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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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LAW AND REGULATION REPORTER

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ENVIRONMENTAL NEWS

U.S. BUREAU OF RECLAMATION FORECASTS DROUGHT REDUCED INFLOWS TO LAKE MEAD, EXACERBATING SHORTAGE CONDITIONS

In October, the U.S. Bureau of Reclamation (Bureau) released its 24-month study and two-year projections for major reservoir levels in the Colorado River System, forecasting a median inflow in 2022 that is 800,000 acre-feet less than forecasted in September. The forecast comes on the heels of the Bureau's first-ever shortage declaration in August, which led to Colorado River water cutbacks for Arizona and Nevada, but not California. While California's allocation of Colorado River water has not been reduced at this time, further decreases in reservoir capacity at Lake Mead could lead to additional shortage declarations in the future, potentially impacting full use of California's allocation of Colorado River water.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the Bureau. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water.

In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases. They include the latest inflow and water use forecasts. The October 24-Month Study included 30-year inflow data. The October 24-Month study also forecasts a 16 percent chance of a heightened shortage condition in 2023.

Regulation of the Colorado River

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). A seven-party agreement in 1931 apportioned California's allocation between the Palo Verde Irrigation District, Yuma Project, Imperial Irrigation District, Coachella Valley Water District, Metropolitan Water District, and the City and County of San Diego. Nonetheless, California river water users historically used more than California's 4.4 maf allocation due to water surpluses or unused water by Arizona or Nevada. In 2003, certain of these entities executed a quantification settlement agreement that reduced water use to California's allocated amount through water transfers, canal lining projects, and agricultural conservation.

Interim Guidelines

In 2007, the Bureau adopted interim guidelines to address shortages in the Colorado River system (Guidelines). The purpose of the Guidelines consists of three components. First, the Guidelines are intended to improve the Bureau's management of the Colorado River by considering trade-offs between the frequency and magnitude of reductions of water deliveries, including related impacts on water storage in Lake Powell and Lake Mead, water supply, power production, recreation, and other environmental resources. Second, the Guidelines provide mainstream federal water users a greater degree of predictability

regarding the amount of annual water deliveries in future years, particularly under drought and low reservoir conditions. Finally, the Guidelines provide additional mechanisms for the storage and delivery of water supplies in Lake Mead to increase the flexibility of meeting water use needs from Lake Mead, including under drought and low reservoir conditions.

To accomplish the purpose of the Guidelines, the Guidelines have four operational elements: 1) shortage guidelines, 2) coordinated reservoir operations, 3) storage and delivery of conserved water, and 4) surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, as the Bureau currently forecasts, the Bureau will apportion to the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

2019 Drought Contingency Plan

Despite the Guidelines' reduction in Arizona and Nevada allocations when shortage conditions are forecasted for the lower basin, the lower basin states entered into a drought contingency plan in 2019, subsequently approved by Congress, to collaboratively redress lowering reservoir levels in Lake Mead. To this end, California agreed to make "contributions" when certain shortage conditions exist. Specifically, when Lake Mead levels are at or below 1,045 feet but above 1,040 feet, California will contribute 200,000 acre-feet to help remedy low reservoir levels. When Lake Mead levels are below 1,040 feet, California could contribute as much as 350,000 acre-feet. The Bureau would adjust its delivery schedules as necessary to reflect these contributions.

24-Month Study Forecasts

The Bureau's 24-Month Study forecasts Lake Mead levels at the end of calendar year 2022 to be 1,050.63 feet. This is less than one foot above the next shortage condition cutoff of 1,050 feet. While California's 4.4 maf allocation would not be affected—reductions would continue to be made to Arizona and Nevada's allocations—further decreases in Lake Mead levels could trigger California's drought contingency plan contributions which begin when lake levels reach 1,045 feet.

Conclusion and Implications

It remains to be seen whether Lake Mead levels will continue to decline. However, the Bureau's October forecast appears to reflect the continued impact of drought conditions on the Colorado River system. Thus, it is possible that California's drought contingency plan contributions could be triggered sometime after 2022, with corresponding adjustments made by the Bureau to lower basin delivery schedules. The U.S. Bureau of Reclamation's Updated Projections of Colorado River System Conditions, available online at: https://www.usbr.gov/newsroom/#/news-release/4013.
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA PASSES THREE KEY HOUSING BILLS TO STREAMLINE CEQA REVIEW FOR CERTAIN HOUSING PROJECTS

In the current legislative year, Governor Gavin Newsom has signed over 30 bills to fight California's ongoing housing crisis by providing tools to expand the state's housing production, streamline housing permitting and increase density across the state. Some of the notable bills within this year's housing package include Senate Bills (SB) 7, 8, 9 and 10. Since taking office, the Governor has signed 16 California Environmental Quality Act (CEQA) reform bills aimed at streamlining state laws to maximize housing production. Out of the various housing bills approved this year, SB 7, 9 and 10, include CEQA streamlining for certain housing projects.

Senate Bill 7

SB 7, known as the Housing and Jobs Expansion and Extensions Act and signed by the Governor on May 20, 2021, was the first of the housing bills approved this year. It extends expedited CEQA judicial review for small-scale housing developments. Prompted by high unemployment in 2011, the Legislature enacted Assembly Bill 900, known as the Jobs and Economic Improvement Through Environmental Leadership Act, to provide streamlining benefits under CEQA for specific "leadership projects" (*i.e.* large, multi-benefit housing, clean energy, and manufacturing projects) and only "for a limited period of time to put people to work as soon as possible." AB 900 established fast-track administrative and judicial review procedures for leadership projects that met certain conditions, including the creation of high-wage, high-skilled jobs, no net additional emission of greenhouse gases (GHG), and the payment of certain costs by the project applicant. Eligible projects were entitled to immediate review in the Court of appeal—rather than Superior Court—and would be reviewed on an expedited timeframe.

Under this legislation, the Governor was required to certify that a project met these statutory criteria to qualify for fast-track status. As originally enacted, AB 900 contained no deadline for the Governor's certification of a leadership project. The statute provided a deadline for a lead agency to approve a project by June 1, 2014, and the legislation itself was set to expire on January 1, 2015, unless a later enacted statute extended or repealed that date. The statutory deadline was extended several times and in its final iteration, AB 900 required the Governor to certify a leadership project by January 1, 2020 and the lead agency to approve the project by the sunset date, January 1, 2021.

SB 7, which was proposed by Senate President pro Tempore Toni G. Atkins (D-San Diego), extends the provisions of AB 900 through the year 2025and provides CEQA streamlining benefits to projects that were previously certified under AB 900 but that did not receive project approvals by the prior deadline of January 1, 2021. SB 7 also expands eligible housing projects by including infill housing projects with lower investment amounts than previously allowed.

SB 7 adds the following components to AB 900: 1) eligibility for infill housing development projects with investments between $15 million and $100 million (the previous threshold was $100 million and above); 2) a requirement of quantification and mitigation of the impacts of a project from the emissions of greenhouse gases with geographic restrictions for non-housing development projects; 3) a revision of labor-related requirements for projects undertaken by both public agencies and private entities, adding "skilled and trained" workforce to the existing prevailing wage requirements; and 4) authorization for the Governor to certify a project before the lead agency certifies the final Environmental Impact Report (EIR) for the project and/or an alternative described in an EIR. SB 7 requires an applicant for certification of a project to: 1) demonstrate that they are preparing the administrative record concurrently with the administrative process; and 2) agree to pay the costs of both the trial court and court of appeal in hearing and

deciding a case challenging a lead agency's action on a certified project.

No AB 900 project has been overturned in court since the law was enacted, and implementation of the law and its benefits resulted in the creation of over 10,000 new housing units. SB 7 extends the provisions of AB 900 and marked the first bill of the Senate's 2021 "housing package" that targets California's ongoing housing crisis, while including an emphasis on minimization of greenhouse gases and boosting employment opportunities. SB 7 accomplishes this by tackling zoning and CEQA reforms, both of which often slow down the speed of housing projects.

Other Senate Bills

In addition to approving SB 7 earlier this year, on September 16, 2021, Governor Newsom signed additional housing bills, which included SB 9 and 10, which provide some CEQA streamlining for certain housing projects as well. SB 9, known as the California Housing Opportunity and More Efficiency (HOME) Act, provides for the ministerial approval of housing development projects that contain up to two dwelling units (duplexes) on a single-family zoned parcel, and also allows for ministerial approval of qualifying lot splits that subdivide single-family parcels into two lots, if various criteria are met. Taken together, these provisions of SB 9 allow for development of up to four housing units where only one would have been permitted, without further CEQA review. It includes provisions to prevent the displacement of existing renters and protect historic districts, fire-prone areas and environmental quality. SB 9 is being viewed by some as an effective end of single-family residential zoning within California.

SB 10, which was proposed by Senator Scott Wiener (D-San Francisco), creates a voluntary process for local governments to streamline zoning processes for new multi-unit housing near transit or in urban infill areas. SB 10 allows local jurisdictions to pass an ordinance through January 1, 2029, to zone any parcel for up to ten residential units if located in transit-rich and urban infill areas. Adoption of such an ordinance or a resolution to amend a general plan consistent with the ordinance would be exempt from CEQA, thereby providing increased ability for cities to approve upzoning without being hindered by CEQA processes and litigation related to zoning. SB 10 also allows a local jurisdiction to override voter-approved zoning for these qualifying parcels by a two-thirds vote, a provision which has already been challenged by AIDS Healthcare Foundation in a lawsuit. Further, the effects of SB 10 in streamlining CEQA for housing projects may be limited as SB 10 does not provide CEQA exemptions or ministerial approval process for the housing projects built on these upzoned parcels itself, and also prohibits by-right approvals and CEQA exemptions for projects with more than 10 dwelling units developed on one or more parcels rezoned through SB 10.

