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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

ARE 'WETLANDS' REALLY 'WATERS OF THE STATE'?

By David Ivester, Esq.

California regulates "discharges of waste" into "waters of the state" under the Porter-Cologne Act. Contrary to popular supposition, "waters of the state" properly do not include "wetlands." The California Legislature had no intention of reaching wetlands when it enacted the statute in 1969. What!? But the State Water Resources Control Board (SWRCB) and the Regional Water Quality Control Boards (RWQCBs) have long treated "wetlands" as "waters of the state" and asserted they have jurisdiction to regulate discharges of waste into them. Indeed, after a decade or so of consideration, the SWRCB recently adopted an extensive regulation prescribing detailed procedures by which it intends to do exactly that. That the SWRCB and RWQCBs have claimed this authority and have so far gotten away with it does not though establish the validity of their claim nor shield it from challenge.

The Porter-Cologne Act

Whether "wetlands" are "waters of the state" regulated under the Porter-Cologne Act is a question of how to read and understand the statute, and that calls for recognizing and following well established, fundamental principles of statutory interpretation. Even though the SWRCB and RWQCBs have long been in the habit of treating wetlands as waters of the state, their claim has never been examined or sanctioned by any court. It remains, in that sense, an open legal question.

The Porter-Cologne Act provides that anyone discharging or proposing to discharge "waste" within any region in the state that could affect the quality of "waters of the state" must first file a report of waste discharge with the pertinent RWQCB and then comply with the conditions of any "waste discharge requirements" (*i.e.*, a permit by another name) issued by the SWRCB. (Wat. Code §§ 13260, 13264.) (Whether discharging "waste" extends beyond discarding or disposing of "sewage and any and all other waste substances," as "waste" is defined in the Porter-Cologne Act, to also encompass placing and using materials such as sand, gravel, soil, concrete, and lumber for some intended, useful purpose, e.g., building houses and roads, repairing levees, or contouring agricultural fields, is a different question for another day.)

When enacting the Porter-Cologne Act in 1969, the Legislature defined "waters of the state" to mean "any surface water or groundwater, including saline waters, within the boundaries of the state." (Wat. Code § 13050(e).)

Legislative Intent

The touchstone of understanding a statute is legislative intent, and in construing a statute, the "fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute." (*Smith v. Superior Court*, 39 Cal.4th 77, 83 (2006).) Toward this end, "we begin with the language of the statute, giving the words their usual and ordinary meaning." (*Id.*)

In 1969, the Legislature undoubtedly understood "surface water" in keeping with its ordinary meaning and then existing law to refer not just to any H_2O on the ground surface, but rather to an actual body of water, either flowing or still, that "encompasses both natural lakes, rivers and creeks and other bodies of water, as well as artificially created bodies such as reservoirs, canals, and dams." (*People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 301-302 (1996).) "But by surface waters are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water-

course." (*Horton v. Goodenough*, 184 Cal. 451, 453 (1920).)

Integral to identifying a surface waterbody and delineating its extent is ascertaining and recognizing its boundary, the ordinary high-water mark at common law, which distinguishes the surface waterbody from surrounding land. In *Churchill Co. v. Kingsbury*, 178 Cal. 554 (1918), for instance, the California Supreme Court considered whether certain lands:

> . . .were swamp and overflowed lands, passing to the state by grant from the United States, or were lands lying under the waters of a navigable lake, belonging to the state by virtue of her sovereignty. (*Id.* at 557).

Noting that a survey had been made of the ordinary high-water mark of the lake, the Court affirmed that "[t]he lake consists of the body of water contained within the banks as they exist at the stage of ordinary high water." (*Id.* at 559.) It distinguished that from other "land [that] was not a part of the bed of the lake, but was marsh or swamp land adjoining the border of the lake." (*Id.*)

"Wetlands" was a word not yet appearing in any California court decision by the time the Porter-Cologne Act was enacted. The term has come into currency more recently to generally refer to areas that do not contain enough water often enough or long enough to develop an ordinary high water mark identifying them as waterbodies and delimiting their boundaries, but instead experience inundation or saturation by water often enough and long enough (perhaps as little as a couple weeks per year) to develop soil characteristics typical of anaerobic conditions and support a prevalence of vegetation typically adapted for saturated soil conditions.

Not only did the Legislature define "waters of the state" to mean "surface waters" as commonly understood, it also said nothing in the Porter-Cologne Act or its legislative history to suggest it intended these terms to include "wetlands" (or swamps, marshes, bogs, or the like). When passing the act, the Legislature said nothing of "wetlands" in its definition of "waters of the state." Indeed, the Legislature never mentioned wetlands *anywhere* in the Porter-Cologne Act. Nor did it refer to wetlands *anywhere* in the legislative history of the Porter-Cologne Act. If the Legislature had intended to depart from the common understanding of surface waters and start treating wetlands as waters of the state, one would reasonably expect the Legislature to have left at least some hint of that innovation in the act and its legislative history. It did nothing of the sort. The Legislature's omission of any reference to wetlands is compelling; it plainly did not have wetlands in mind when it enacted the statute and defined the "waters of the state" regulated under the act.

That rightly marks the end of the inquiry:

> Where the words of the statute are clear, we may not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history. (*Burden v. Snowden*, 2 Cal.4th 556, 562 (1992).)

The Legislature's intent is manifest. "Waters of the state" as defined by the Legislature in the Porter-Cologne Act do not include wetlands.

State Water Resources Control Board Claims over Wetlands

The SWRCB and RWQCBs nonetheless have long claimed authority to regulate wetlands as "waters of the state." On April 2, 2019, the SWRCB formalized their regulatory practices in this regard by adopting a state wetland definition and procedures for discharges of dredged or fill material to waters of the state. (State Water Resources Control Board, Res. No. 2019-0015; 23 Cal. Code Reg. § 3013.) In doing so, it asserted that wetlands of various types are "waters of the state." (State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State, p. 2 (Apr. 2, 2019) (Procedures); Staff Report, pp. 3-4 (Apr. 2, 2019).)

This claim does not withstand scrutiny. Disregarding the first principle of statutory interpretation, the SWRCB failed even to attempt the fundamental task necessary to understanding the Porter-Cologne Act, *i.e.*, read it with the aim of ascertaining the Legislature's intent. In the Procedures and accompanying materials, the SWRCB spoke much about why it regarded including wetlands within its regulatory purview to be a good idea, but said almost nothing about what the Legislature intended. The act's meaning though is not a question of policy for the SWRCB to decide as if writing on a clean slate, but rather a question of statutory interpretation. The SWRCB's

responsibility is to faithfully ascertain and implement the Legislature's intent, and not to arrogate to itself the authority to decide what it thinks should be the scope of its own regulatory jurisdiction.

As explained above, both the text and legislative history of the Porter-Cologne Act reveal no intent of the Legislature to treat wetlands as "waters of the state." The SWRCB has not offered any sound reason to imagine otherwise. It said nothing of the omission of any reference to "wetlands" in the statute and its legislative history. It said nothing of the ordinary meaning and common law understanding of "surface waters." The most the SWRCB offered was its own characterization that the act defines waters of the state "broadly" to include "any surface water or groundwater, including saline waters, within the boundaries of the state." (Procedures, p. 2; Staff Report, p. 57.) Simply labeling the act's definition as "broad," though, hardly serves as evidence of the Legislature's intent. Even less does such a facile assertion explain or justify supposing the Legislature intended to include wetlands within "waters of the state."

Seemingly dropping all pretense of seeking the Legislature's intent, the SWRCB instead offered a novel theory for injecting "wetlands" into "waters of the state." It observed that Congress enacted the federal Clean Water Act to regulate discharges of dredged or fill material into "waters of the United States." Since the Clean Water Act is subject to constitutional limitations, *e.g.*, the limited reach of the federal commerce power, inapplicable to the Porter-Cologne Act predicated on the state's general police powers, the SWRCB observed that "waters of the state" thus could extend beyond "waters of the United States" that Congress might regulate under the commerce power. (Staff Report, pp. 16-17.) On that premise, the SWRCB asserted without further explanation that "'[w]aters of the state' includes all 'waters of the U.S.'" (Procedures, p. 2; Staff Report, p. 57.) Extending its assertion even further, the SWRCB reasoned that since the term "waters of the United States" has been defined by the U.S. Army Corps of Engineers (Corps) and U.S. Environmental Protection Agency (EPA) in their regulations to include "wetlands," "waters of the state" necessarily includes wetlands as well. (Staff Report, pp. 13-21, 55.)

This makes no sense. It is but wordplay, toying with an impossibility and a *non sequitur*—and failing to offer any real basis for the SWRCB's claim over wetlands. First, the impossibility: When the Legislature enacted the Porter-Cologne Act in 1969, it could not have intended "waters of the state" to include "waters of the United States" because the latter term had not yet been invented. Congress did not coin it until three years later when passing the Clean Water Act in 1972. Similarly, the Legislature could not have had in mind then nonexistent Corps and EPA wetland regulations when it defined "waters of the state" in the Porter-Cologne Act. The SWRCB cannot subsequently infuse "waters of the state" with meaning the Legislature could not possibly have intended when it defined the term. (*See*, *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1388-1389 (1987); 78 Ops.Cal.Atty.Gen. 137, 140 (1995), observing that a California statute "could not possibly have been intended or designed to conform with the federal counterpart" enacted years later.)

