without prejudice and describing it as "premature" in light of the amended complaint that would be filed. Prior to the filing of an amended complaint, the City appealed.

The Court of Appeal's Decision

After relatively quickly finding that the Superior Court was not required to rule on the City's SLAPP motion before ruling on the demurrer and standard motion to strike, the Court of Appeal proceeded to address the merits of the motion. Generally, a two-step process is used for determining whether an action is a "SLAPP."

First, a court decides if a defendant has made a threshold showing that the challenged cause of action is one arising from protected activity, that is, by demonstrating that the facts underlying the plaintiff's complaint consist of acts made in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue. If such a showing is made, a court will then reach a second step, which considers whether the plaintiff has demonstrated a probability of prevailing on the claims.

On the merits, the City contended that the Developer's complaint alleged the City had breached its contractual obligations and committed torts by engaging in certain categories of protected activity. This included, among other things: defending against the Developer's claims in the federal case; interfering with funding by writing a letter to the Alameda County Transportation Commission (ACTC) and introducing an ACTC resolution that would condition disbursement of ACTC funding for the terminal on a promise not to handle coal; failing to negotiate a Rail Access Agreement with the Port of Oakland; and issuing letters that the Developer was in default under a ground lease.

The Court of Appeal disagreed, finding that the City actions referenced in the complaint were not the basis for the Developer's claims, but rather evidence in support of those claims, or that they otherwise were not protected activity. A claim may be struck, the court explained, only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted. Here, the essence of the complaint arose from acts or omissions by the City in breach of agreements, its refusal to cooperate, its stonewalling, and its tortious conduct. Whatever else might be in the complaint, the court found, was the background and context—that is, the evidence—to support those claims.

Conclusion and Implications

The case is significant because it includes a substantive discussion of the law regarding SLAPP motions, both procedurally and substantively. At the conclusion, the opinion also raises various policy concerns regarding the use of SLAPP motions. The decision is available online at: https://www.courts.ca.gov/opinions/documents/A157330.PDF
(James Purvis)

SECOND DISTRICT COURT FINDS SUFFICIENT EVIDENCE IN THE RECORD THAT PROPOSED RESTAURANT WOULD HAVE SIGNIFICANT TRAFFIC IMPACTS REQUIRING AN EIR

Save Our Rural Town v. County of Los Angeles, *Unpub.*, Case No. B294182 (2nd Dist. Sept. 10, 2020).

In an *unpublished* decision dated September 10, 2020, the Second District Court of Appeal highlighted how low of a threshold the "fair argument test" applicable to Negative Declarations and Mitigated Negative Declarations is for requiring preparation of a full Environmental Impact Report (EIR) under the California Environmental Quality Act (CEQA). The court found that the County of Los Angeles violated CEQA by certifying a Negative Declaration for a restaurant and retail project where one of two traffic methodologies indicated significant traffic impacts. The court also found sufficient data in the record to

support a fair argument of significant traffic interference resulting from the number of cars using the project's drive-through. Finally, the court found that the more deferential "substantial evidence" test applied when analyzing the county's determination that the project was consistent with the an applicable area plan and the county zoning code.

Factual and Procedural Background

Applicants sought approvals to develop a 3,300 square foot restaurant with dine-in and drive-through service, and a 6,000 foot retail building on rural property in the unincorporated community of Acton, in Los Angeles County. The applicant sought two separate entitlements, a Conditional Use Permit (CUP) and property subdivision.

In 2014, the applicants sought a conditional use permit for the project. Initially, the county planning commission certified a Negative Declaration and approved a CUP without the drive-through portion of the project. The planning commission explained that its decision to approve the project without the drive-through was because the drive-through would be disruptive to Acton's rural character. The applicant appealed the planning commission's removal of the drive through. On appeal, the county board of supervisors certified a Negative Declaration for the project and approved the project with a drive-in after finding that the project: 1) would not draw substantial traffic from a nearby freeway, 2) was consistent with the applicable Antelope Valley Area Plan, and 3) complied with the county's zoning code. The county prepared two traffic studies in association with the project, one dated January 20, 2015, and a second dated August 5, 2015, however the county only disclosed the January 20, 2015 traffic study to the public.