Conclusion and Implications

Housing in California remains in crisis mode with prices continuing to rise rapidly and "affordable" entry-level housing scarce. Senator Wiener has taken on these challenges with many efforts to tackle affordable housing. CEQA is often an expensive process which inherently challenges the practicality of affordability With those bills signed into law by Governor Newsom, the state is creeping towards addressing housing woes.
(Madeline Weisman and Hina Gupta)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

Major Restructuring of Marine Plankton Assemblages Under Global Warming

Plankton play a key role in ocean ecosystems: phytoplankton fix carbon from carbon dioxide in water, and zooplankton, which consume phytoplankton, are a major food source for larger marine animals. As the base of the trophic pyramid, plankton have the power to dictate larger scale trends in marine life. Understanding how plankton react to changes in their ecosystem, most notably ocean warming and acidification as a result of climate change, is important for predicting potential changes to marine ecosystems.

A study conducted by scientists at ETH Zurich, in collaboration with the Swiss Federal Institute for Forest, Snow and Landscape Research, aimed to map out the redistribution of plankton as a result of ocean warming due to climate change. The analysis used statistical algorithms and climate models to map out 860 different species of phytoplankton and zooplankton and determine where rising sea temperatures will push these species. The team had several key findings. Firstly, warming will diversify plankton species; however, at higher temperatures such as in the tropics, phytoplankton diversity will increase while zooplankton diversity will decrease. Additionally, new communities of plankton will develop as plankton species in the tropics move polewards and replace species adapted to cooler waters. This will have a potentially negative impact at mid and high-latitude marine ecosystems, which are currently dependent on having a less diverse plankton population. Finally, the size distribution of plankton populations will change, with an increasing number of smaller plankton. This change in size will impact the populations of larger organisms that feed on plankton, such as fish. Along with potential changes to fish populations, an increase in smaller plankton will disrupt the ocean carbon cycle. Larger plankton tend to sink faster than smaller plankton, so as they die and decompose, they will release CO_2 at greater depths. In some locations a shift toward smaller plankton would decrease the amount of CO_2 sequestered in the deep ocean, which is expected to impact the global carbon cycle.

While this study used climate models to predict shifts in plankton populations and their global distribution, other observational research has demonstrated the trends mentioned above are already underway. The impact we will see from climate change will affect all species on earth, in this case starting with the smallest yet most critical organisms.

See: Fabio Benedetti, Meike Vogt, Urs Hofmann Elizondo, Damiano Righetti, Niklaus E. Zimmermann, Nicolas Gruber. Major restructuring of marine plankton assemblages under global warming. *Nature Communications*, 2021; 12 (1) DOI: 10.1038/s41467-021-25385-x.

Emergent Biogeochemical Risks from Arctic Permafrost Degradation

It is well documented that climate change poses serious threats to Arctic permafrost. The Arctic is warming two-three times faster than the mean global warming rate and, as a result, permafrost may reduce by as much as 65 percent by 2100. Typically, Arctic permafrost thaw is discussed in the context of the carbon feedback loop, whereby large quantities of carbon stored in the permafrost are released through global warming induced thawing, causing an increase in global carbon emissions that instigates further warming. But the thawing of the Arctic permafrost presents risks to human health beyond just the increasing impacts of climate change. A recent review article in *Nature Climate Change* that aimed to summarize the risks of permafrost thaw and elaborate the gaps in the research, found that permafrost thaw can release entrained viruses, bacteria, anthropogenic chemicals, nuclear waste and other biogeochemical hazards.

According to the article, the Arctic permafrost is rich with so called Methuselah microorganisms; organisms with extremely tolerant traits that can remain viable for over a million years. These microorganisms contribute to an incredibly diverse virosphere with thousands of unclassified viruses whose viability and in particular, adaptability pose serious risks to the arctic biosphere and even human health. The thawing of Artic permafrost can also contribute seques-

tered carbon that serves as both a nutrient source and a vector for these organisms.

Unfortunately, Arctic permafrost is also rich with anthropogenic chemicals; black carbon from the combustion of fossil fuels, heavy metals from local mining, legacy persistent organic pollutants long outlawed, and nuclear waste from Soviet Union era weapons testing, the Camp Century nuclear research station, and even a 1968 airplane crash carrying nuclear materials. Long range atmospheric transport of anthropogenic chemicals to the Arctic leads to sequestration of anthropogenic chemicals in the Arctic's permafrost that could have originated from anywhere in the world. The thawing of the Arctic permafrost threatens to release these chemicals rapidly back into the atmosphere, posing serious health and ecosystem risks.

Perhaps the greatest cause for concern, however, is the unpredictability of this diverse myriad of risks. Very little is understood about permafrost thaw dynamics, the composition of Methuselah microorganisms, the quantity and makeup of anthropogenic chemicals sequestered and the ability of all of these components sequestered in the Arctic permafrost to cause serious health risks. The researchers highlight the above areas as crucial areas of study to better understand, outside of the carbon feedback loop, how the thawing permafrost will change the Arctic and surrounding areas forever.

See: Miner, K. R., D'Andrilli, J., Mackelprang, R., Edwards, A., Malaska, M.J., and Miller, C.E. Emergent biogeochemical risks from Arctic permafrost degradation. Nature Climate Change. 11. 809-819. (2021).

Effects of Global Warming on Mediterranean Coral Forests

Much research has been conducted to understand the effects of climate change on large, tropical coral ecosystems such as the Great Barrier Reef. The effects of climate change, however, are not limited to tropical marine ecosystems. The Mediterranean Sea, for instance, contains 7 percent of the world's marine biodiversity and is home to mesophotic coral forests, which are suffering from the effects of climate change and classified as "vulnerable" by the International Union for the Conservation of Nature. Little research has been conducted on these Mediterranean coral forests, until now.

In a recent study by Chimienti et al. of The University of Bari in Italy and other Italian research institutions, the detrimental effects of warming sea temperatures were evaluated. The Mediterranean Sea is a relatively cold ecosystem, so the species that live there are much more sensitive to increasing temperatures, which can cause Mass Mortality Events (MMEs), the first of which were observed 40 years ago. Cheimienti et al. focused on an MME in the Adriatic Sea, specifically the Tremiti Islands Marine Protected Area due to the high population of *P. clavata* coral forests and as a way to control for the influence of fishing on the MME.

Over the five-year study (2014-2019), 39.4 percent of the approximately 2,000 coral colonies had died, and damage was seen in 95.5 percent the remaining ones. This trend aligns with an approximately 2°C increase in sea temperature change since 2016 (measured at ~30m), which triggers macroalgal overgrowth. The macroalgal blooms in turn compromise the health of the coral colonies. Coral forests located below 40 m in depth remained relatively unaffected and healthy—at these depths the temperature likely remained stable, which prevented damaging algal blooms. At these lower depths, only 9.9 percent of colonies died and 27.3 percent of the remaining were damaged by macroalgae.

Chimienti et al. warn that such impacts to the Mediterranean coral forests could be irreversible, cascading into widespread disturbance of the entire marine ecosystem in the region. As such, Chimienti et al. conclude that the study highlights the continued urgency of addressing climate change and curbing further warming.

See: Chimienti, G., De Padova, D., Adamo, M. *et al*. Effects of global warming on Mediterranean coral forests. *Sci Rep* **11,** 20703 (2021). https://doi.org/10.1038/s41598-021-00162-4.

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

REGULATORY DEVELOPMENTS

BIDEN ADMINISTRATION BEGINS PROCESS OF REVERSING TRUMP-ERA AMENDMENTS TO NEPA REGULATIONS—CEQ RELEASES PROPOSED RULE

The Bident administration has begun the process of reversing various Trump administration amendments to regulations governing agencies' implementation the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq*., [NEPA]). Likely most consequential are the reversal of amendments that eliminated those well-litigated categories of "direct," "indirect" and "cumulative" effects of a project that should be analyzed, and replaced them with direction that agencies should concentrate on "reasonably foreseeable impacts." [86 Fed. Reg. 55757 (Oct. 7, 2021).]

Background

The Council for Environmental Quality (CEQ) on October 7, 2021, published a notice of proposed rulemaking that is the first of an intended two-phase process of implementing January 20, 2020 Executive Order (EO) 13990 establishing policies for the Biden administration to listen to the science; improve public health and protect our environment; ensure access to clean air and water; limit exposure to dangerous chemicals and pesticides; hold polluters accountable, including those who disproportionately harm communities of color and low-income communities; reduce greenhouse gas emissions; bolster resilience to the impacts of climate change; restore and expand our national treasures and monuments; and prioritize both environmental justice and the creation of well-paying union jobs necessary to deliver these goals.