The SWRCB nonetheless tried bootstrapping its claim, saying that its own regulation adopted in 2000 stating that, for certain limited purposes, "[a]ll waters of the United States are also 'waters of the state'" (23 Code Cal. Reg. § 3831(w)):

> [This]. . .reflects an intention by the Water Boards to include a broad interpretation of waters of the United States into the definition of waters of the state. (Staff Report, p. 57.)

The SWRCB's regulation, though, equates waters of the state with waters of the United States *only* for purposes of "certifications" provided by the SWRCB and RWQCBs pursuant to certain federal laws, such as § 401 of the federal Clean Water Act, and not for any other purposes. If anything, the regulation's limitation to circumstances governed by federal law suggests that, contrary to the SWRCB's supposition, in other contexts all waters of the United States are *not* necessarily waters of the state. More to the point, though, it is the Legislature's intention, not the SWRCB's, that establishes the meaning of "waters of the state." An agency cannot simply will a statute to mean what *it* wishes. Indeed, to the extent the SWRCB strayed beyond the Legislature's intention, its regulation is invalid.

Second, the *non sequitur*: In defining "waters of the state," the Legislature, of course, was not bound by constitutional limitations on Congress in defining

"waters of the United States," and that may explain how "waters of the state" could extend to surface waters beyond the reach of the federal commerce power. How that observation might have any bearing though on the SWRCB's further assertion that "waters of the state" must also be read to encompass features other than the "surface waters" specified by the Legislature, the SWRCB does not explain. It simply does not follow that because the Legislature had the power to regulate surface waters beyond Congress' reach, it necessarily intended to regulate features other than surface waters, such as wetlands—and, moreover, did so without saying so.

Conclusion and Implications

The Porter-Cologne Act and its legislative history demonstrate the lack of any intent by the California Legislature to treat "wetlands" as "waters of the state." In nonetheless claiming authority to regulate "wetlands," the State Water Resources Control Board shrugs off the Legislature's intent and instead resorts to alternative theories serving only to reveal the absence of any sound basis for its claim. "Waters of the state" within the meaning of the Porter-Cologne Act properly do not extend beyond "surface waters" to encompass "wetlands" elsewhere on the landscape.

That said, as a matter of practicality, there is little reason to expect major changes in the scope of wetland regulation in California any time soon. The vast majority of wetlands are regulated under the federal Clean Water Act by the Corps and EPA—and by the State Water Resources Control Board and Regional Water Quality Control Boards exercising their authority under § 401 of that federal CWA to "certify" whether permits to fill such wetlands comply with pertinent federal and state requirements. That regulatory program will continue unaffected by whether the Boards regard wetlands to be "waters of the state" under state law. Moreover, wetlands outside federal jurisdiction commonly are regulated in some manner under local ordinances or other state or regional programs; those regulatory programs will continue as well.

The SWRCB's newly adopted wetland regulatory Procedures may well remain in place too. Having accustomed itself for many years to enjoy regulatory jurisdiction under the Porter-Cologne Act at least coextensive with that exercised by the Corps and EPA under the Clean Water Act and having worked for a decade to develop the Procedures to extend and refine its regulatory program, the board appears sufficiently invested in the effort to not readily relinquish it. Few landowners have much incentive to challenge that claim. Owners of the vast majority of wetlands regulated under the federal or some other program would gain little or no regulatory relief by removal of the SWRCB's largely duplicative regulation of wetlands under the Porter-Cologne Act. Whatever projects or activities they undertake affecting those wetlands would remain subject to regulation under those other programs even if the SWRCB or a court set aside the Procedures. Landowners with wetlands outside the jurisdiction of the federal agencies, who thus might gain some regulatory relief by removal of the SWRCB and RWQCBs' regulatory program, typically tend to prefer trying to reach acceptable resolutions of their land use issues through permitting rather than litigation. Generally, only those with their backs against the wall, such as those facing enforcement actions and penalties or onerous permit requirements, prohibitively expensive avoidance and mitigation measures, and the like, may feel sufficiently motivated to contest the legality of the Boards' claim that they can regulate "wetlands" as "waters of the state." In the meantime, the Boards' house of cards likely will remain undisturbed.

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REGULATORY DEVELOPMENTS

EPA FINALIZES GUIDANCE ON IMPLEMENTATION OF U.S. SUPREME COURT'S 'FUNCTIONAL EQUIVALENT' CLEAN WATER ACT TEST IN *COUNTY OF MAUI* CASE

On January 14, 2021, the U.S. Environmental Protection Agency (EPA) finalized guidance regarding the implementation of the U.S. Supreme Court's decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 590 U.S. ___ (2020) (*Maui*), which established a "functional equivalent" test to determine when discharges to groundwater that ultimately reach surface waters should be regulated under the federal Clean Water Act in the same manner as a direct discharge to surface waters (*Maui* Guidance). The *Maui* Guidance states that any discharge must meet certain "baseline permitting principles" comprised of threshold conditions that trigger the National Pollutant Discharge Elimination System (NPDES) Permit requirement, and the type of analysis permit writers currently conduct for surface water discharges. In doing so, the *Maui* Guidance sets forth an additional factor that should be evaluated when determining whether a discharge to groundwater requires an NPDES Permit—"the design and function of the treatment system"—and provides guidance regarding the types of discharges and associated treatment systems for which NPDES Permits will not be required.

Background—The *Maui* Decision

In *Maui*, the Supreme Court held that an NPDES permit is required "if the addition of the pollutants through groundwater is the *functional equivalent* of a direct discharge from the point source into navigable waters." According to the Court, evaluation of whether a discharge of a pollutant to groundwater is the "functional equivalent of a direct discharge from the point source into navigable waters," requires the application of the following seven factors: 1) the pollutant's travel time between the discharge point and the navigable water; 2) the distance traveled; 3) the material through which the discharge travels; 4) dilution or chemical changes during travel; 5) the amount of pollutant entering the navigable water as compared to the amount that leaves the point source; 6) the way or location the pollutant enters the navigable water; and 7) the degree to which the pollution has retained its identity upon reaching the navigable water. The opinion makes clear that the list is not exhaustive, but notes that time and distance may be the most important factors. (*See:* https://www.supremecourt.gov/opinions/19pdf/18-260_jifl.pdf)

The *Maui* Guidance Summary

The primary focus of the *Maui* Guidance appears to be a reduction in the number of inquiries from the regulated community regarding whether or not an NPDES Permit is required for a particular discharge. To eliminate a number of those inquiries, the *Maui* Guidance describes "baseline permitting principles" that seek to resolve questions from the regulated community (and potentially frivolous litigation). The baseline permitting principles, which consume the majority of the eight-page guidance memorandum, are primarily a recitation of the elements that traditionally trigger the NPDES Permit requirement as applied to surface waters.

By confirming that all discharges are subject to the described framework, the EPA adopts an additional factor that:

> . . .may prove relevant and thus should be considered when performing a 'functional equivalent' analysis: the design and performance of the system or facility from which the pollutant is released.

The *Maui* Guidance indicates that an evaluation of the design and performance of the facility or system from which a pollutant is released is customary when the agency evaluates whether a direct discharge requires an NPDES Permit. The *Maui* Guidance goes one step further by describing treatment system designs and discharge point locations that are unlikely to be subject to the NPDES Permit requirement, as well as the influence of such system component designs and locations on the composition of any pollut-

ants discharged to groundwater that ultimately reach surface water. For example:

> . . .the point of discharge may be engineered to direct the pollutant into a subsurface aquitard or to a surface area designed to slow the transit time of a pollutant that ultimately reaches a water of the United States.

EPA also clarifies that the agency anticipates that the issuance of NPDES Permits for discharges of pollutants to groundwater:

> . . . will continue to be a small percentage of the overall number of NPDES permits issued following application of the Supreme Court's 'functional equivalent' analysis.

To emphasize this point, the *Maui* Guidance reminds practitioners that: 1) the discharge must first meet the threshold requirements that trigger the NPDES Permit requirement; and 2) all of the factors comprising the "functional equivalent" test must be applied to the discharge. In other words, a demonstration that pollutants associated with a point source discharge merely reach surface waters falls short of the analysis required by the *Maui* decision, and would not trigger the NPDES Permit requirement for discharges to groundwater.

Conclusion and Implications

The *Maui* Guidance provides insight into how the EPA will apply its current NPDES Permit program framework to groundwater discharges, confirmed by the establishment of the new "design and performance" factor. Moreover, the *Maui* Guidance crafts a distinction between the Ninth Circuit's "fairly traceable" standard and the Supreme Court's "functional equivalent" test by indicating that the fact that a pollutant associated with a point source discharge to groundwater reaches surface waters is not enough to trigger NPDES Permitting.