In 2016, applicants initiated a second application seeking to subdivide its property and separate the retail component of the project from the restaurant and drive through. The planning commission approved the parcel split and certified an addendum to the Negative Declaration prepared for the project CUP.

Shortly after the County's approval of the CUP, plaintiffs Save Our Rural Town (SORT) filed a petition for writ of mandate alleging that the county violated CEQA when it approved the project. The Superior Court issued a ruling finding that the county violated CEQA by failing to make the August 4, 2015 traffic study available to the public before certifying the Negative Declaration for the project. The court also found that substantial evidence in the record supported a fair argument that the project may cause significant transportation impacts on two grounds. First, substantial evidence in the record supported a fair argument that the project might require installation of traffic signals at a nearby intersection, the county did not analyze that traffic impact. Second, the court found that substantial evidence existed to support a fair argument that the project might exacerbate pedestrian hazards, which were not analyzed in the initial study for the Negative Declaration. Importantly, the Superior Court found that insufficient evidence supported a fair argument of two of the supposed impacts raised SORT's writ action: 1) that the project would cause traffic delays at a specific intersection in Acton, and 2) that the project's drive-through would cause traffic delays and interference based on the number of cars that would utilize the drive through at certain times.

The trial court issued a writ of mandate requiring the county to do the following: 1) set aside and vacate the county's CUP approval for the project and its associated certification of the Negative Declaration, 2) set aside and vacate the county's approval of a parcel split for the project which relied on the Negative Declaration through an addendum, and 3) to set aside and vacate any other approvals dependent on the Negative Declaration. The court then directed the county to proceed with reviewing the project consistent with its ruling under CEQA.

The applicant appealed and SORT cross-appealed.

The Court of Appeal's Decision

Regarding the applicant's appeal, the court noted that the applicant's initial appeal brief did not demonstrate any prejudicial error by the Superior Court requiring reversal, and merely asked that the Second District Court of Appeal add language to the trial court's judgment. The applicants sought to remedy this problem by raising an argument in their *reply brief* that the trial court failed to sever its judgment under Public Resources Code § 21168.9 (allows courts in some instances to sever the invalidation of a CEQA document from portions of a related approval). The court noted that this argument was waived because it was not raised in the applicant's opening brief. However, the court noted that even if the applicant's severability arguments were not waived, the county's

certification of a Negative Declaration was *not* severable from the county approval of a conditional use permit or subdivision approval. These approvals would not be compliant with CEQA without the Negative Declaration, both approvals required some valid CEQA document to be valid.

SORT appealed the trial court's: 1) failure to find that substantial evidence of a fair argument existed that the project would result in traffic delays at a nearby intersection and the project's drive through would interfere with and delay street traffic, and 2) finding that substantial evidence supported the county's finding that the project was consistent with the applicable county area plan, and zoning code.

Substantial Evidence of a Fair Argument

Regarding SORT's argument that substantial evidence of a fair argument in the record indicated that the project may have an impact on traffic delays and interference with street traffic, the court agreed and overruled the trial court. Regarding delays at the intersection, the court noted that the August 4, 2015 traffic study for the project discussed two methodologies to study traffic impacts, a Highway Capacity Manual (HCM) and an Intersection Capacity Utilization (ICU). The ICU methodology did not indicate significant traffic impacts at the subject intersection, however the HCM methodology did. The county ignored the HCM methodology and relied on the ICU methodology when adopting the Negative Declaration. Under the low threshold required to establish substantial evidence of a fair argument that environmental impacts may occur when evaluating a Negative Declaration, the existence of one standard methodology in the record indicating significant impacts is enough to establish substantial evidence of a fair argument:

> . . .where an agency generates traffic studies using two different, standard methodologies, its later reliance on only one of the two methodologies to determine that a project will have no significant traffic impacts does not prevent project opponents from citing the other methodology as substantial evidence of a fair argument.

The court also found that sufficient data existed in the record indicating that vehicles using the drive-through may cause a significant traffic impact based on the number of vehicles anticipated at the lot and the design of the lot to give rise to substantial evidence of a fair argument of significant traffic impacts.

As a remedy for these CEQA violations, the court held that the county could either prepare a full EIR for the project or prepare a Mitigated Negative Declaration to show that all potentially significant traffic impacts would be mitigated.