EO 13990 took specific aim at various actions by the Trump administration regarding CEQ regulations implementing the National Environmental Policy Act of 1969 (42 U.S.C. 4321), revoking Trump-signed EO 13807, entitled *Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects*, and directing agencies:

> . . .to review existing regulations issued between January 20, 2017, and January 20, 2021, for consistency with the policy articulated in the E.O. and to take appropriate action.

Trump's EO 13807 had culminated in a rulemaking process amending CEQA regulations first adopted in 1978, with the final rulemaking going into effect on July 16, 2020 (the 2020 amendments). Five separate lawsuits were subsequently filed, with stays of the 2020 amendments having been imposed in four of them, while the dismissal of the fifth is subject of a pending appeal.

On January 27, 2020, Biden signed EO 14008, which establishes a government-wide approach to the climate crisis by reducing greenhouse gas emissions and an administration policy to increase climate resilience, transition to a clean energy economy, address environmental justice and invest in disadvantaged communities, and spur well-paying union jobs and economic growth.

The Proposed Rules

CEQ's proposed rulemaking proposes to restore the definitions of "direct" and "indirect" effects, and "cumulative impacts" from the 1978 NEPA Regulations, 40 CFR 1508.7 and 1508.8 (2019), by incorporating them into the definition of "effects" or "impacts," such that each reference to these terms throughout 40 CFR parts 1500 through 1508 would include direct, indirect, and cumulative effects.

These revisions would eliminate 2020 amendments that, per CEQ:

> . . .create[d] confusion and could be read to improperly narrow the scope of environmental effects relevant to NEPA analysis, contrary to NEPA's purpose.

The 2020 amendments directed agencies to concentrate on "reasonably foreseeable impacts," rather than categorizing them as "direct," "indirect" or "cu-

mulative." CEQ's current thinking is that the 2020 amendments could improperly limit the timescale and scope of effects analyzed by agencies.

The proposed amendment to 40 C.F.R. 1502.13 addresses an agency's duty to "set[] forth the rational for the agency's proposed action" the purpose and effect section" of an Environmental Impact Statement (EIS). The 1978 version of the regulation required that an agency "briefly state the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action." The 2020 amendments:

> . . .add[ed] language that requires agencies to base the purpose and need on the goals of an applicant and the agency's authority when the agency's statutory duty is to review an application for authorization.

The proposed rule would revert to the 1978 language. CEQ reasoned that the 2020 amendments "could be construed to require agencies to prioritize the applicant's goals over other relevant factors, including the public interest." Rather than restrict the purpose and need for agency actions to applicants' goals, NEPA, per CEQ's reading, endorses agencies considering a range of factors including "regulatory requirements, desired conditions on the landscape or other environmental outcomes, and local economic needs, as well as an applicant's goals." CEQ also proposes a conforming change to 40 C.F.R. 1508.1(z), to define "reasonable alternatives" to the project that is the subject of an EIS as:

> . . .a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, *and, where applicable, meet the goals of the applicant*.

CEQ's next draft amendment seeks to re-establish the longstanding understanding, upended by the 2020 amendments, that agencies could develop NEPA procedures of their own to augment the CEQ regulations, so long as those procedures met or exceeded the degree of environmental review required by the CEQ regulations. The proposed rulemaking would remove language from 40 C.F.R 1507.3(a) and (b) that, collectively, "make the CEQ regulations a ceiling for agency NEPA procedures." Per CEQ "would allow agencies to fully pursue NEPA's aims by allowing them to establish procedures specific to their missions and authorities that may provide for additional environmental review and public participation," while CEQ would continue its review agencies' proposed NEPA regulations "to ensure that they are consistent with, but not necessarily identical to, CEQ's regulations."

Conclusion and Implications

That both administrations claim that their amendments (the 2020 amendments and those currently proposed by CEQ) are consistent with NEPA and the substantial body of caselaw seeking to interpret and apply the terms "direct," "indirect" or "cumulative" should give some idea of the potential for a spirited comment period and, if the proposed amendments to 40 C.F.R. 1508.7 and 1508.8 become final, renewed litigation over the meaning and proper application of these terms. For more information on the CEQ's proposed rule for implementation of NEPA, October 7, 2021, *see:* https://www.federalregister.gov/documents/2021/10/07/2021-21867/national-environmental-policy-act-implementing-regulations-revisions. (Deborah Quick)

U.S. ENVIRONMENTAL PROTECTION AGENCY ISSUES FINAL RULE PHASING DOWN PRODUCTION AND USE OF HYDROFLUOROCARBONS

On September 23, 2021, the U.S. Environmental Protection Agency (EPA) issued a final rule that established a large-scale program to phase down the production and consumption of hydrofluorocarbons (HFCs) by 85 percent by 2036. *Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act*, 86 Fed. Reg. 55116.

Background

HFCs are commonly used in aerosols, refrigeration, and air conditioning, but are also greenhouse gases (GHGs) that contribute to climate change. HFCs have grown in popularity and use as alternatives to ozone-depleting substances that were formerly used in similar applications. EPA's statement on the final rule is as follows:

> This final rule is the first regulation under the AIM Act to address HFCs, which are potent greenhouse gases commonly used in refrigerators, air conditioners, and other applications. This final rule sets the HFC production and consumption baseline levels from which reductions will be made, establishes an initial methodology for allocating and trading HFC allowances for 2022 and 2023, and creates a robust, agile, and innovative compliance and enforcement system.

The Final Rule on HFCs

This rule implements Congress' direction to address HFCs in the American innovation and Manufacturing Act (AIM Act), passed in late December 2020. One of the key goals of both the AIM Act and EPA's rule is an allowance and allocation program. The rule establishes baselines for HFC production and consumption, against which the 85 percent phasedown will be measured. Consumption is defined as the amount of HFCs added to the United States market through importation and production, less exports and destruction. The rule also establishes the phasedown schedule for HFCs: where 2020-2023 is set at 90 percent of the baseline, 2024-2028 at 60 percent, 2029-2033 at 30 percent, 2034-2035 at 20 percent, and for 2036 and beyond, 15 percent.

Phasedown Limits and Allowances

The rule proposes to achieve the phasedown limits by issuing allowances to companies that produced or imported HFCs in 2020, and such allowances may be traded pursuant to a trading program the rule establishes. In this sense, the phasedown program is similar to a cap and trade system. EPA must approve the transfer of allowances, but this approval is simply to ensure that the transferor does indeed have sufficient allowances to cover the transfer. The rule includes an appeal process if a transfer is disallowed. The transferor's remaining allowances will be reduced by 5 percent of the amount transferred in the form of an offset.

Compliance

The rule also includes a series of actions aimed at ensuring compliance with the phasedown limits. These actions include creating an electronic tracking system to track HFC movement through commerce, where QR codes will be used to track HFCs and all persons who import, sell, distribute, or offers to sell or distribute HFCs must be registered in the tracking system. The rule requires the use of refillable cylinders. The European Union (EU) already requires HFCs to be sold in refillable cylinders, so this requirement is not unique in the global marketplace. The refillable cylinder requirement will be phased in, where disposable cylinders may be used for importing or filling until January 1, 2025. Disposable cylinders may be sold or distributed until January 1, 2027.

Labeling Requirements

The rule imposes labeling requirements for bulk HFC containers, such as ISO tanks, drums, cylinders of any size, and small cans. Such containers must bear a label that states the common name of the HFC or HFC blend in the container, and the ratios of HFCs if it is a blend. If a container is not labeled or illegibly labeled, but evidence suggests that the container holds HFCs, then EPA will presume that the container is full of HFC-23. This presumption can be corrected by the importer if the contents are verified with independent laboratory testing and the label is fixed before the container is imported. Importers can hold the shipments at the port or a bonded warehouse until testing and relabeling can be arranged. The intention of the presumption and testing requirements is to deter inaccurate or unclear labeling.

Administrative Consequences—Revocation and Retirement

Finally, the rule sets forth administrative consequences in the form of revoking or retiring HFC allowances for noncompliance. These consequences are in addition to any available civil or criminal enforcement actions. The rule requires third-party auditing of recordkeeping and reporting submitted by all

producers, importers, exporters, reclaimers, and other entities receiving allowances. Such audits are anticipated to occur on an annual basis. The rule is also intended to provide transparency in HFC production and consumption by making data on those activities available to the general public, which should also assist in enforcement and compliance actions.

Conclusion and Implications

The U.S. Environmental Protection Agency in the Biden administration is tackling HFCs and their impact on greenhouse gas emissions and climate change in a final rule that "creates a robust, agile, and innovative compliance and enforcement system."

The complete final rule and history are available online at: https://www.epa.gov/climate-hfcs-reduction/final-rule-phasedown-hydrofluorocarbons-establishing-allowance-allocation.
(Brenda C. Bass, Darrin Gambelin)

FEDERAL EMERGENCY MANAGEMENT AGENCY FLOOD RISK RATING 2.0 ROLLS OUT AS FIRST MAJOR UPDATE TO PRICING METHODOLOGY

Formally taking effect as of October 1, 2021, Risk Rating 2.0 is the first time the Federal Emergency Management Agency (FEMA) has updated its pricing methodology for flood risk since the 1970s. The pricing of rates under the National Flood Insurance Program (NFIP) has been based on relatively static measurements, emphasizing a property's elevation within a zone on FEMA's Flood Insurance Rate Map. With the implementation of Risk Rating 2.0, however, FEMA expects the new rates to more accurately reflect the risks associated with properties throughout the country.