However, whether the Maui Guidance will remain in effect is unclear, given the Biden Administration's recent adoption of the Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis, which will require EPA to revisit all "regulations, orders, guidance documents, policies, and any other similar agency actions (agency actions) promulgated, issued, or adopted between January 20, 2017, and January 20, 2021" that may be inconsistent with the Biden administration's policy on environmental protection and public health. The outcome of that review process remains to be seen. For more information about the Guidance, *see:* https://www.epa.gov/npdes/releases-point-source-groundwater)

(Nicole Granquist, Meghan Quinn, Meredith Nikkel)

U.S. FISH AND WILDLIFE SERVICE FINALIZES REGULATORY DEFINITION OF THE TERM 'HABITAT' AS USED IN THE ENDANGERED SPECIES ACT

On December 16, 2020, the U.S. Fish & Wildlife Service (FWS) finalized for the very first time a regulatory definition for the term "habitat," as the term is used in the Endangered Species Act (16 U.S.C., § 1531, *et seq.* (ESA) and its various implementing regulations. (85 Fed. Reg. 81411 (Dec. 16, 2020). The definition, which modified a proposed regulatory definition of "habitat" that was originally published on August 5, 2020 (85 Fed. Reg. 47333) based upon public comments and further consideration of the relevant issues, became effective on January 15, 2021.

Critical Habitat Designations under the ESA

The FWS proposed a regulatory definition of "habitat" with respect to the use of the term in the context of critical habitat designations under the ESA. The ESA defines "critical habitat" in § 3(5)(A), establishing separate criteria depending on whether the relevant area is within or outside of the geographical area occupied by the species at the time of listing, but it does not define the broader term "habitat." (16 U.S.C. 1532(5)(A).) The FWS had

not previously adopted a definition of the term "habitat" through regulations or policy, but had instead traditionally applied the criteria from the definition of "critical habitat" based on the implicit premise that any specific area satisfying that definition was habitat.

However, the U.S. Supreme Court recently held that an area must logically be "habitat" in order for that area to meet the narrower category of "critical habitat" as defined in the ESA. (*Weyerhaeuser Co. v. U.S. FWS*, 139 S. Ct. 361 (2018). The Court stated: ". . . Section 4(a)(3)(A)(i) does not authorize the Secretary to designate [an] area as critical habitat unless it is also habitat for the species.")] (*Id.* at p. 368; see *id.* at 369 n.2 ["we hold that an area is eligible for designation as critical habitat under section 4(a)(3)(A)(i) only if it is habitat for the species".) Given this holding in the Supreme Court's opinion in *Weyerhaeuser*, the FWS determined to establish a regulatory definition of "habitat."

After reviewing and considering public comments on the proposed alternative definitions published in August 2020, the FWS revised and simplified the final definition of "habitat" as follows:

> For the purposes of designating critical habitat only, habitat is the abiotic and biotic setting that currently or periodically contains the resources and conditions necessary to support one or more life processes of a species. (85 Fed. Reg. at 81412.)

No New Regulatory Procedures or Processes

In addressing public comments, the FWS noted that:

> . . .the regulatory definition of 'habitat' will not be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens or landowners or other parties. (85 Fed. Reg. at p. 81414.)

The criteria and process for designating critical habitat will continue to rely, primarily, on the regulatory requirements found in 50 Code of Federal Regulations § 424.12. The FWS also reiterated that the new definition applied only prospectively and would not require that previously finalized critical habitat designations be revisited. (85 Fed. Reg. at p. 81411.)

Key Changes

The final definition of "habitat" incorporated several key changes from the alternative definitions that were previously-proposed by the FWS, including:

- reducing the definition to a single sentence;

- adding an introductory phrase that explicitly limits the scope of applicability of the definition to the designation of critical habitat and thereby address commenter's concerns about the potential for the definition to apply to other sections of the ESA or other Federal programs that use the term "habitat" and thus have unintended consequences on implementation of these other sections and programs;

- replacing the phrase "physical places" with abiotic and biotic setting" to address comments that habitat is more than simply a physical location;

- adding the phrase "resources and conditions" to clarify that the definition of "habitat" is inclusive of all qualities of an area that can make that area important to the species; and,

- replacing the phrase "depend upon to carry out" with the phrase "necessary to support" to clarify that the definition applies to areas needed for one or more of a species' life processes.

Conclusion and Implications

Despite confirming that the revised definition of "habitat" won't "be used to create a new procedural step or regulatory process, nor will it result in any new regulatory burdens or landowners or other parties" the change is significant and land use practitioners should avail themselves of the nature of the changes in the context of critical habitat matters.

The new definition is codified at 50 Code of Federal Regulations § 424.02, available online at: https://www.govregs.com/regulations/expand/title50_chapterIV_part402_subpartA_section402.02#regulation_1 (Paige Gosney)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT REJECT'S DISTRICT COURT HOLDING THAT ENVIRONMENTAL ASSESSMENT AND FINDING OF NO SIGNIFICANT IMPACT FOR ROAD PROJECT VIOLATED NEPA

Bair v. California Department of Transportation, 982 F.3d 569 (9th Cir. 2020).

In a December 2, 2020 decision, a three-judge panel from the Ninth Circuit Court of Appeals rejected a U.S. District Court's ruling that the California Department of Transportation's (Caltrans) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) related to a proposed road widening project through Richardson Grove State Park violated the National Environmental Policy Act (NEPA). The decision is the latest development in several years of state and federal litigation over the road improvement project. The Ninth Circuit panel concluded that the hundreds of pages of environmental analysis and mitigation measures by Caltrans constituted a sufficient "hard look" at the project's potential environmental impacts as required by NEPA.

Factual and Procedural Background

Highway 101 bisects Richardson Grove State Park (the Grove) and is lined with redwood forests in southern Humboldt County, California (County). Because several old-growth redwoods abut Highway 101 in the Grove, the highway is a two-lane highway "on nonstandard alignment." This means that through the Grove, Highway 101 was restricted to certain trucks that exceed the length of 65 foot long "California Legal Trucks." These longer trucks are known as industry-standard Surface Transportation Assistance Act of 1982 trucks (STAA).

In 2010, Caltrans proposed a strategic widening project that would make the roadway accessible to STAA trucks. The project would involve slightly widening the roadway and straightening some curves along a one mile stretch of Highway 101 within the Grove.

Caltrans assumed responsibility to obtain environmental approval of the project under NEPA. In 2010, the County prepared an Environmental Analysis that included "extensive analysis" of the project's environmental effects and included efforts to minimize those effects.

Caltrans determined that the project's impacts on the Grove would be minor and would not remove any old-growth redwoods. Although the project would involve construction of roadways in the structural root zones of redwoods, according to Caltrans' experts, sufficient plans and reduction measures were included to mitigate these effects. After determining that the project would not significantly harm old-growth redwoods within the Grove, Caltrans issued the EA and a FONSI for the project in May of 2010.

Plaintiffs filed suit in 2010 challenging the project. During the 2010 lawsuit, the U.S. District Court granted partial summary judgment in favor of plaintiffs and required Caltrans to undertake additional studies, including new maps of each redwood tree, its root health zone, and the environmental impacts to each tree. In response, Caltrans commissioned a new tree report, took public comments, responded to comments, and then issued a NEPA revalidation of the project in January 2014.

Plaintiffs filed a second suit in 2014 alleging similar claims to the 2010 suit. The 2014 case was dismissed after Caltrans withdrew the FONSI in response to an adverse ruling in a parallel state court action. In response to the state court order, Caltrans reduced the scope of the project and prepared an additional report on the project's impacts on nearby trees.

In 2017, Caltrans returned with a modified project designed to reduce its environmental impact, primarily by narrowing the project's proposed roadway shoulder widths. Plaintiffs again sued raising seven claims, including alleged violations of NEPA, the Department of Transportation Act, the Wild and Scenic Rivers Act, and a violation of the Administrative Procedure Act. The District Court granted plaintiffs' partial summary judgment on their NEPA claims and specifically identified the following issues that it

claimed Caltrans had not adequately considered in the EA:

> . . .whether (1) redwoods would suffocate when more than half of their root zones were covered by pavement; (2) construction in a redwood's structural root zone would cause root disease; (3) traffic noise would increase because of the larger size of the STAA trucks or because of additional numbers of trucks; and (4) redwoods would suffer more frequent and severe damage as a result of strikes by STAA trucks.

As a result of these alleged shortcomings, the District Court found that Caltrans had not taken the necessary "hard look" at environmental impacts of the project, and that the EA was therefore inadequate. The District Court held that given the "substantial questions" raised by the above, Caltrans should prepare an Environmental Impact Statement (EIS). The District Court then enjoined Caltrans from proceeding with the project until an EIS was prepared.

The Ninth Circuit's Decision

The NEPA Claim and Alleged Need for an EIS

The Ninth Circuit noted that agency decisions that allegedly violate NEPA are reviewed under the Administrative Procedure Act, and courts will set aside decisions:

> . . .only if they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

A determination of whether an agency's decision not to prepare an EIS was arbitrary and capricious requires courts to determine whether an agency has:

> . . .taken a hard look at the consequences of its actions, based on its decision on a consideration of the relevant factors, and provided a convincing statement of reasons to explain why a project's impacts are insignificant.

Although a court's review is "searching and careful" it is narrow and "courts cannot substitute [their] own judgment for that of the agency." Courts ask whether an agency's decision "was based on a consideration of the relevant factors and whether there has been a clear error of judgment" when finding whether an EA and FONSI were appropriately issued.