Standard of Review and Consistency with the County's General Plan

SORT also challenged the standard of review the trial court utilized to uphold the county's determination that the project was consistent with the county's General Plan and zoning code. The trial court applied the more deferential "substantial evidence" standard and not the less deferential "fair argument standard" applicable under CEQA when analyzing Negative Declarations. The court rejected SORT's argument. Although a project's inconsistency with a General Plan or zoning provision is a potential CEQA impact, this does not mean that a court must analyze a local agency's non-CEQA consistency determination, based on its own general plan or zoning code, subject to the less deferential standard that applies when reviewing Negative Declarations.

Conclusion and Implications

Although *unpublished*, *Save Our Towns* is important because it highlights the significant risks involved when a Negative Declaration, or Mitigated Negative Declaration is certified for a project that has any controversy or indicia of potential environmental impacts. This decision, and others highlight the very low threshold that must be met to find potential environmental impacts under the "fair argument" standard, thus requiring further mitigation measures to be developed or a full EIR to be prepared. The court's *unpublished* opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B294182.PDF (Travis Brooks)

FOURTH DISTRICT COURT UPHOLDS PUBLIC IMMUNITY FOR TRAIL CONDITIONS WHERE MODIFICATIONS TO TRAIL RESULT IN DECREASED VISIBILITY OF BARRIER

Sean Nealy v. County of Orange, ___ Cal.App.5th ___, Case No. G058036 (4th Dist. Aug. 24, 2020).

The Fourth District Court of Appeal in Sean *Nealy v. County of Orange* held that the absolute governmental trail immunity doctrine applied to a situation in which a recreational public trail barrier constructed within the trail was modified by the county in a manner to make the barrier significantly less visible to a bicycle rider injured by the barrier.

Factual and Procedural Background

The Thomas F. Riley Wilderness Park (Park) is a 544-acre public wilderness area park owned and operated by the County of Orange (County). The Park includes five miles of multiuse trails for hikers, equestrians, and bicyclists, including the Wagon Wheel Canyon Loop Trail (Trail), a 2.7-mile long loop trail located inside the Park used for hiking and bicycling.

Before the incident at issue in this case, a wooden lodgepole fence ran perpendicularly across the midpoint of the eastern half of the Trail loop. It served as an entrance and exit for the Trail and created a physical barrier that cyclists had to maneuver around when riding either north or south on the Trail. Plaintiff had ridden his bicycle on and along the Trail several times in the past and knew of the existence of the perpendicular wooden lodgepole fence and knew that the fence created a barrier.

At some point unknown to plaintiff, the lodgepole fence was replaced with new fencing, which consisted of wooden fenceposts or "pylons" between which were strung horizontal, gray colored wire cables. This new fence was constructed on the Trail and ran perpendicularly across it. Gray colored loose gravel was placed below and around the new fencing and covered the ground in the surrounding area.

Like the original lodgepole fence, the new perpendicular fence divided the southern and northern portions of the Trail loop, separating each direction of travel. However, the new fence actually ended before it reached the boundary of the Trail, and there was an opening between the fence's western-most post and the parallel fencing at the western edge of the Trail.

Plaintiff, an experienced cyclist, was riding his bicycle on the Trail, traveling southbound on the northern portion of the Trail loop, and intending to continue on to the southern portion. Plaintiff noticed the old wooden lodgepole fence had been removed. He did not see the wire cables strung between the new fenceposts which blended in with the gravel background.

He mistakenly believed he could ride between the fenceposts now traversing the Trail and decided to ride "directly between the posts" of the new fence. He figured the cross logs from the old lodgepole fence were removed with the posts remaining and thought he could ride directly between the posts. Instead, plaintiff rode his bicycle directly into the wire cables, where he was thrown over the handlebars and onto the ground, resulting in serious injuries.

Plaintiff filed his original complaint against County alleging two causes of action: 1) Negligence (Premises Liability); and 2) Dangerous Condition of Public Property. The County demurred, asserting plaintiff's claims were barred both by Government Code § 831.4's "trail immunity" and Government Code § 831.7's "hazardous activity immunity." The trial court sustained the demurrer based on the trail immunity doctrine, finding the new fencing was a "condition" of the Trail for which the County was statutorily immune. It granted plaintiff leave to amend.