Background

According to FEMA, Risk Rating 2.0 is designed in part to correct the problem of policyholders with properties of lower value paying rates that more accurately reflect the risk associated with homes of higher value. Whereas the traditional pricing methodology relied heavily on FEMA's Flood Insurance Rate Map, Risk Rating 2.0 models a property's risk through various considerations like the probability of inland flooding, historical storm surges, the cost to rebuild the property, historical losses, elevation, and any natural surroundings and barriers to the property.

FEMA breaks down its projections for rate changes across four categories: immediate cost reductions; increases that are $10 or less a month; increases between $10 and $20 a month; and increases of more than $20 a month. Under the new rates, FEMA estimates that Risk Rating 2.0 will result in immediate cost reductions for 23 percent of existing policies nationwide. While this means that nearly 1.2 million policies nationwide will see costs decrease, more than 3.8 million policyholders will see their rates increase.

Impacts in California

Most California policyholders will see small increases but, overall, the state should see an average policy discount of more than 10 percent. Looking closer at the state's numbers, the number of policies benefitting from a decrease in premiums will be 27 percent in California. This means that roughly 58,000 policies will have their premiums decrease under Risk Rating 2.0 once they are eligible for renewal. By contrast, 69 percent of policies will see relatively minor increases of less than $20 per month and only 4 percent of policies will see increases in premiums greater than $20 per month.

State Regional Impacts

As for the specific regions throughout the state, 4 of California's top 5 zip codes with the most NFIP policies are located in the Greater Sacramento region. In the Natomas area, just north of Downtown Sacramento, policyholders see moderate declines in their policy premiums. South of downtown in the Pocket area, however, policyholders can expect to

see their premiums increase. Generally speaking, premium decreases are also expected for most of the Sacramento and San Joaquin valleys.

In the San Francisco Bay Area, premium increases are to be expected in some of the lower lying coastal areas. Conversely, properties in the foothills around the Bay will experience significant discounts. Specifically, areas like South San Francisco, Pacifica and Millbrae will see increases of about $5-7 per month, while properties in the higher up areas such as the Oakland Hills and San Ramon will benefit from decreases of more than $20 per month.

To the south, those in Malibu will see some of the largest discounts in the entire state with an average reduction in policy premiums of more than $40 per month. In the Santa Monica foothills and Hollywood Hills, policyholders can also expect relatively large decreases in their premiums. For those in the San Fernando Valley and Los Angeles Basin, however, policy premiums will be seeing modest increases.

A Phased Approach

In rolling out Risk Rating 2.0, FEMA will be taking a phased approach. In Phase 1, which began on October 1, 2021, all *new* policies will be subject to the new pricing methodology. Furthermore, existing policyholders eligible for renewal will be able to take advantage of immediate *decreases* in their premiums. For Phase 2, all policies renewing on or after April 1, 2022 will be subject to the Risk Rating 2.0 pricing methodology. In essence, current policyholders set to receive premium decreases under Risk Rating 2.0 will transition to the lower rate immediately at the first renewal of their policy. Any premium increases will transition gradually and within the existing statutory limits until the full-risk rate for the property is reached.

Conclusion and Implications

FEMA's Risk Rating 2.0 is intended as a complete overhaul to the policy pricing methodology for policyholders under the NFIP. As changes to the methodology will be affecting policies throughout the State, drastically in some cases, policyholders should familiarize themselves with how Risk Rating 2.0 will impact their own policies. With the rainy seasons—hopefully—fast approaching, those without coverage should likewise act fast in ensuring that their property is protected given that flood insurance from the NFIP normally carries a 30-day waiting period before it takes effect. For information, *see:* https://www.fema.gov/flood-insurance/risk-rating.
(Wesley A. Miliband, Kristopher T. Strouse)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Editor's Note: Complaints and indictments discussed below are merely allegations unless or until they are proven in a court of law of competent jurisdiction. All accused are presumed innocent until convicted or judged liable. Most settlements are subject to a public comment period.

Civil Enforcement Actions and Settlements—Air Quality

•September 27, 2021—EPA finalized a settlement with Grafton & Upton Railroad Company for alleged violations of federal chemical accident prevention requirements at the company's propane distribution terminal in N. Grafton, Mass. The company will pay a $52,000 civil penalty, automate the delivery of water for fire suppression in the winter, and deliver training to emergency responders. Propane is subject to regulation under the Clean Air Act's chemical accident prevention provisions, found in Section 112(r) of the Act and implementing regulations. EPA alleged that G&U failed to file a risk management plan (RMP) before the terminal opened for business. An EPA inspection concluded that the terminal generally was well-designed in accordance with industry standards, but EPA did raise additional concerns to ensure protection for the surrounding community. EPA particularly was concerned about whether water could fill the facility's water cannons quickly enough in the winter. The water cannons spray water to cool tanks in the event of a fire, but water must be manually turned on in the winter to avoid freezing pipes. Further, due to public concerns over siting of the facility, EPA provided an opportunity for public input before reaching this settlement. G&U has been responsive addressing concerns raised by EPA throughout the enforcement process.

•September 27, 2021—The United States filed suit under the Clean Air Act (CAA) against the City of New York and the New York City Department of Education (NYCDOE) and lodged a proposed consent judgment to address the defendants' longstanding failure to properly monitor and control harmful emissions from NYCDOE oil-fired boilers in New York City public schools. Many of NYCDOE's boilers are located in disadvantaged communities whose residents are exposed to disproportionately high pollution levels that result in adverse health and environmental impacts. The consent judgment, agreed upon by the parties and also filed with the court, requires NYCDOE to: 1) conduct regular tune-ups to monitor and repair its boilers as required by the CAA to control excess emissions; 2) reduce its boiler emissions by transitioning seven of its largest oil-fired boilers to cleaner, natural gas boilers by 2023, at an approximate cost of $50 million; and 3) pay a civil penalty of $1 million to the United States.

•September 30, 2021—EPA announced administrative settlements with Chevron U.S.A. Inc. (Chevron) and American Refining Group, Inc. (ARG) that resolve alleged violations of the Clean Air Act's fuel quality standards that are designed to reduce air pollution from motor vehicles. Pursuant to the settlements, Chevron and ARG will pay civil penalties of $647,988 and $220,000, respectively. The fuel quality violations in this case include Chevron's failure to comply with the gasoline volatility standard, the gasoline per-gallon sulfur standard, and the gasoline benzene credit reporting requirements. Violations of the gasoline volatility standard resulted in additional emissions of volatile organic compounds (VOCs). VOCs are a precursor to the formation of ground-level ozone. EPA discovered ARG's alleged violation from information that ARG self-disclosed to the agency. The fuel quality violation in this case includes ARG's failure to comply with the maximum average gasoline benzene standard. Violations of the maximum average gasoline benzene standard resulted in additional emissions of benzene.

•September 30, 2021—EPA Region 10 settled with Riverbend Landfill, in McMinnville, Oregon,

for violations of the federal Clean Air Act. The settlement includes a Consent Agreement and Final Order (PDF) which requires Riverbend Landfill to pay a $104,482 penalty. The settlement also includes an Administrative Order on Consent which reduces emissions by requiring Riverbend to conduct enhanced monitoring, inspection, and tracking measures to find and address landfill emissions. The one square mile municipal solid waste landfill and recycling center has an air permit issued by Oregon Department of Environmental Quality. It has been in operation since 1982 and is owned and operated by Waste Management, Inc. Under the Clean Air Act, Riverbend Landfill is required to capture the emissions generated as the garbage breaks down. In 2018, an inspection by EPA discovered nine separate instances of methane emissions greater than 500 ppm at different areas of the landfill. EPA determined that Riverbend Landfill did not conduct adequate surface emission monitoring. EPA also determined that the Riverbend Landfill failed to monitor cover integrity monthly, as required. They also failed to perform required monthly monitoring in an onsite well. Riverbend landfill neither confirms nor denies EPA's alleged violations in this matter.

•September 30, 2021—The DOJ, EPA, and Louisiana Department of Environmental Quality (LDEQ) announced Firestone Polymers, LLC (Firestone) has agreed to resolve alleged violations of the Clean Air Act and several other federal and state environmental laws at the company's synthetic rubber manufacturing facility in Sulphur, Louisiana. The company will also pay a total of $3.35 million in civil penalties. The settlement requires several actions from Firestone, including meeting emissions limits, operating and maintenance requirements, equipment controls, limiting hazardous air pollutants from facility dryers, conducting inspections of heat exchangers, installing controls and monitors on covered flares, and installing flaring instrumentation and monitoring systems. As part of the consent decree, Firestone will pay a civil penalty of $2,098,678.50 to the United States and $1,251,321.50 to LDEQ for a total of $3,350,000. Firestone will also complete a Beneficial Environmental Project in Louisiana by funding ambient air monitoring system upgrades in several locations in Southwest Louisiana.