Based on these standards, the Ninth Court rejected the District Court's finding that Caltrans violated NEPA when it issued the EA for the project. The 2017 FONSI was based on the analysis contained in Caltrans' revised EA, which incorporated the analysis of the 2010 EA and the 2013 revised supplemental EA. Here, because the 2010 EA as supplemented and revised constituted a "hard look" at the project's environmental effects, Caltrans' issuance of the 2017 FONSI was reasonable and sufficient under NEPA.

Claim of Tree Suffocation

Regarding redwood tree suffocation, the court noted that Caltrans sufficiently considered the effect of paving over tree root zones. The project incorporated measures to reduce this effect, for example the project would use special paving material to allow for greater porosity and promote air circulation under the asphalt. Caltrans' tree expert determined that the project would not cause extreme stress to the redwoods "or overwhelm their natural resilience." The court found that Caltrans reasonably concluded, based on its analysis, that the project would not significantly impact the health of protected redwoods in the grove.

Claim of Construction within Root Zones

Regarding construction within root zones, the court similarly found that Caltrans performed the necessary "hard look" the project's effects on these root zones. Although the California State Parks handbook recommended that "no construction should take place in the structural root zone of a protected tree," it was not clear whether this guidance applied to the project. Moreover, Caltrans was not required to adopt the State Parks' opinion of the project. NEPA anticipates the administrative record may contain conflicting and contradictory opinions. Here Caltrans could and did reasonably refuse to follow the State Parks handbook, especially where it relied on evidence specifically pertaining to the effects of the project.

Traffic and Noise Analyses

Regarding traffic and noise, the court again found that Caltrans had taken a sufficient hard look at the project's environmental effects. The court rejected the District Court's finding that STAA trucks would be noisier than California Legal trucks because the District Court cited no specific evidence in support of this assumption and in effect was stepping into the agency's shoes to perform its own factual analysis.

Claim of Increased Vehicle Collisions

Last, the court rejected the District Court's findings as to an alleged increase in the number and severity of collisions with trees. Regarding collision frequency, the purpose of the project was to widen the road to provide more room for trucks and traffic. Caltrans reasonably concluded that the project would reduce the frequency of vehicle collisions with trees. Regarding crash severity, the court did not find any documentation in the administrative record indicating that STAA trucks would cause more damage when they strike trees. Accordingly, plaintiffs failed to administratively exhaust this issue, and even if it had, the court found that Caltrans' analysis included a sufficiently hard look into this issue.

Conclusion and Implications

The Ninth Circuit reversed the District Court's judgment requiring Caltrans to prepare an EIS, and directed the District Court to resolve the other unresolved issues in the case consistent with its decision.

The Ninth Circuit's decision in *Bair* is the latest development in multi-year litigation related to Caltrans' proposed roadway improvements through the environmentally sensitive old-growth redwood groves in Richardson Grove State Park. It is unclear whether this decision will allow the project to move forward, or whether ongoing litigation will continue to slow the project. A copy of the decision can be found at: http://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/02/19-16478.pdf
(Travis Brooks)

NINTH CIRCUIT FINDS FEDERAL AGENCIES VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT AND ENDANGERED SPECIES ACT IN APPROVING OFFSHORE OIL FACILITY

Center for Biological Diversity v. Bernhardt, 982 F.3d 723 (9th Cir. 2020).

Various conservation groups brought suit challenging the U.S. Department of the Interior's Bureau of Ocean Energy Management's (BOEM) approval of an offshore oil drilling and production facility, claiming that the approval failed to comply with the National Environmental Policy Act (NEPA), the federal Endangered Species Act (ESA), and the Marine Mammal Protection Act (MMPA). After holding that it had original jurisdiction over the claims, the Ninth Circuit Court of Appeals found that BOEM acted arbitrarily and capriciously by failing to quantify the emissions resulting from foreign oil consumption in its Environmental Impact Statement (EIS). The Ninth Circuit also held the U.S. Fish and Wildlife Service (FWS) violated the ESA by relying on uncertain, nonbinding mitigation measures and failing to estimate the project's amount of nonlethal take of polar bears. In all other respects, the Ninth Circuit denied the petition.

Factual and Procedural Background

Hilcorp Alaska, LLC sought to produce crude oil from Foggy Island Bay, which is located along the coast of Alaska in the Beaufort Sea. To extract the oil, Hilcorp would need to construct an offshore drilling and production facility. That facility—referred to as "the Liberty project," or "the Liberty prospect"—would be the first oil development project fully submerged in federal waters. Hilcorp estimates that the site contains about 120 million barrels of recoverable oil, which it would plan to extract over the course of 15 to 20 years.

The site is located within the outer Continental Shelf of the United States and thus governed by the Outer Continental Shelf Lands Act (Act). Under that Act, BOEM oversees the mineral exploration and development of the Outer Continental Shelf. This may include, among other things, leasing federal

land for oil and gas production. The Act requires BOEM to manage the outer Shelf in "a manner which considers [the] economic, social, and environmental values" of the Shelf's natural resources. Relying on a Biological Opinion prepared by the Service, BOEM approved the project. Various environmental groups then sued, alleging that the BOEM failed to comply with NEPA, the ESA, and the MMPA. Under the Outer Continental Shelf Lands Act, the Ninth Circuit had original jurisdiction over the challenge.

The Ninth Circuit's Decision

The NEPA Claims

The Ninth Circuit first addressed petitioners' claims that BOEM's EIS was arbitrary and capricious because it: 1) improperly relied on different methodologies in calculating the lifecycle greenhouse gas emissions produced by the "no action" alternative and the other project alternatives, thus making the options incomparable; and 2) failed to include a key variable (foreign oil consumption) in its analysis of the "no action" alternative.

First, with respect to the methodologies used, the Ninth Circuit disagreed and found that BOEM had not applied a different methodology in estimating emissions among the alternatives. While the EIS used a "market simulation model" in connection with its analysis of the "no action" alternative, the "lifecycle" analysis conducted for other alternatives implicitly took this analysis into account. This analysis, the Ninth Circuit concluded, was a relative comparison, sufficient for making a reasoned choice among alternatives.

Second, with respect to the omission of emissions associated with foreign oil consumption, the Ninth Circuit agreed that such omission violated NEPA. This issue, as the court framed it, was essentially one of economics—if oil is produced at the project site, the total supply of oil in the world will increase; increasing global supply will reduce prices; once prices drop, foreign consumers will buy and consume more oil. The model used in the EIS, however, assumed that foreign oil consumption would remain static, whether or not oil is produced at the project site. The EIS, the Ninth Circuit concluded, should have either given a quantitative estimate of the downstream greenhouse gas emissions that would result from consuming oil abroad, or explained more specifically why it could not have done so, and provided a more thorough discussion of how foreign oil consumption might change the carbon dioxide equivalents analysis. Having failed to do so, the court found that the alternatives analysis was arbitrary and capricious.

The Endangered Species Act Claims

The Ninth Circuit next addressed petitioners' claims that the FWS violated the ESA by: 1) relying on uncertain mitigation measures in reaching its conclusions in the Biological Opinion; and 2) failing to specify the amount and extent of "take" in the incidental take statement included within the Biological Opinion.

First, while the Ninth Circuit acknowledged that the record reflected a "general desire" to impose mitigation, it agreed that any mitigation proposed by the FWS was too vague to enforce. The generality of the measures also made it difficult to determine the point at which the agency may renege on its promise to implement the measures. The Ninth Circuit also found that, while the FWS did not appear to have relied on any of these measures in its "no jeopardy" conclusion, it had relied on such measures in its "no adverse modification" finding (in which it concluded that the polar bear's critical habitat would not be adversely affected by the project). Accordingly, it found that the FWS' reliance on these uncertain mitigations measures was arbitrary and capricious, and that the FWS' Biological Opinion therefore violated the ESA.

Second, the Ninth Circuit agreed that, while the FWS contemplated that the harassment and disturbances polar bears would suffer could trigger re-consultation, the Biological Opinion failed to quantify the project's amount of nonlethal take to the polar bear (or explain why it could not do so). "Take" under the ESA, the court explained, can occur via injury or death, as the Biological Opinion recognized, but it can also occur via nonlethal harassment. On this basis, the Ninth Circuit found that the FWS' incidental take statement violated the ESA.

Conclusion and Implications

The case is significant because it contains a substantive discussion of both NEPA and the ESA, particularly as they relate to the analysis of alter-

natives under NEPA and reliance on mitigation measures under the ESA. The decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/07/18-73400.pdf
(James Purvis)

NINTH CIRCUIT REJECTS CONSTITUTIONAL CHALLENGES TO CITY OF SAN JOSE'S DISCLOSURE REQUIREMENTS RELATED TO RENT STABILIZATION ORDINANCE

Hotop v. City of San Jose, 982 F.3d 710 (9th Cir. 2020).

In a December 7, 2020 decision, a three-judge panel of the Ninth Circuit Court of Appeals upheld a U.S. District Court decision to grant a motion to dismiss plaintiffs' claims for failure to state a cause of action. Plaintiffs challenged a City of San Jose (City) ordinance that added information disclosure obligations for landlords that owned rent-stabilized apartment buildings. The Ninth Circuit upheld the District Court's decision, and rejected plaintiffs' various constitutional claims. These claims included allegations that the ordinance violated the Fourth Amendment's prohibition against unlawful searches and the Fifth Amendment's prohibition against unlawful takings without compensation.