Plaintiff filed a First Amended Complaint (FAC), alleging the same two causes of action, but asserting contrary to the original complaint that the barrier was not part of the Trail. The FAC included two photos of the new fence showing how the wires seemed to fade into the surrounding gravel. The FAC also included a set of plans for the "Wagon Wheel Creek Restoration and Stormwater Management" restoration project for Wagon Wheel Creek, which included planned modifications to the area of the Trail where the new fence was located.

The County demurred again on the same two grounds. Plaintiff responded by stating he wanted to further call into question the County's design—and the lack of approval—of the new fencing and how it

created a dangerous condition on the Trail. The court noted the County had not offered a "design immunity" affirmative defense (Government Code, § 830.6), and as a result, found that the Trail's design had no bearing in the case.

The trial court sustained the demurrer to the FAC, this time without leave to amend. Plaintiff's attempt to allege in the FAC that the barrier was not located on or part of the trail was rejected by the trial court under the sham pleadings doctrine. The trial court reiterated that the County was immune under § 831.4 because the new fencing was a "condition" of the Trail within the meaning of that section and concluded plaintiff had not been able to state how it could amend around the trail immunity. The court dismissed the action with prejudice, and judgment was entered accordingly.

The Court of Appeal's Decision

The Court of Appeal, noting that plaintiff admitted on appeal that the barrier was part of a recreational trail under the trail immunity, held that the recreational trail immunity doctrine provided absolute immunity for the Trail and the fence barrier within the trail. The Court of Appeal held that the doctrine of trail immunity must extend to claims arising from the design of a trail as well as its maintenance. Thus, the County cannot be subject to liability for a dangerous condition of the Trail under Government Code § 835.

Recreational Trail Immunity from Dangerous Conditions

Under the Government Claims Act (Gov. Code, § 810 *et seq.*), there is no common law tort liability for public entities in California—the government has sovereign immunity unless the government violates an express statute.

A broad Government Claims Act statutory exception to that sovereign immunity is when the government property is in a dangerous condition. Unless a particular immunity applies, Government Code § 835 subjects the government to dangerous condition liability if the dangerous condition proximately causes the injury in a foreseeable manner and the dangerous condition is either apparent to the government a sufficient time for the government to have corrected the dangerous condition or a government employee within the scope of his employment created the dangerous condition.

The trail immunity absolute exception to government liability (including dangerous condition liability) found in Government Code § 831.4 has been in existence for more than 50 years. The immunity broadly applies to any condition of any trail used for recreational purposes (or for access for those purposes), including for biking and hiking.

The express purpose for the broad trail immunity is to encourage the government to open its property for public recreational use without the burden and expense of defending against claims for unsafe or dangerous condition, which claims would cause the government to close public lands for recreational use. To fulfill that purpose, the broad trail immunity extends to claims arising from the design and maintenance of trails.

De Novo Review of the Judgment

Because a demurrer tests the sufficiency of a pleading by raising questions of law, the Court of Appeal reviews a trial court order sustaining a demurrer under the *de novo* standard of review.

With respect to the judgment sustaining the demurrer without leave to amend, the Court of Appeal reviews that determination under the abuse of discretion standard, as to whether a cause of action could be alleged under the given facts.

Under the *de novo* review of the sustaining of the demurrer, while normally in trail immunity cases the existence of a trail and the recreational purpose for which a trail is being used may be issues of fact, in this case the plaintiff alleged and conceded that the Trail and his use thereof fit the trail immunity criteria.

Thus, because the County is statutorily immune as a matter of law, the question of whether the new fence created a dangerous condition was irrelevant. The Court of Appeal held that the barrier in this case is similar to the chain link fence in the case of *Prokop v. City of Los Angeles*, 150 Cal.App.4th 1332 (2007), in which a cyclist riding along the Los Angeles River bike trail collided with a chain link fence at the opening for the bike path. In Prokop, the court held that the condition of the bike path included the design of the bicycle gate. (Id. at p. 1341-1342)

Because the trial immunity is absolute, the Court of Appeal rejected plaintiff's arguments that a warn-

ing should have been posted or that the design of the new barrier was not specifically approved by the County.