•October 1, 2021—Five subsidiaries of West Texas Gas Inc. will spend up to $5 million on compliance measures in a settlement that resolves allegations in the United States' complaint that they violated federal Clean Air Act chemical accident prevention requirements at several of their natural gas processing plants. The companies will pay more than $3 million in civil penalties to resolve claims stemming from fatal chemical accidents and accident prevention program violations. The settlement requires the subsidiaries to take steps to prevent chemical accidents and improve safety at eight natural gas processing plants that the companies own and operate. Seven plants are located in Texas and one is in New Mexico. The plants use a variety of chemical processes containing toxic substances and flammable hydrocarbons, such as butane, methane and propane. Under the settlement, the companies must hire an outside, independent engineering firm to recommend actions that the companies will complete to improve process safety at six of the eight plants. The six plants must also implement an environmental management system to improve their compliance with all federal, state and local air pollution related requirements, not just those dealing with preventing chemical accidents. The companies have elected to permanently shut down the remaining two plants.

•October 7, 2021—EPA announced a settlement with Taylor Farms over alleged Clean Air Act violations at the Taylor Fresh, Inc. and Taylor Farms California, Inc. food storage and distribution facilities in Salinas, California. The violations pertain to chemical release prevention and reporting requirements under the Clean Air Act. The Delaware-based company will pay more than $178,000 in civil penalties and make safety improvements to their facilities to ensure protection of the public and first responders from dangerous chemicals. Both facilities use anhydrous ammonia in their refrigeration systems. EPA inspections of the two Salinas facilities identified significant violations of the Clean Air Act's risk management program requirements. The inspections revealed process safety and equipment maintenance issues including failure to properly conduct a hazard assessment, failure to document the design, maintenance, inspection, testing and operation of electrical equipment, and lack of written operating procedures.

•October 14, 2021—Three U.S. subsidiaries of Dutch chemical giant LyondellBasell Industries N.V. (Lyondell) have agreed to make upgrades and perform compliance measures estimated to cost $50 million to resolve allegations they violated the Clean Air Act and state air pollution control laws at six petrochemical manufacturing facilities located in Channelview, Corpus Christi, and LaPorte, Texas, and Clinton, Iowa. Lyondell will also pay a $3.4 million civil penalty. The settlement, announced by DOJ and EPA will eliminate thousands of tons of air pollution from flares. According to the complaint, the companies failed to properly operate and monitor their industrial flares, which resulted in excess emissions of harmful air pollution at five facilities in Texas and one in Iowa. Lyondell's subsidiaries regularly "oversteamed" the flares at their facilities and failed to comply with other key operating constraints to ensure the volatile organic compounds (VOCs) and hazardous air pollutants contained in the gases routed to the flares are effectively combusted. EPA identified potential environmental justice concerns at the two Channelview facilities for exposure to particulate matter (2.5 micron), ozone, toxic cancer risk, and respiratory hazard. The settlement requires the companies to install and operate air pollution control and monitoring technology to reduce flaring and the resulting harmful air pollution from 21 flares at the six facilities.

Civil Enforcement Actions and Settlements—Water Quality

•September 29, 2021 - EPA reached settlement agreements with Eagle 1968 LC and Kings Construction Co. Inc. to resolve alleged violations of the federal Clean Water Act (CWA) at the Jayhawk Club golf course in Lawrence, Kansas. In the settlement documents, EPA alleged that the companies discharged pollutants into approximately 7,000 feet of streams by placing fill material into the streams and grading over 256 acres of land as part of a renovation of the former Alvamar Country Club, now the Jayhawk Club, in Lawrence. EPA also says that the companies did the work without obtaining the required CWA permits. Eagle 1968 LC owns the property and hired Kings Construction Co. Inc. to do grading and excavation work at the site. Under the terms of settlement, the companies also agreed to restore streams at the site; conserve restored portions of the site; and purchase "mitigation bank" credits at a local stream and wetland preserve at a cost of approximately $300,000. The companies will also pay civil penalties totaling over $84,000.

•October 5, 2021—EPA announced that the cities of Winchester and Craigmont, Idaho have agreed to each pay a $15,000 penalty for hundreds of Clean Water Act violations at the cities' wastewater treatment plants. Winchester's plant discharges treated wastewater into Lapwai Creek and Craigmont's plant discharges into John Dobb Creek. During inspections in August 2019 and following a review of each treatment plants' records, EPA found the cities regularly discharged wastewater into the creeks in excess of permit limits. Winchester also failed to maintain a quality assurance plan for all monitoring required in its permit. In addition to each city paying the $15,000 penalty, both cities agreed to develop and implement a Facility Plan that will describe the specific actions, upgrades, and remedial measures to achieve and maintain compliance with the effluent limitations and requirements of their Clean Water Act permits. Craigmont also agreed to implement interim measures to achieve compliance with the chlorine limits in its permit until construction and implementation of the Facility Plan is complete. Winchester must complete implementation of its Facility Plan by April 30, 2025 and Craigmont must complete implementation of its Facility Plan by June 1, 2025.

•October 5, 2021—On September 30, 2021, three settlement agreements were approved by the U.S. District Court for the Central District of California. Under the agreements, Montrose Chemical Corporation of California, Bayer CropScience Inc., TFCF America Inc., and Stauffer Management Company LLC have agreed to pay $77.6 million for cleanup of contaminated groundwater at the Montrose Chemical Corp. Superfund and the Del Amo Superfund Sites in Los Angeles County, California. The companies will also investigate potential contamination of the historic stormwater pathway leading from the Montrose Superfund Site, south of Torrance Boulevard. The settlements not only provide for cleanup and investigation, but also collectively resolve active litigation in a case that has been pending for over 30 years under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly referred to as Superfund). From 1947 to

1982, Montrose operated the U.S.'s largest manufacturing plant for the pesticide DDT (dichloro-diphenyl-trichloroethane). The settlements require the companies to pay for and implement cleanup remedies and perform an investigation with federal and state oversight. The companies will also reimburse EPA more than $8 million and California DTSC more than $450,000 for costs already incurred.

•October 13, 2021—The owner and operator of a pipeline have agreed to pay a $1.5 million civil penalty under the Clean Water Act and $7.2 million in damages and mitigation to resolve federal and state Oil Pollution Act and Clean Water Act claims arising from a 2010 spill of over 1,800 barrels of oil into a globally rare dolomite wetland from a pipeline near Lockport, Illinois. The complaint, filed along with the settlement, alleges that the crude oil spill injured a critical habitat for the federally-endangered Hine's emerald dragonfly. The December 2010 spill resulted from a breach in a 12" buried pipeline that discharged crude oil into a wetland adjacent to the Illinois-Michigan Canal near Lockport, Illinois. West Shore Pipe Line Co. of Lemont, Illinois, the owner of the crude oil pipeline, and Houston-based Buckeye Pipe Line Co., the operator, previously undertook responsibility for the cleanup of the spill site overseen by the EPA. In the settlement, Buckeye and West Shore have also agreed to pay $7.2 million for injury to the Hine's emerald dragonfly and other natural resources in the wetland which the federal and state trustees, and the U.S. Army Corps of Trustees (Corps), will jointly use to plan, design and perform restoration projects to compensate for the harms caused by the oil spill, as well as mitigation for impacts to wetlands.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•September 23, 2021—EPA announced a settlement with Cornell Forge Company to resolve alleged violations of the Emergency Planning and Community Right to Know Act (EPCRA) at the company's facility in Chicago, Illinois. The settlement includes a $165,197 civil penalty. Cornell Forge manufactures steel products from steel bar with drop hammers and mechanical presses and has finishing operations. EPA alleged that Cornell Forge violated EPCRA by failing to submit to the federal and state governments required forms regarding the releases and transfers of substances including chromium, nickel, ethylene glycol and manganese. Under the terms of the consent agreement and final order with EPA, Cornell Forge has addressed the alleged EPCRA violations at the facility and will pay a civil penalty of $165,197 to the federal government. The facility is located in a community with potential environmental justice concerns.

•September 23, 2021—The DOJ Justice and state of Nebraska finalized a settlement with Big Ox Energy - Siouxland LLC and NLC Energy Venture 30 LLC for alleged violations of federal and state environmental laws at its waste-to-energy facility in Dakota City, Nebraska. Under the terms of the settlement, the defendants will pay a $1.1 million civil penalty to be split between the United States and Nebraska. EPA and Nebraska Department of Environment and Energy conducted multiple inspections of the facility in 2017 and 2018. The agencies found that the facility was releasing hazardous amounts of biomass and biogas. On at least 16 occasions between 2017 and 2019, biomass released from the digesters went over the sides of the facility's roof and onto the ground where it mixed with stormwater, resulting in discharges to adjacent properties and into nearby water bodies. In 2018, a facility malfunction resulted in 80,000 gallons of biomass overflowing from the digesters. These discharges resulted in emissions of biogas, an extremely hazardous substance. Air monitoring conducted by EPA determined that the facility was emitting methane at levels that were flammable and hydrogen sulfide in amounts that could result in injury or death from inhalation. As a result, the facility was required to take actions to reduce the risks posed by the emissions.