Factual and Procedural Background

In 2017, the City passed an ordinance and adopted implementing regulations amending the city's apartment rent ordinance. The ordinance and regulations required landlords to disclose certain information about rent stabilized units and conditioned landlords' ability to increase rents on providing that information. Landlord plaintiffs filed causes of action under § 1983 of Title 42 of the United States Code. Specifically, plaintiffs alleged that the city's new ordinance violated their Fourth, Fifth, and Fourteenth amendment rights. Plaintiffs also claimed that the ordinance violated the Contracts Clause of the U.S. Constitution.

The District Court granted the City's motion to dismiss without prejudice. Plaintiffs chose not to amend their complaint and appealed to the Ninth Circuit standing on their complaint.

The Ninth Circuit's Decision

Fourth Amendment Claim

The court first analyzed plaintiffs' Fourth Amendment claim that the ordinance violated the Constitution's prohibition against unreasonable searches. The ordinance required landlords to provide information when registering rent stabilized units. The information sought included the address of rent stabilized units, a history of the rent charged for such units, the names of all tenants occupying rent-controlled units, the rental history of units, and any household services provided at the start of the current tenancies. The ordinance also required disclosure of information when tenants vacated subject units and when a landlord offered to buyout a rent-stabilized unit. Plaintiffs alleged that the information sought constituted private business records that are not found in the public domain.

The Ninth Circuit agreed with the District Court that plaintiffs failed to sufficiently allege that the ordinance amounted to an unlawful search that violated plaintiffs' reasonable expectation of privacy. As the District Court noted, San Jose landlords were already required to provide similar information in different contexts. For example, landlords were required to provide financial information regarding their net operating income when trying to raise rent by more than ordinarily permitted. Moreover, when landlords intend to pass through costs of capital improvements, they are required to indicate the number of units affected, occupancy status, rent charged for each unit, and other detailed information. Considering that landlords were required to provide similar information in other contexts, the court found that plaintiffs

failed to allege facts "plausibly suggesting that they have a reasonable expectation of privacy in the information that must be disclosed."

Fifth Amendment Claims

The court moved on to reject plaintiffs' Fifth Amendment takings claims, under which plaintiffs alleged that the ordinance effected a *per se* taking. Here, the Ninth Circuit noted, the ordinance did not effectuate any *per se* taking, such as occurs with a physical invasion of property. Therefore, to prevail in a takings claim, such claim must be judged under the multi-factor test set forth in the U.S. Supreme Court's 1978 *Penn Central Transportation Co. v. New York City* decision. These factors include: 1) the economic impact of the regulation at issue, 2) the extent to which the regulation interferes with distinct investment-backed expectations, and 3) the character of the government regulations.

The court noted that while plaintiffs alleged a regulatory (versus a *per se*) taking on appeal, they failed to allege any facts:

> . . .that would plausibly assert a regulation a regulatory taking. Indeed, the only allegation even arguably relevant to a regulatory taking claim is that landlords 'cannot increase rent on their tenants' if they fail to comply with the Ordinance and Regulations. But when buying a piece of property, one cannot reasonably expect that property to be free of government regulation such as zoning, tax, assessments, or. . . rent control. . . .

Contract Clause Claim

Regarding plaintiffs Contract Clause claims, the court agreed with the District Court that plaintiffs failed to present any allegations showing that the city's ordinance affected plaintiffs' contracts with their tenants. The Ninth Circuit then rejected plaintiffs' procedural and substantive due process claims because plaintiffs failed to articulate how the ordinance and regulations harmed plaintiffs protected personal or property interests. Last, the court rejected plaintiffs' argument that the ordinance violated the "unconstitutional conditions" doctrine set forth in the U.S. Supreme Court's 2013 decision in *Koontz v. St. Johns River Water Management District*. This claim failed because plaintiffs did not show any unconstitutionality in the actions taken by the city.

Conclusion and Implications

The Ninth Circuit's decision in *Hotop* reflects the relative difficulty of proving regulatory takings under the U.S. Supreme Court's *Penn Central* decision outside of the *per se* takings context. Moreover, courts are likely to uphold zoning and other land use regulations, including those that require property owners to disclose information in furtherance of a valid regulatory purpose. The Ninth Circuit's decision can be found online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2020/12/07/18-16995.pdf
(Travis Brooks)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT UPHOLDS COASTAL COMMISSION CEASE AND DESIST ORDER—FINDS NO ABUSE OF DISCRETION IN IMPOSING $1 MILLION PENALTY

11 Lagunita, LLC v. California Coastal Commission, 58 Cal.App.5th 904 (4th Dist. 2020).

Private property owners filed a petition for writ of mandate challenging the California Coastal Commission's cease and desist order requiring removal of a seawall and imposing a $1 million administrative penalty for violation of a coastal development permit. The Superior Court denied the petition with respect to the cease and desist order but granted the petition as to the penalty. The parties then filed cross-appeals, and the Fourth District Court of Appeal upheld both the order and penalty.

Factual and Procedural Background

In late 2015, the California Coastal Commission (Commission) issued a Coastal Development Permit (CDP) for the reinforcement of an existing seawall, which had been installed years earlier at the base of a Laguna Beach home built in 1952. The CDP generally allowed for structural reinforcements and visual improvements to the seawall. The CDP also included a special condition providing that it would expire and the seawall would have to be removed if the home were "redeveloped in a manner that constitutes new development." The CDP further provided that future development not otherwise exempt from CDP requirements or redevelopment shall not rely on the permitted seawall to establish geologic stability or protection from hazards.

Around that same time, the property was sold. The new homeowners reinforced the seawall, as contemplated in the CDP, but they also remodeled the home without consulting the Commission. The City of Laguna Beach (City) did not classify the project as a "major remodel" and found that the remodel was exempt from CDP requirements. The project included the demolition of all the exterior walls down to their studs, the removal and replacement of the roofing materials, and the reinforcement of the entire framing system for the home. Eventually, virtually all components of the home were demolished, removed, and replaced (*e.g.*, interior walls, floors, windows, doors, counters, cabinets, plumbing, electric). The remodel reportedly increased the value of the home from $14 million to $25 million.

The Commission eventually became aware of the ongoing remodel. In spring 2017, the Commission sent an enforcement violation letter alleging that the remodel constituted new development and violated the special conditions of the 2015 CDP. Throughout the following months, there was an exchange of letters between the parties. During this time, the homeowners continued with the remodel. In spring 2018, the Commission began official enforcement proceedings. Later that year, the Commission voted unanimously to issue a cease and desist order and to impose a $1 million administrative penalty for the violation.

The homeowners challenged those orders in court by filing a petition for writ of mandate. The Superior Court denied the petition as to the cease and desist order but granted the petition as to the penalty based on the homeowners' good faith defense. The homeowners then filed an appeal as to the cease and desist order, and the Commission filed a cross-appeal as to the penalty. The City filed an *amicus* brief in support of the homeowners.

The Court of Appeal's Decision

Issuance of the Cease and Desist Order

The Court of Appeal first addressed the homeowners' various arguments that the Commission lacked statutory jurisdiction to issue the cease and desist order. These included arguments based on equitable estoppel, collateral estoppel, *res judicata*, and the general jurisdiction of the Commission. The Court of Appeal disagreed with these claims. In particular, it

stressed that this case was about whether the homeowners violated any conditions of the 2015 CDP issued by the Commission, not whether the City correctly determined that the remodel was not a "major remodel" under the Local Coastal Program. Thus, the issues were different.

The Court of Appeal next addressed the claim that the cease and desist order was not supported by substantial evidence. Rejecting this argument, the Court of Appeal found that the homeowners again misidentified the issue. Whether the redevelopment of the residence can be considered a "major remodel" or "repair and maintenance," the court noted, was irrelevant. The issue was whether the remodel constituted "new development" under the CDP, and the Court of Appeal found that the Commission's determination was supported by substantial evidence.

The $1 Million Administrative Penalty

The Court of Appeal next addressed the Coastal Commission's argument that the Superior Sourt erred when it granted the petition as to the administrative penalty, finding that the Commission thoroughly evaluated the issues and made extensive findings regarding various factors before adopting its findings. It also rejected the homeowners' claims that the Commission lacked authority to impose an administrative penalty, that public access was not at issue and should not have figured into the penalty calculation, and that the homeowners had a good faith belief in the lawfulness of their actions. On the last of these arguments, the Court of Appeal found it was reasonable to conclude that the homeowners had deliberately avoided Coastal Commission review because they knew, or reasonably should have known, that Commission staff would have found that the proposed remodel constituted new development in violation of the 2015 CDP.

Conclusion and Implications

The case is significant because it contains a substantive discussion of the Coastal Commission's enforcement jurisdiction, including its ability to issue administrative penalties, as well as the applicable standard of judicial review for such actions. The decision is available online at: https://www.courts.ca.gov/opinions/documents/G058436M.PDF
(James Purvis)

THIRD DISTRICT COURT UPHOLDS MITIGATED NEGATIVE DECLARATION PREPARED BY COUNTY FOR PRISON EXPANSION PROJECT

Citizens for Smart Development in Amador County v. County of Amador, ___Cal.App.5th___ Case No. C082915 (3rd Dist. Dec. 11, 2020).