Under the abuse of discretion review for the judgment, the Court of Appeal held that plaintiff's allegations pertaining to design immunity could not be amended to overcome the absolute immunity under the admittedly applicable trail immunity doctrine.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal is consistent with recent cases in which the Courts of Appeal have rejected attempts by plaintiffs to make inroads into the absolute recreational trail immunity on the basis of claims that the government has a duty to warn of trail hazards or safely design trail features. (*See*, *Reed v. City of Los Angeles*, 45 Cal. App.5th 979 (2020) [badminton net stretched across bicycle trail].) The opinion provides assurance to governments and to developers who dedicate and create trails so popular with communities and required as conditions of development permits by government authorities. As the Court of Appeal recognized, the legislatively imposed trail immunity comes at a cost for those denied recovery for injuries on public land. But without that legislative protection, the public would have extremely limited access to public lands for recreational purposes and the community interconnection improvements and dedications required as conditions of development permits would not be built. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/B298581.PDF
(Boyd Hill)

THIRD DISTRICT COURT AFFIRMS ORDER REQUIRING APPELLANTS TO POST AN UNDERTAKING AS A CONDITION FOR INJUNCTIVE RELIEF UNDER THE PUBLIC RECORDS ACT

Stevenson v. City of Sacramento, ___Cal.App.5th___, Case No. C080685 (3rd Dist. Oct. 6, 2020).

The Third District Court of Appeal in *Stevenson v. City of Sacramento* affirmed the trial court's order requiring appellants to post an undertaking pursuant to Code of Civil Procedure § 529 as a condition to obtaining an injunction under the California Public Records Act (PRA) (Gov. Code, § 6250 *et seq.*)

Factual and Procedural Background

In 2007, the City of Sacramento (City) adopted a resolution approving destruction of records under Government Code § 34090—which allows destruction of city records that are at least two years old unless the law otherwise requires—and authorizing the city clerk to adopt a new records retention policy. In 2010 city clerk adopted a new records retention schedule consistent with § 34090 of the Government Code. It was not, however, until 2014 when the City attained the technological ability to automatically delete older emails did it begin implementing its 2010 policy.

The City notified the public and various citizen groups in December 2014 that it would begin deleting older emails in compliance with its 2010 policy on July 1, 2015. Less than a week prior to the commencement of the planned effort, appellants each submitted broad PRA requests to the City for all emails currently scheduled to be deleted and emails from anyone acting on the City's behalf from January 1, 2008 until the present. Of the roughly 83 million emails in the City's possession at that time, the requests concerned between 53 and 64 million of those records. Staff estimated it would take more than 20,000 hours to comply with appellants' requests.

The City offered to postpone its planned deletion effort by a week to allow appellants to narrow the scope of the records sought. Appellants agreed, but at the same time filed suit claiming that the City had refused to provide access to public records in violation of the PRA and the California Constitution.

On the same day the lawsuit was filed, appellants obtained a temporary restraining order barring the City from deleting records potentially responsive to their PRA requests. Subsequently, the trial court issued a preliminary injunction directing the City

to preserve approximately 15 million potentially responsive records and conditioned the grant of the injunction on appellants posting an undertaking in accordance with § 529 (Section 529) of the Code of Civil Procedure.

Appellants appealed alleging that Section 529 impermissibly conflicts with the PRA.

The Court of Appeal's Decision

The appellate court began its inquiry with a background of Section 529's undertaking requirement, which absent a specific exemption is mandatory in connection with the issuance of a preliminary injunction. While certain statutory schemes exempt application of Section 529, the court found that the PRA is not one of those schemes. The PRA allows for injunctions but does not address the topic of undertakings.

Undertakings and the Public Records Act

In light of this, the court considered appellants' claim that Section 529's undertaking requirement impermissibly conflicts with PRA requirements. Because the PRA and Section 529 both relate to injunctions, but only Section 529 discusses the need for an undertaking, appellants contend that under the traditional rules of statutory construction "that a specific provision prevails over a general one relating to the same matter" Section 529 should not apply to injunctions issued in accordance with the PRA. The court disagreed. The court emphasized that that particular rule applied only where an "'irreconcilable conflict exists between the general and specific provisions,'" and found that the PRA did not contain a conflicting specific rule.