•October 4, 2021—Jeffersonville, Indiana-based American Commercial Barge Line LLC (American Commercial) has agreed to acquire and preserve 649 acres of woodland wildlife habitat near New Orleans, Louisiana, and pay over $2 million in damages, in addition to $1.32 million previously paid for damage assessment and restoration planning costs, under the Oil Pollution Act (OPA) and the Louisiana Oil Spill Prevention and Response Act (OSPRA), to resolve federal and State claims for injuries to natural resources resulting from an oil spill from one of its barges. The United States and Louisiana concur-

rently filed a civil complaint with a proposed consent decree. The complaint seeks damages and costs under OPA and OSPRA for injuries to natural resources resulting from American Commercial's July 2008 discharge of approximately 6,734 barrels (282,828 gallons) of No. 6 fuel oil into the Mississippi River upriver of New Orleans. The complaint alleges that the spill resulted from a collision that occurred when the American Commercial tug Mel Oliver, which was pushing a barge upriver, veered directly in front of the MV Tintomara, an ocean-going tanker ship sailing downriver. The oil spill spread more than 100 miles downriver and covered over 5,000 acres of shoreline habitat. The oil spill caused significant impact and injuries to aquatic habitats within the Mississippi River and along its shoreline, as well as to birds and other wildlife.

•October 6, 2021—EPA announced settlement agreements with Smark Company and Oreq Corp. for violations of the Toxic Substances Control Act (TSCA). Under the settlements, these chemical distribution companies will pay a combined total of more than $117,000 in penalties. The violations at Smark and Oreq were discovered during inspections at their respective facilities in South Gate and Temecula, Calif. EPA inspectors found that both companies failed to submit timely reports to EPA associated with the import of five chemicals between 2012 and 2015, as required by the 2016 Chemical Data Reporting Rule. Smark will pay a $93,813 fine and Oreq will pay a $23,452 fine.

•October 6, 2021—EPA announced a settlement with the U.S. General Services Administration (GSA) that resolves violations of federal laws for the operation and maintenance of underground tanks that store diesel fuel at four GSA buildings in New Jersey and New York. Under the settlement, GSA will pay a civil penalty of $107,000 and ensure staff who oversee the tanks at one of the New York facilities are trained to properly manage underground storage tanks. The facilities where the violations occurred are the Robert A. Roe Federal Building in Paterson, N.J., the Martin Luther King, Jr. Federal Building and U.S. Courthouse in Newark, N.J., the Silvio J. Mollo Federal Building in Manhattan, and the Alfonse M. D'Amato U.S. Courthouse in Central Islip, New York. Violations at these facilities included failures to conduct required triennial inspections of overfill prevention equipment, ensure operations staff were properly trained, and ensure staff keep records related to the management of storage tanks as required by federal law.

•October 7, 2021—In an enforcement action that illustrates vigilance to ensure compliance with the law, the EPA announced a settlement with Reckitt Benckiser, LLC, that resolves violations of federal pesticide laws by the company for selling and distributing two rodenticide products in the United States that had misleading advertising claims on their packaging. Reckitt Benckiser will pay a civil penalty of $458,000 under the settlement to resolve these violations. During a 2019 investigation, which included inspections of a Home Depot in South Plainfield, N.J, and Reckitt Benckiser's offices in Parsippany, N.J., EPA determined that Reckitt Benckiser was selling two rodenticide products designed to poison mice; the products were sold in packages or with labels making comparative claims as to the effectiveness of the product. Because the comparative claims were not subject to verification, they were "false and misleading comparisons" prohibited under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). EPA's investigation found that the company had sold one or both of these products with shipping containers bearing the improper advertising claim on 239 separate occasions.

•October 7, 2021—EPA fined three companies a total of more than $650,000 for importing unregistered and misbranded antimicrobial products. OnTel Products Corp., Forma Brands LLC and Loginet Inc. also failed to comply with federal reporting requirements for their products. OnTel Products, a New Jersey corporation, imported numerous shipments of air-cooling products known as the "Artic Air Tower Evaporative Air Cooler" and the "Arctic Air Pure Chill Evaporative Air Cooler" into the United States through California. Although these products contained antimicrobial components and bore antimicrobial claims, they were not registered with the EPA and their labels included misleading language. The company also failed to file required reports under the FIFRA. Consequently, the company will pay a penalty of $638,624. In addition, OnTel has removed the antimicrobial components from the products and the

misleading language from the labels, resulting in these products no longer being subject to FIFRA regulation. The company will pay a penalty of $22,083

•October 14, 2021—The EPA, DOJ, the Eastern District of Texas, and the Texas Commission on Environmental Quality (TCEQ) have announced a settlement with E.I. Du Pont de Nemours and Company (DuPont) and Performance Materials NA, Inc. (PMNA) to resolve alleged violations of hazardous waste, air, and water environmental laws at the PMNA Sabine River chemical manufacturing facility in Orange, Texas. Under this settlement agreement, DuPont and PMNA will conduct compliance audits, control benzene emissions, and perform other injunctive relief to address violations at the facility. Defendants will also pay a $3.1 million civil penalty and attorney's fees to the State of Texas. These measures will benefit nearby communities already overburdened by pollution by reducing uncontrolled emissions of hazardous air pollutants and unpermitted discharges from surface impoundments at the facility. In a joint complaint filed on October 13, 2021, DOJ, on behalf of EPA, and the State of Texas, asserted claims against DuPont and PMNA for alleged violations of the Resource Conservation and Recovery Act (RCRA), the Clean Water Act (CWA), the Clean Air Act (CAA), Section 7.002 of the Texas Water Code, Tex. Water Code § 7.002, and applicable regulations, at the former DuPont facility now owned and operated by PMNA. The alleged RCRA violations include failure to make hazardous waste determinations, the treatment, storage or disposal of hazardous waste without a RCRA permit, and failure to meet land disposal restrictions. The alleged CWA violations include unpermitted discharges of process wastewater in violation of the facility's Texas Pollutant Discharge Elimination System permits. The alleged CAA violations include failure to comply with the national emission standards for hazardous air pollutants for benzene waste operations and for miscellaneous organic chemical manufacturing for certain waste streams.

Indictments, Sanctions, and Sentencing

•October 1, 2021—Empire Bulkers Ltd., Joanna Maritime Limited and Chief Engineer Warlito Tan were indicted in New Orleans for violations of environmental and safety laws related to the Motor Vessel Joanna, a Marshall Islands registered Bulk Carrier. The four-count grand jury indictment alleges that the companies and Tan tampered with required oil pollution prevention equipment and falsified the ship's Oil Record Book, an official ship log regularly inspected by the Coast Guard. The Coast Guard found that the ship's Oily Water Separator had been bypassed by inserting a piece of metal into the Oil Content Meter so that it would only detect clean water instead of what was actually being discharged overboard. According to the indictment, Tan and the shipping companies falsified the log and sought to obstruct the Coast Guard's inspection. The defendants also were charged with violating the Ports and Waterways Safety Act by failing to immediately report a hazardous situation that affected the safety of the ship and threatened U.S. ports and waters. During the inspection on March 11, 2021, the Coast Guard discovered an active fuel oil leak in the ship's purifier room that resulted from disabling the fuel oil heater pressure relief valves, an essential safety feature designed to prevent catastrophic fires and explosions.
(Andre Monette)

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
LAW AND REGULATION REPORTER

RECENT FEDERAL DECISIONS

NINTH CIRCUIT VACATES JUDGEMENT REQUIRING CLEAN WATER ACT CITIZEN SUIT TO PROVE ONGOING DISCHARGE IN CASE ALLEGING MONITORING VIOLATIONS

Inland Empire Waterkeeper and Orange County Coastkeeper v. Corona Clay Co., 13 F.4th 917 (9th Cir. 2021).

The Ninth Circuit Court of Appeals, on September 20, 2021, vacated a U.S. District court's grant of partial summary judgment and jury instructions. The court found that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations.

Factual and Procedural Background

The Corona Clay Company (Corona) processes clay products at an industrial facility overlooking Temescal Creek in Corona, California. Inland Empire Waterkeeper and Orange County Coastkeeper (Coastkeeper) are two affiliated nonprofit organizations with the mission of protecting water quality and aquatic resources in Orange and Riverside counties.

Storm water discharges from Corona's industrial processing activities are regulated under a statewide general National Pollutant Discharge Elimination System (NPDES) permit (General Permit). The General Permit includes requirements to sample storm water discharges, and if the discharge exceeds specified pollutant levels, specific response actions are required.

In 2018, Coastkeeper filed a citizen suit under the federal Clean Water Act (CWA) alleging that Corona illegally discharged pollutants into the navigable waters of the United States, failed to monitor that discharge as required by the General Permit, and violated the conditions of the permit by failing to report violations. The District Court granted partial summary judgment for Coastkeeper after finding, with no dispute, that Corona had violated various requirements imposed by the General Permit and that the discharge was flowing into Temescal Creek.

On the remaining issues, the District Court instructed the jury that Coastkeeper must prove either a prohibited discharge after the complaint was filed, or a reasonable likelihood that discharge would recur. In issuing the jury instructions, the court determined Coastkeeper was required to show not only a monitoring violation, but also ongoing discharge violations to bring a CWA citizen suit.

The District Court's jury instructions asked the jury to determine two questions: First, whether Corona had discharged pollutants into "waters of the United States" and whether the discharge occurred after the complaint was filed. Second, whether the storm water discharge adversely affected the beneficial uses of Temescal Creek. The jury was also instructed to only answer the second question if it answered the first question in the affirmative. After the jury answered "No" to the first question, the court entered a final judgment in favor of Corona. Both parties appealed.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first considered and rejected Corona's arguments that Coastkeeper lacked standing to bring the action. To have standing, an organizational plaintiff must have a concrete and particularized injury fairly traceable to the challenged conduct that likely can be redressed by a favorable judicial decision. The court determined Coastkeeper showed standing by sworn testimony from several members that they lived near the creek, used it for recreation, and that pollution from the discharged storm water impacted their present and anticipated enjoyment of the waterway. The court then determined that failure to provide information can give rise to an injury for purposes of standing. Coastkeeper's allegations that Corona failed to file reports required by the General Permit was an injury in fact that could support Coastkeeper's standing.