The Third District Court of Appeal rejected a citizen group's claims under the California Environmental Quality Act (CEQA) challenging the County of Amador's (County) decision to prepare a Mitigated Negative Declaration (MND) for a prison expansion project. The Court of Appeal upheld the Amador Superior Court's decision, finding that the MND adequately analyzed the project's aesthetic and hydrological impacts, did not improperly defer mitigation, and reflected the County's independent judgment.

Factual and Procedural Background

The County of Amador's jail facility was constructed in 1984 and has beds available for 76 inmates. In recent years, the number of incarcerated inmates has exceeded the number of available beds, with an average population of 91 inmates.

To address its prison overcrowding issue, in 2008 the County obtained a obtained a conditional grant from the state in 2008 to finance a new jail facility that could house a larger inmate population. The plans ultimately fell through due to citing and funding issues. In the alternative, the County proposed a project to expand its existing jail facility. The expansion contemplated constructing an 8,000 to 10,000-square foot space adjacent to the existing prison facility, which would provide 40 new inmate beds, spaces for exercise and educational programs, and a new parking lot.

The County initiated CEQA review of the project in 2014. The initial study concluded that the project could have significant effects that could be mitigated to less-than-significant levels. During the public comment period, neighboring residents expressed concerns that the project would infringe on their privacy, shade their properties, have potentially bothersome lighting, and lead to increased stormwater runoff. The County ultimately concluded that, with mitigation, the expansion would not have significant adverse effects.

The County adopted a MND and issued an NOD for the Project in July 2015. Thereafter, Citizens for Smart Development in Amador County (Citizens) filed a petition for writ of mandate challenging the County's approval. Citizens' alleged that the MND inadequately analyzed impacts to aesthetics and hydrological resources, the Project will create a mandatory finding of significance, and the County failed to make requisite CEQA findings. The Superior Court denied each of Citizens' claims, finding they had no merit. Citizens timely appealed.

The Court of Appeal's Decision

On appeal, the Third District Court of Appeal considered whether the County abused its discretion in adopting an MND for the prison expansion project. Under this lens, the court reviewed whether Citizens raised a "fair argument," based on substantial evidence in the record, that the County's prison expansion project could have significant environmental effects, such that the County should have prepared an Environmental Impact Report (EIR).

Claim of Significant Unmitigated Effects on Aesthetic Impacts

As to the first cause of action, the appellate court held that Citizens failed to raise a "fair argument" that the project would yield significant unmitigated effects on aesthetic impacts. To support their claim that the project would significantly impact privacy and sunlight blockage, Citizens claimed the project would face down into one neighboring property while shading another during winter. The court concluded that potential impacts to two properties was "limited evidence" that did not raise a fair argument that the project may have a significant environmental effect. The court similarly rejected Citizens' argument that the project could yield significant lighting impacts. By only citing speculative comments and testimonies from nearby residents, Citizens had failed to point to evidence that could be considered "substantial." The court also rejected Citizens' claim that the County deferred mitigation of aesthetic impacts, because they failed to explain why the aesthetic mitigation measures for were inadequate or how they would not mitigate for potential impacts.

Claim of Hydrological Impacts

The appellate court similarly rejected Citizens' claim that the County failed to adequately assess the project's hydrological impacts. Citizens argued that the County should have studied the project's potential impacts from increased runoff by preparing an expert hydrology court. The court rejected this claim, citing to an expert report the County had prepared, which considered potential runoff issues. The court reasoned that the County was not required to undertake additional or more detailed studies because a lack of study on a particular issue does not automatically invalid an MND. Towards this end, the court rejected Citizens' claim that the County improperly deferred mitigation of runoff impacts by requiring future approval of a drainage plan. The court rejected this on grounds that the County could properly rely on a future study to craft the specific details of the hydrological mitigation measure.

Claim of Failure to Provide an Explanation or Mitigate 'Mandatory Finding of Significance'

Citizens' third claim challenged the MND's "mandatory finding of significance," arguing that the County failed to provide an explanation or mitigation for this finding. The court rejected the claim because Citizens failed to exhaust this issue at the administrative level. Citizens also failed to exhaust their claim that the County failed to make a finding that the MND reflected the County's independent judgment and analysis (as required by Public Resources Code § 21082.1, subdivision (c)(3)). Because Citizens did not raise these issues orally or in writing to the County before it approved the project, the court held that Citizens forfeited their claims.

Conclusion and Implications

The Third District Court of Appeal's opinion offers a straightforward analysis of the foundational

principles that govern Mitigated Negative Declarations. The opinion reemphasizes the "fair argument" standard required for challenging an agency's adoption of an MND. To survive, a challenger must present substantial evidence showing that a project may have significant effects, such that an Environmental Impact Report should be prepared. Where, as here, a party fails to cite to such evidence or raise the issues before the lead agency, courts will defer to the agency's decision. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/C082915.PDF
(Bridget McDonald)

FIFTH DISTRICT COURT REVERSES DENIAL OF WRIT OF MANDATE CHALLENGING WATER BOARD ADMINISTRATIVE PENALTIES WITHOUT CONSIDERATION OF CERTAIN DEFENSES

Malaga County Water District v. State Water Resources Control Board, ___Cal.App.5th___, Case No. F075868 (5th Dist. Dec. 10, 2020).

The Fifth District Court of Appeal has held that the Superior Court, in upholding the Central Valley Regional Water Quality Control Board's (RWQCB or board) administrative decision to impose $78,000 in civil penalties against Malaga County Water District (Malaga) for violation of its wastewater discharge permit requirements failed to consider Malaga's defenses of laches and underground regulation. This summary focuses only on the facts and legal issues relating to the laches defense. [Note: This is one of several cases before the Court of Appeal involving disputes between the Malaga County Water District (Malaga) and the agencies involved in issuing and enforcing the permits necessary for Malaga to operate its waste treatment facility. Two separate opinions were issued on December 10, 2020 in Case Nos. F078327 (pertaining to underground regulation in the administrative proceedings on a separate administrative civil liability complaint) and F075851 (pertaining to improper delegation of authority in the verification process for Malaga's permit).]

Factual and Procedural Background

On July 8, 2010, the RWQCB sent Malaga notice of violations of Malaga's wastewater discharge permit requirements, and on November 5, 2010 the RWQCB sent a revised notice. A new notice of violation and draft record of violations issued December 8, 2011, identifying violations occurring between March 14, 2008 and October 30, 2011.

On May 1, 2013, the board filed an administrative civil liability complaint for violations of Malaga's wastewater discharge requirements occurring between 2007 and 2011. The complaint also stated that Malaga had additional violations between February 1, 2004, and March 13, 2008, that were subject to mandatory minimum penalties pursuant to Water Code § 13385.

Malaga claimed it responded to each of the notices of violation, and that the RWQCB did not further communicate. Malaga also claimed that early violations occurring between 2008 and 2010 were addressed and suspended prior to the notices, provided Malaga completed certain compliance projects.

Malaga objected to the board's prosecution team submitting any evidence in the case, claiming it was irrelevant because the proceedings were barred by laches.

The administrative hearing occurred on July 25, 2013. At that hearing, the prosecution team primarily relied upon a witness who presented a summary of the known violations compiled by board staff from Malaga's self-monitoring reports, provided his opinion on why certain violations required imposition of mandatory minimum penalties, and explained why the total violation penalty recommendation was $78,000.

Malaga's president testified that due to the delay in proceedings, Malaga had lost the ability to determine who had caused the effluent violations and therefore could not shift the cost of the penalties to the polluter.

He further testified that the proposed penalty was around 15 percent of Malaga's budget, and that

Malaga could not afford to pay such a penalty. Malaga claimed that it was precluded from presenting additional evidence about its claimed inability to pay, in part because the RWQCB voted to approve an opinion that a laches defense was not valid.

The RWQCB imposed the recommended $78,000 penalty. The order entered parroted the language of the complaint, with additional language rejecting the laches claim.

Malaga petitioned the State Water Resources Control Board (SWRCB) for review of this order. This petition was dismissed by the executive director of the SWRCB for failing to raise substantial issues that are appropriate for review by the SWRCB.

Malaga then filed a petition for writ of administrative *mandamus* pursuant to Code of Civil Procedure § 1094.5. The trial court concluded that laches was not a defense to the assertions brought by the RWQCB, and otherwise concluded no substantive or procedural errors arose in the proceedings.

The Court of Appeal's Decision

The Court of Appeal held that the trial court erred in concluding that laches was not a viable defense. The Court of Appeal also held that claims where the SWRCB could be said to have known of the violation more than three years before the enforcement action was initiated are subject to a burden shifting presumption that the delay in initiating an action was unreasonable and prejudicial.

Laches in Administrative Proceedings

It is well understood that statutes of limitation are inapplicable to administrative proceedings. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal.4th 1072, 1088 (2005).)

Laches is an equitable principle that bars certain claims or proceedings based on a combination of unreasonable delay in pursuing the claims and prejudice based on that delay. Laches applies to quasi adjudicative proceedings pursuant to the common law inherent power of courts to dismiss when a case is not diligently prosecuted. (*Brown v. State Personnel Bd.*, 166 Cal.App.3d 1151, 1158 (1985) (*Brown*).)