Analogizing to Proposition 65

The court found further support for its conclusion by looking to how courts have treated similar statutory schemes, *e.g.*, the Proposition 65 (Safe Drinking Water and Toxic Enforcement Act), which allows courts to enjoy those who violate or threaten to violate its provisions, but is also silent as to whether an undertaking is required. Courts have found Section 529's undertaking requirement applicable to Proposition 65 cases. The court plainly pointed out that had the California Legislature wished to include a specific exemption from Section 529 in either the PRA or Proposition 65, it certainly could have. That it did not is "telling."

Granting Some Protections Doesn't Necessarily Take Away Other Protections

Next appellants asserted that undertaking costs are not included in the specific costs that PRA applicants can be expected to pay under the statute. The court was not persuaded. It found that the fact that the Legislature found PRA applicants should be required to pay certain specific costs, *e.g.*, copying costs, and in some instances court costs or attorney fees, does not by implication mean that the California Legislature intended PRA applicants to be exempt from generally applicable requirements. The court stated that granting specific protections, does not take away other protections provided by law. Again, the court found that if the Legislature had intended to exempt PRA applicants from Section 529, it would "have spoken far more clearly."

The court further rejected appellants' claim that accepting the trial court's ruling would leave indigent litigants unable to pursue PRA cases. The court noted that state law already allows courts to except indigent parties from Section 529—and highlighted that appellants never acknowledged as much.

Additional Arguments

The court similarly disposed of appellants' additional arguments. The court found that while the Constitution requires courts to narrowly construe statutes limiting the right of access to public records—it does not "nullify unambiguous statutory requirements"—noting that PRA plaintiffs must still pay court fees, even though that places an incidental burden on the plaintiff's right to access public records. The court also disagreed that the trial court wrongly imported Section 529's requirements into the PRA finding that the argument incorrectly suggested that Section 529 did not apply unless another statute, like the PRA, specifically incorporates it. Section 529, however, is the default rule and therefore it applies unless there is a specific statutory exemption.

The court briefly addressed arguments of certain *amici curiae* that made contentions similar to appellants. The court found that simply because public agencies were entitled to court costs and attorney's fees in frivolous PRA cases did not conflict with the

right of public agencies to demand an undertaking—thus, no irreconcilable conflict. Nor did the court find it "absurd" that public agencies are exempt from posting and undertaking, but private individuals are required to do so. The court also pointed out that private individuals are not always required to post a bond because courts have the discretion to exempt indigent individuals form doing so.

Finally, the court held that Section 529 in the context of PRA is not an unlawful prior restraint under the First Amendment. Section 529 is not concerned with speech and is therefore not a prior restraint "simply because [it] may incidentally affect discretion."

Conclusion and Implications

The Court of Appeal affirmed the trial court order and held that the City of Sacramento was entitled to recover its costs on appeal.

Petitioners, in some instances, use PRA requests to gather documents necessary for the administrative record in land use litigation. This decision makes clear that while a petitioner may obtain an injunction under the PRA to stop destruction of public records, it must meet Section 529's undertaking requirement, unless otherwise exempt. This may also have relevance in light of the Fourth Appellate District's decision in *Golden Door Properties LLC v. The Superior Court of San Diego County,* 53 Cal.App.5th 733 (2020) where that court considered the city's record destruction policy in the context of litigation under the California Environmental Quality Act. The court's published opinion is available online at: https://www.courts.ca.gov/opinions/documents/C080685.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

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

SB 974 was introduced in the Senate on February 11, 2020, and, most recently, on September 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 234, Statutes of 2020.

Housing / Redevelopment

•AB 2345 (Gonzalez)—This bill would amend the Density Bonus Law to, among other things, authorize an applicant to receive: A) 3 incentives or concessions for projects that include at least 12 percent of the total units for very low income households; B) 4 and 5 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 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 197, Statutes of 2020.

•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 28, 2020, was vetoed by 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 30, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 334, Statutes of 2020.

•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 28, 2020, was approved by the Governor and chaptered by the Secretary of State at Chapter 202, Statutes of 2020. (Paige Gosney)

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