Jury Instructions

The Circuit Court next considered the District Court's conclusion and jury instructions that a CWA suit alleging monitoring and reporting violations can only lie if there are also current prohibited discharges. Under this analysis, the Ninth Circuit first considered a Supreme Court decision issued after the District Court's final judgment, which determined that a National Pollutant Discharge Elimination System permit is required when discharge flows directly into navigable waters or when there is a "functional equivalent of a direct discharge." Here, the Ninth Circuit noted that the District Court failed to ask the jury whether Corona's indirect discharge amounted to a "functional equivalent" of a discharge.

Demonstration of Ongoing Discharge Violations as Prerequisite to Citizen Suit

The Ninth Circuit then considered whether the District Court erred by requiring Coastkeeper to demonstrate ongoing discharge violations in order to bring a citizen suit alleging monitoring and reporting violations. Under current Supreme Court case law, entirely past violations which are not likely to recur cannot support a citizen suit seeking injunctive relief. In support of the District Court's decision, Corona asserted Congress left violations of monitoring and reporting requirements to regulatory agencies alone. The Ninth Circuit rejected the District Court's conclusion and Corona's assertion, reasoning that an ongoing discharge violation is not a prerequisite to a citizen suit asserting ongoing monitoring and reporting violations; the CWA allows a citizen suit based ongoing or imminent procedural violations. Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

Conclusion and Implications

Because the District Court's partial summary judgement was predicated on Corona's admitted discharge and the jury instructions required Coastkeeper to prove elements not required by the CWA, the Ninth Circuit vacated the jury verdict and remanded for further proceedings in light of recent Supreme Court caselaw.

This case affirms that if a prohibited discharge into waters of the United States occurred, a Clean Water Act citizen suit can be premised on ongoing or reasonably expected monitoring or reporting violations. The court's decision is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/20/20-55420.pdf; or at: https://scholar.google.com/scholar_case?case=5623238957513399786&hl=en&as_sdt=6&as_vis=1&oi=scholarr.
(Carl Jones, Rebecca Andrews)

NINTH CIRCUIT DECISION BROADENS SCOPE OF RCRA LIABILITY, UNDER ENDANGERMENT PROVISION, TO TRANSPORTERS

California River Watch v. City of Vacaville, ___F.4th___, Case No. 20-16605 (9th Cir. Sept. 29, 2021).

In September, the Ninth Circuit Court of Appeals issued a decision in *California River Watch v. City of Vacaville*, holding that the City of Vacaville could be found liable under the Resource Conservation and Recovery Act (RCRA) for the presence of the contaminant hexavalent chromium in its potable water system. The Ninth Circuit's decision broadens the scope of RCRA liability to reach entities transporting materials discarded as waste, despite lacking involvement in the creation or generation of waste.

Background

The federal Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq*., establishes a comprehensive regulatory framework governing the treatment, storage, and disposal of solid and hazardous waste. RCRA contains a citizen suit provision that allows for private causes of action. The "endangerment provision" allows any person to file a lawsuit against any person "who has contributed or who is contributing to the past or present handling, storage,

treatment, transportation, or disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." 42 U.S.C. § 6972(a)(1)(B).

In 2017, California River Watch, an environmental non-profit organization, brought a citizen suit under RCRA's endangerment provision against the City of Vacaville (City), alleging the City's water supply was contaminated with hexavalent chromium (also known as chromium 6), which created an imminent and substantial endangerment to the health and safety of its residents. The City argued that the potable water served to customers, and the traces of chromium 6 contained in the water, did not constitute a solid waste under RCRA.

The case turned on whether the chromium 6 in the City's water supply qualifies as a "solid waste," which turns on the meaning of "discarded material." The U.S. District Court found for the City, holding the potable water supply containing chromium 6 did not qualify as solid waste. On appeal, the Ninth Circuit reversed the District Court's decision. The Ninth Circuit found that if the chromium 6 was previously discarded as waste and then reached the City's water system, it could qualify as discarded material and therefore as solid waste. The Ninth Circuit remanded the case to the District Court for further proceedings.

The Ninth Circuit's Decision

Under RCRA, solid waste is:

> . . .garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material . . . resulting from industrial, commercial, mining and agricultural operations, and from community activities . . . . 42 U.S.C. § 6903(27).

'Discarded Material'

The issue disputed here was whether the chromium 6 qualified as "other discarded material."

As decided by previous Ninth Circuit decisions, the meaning of "discard" is to "cast aside; reject; abandon; give up." *Vacaville*, Case No. 20-16605 at 9. The Ninth Circuit has held that a key consideration is whether the product has "served its intended purpose and is no longer wanted by the consumer." *Id.* The District Court found that the chromium 6 existed prior to, and was not a result of, the City's water treatment process. Moreover, the potable water itself was still being delivered to intended customers as a drinking water product. Thus, the District Court found that the City's activities did not demonstrate any "discarding" of the chromium 6 as part of its water treatment process.

On appeal, the Ninth Circuit considered the origins of the chromium 6 in the City's water to arrive at the conclusion that the chromium 6 constitutes discarded material. River Watch had provided expert testimony establishing that chromium 6 was widely used for commercial wood preservation at a location near Elmira, California called the "Wickes site." *Id.* at 10. From 1972 to 1982, companies operated wood treatment facilities and used chromium 6 to treat wood for preservation. It was common practice to drip dry wood treated with chromium 6, which trickled directly into the soil. The expert additionally claimed that a large amount of chromium 6 waste was dumped into the ground at the location.

The Ninth Circuit found that if River Watch's expert testimony was found credible, to be determined by the District Court on remand, then the chromium 6 would meet the RCRA definition of solid waste. Once the chromium 6 was discharged into the environment after the wood treatment process, it was no longer serving its intended use as a preservative, nor was it the result of natural wear and tear. *Id.* at 11. Thus, River Watch had created a triable issue on whether chromium 6 was discarded material.

'Transporter' Liability

In addition, the Ninth Circuit discussed whether the City could be a "transporter" of the waste under RCRA's endangerment provision. *Id.* at 12. The District Court's decision did not depend on whether the City was *transporting* the waste, rather the court had framed River Watch's claims as alleging the City was *generating* the waste. The Ninth Circuit observed that a transporter of solid waste does not need to play a role in discarding or creating the waste in the first place. Based on the definitions of "contribution" and "transportation," a triable issue existed as to whether the City was a past or present transporter of solid waste. On remand, the District Court would determine whether evidence showed that the chromium 6 originated from the Wickes site, reached the City's

water wells, and was pumped through the City's water distribution system.

Conclusion and Implications

The Ninth Circuit issued an opinion that broadens the definition of "discarded material" and therefore "solid waste" under RCRA. The holding extends RCRA liability to entities that may be transporting materials previously discarded as waste, despite lack of involvement in the actual discarding or waste generation process. This decision may broadly affect water suppliers and distributors facing contamination issues. In addition to being regulated under federal and state drinking water laws and regulations, water systems face increased litigation risk under RCRA's endangerment provision. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/09/29/20-16605.pdf.
(Steve Anderson)

DISTRICT COURT DENIES ALL BUT ONE MOTION IN REVIEW OF ACTIVITIES REQUIRING A GENERAL PERMIT UNDER THE CLEAN WATER ACT

Eden Environmental. Citizen's Group v. California Cascade Building Materials, Inc. et. al, ___F.Supp.4th___, Case No. 2:19-cv-01936 (E.D. Cal. Sept. 20, 2021).

The U.S. District Court for the Eastern District of California recently ruled on a number of motions and defenses associated with a federal Clean Water Act (CWA) citizen suit against a wood product plant for discharging pollutants without an industrial permit. The District Court interpreted use of the Standard Industrial Classification (SIC) Codes to identify facilities subject to permit requirements under the CWA.

Factual and Procedural Background

California Cascade Building Materials (Cascade) is a 20-acre wood products manufacturing and distribution plant. Using on-site equipment, Cascade saws, cuts, trims, planes, molds, and treats raw wood and timber into various end products it sells to retail lumber companies and businesses. Cascade also operates an interstate trucking operation for the transport of logs, poles, beams, lumber, and building materials. It is licensed under the U.S. Department of Transportation and provides on-site maintenance and repair for its trucks.

The California State Water Resources Control Board (State Water Board or SWRCB) issues statewide General Permits for industrial activities pursuant to the Clean Water Act's National Pollutant Discharge Elimination System (NPDES) (General Permit). Facilities that either discharge or have the potential to discharge storm water associated with industrial activity and have not obtained a NPDES permit must apply for coverage under the General Permit. The General Permit identifies facilities required to enroll by reference to a list of Standard Industrial Classification (SIC) Codes.

On July 7, 2015, Cascade obtained coverage under the General Permit believing SIC Code 2499 (wood products, not elsewhere classified) applied. Subsequently, Cascade changed its position and determined that SIC Code 5031 (warehousing and wholesale distribution lumber) applied, which does not require coverage. On August 1, 2019, Cascade filed paperwork with the SWRCB to terminate its General Permit coverage.