There are two general ways to demonstrate unreasonable delay and resulting prejudice. In the first, the party arguing laches bears the burden of proof and is required to present evidence sufficient to tip the equitable balance toward preclusion in order to prevail. In the second, an unreasonable delay is established as a matter of law and prejudice is presumed when there is a statute of limitations governing an analogous action at law and the claims pertain to a period beyond that statute of limitations. (*Brown*, *supra*, 166 Cal.App.3d at p. 1159.)

Issue Whether Section 13385 Precludes Laches

The RWQCB argued that the policy embodied in *Brown* that laches should typically be available as a defense in administrative proceedings run by the state does not apply to administrative proceedings under § 13385.

First, the RWQCB argued that equitable defenses cannot be used to countermand statutory commands on matters that are plain and fully covered by a positive statute. The board contended that § 13385 is plain and clear on the position that the only recognized defenses to the mandatory minimum penalties contained in subdivisions (h) and (i) are those specific examples contained in subdivision (j), which do not include any equitable rights.

The Court of Appeal rejected that argument, noting that the language of § 13385 does not plainly exclude a defense of laches. The Court of Appeal analyzed the various subdivisions of § 13385 and found that those subdivisions requiring mandatory minimum penalties in certain situations and limiting defenses to those penalties did not limit the:

> . . . long-standing judicial policy curtailing the ability to belatedly prosecute stale claims to the detriment of one who had relied upon their lack of prosecution.

Second, the board contended that imposition of laches cannot be invoked against a government agency's actions because it would impermissibly nullify an important policy adopted for the public's benefit. The Court of Appeal rejected that argument, noting that the limited substantive defenses and mandatory minimum penalties of § 13385 are equally applicable to judicial proceedings brought by the Attorney General under § 13385, to which the three-year statute of limitations under Code of Civil Procedure § 338, subdivision (i) applies. Nothing in the statutory scheme

or the case law suggests that the Legislature intended to limit potentially stale actions brought in court but permit those same actions to proceed through administrative hearings.

The Court of Appeal noted that the § 13385 legislative history suggests the opposite. In streamlining the proof required for demonstrating a violation, specifically creating a statute of limitations for court actions while permitting state-level administrative actions to enforce these violations where a common-law application of laches exists, and in highlighting the need to ensure speedy and effective prosecutions, the overall framework of California's enforcement scheme is designed to quickly stop and remedy polluting discharges. Indeed, it was a history of delays in administrative prosecution that led to § 13385.

The Relevant Statute of Limitations for Presumed Prejudice under Laches

Having concluded that laches may be asserted as a defense to administrative enforcement actions under Water Code § 13385, the Court of Appeal adopted the three-year statute of limitations for violations of the Porter-Cologne Water Quality Control Act contained in Code of Civil Procedure § 338, subdivision (i), as the period for presumed prejudice under laches. It is the more specific statute of limitations that applies to similar types of penalties as those contained in § 13385.

The Court of Appeal rejected Malaga's argument that the one year statute of limitations contained in Code of Civil Procedure § 340 for actions upon a statute for a penalty or forfeiture because the three-year statute of limitations contained in Code of Civil Procedure § 338, subdivision (i) specifically referencing the Porter-Cologne Water Quality Control Act is the more specific limitation period involved and applies to similar types of penalties as those now contained in Water Code § 13385.

Conclusion and Implications

This opinion by the Fifth District Court of Appeal is important in preserving the ability to resort to principles of equity such as laches in administrative proceedings to avoid the threat of government administrative overreach, in situations such as where the government tries to leverage stale inconsequential violations. While the Court of Appeal did not believe that Malaga would be able to satisfy the burden of proving prejudice sufficient for laches given evidence of violations established by Malaga's self-reporting, there may be previously unintroduced evidence of prejudice sufficient to overcome Malaga's awareness of the violations, such as inability to halt violations from third parties discharging within Malaga's system. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F075868.PDF (Boyd Hill)

FIRST DISTRICT COURT FINDS ALLEGATIONS OF BROWN ACT VIOLATION FOR VOTE REPORTING REQUIREMENT NEED NOT ALLEGE PREJUDICE OR OVERCOME HEARSAY STATEMENTS

New Livable California v. Association of Bay Area Governments, ___Cal.App.5th___, Case No. F075868 (1st Dist. Dec. 18, 2020).

The First District Court of Appeal in *New Livable California v. Association of Bay Area Governments* reversed the Superior Court's dismissal of plaintiffs' complaint alleging violation of the Ralph M. Brown Act ((Brown Act) Govt. Code § 54950 *et seq.*) on the grounds that the complaint need not allege prejudice from the failure to report votes taken by defendant Association of Bay Area Governments (ABAG) and that the complaint need not overcome a hearsay statement implying that matter had become moot.

Factual and Procedural Background

ABAG is a joint power authority of nine San Francisco Bay Area counties—Alameda, Contra Costa, Marin, Napa, Sonoma, San Mateo, San Francisco, Santa Clara, and Solano—as well as the 101 cities located therein. ABAG's mission is to maintain, improve, and increase the region's housing supply,

including housing opportunities for lower income individuals. ABAG's governing Board of Directors (Board), comprised of county supervisors, mayors, and city councilmembers, is subject to the Brown Act.

At a January 17-18, 2019 ABAG Board meeting, the Board considered a motion to authorize the Board President to sign a regional housing and transportation development proposal known as the CASA Compact (CASA Motion).

During the meeting, the Board took the following actions: 1) rejected a motion to postpone a vote (Substitute Motion) on the CASA motion by "a show of hands," that was reported as a "voice vote" in the minutes of the meeting; 2) approved a motion to call the question (to close discussion on the CASA Motion) (Motion to Call the Question) by "a show of hands," that was not reported in the minutes; and 3) adopted an amended CASA motion (Amended CASA Motion) by a "roll call vote," that was reported in the minutes as a "vote" that listed the name and vote (for or against) of each member present with no abstentions and the names of absent members.

On May 31, 2019, plaintiffs filed a complaint/writ petition claiming that the Board violated Government Code § 54953(c)(2) in failing to report the votes on the motions concerning the CASA Compact. Section 54953(c)(2) requires the Board to publicly report any action taken and "the vote or abstention on that action of each member present for the action." An "action" includes votes on motions and proposals.

The complaint sought declaratory, injunction and writ relief allowed under the Brown Act. The Brown Act allows for relief including but not limited to preventing future violations or nullifying void acts. (Govt. Code, §§ 54960, 54960.1.)

Plaintiffs alleged that because there was no public reporting of the vote on the Substitute Motion, the later vote on the Amended CASA Motion was null and void. Plaintiffs claimed prejudice from the failure to publicly report the votes or abstentions of each member because it undermined their ability and that of the public to monitor how members voted on an important, controversial issue concerning regional housing policy and reduced their ability to hold elected officials accountable.

The trial court sustained ABAG's demurrer without leave to amend on the ground that plaintiff had not alleged and could not allege facts sufficient to support any relief for a Brown Act violation, on two separate grounds.

First, the trial court found that no cause of action would lie based on the Board's report of the vote taken on the Substitute Motion because plaintiffs had not and could not allege facts demonstrating legally cognizable prejudice as a consequence of any alleged violation of § 54953(c)(2).

Second, the trial court found that no cause of action would lie because there was no live controversy between the parties. The court reached this conclusion based on the ABAG response to plaintiffs' Brown Act meet and confer letter attached to the complaint and on the judicially noticed "transcribed portion" of the May 16, 2019 ABAG meeting during which the ABAG Executive Board Vice-President stated:

> First I want to reiterate the process for voting on actions at our Executive Board meetings where support for, or against, a given action is less than unanimous. Under those circumstances, the Clerk will conduct a roll-call vote to report the vote or abstention of each member present, and to determine whether there are a sufficient number of votes to approve an action. So, I just want to let everyone know, I will ask to see if there is unanimous consent to a particular item; if not, we will proceed to roll-call vote on those items.

Without allowing the parties an opportunity to present extrinsic evidence regarding the meaning of the public announcement and its application to the January votes, the trial court ruled the lawsuit moot, claiming that the announcement:

> . . .neutralizes [the parties'] controversy moving forward and renders the request for mandate and declaratory relief superfluous.

The Court of Appeal's Decision

The Court of Appeal reversed the trial court dismissal of the complaint and remanded the matter to the court. The Court of Appeal held that prejudice need not be alleged in order to obtain relief under the Brown Act. The Court of Appeal also held that mootness cannot be determined by judicial notice of hearsay statements.

Pleading of Prejudice under the Brown Act

A demurrer tests only whether the facts alleged state a cause of action "under any legal theory." (*Olson v. Hornbrook Community Services Dist.*, 33 Cal. App.5th 502, 522 (2019) (*Olson*).) The Court of Appeal held that the complaint stated a cause of action for violation of the Brown Act and declaratory, injunctive and mandamus relief under Government Code §§ 54960 and 54960.1. (*Olson*, supra, at p. 522.) In *Olson*, it was held that a prejudice allegation is not necessary to state a cause of action for relief under § 54960.1, but that a showing of prejudice may be required before the relief of nullifying a challenged action. (Id.)

The Court of Appeal distinguished the situation in *Galbiso v. Orosi Public Utility Dist.*, 182 Cal.App.4th 652 (2010) (*Galbiso*), on which the trial court relied. In *Galbiso* there was insufficient allegation of a Brown Act violation. Because there was a sufficient allegation of a Brown Act violation in the complaint, the Court of Appeal held that *Galbiso* was not applicable.

The Court of Appeal declined to express an opinion as to whether prejudice would need to be shown in order to declare Board Substitute Motion null and void under Government Code section 54960.1. While the Court of Appeal did not further explain, it apparently rejected dictum in Galbiso that seemed to link a showing of prejudice in order to nullify a challenged action with a requirement for an allegation of prejudice to state a Brown Act cause of action.

Given its determination as to the adequacy of the alleged violations for the Substitute Motion, the Court of Appeal did not address the adequacy of the alleged violations for the other ABAG meeting motions.

Judicial Notice of Hearsay Statements

The Court of Appeal rejected ABAG's argument that the case is moot based on its expressed concession in its response to plaintiffs' cease and desist letter that during the January 2019 meeting the reporting of votes on procedural motions was not Brown Act compliant, and its later public announcement "committing to take roll-call votes for all non-unanimous votes in the future."

While a court ruling on a demurrer may take judicial notice of official documents, it cannot take judicial notice of the proper interpretation of such documents. The court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show.

Thus, court was unable to determine as a matter of law based on ABAG's cease and desist letter coupled with the public announcement that there is no longer an actual controversy between the parties.

Conclusion and Implications

This opinion by the First District Court of Appeal does not fully resolve the apparent conflict between *Olson* and *Galbiso* regarding whether allegation of prejudice is required in a Brown Act complaint seeking to nullify an action taken in violation of the Brown Act. It also leaves open what seemed to be settled law regarding a requirement to demonstrate prejudice in order to obtain nullification of an action in violation of the Brown Act. It does not explain in what matter there may still be a controversy between the parties. This may not be the last time that this case reaches the Court of Appeal for clarification of these matters. The court's opinion is available online at https://www.courts.ca.gov/opinions/documents/A159235.PDF

(Boyd Hill)

FIRST DISTRICT COURT HOLDS REGIONAL WATER BOARD, ACTING AS RESPONSIBLE AGENCY UNDER CEQA, COULD IMPOSE ADDITIONAL MITIGATION MEASURES UNDER THE PORTER-COLOGNE ACT

Santa Clara Valley Water District v. San Francisco Bay Regional Water Quality Control Board, 59 Cal.App.5th 199 (1st Dist. 2020).

The First District Court of Appeal has held that the California Environmental Quality Act (CEQA) did not preclude a responsible agency–the San Francisco Bay Regional Water Quality Control Board (RWQCB)–from imposing additional waste discharge requirements via the Porter-Cologne Water Quality Control Act—beyond the mitigation measures the lead agency–Santa Clara Valley Water District–set forth in its project Environmental Impact Report (EIR).

Factual and Procedural Background

The Upper Berryessa Creek (Creek) in Santa Clara County, drains from the Diablo Range Hills to the Coyote Creek tributary, and ultimately into the San Francisco Bay. Every 10-20 years, the Creek historically flooded the nearby areas of Milpitas and San Jose, CA. In the 1980s, the U.S. Army Corps of Engineers (Corps) began working on plans to build a flood control project on the Creek. The project did not move forward until 2013, when renewed interest was sparked by construction of a nearby Bay Area Rapid Transit (BART) station that could be impacted by flooding.

In 2014, the Corps conducted federal environmental review for the proposed flood control project under the National Environmental Policy Act (NEPA). The Corps' Environmental Impact Study (EIS) named the Santa Clara Valley Water District (District) as the project sponsor. An agreement between the Corps and the District articulated that the Corps was responsible for the design and construction of the project, while the District was responsible for land acquisition, operating, and maintaining the project.

In early 2015, staff from the San Francisco Bay Regional Water Quality Control Board submitted comments on the Corps' design of the project. The comments suggested various changes to mitigate the project's impacts on wetlands. The Corps rejected the changes, citing they exceeded the scope of the Corps' environmental review. In September 2015, the District, acting as CEQA lead agency, issued a Draft Environmental Impact Report (EIR) for the project. That same month, the Corps applied to the RWQCB for a § 401 federal Clean Water Act certification for the project. The RWQCB notified that the Corps' application was incomplete because it lacked compensatory mitigation to address the project's impacts on waters and wetlands. This action prompted pressure from both the Governor's office and the California Congressional delegation, based on concerns that the BART station was already under construction and could lose federal funding absent the board's § 401 certification. In an effort to compromise, the RWQCB agreed to quickly issue the § 401 certification so that the Corps could proceed with project construction. However, the board informed the District that it would issue Waste Discharge Requirements (WDRs) under the Porter-Cologne Act to address project impacts that were not handled by the § 401 certificate.

In January 2016, the District issued its Final EIR on the project. In March 2016, the RWQCB's executive officer issued the § 401 certification. As a CEQA responsible agency, the board found that all impacts within its purview would be mitigated to less-than-significant levels, but qualified that the board would later consider WDRs to "compensate for temporal and permanent losses of functions and values."

In April 2017, when project construction was nearly complete, the RWQCB issued a WDR order requiring the Corps and the District to provide off-site mitigation of the project's effects by enhancing about 15,000 linear feet or 15 acres of waters of the state. The order suspended and replaced the board's prior 401 certificate, and addressed CEQA by stating the board had considered the EIR and found that with mitigation, project impacts would be less than significant.

In May 2017, the District appealed the RWQCB's order to the State Water Resources Control Board (SWRCB). During the pendency of their appeal, the District filed a petition for writ of mandate against the RWQCB, challenging the WDR order under

CEQA. The SWRCB failed to take action on the District's appeal, thereby denying it by operation of law. The District amended its petition to add causes challenging the order under § 401 of the Clean Water Act, the Porter-Cologne Act, and other state laws. The trial court denied the District's petition in February 2019, and the District timely appealed.

The Court of Appeal's Decision

On appeal, the District claimed the trial court erred in denying the administrative writ petition challenging the RWQCB's WDR. As to its CEQA claim, the District argued: 1) the board's failure to impose mitigation requirements as part of the board's CEQA review of the project barred it from imposing mitigation via the WDR order; and 2) the board prejudicially abused its discretion by failing to support the mitigation requirements with substantial evidence.

The First District Court of Appeal affirmed the trial court's judgment, finding that the District failed to demonstrate reversible error. The appellate court begun its analysis of the District's CEQA claim by reviewing the role of a responsible agency. Citing to CEQA Guidelines § 15096, the court reiterated that a responsible agency that disagrees with the adequacy of a lead agency's final EIR must either timely sue the lead agency, be deemed to have waived any objections to the EIR, prepare a subsequent EIR if legitimate grounds exist, or, assume the role of a lead agency as provided by Guidelines § 15052, subdivision (a)(3).

Regional Board Had Authority under Porter-Cologne

Accordingly, § 15096 prohibits a responsible agency from requiring additional environmental review after a lead agency completes its CEQA review, so long as the responsible agency does not have separate independent authority to enforce or administer a different environmental law. However, the savings clause in Public Resources § 21174, makes clear that CEQA does not prevent an agency from exercising independent authority under a separate statute. Here, the court found that RWQCB did not violate CEQA by issuing the WDRs against the District because it did so pursuant to its duties under the Porter-Cologne Act. Although the District, acting as lead agency, had not formulated CEQA mitigation measures requiring WDRs, the board, as a responsible agency, was not precluded from separately discharging its authority under the Porter-Cologne Act. The appellate court conceded that while unified CEQA review and environmental regulation should be the norm, there may be times when an agency's own environmental regulation can take place after CEQA review, as permitted by Public Resources Code § 21174. Towards this end, the RWQCB and District could be subject to legal challenges by a third party on grounds that the agencies divided their CEQA approval process "into two stages." But, that situation did not arise here, and the District agreed to the board's two-stage approval process due to the hurried 401 certification.

Issue of 'Excessive' Mitigation

Finally, the Court of Appeal rejected the District's claim that the RWQCB's WDR order imposed "excessive" mitigation. The court concluded that the District failed to engage in sufficient analysis of the evidence support the trial court and board's conclusions. By failing to cite to the evidence that the trial court relied on and explain why such evidence was insufficient to support the board's decision, the District failed to carry its burden to rebut the presumption, as required under the substantial evidence standard of review.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies the effect of an agency's overlapping responsibilities under CEQA and other environmental statutes. CEQA's savings clause does not prevent a responsible agency from discharging its duties under separate environmental laws, even if the exercise of that authority does not neatly align with its duties under CEQA. The court of appeal's decision will likely play an important role in future matters between local, regional, state, or federal agencies, particularly where a lead agency's authority under CEQA must heed to a responsible agency's other statutory duties to mitigate a project's potential effects. To avoid miscommunication, lead and responsible agencies should collaborate early in the environmental review process and identify potential mitigation measures promulgated by other statutes to ensure they are appropriately included in all draft and final CEQA documents. The court's decision is available online at: https://www.courts.ca.gov/opinions/documents/A157127.PDF (Bridget McDonald)

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