On September 23, 2019, Eden Environmental Citizen's Group (Eden), an environmental organization, filed a citizen suit against Cascade and its officers alleging six violations of the General Permit and one violation of the CWA for failure to obtain coverage under the General Permit. As to the last claim, Eden asserted that Cascade engages in at least three distinct and separate economic activities, two of which require coverage under the General Permit: (a) warehousing and wholesale distribution of lumber and construction building materials under SIC Code 5031; (b) wood products manufacturing under SIC Codes 2421, 2431, 2491, and 2499; and (c) local trucking operations with on-site maintenance and fueling under SIC Codes 4213 and 7538. Cascade

filed a motion to dismiss and in the alternative a motion for summary judgment, arguing that all of Eden's claims fail to the extent they are premised on violations of the General Permit Order. Eden's Officers also filed a motion to dismiss on the grounds that the fiduciary shield doctrine means the court did not have personal jurisdiction.

The District Court's Decision

Cascade's Motion to Dismiss

The court first considered and rejected Cascade's arguments that all claims premised on the violations of the General Permit should be dismissed because Eden failed to allege that: 1) the primary industrial activity at the facility had an SIC Code that requires General Permit coverage, or 2) the Facility had activities sufficiently economically separate and distinct to be considered separate "establishments" thereby requiring the application of multiple SIC Codes. The court noted that Eden alleged the facility caused the mechanical transformation of materials into new products, which met the definition of "manufacturing" facility under the SIC manual and with respect to local trucking operations. The also court noted that Eden alleged Cascade operated an interstate trucking operation as evidenced by the number of truck drivers (16) and total traveled mileage in 2018 (754,156 miles). The court then examined the facilities covered by the General Permit and found that Eden adequately alleged sufficient facts to establish Cascade's wood products manufacturing and local trucking operations should be treated as separate establishments and distinct and separate economic activities from warehousing and wholesaling under SIC Code 5031. The court denied Cascade's motion to dismiss.

Cascade's Motion for Summary Judgment

The court next considered Cascade's motion for summary judgement, made on essentially the same grounds as its motion to dismiss, but emphasized that this motion was brought pursuant to the voluntary, self-imposed deadline in the parties' Joint Status Report. Cascade responded, in part, by requesting that the court defer its ruling on the motion, contending it needed additional discovery material to oppose the motion— specifically, evidence relevant to the SIC manual, such as Cascade's reports on employment, as well as sales and receipts. The court determined Eden was sufficiently diligent in pursuing discovery, which was still on going, and that the discovery sought was relevant to the matters at issue in the motion. The court denied Cascade's motion for summary judgment.

Cascade Officer's Motion to Dismiss

The court next considered Cascade's officers' argument that they were not subject to personal jurisdiction in California because their employment affiliations as the CEO and CFO were insufficient to create jurisdiction. They contended the ninth circuit, in applying in the fiduciary shield doctrine:

> . . .limit[s] personal jurisdiction to only those instances in which the individual defendant is the alter ego of the corporation or the individual's own activity in the state constitutes sufficient 'minimum contacts.'

Eden argued that the court had personal jurisdiction over Cascade's officers because the fiduciary shield doctrine does not apply to actions brought to enforce the CWA against responsible officers in their individual capacities, and that Eden's officers had the authority to exercise control over Eden's activities violating the CWA. In ruling on the officers' motion, the court noted that Eden failed to identify any affirmative action taken by the officers establishing alter ego liability or make specific arguments establishing the officers' control of and direct participation in the activities at issue. The court granted Cascade's officers' motion to dismiss for lack of personal jurisdiction.

Conclusion and Implications

This case provides additional insight as to the use of SIC codes to identify facilities subject to a General Permit for industrial activities. Specifically, this case is a useful tool for analyzing whether and when undertakings potentially under the umbrella of the CWA should be treated as separate establishments and distinct and separate economic activities. The case opinion is available online at: https://casetext.com/case/eden-envtl-citizens-grp-v-cal-cascade-bldg-materials-inc.
(McKenzie Schnell, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS CEQA CATEGORICAL EXEMPTION FOR ONE UTILITY PROJECT BUT FINDS MITIGATED NEGATIVE DECLARATION FAILED TO EVALUATE GHG EMISSIONS FOR OTHER PROJECTS

McCann v. City of San Diego, ___Cal.App.5th___, Case No. D077568 (4th Dist. Oct. 18, 2021).

A property owner petitioned for a writ of mandate, alleging that the City of San Diego's (City) environmental review processes related to its decisions to approve two sets of projects regarding the undergrounding of utility wires violated the California Environmental Quality Act (CEQA). The Superior Court denied the petition in all respects and the property owner appealed. The Court of Appeal for the Fourth Judicial District found that the property owner failed to exhaust administrative remedies with respect to the set of projects that relied on a categorical exemption but that the Mitigated Negative Declaration (MND) prepared for the other set of projects failed to properly evaluate greenhouse gas (GHG) emissions.

Factual and Procedural Background

Over a period of decades, the City has made efforts to convert its overhead utility systems, suspended on wooden poles, to an underground system. In 2017, as part of its new Utilities Undergrounding Program Master Plan, the City set a goal of undergrounding 15 miles of overhead lines each year. Given the small scope of projects that could be completed in any one year due to limited funding, the Master Plan and accompanying Municipal Code § developed a process to manage the selection and prioritization of undergrounding projects in any given year. Following the process set forth, the city council each year approves a "project allocation" to select blocks to be completed based on the available funding. Once the allocation is approved, City staff begins its initial work, including CEQA review, for each block.

Subsequently, the City creates an "Underground Utility District" including the selected blocks for projects to be completed with that year's funding. All residents and property owners within the proposed district are mailed a notice of public hearing and a map of the proposed area for the undergrounding projects. Any member of the public may attend and comment. The City then holds a public hearing and, assuming no insurmountable issues arise, approves the creation of the Underground Utility District. A detailed design process follows, and then construction.

Plaintiff Margaret McCann filed a petition for writ of mandate, challenging the City's CEQA compliance related to its decision to approve two sets of undergrounding projects. One set was found to be exempt from CEQA and the other required preparation of a MND given that some of the sites had cultural significance for Native American Tribes. Plaintiff asserted that the significant impact on the environment that would be caused by the above-ground transformer boxes, and the projects as a whole, required the City to prepare an Environmental Impact Report (EIR) for both sets of undergrounding projects.

A few months later, McCann sought a temporary restraining order enjoining the City from engaging in any conduct (in particular, the cutting of trees) in furtherance of the undergrounding projects during the pendency of her action. The Superior Court issued the temporary restraining order and set a hearing on a request for a preliminary injunction on the same day of the merits hearing. In an opposition, the City noted that tree removal was unrelated to the undergrounding projects, and instead was part of a sidewalk repair project. Ultimately, the Superior Court denied both the writ petition and the request for a preliminary injunction. McCann appealed.

The Court of Appeal's Decision

Exempt Projects

The Court of Appeal first addressed the City's determination on the projects found to be exempt, finding that McCann's claims regarding the exempt projects were barred because she had failed to exhaust her administrative remedies prior to challenging the City's determination in a judicial action. Specifically, the City's Municipal Code creates a procedure for interested parties to file an administrative appeal of an exemption determination before a project is submitted for approval. McCann did not avail herself of that procedure, and the Court of Appeal found that she could not now raise that issue for the first time in a legal action. The Court of Appeal also rejected McCann's argument that the notice posted in connection with the public's right to appeal the City's exemption determination violated constitutional due process principles, failed to comply with CEQA, and improperly bifurcated the CEQA process.

Mitigated Negative Declaration Projects

Regarding the MND adopted for the other set of undergrounding projects, McCann contended that the City violated CEQA by: segmenting the citywide undergrounding project into smaller projects; not defining the location of each transformer box before considering the environmental impacts of the plan; and failing to consider the significant impact on aesthetics caused by the projects. The Court of Appeal rejected these claims, finding that: each utility undergrounding project was independently functional and did not rely on any other undergrounding project to operate or necessarily compel completion of another project; McCann failed to establish that the precise location of the transformer boxes was critical to considering the environmental impacts of the project; and substantial evidence did not support a fair argument that the transformers at issue would have a significant environmental impact so as to trigger a need for an EIR.

However, the Court of Appeal agreed with McCann that the City's GHG emission findings were not supported by substantial evidence. Although CEQA provides agencies with a mechanism to conduct a streamlined review of a project's greenhouse gas emissions by analyzing a project's consistency with a broader greenhouse gas emission plan, such as the City's Climate Action Plan, the Court of Appeal found that the record showed the City never completed the required analytical process for the MND projects. Thus, the Court of Appeal found that remand was necessary to allow the City to conduct further review to determine if greenhouse gas emissions would be consistent with the City's Climate Action Plan.

Conclusion and Implications

Based on the above analysis, the Court of Appeal reversed the Superior Court judgment in part regarding the analysis of greenhouse gas emissions, but otherwise affirmed the Superior Court.

The case is significant because it contains a discussion of both categorical exemptions and MNDs under CEQA, including as well principles of exhaustion of administrative remedies. The decision is available online at: https://www.courts.ca.gov/opinions/documents/D077568.PDF.
(James Purvis)

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