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LAW AND REGULATION REPORTER

RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

STATE OF DROUGHT EMERGENCY EXTENDED TO ALL 58 COUNTIES IN CALIFORNIA AS LACK OF PRECIPITATION PERSISTS AND CONSERVATION EFFORTS FALL FLAT OF GOALS

With the current drought still appearing to have no end in sight, California Governor Gavin Newsom, on October 19, 2021, issued a proclamation extending the drought emergency statewide and further urging Californians to step up their water conservation efforts.

Voluntary Conservation Efforts

Back in July, Governor Newsom issued an executive order imploring Californians to voluntarily reduce their water use by 15 percent as compared to 2020 in order to protect the State's water reserves and complement ongoing local conservation mandates. Despite Governor Newsom's pleas, Californians reduced their water use at home by a meager 1.8 percent statewide in July compared to last year's water use. Since then, these numbers have certainly increased, with August's report indicating an average conservation of about 5 percent statewide.

Leading this conservation effort has been the north Coast region, reducing water use by 18.3 percent compared to last year's figures, with the San Francisco Bay Area and Sacramento River regions following at 9.9 percent and 8.1 percent reductions in water use, respectively. On the other side of the coin, the South Coast region—which houses over half of the State's population—was only able to achieve a 3.1 percent reduction in water use from last year.

Statewide Proclamation of Emergency

As a part of Governor Newsom's Statewide proclamation of a drought emergency, he acknowledged that:

> . . .sustained and extreme high temperatures have increased water loss from reservoirs and streams, increased demands by communities and agriculture, and further depleted California's water supplies.

With that said, the Governor reiterated that:

> . . .the most impactful action Californians can take to extend available supplies is to re-double their efforts to voluntarily reduce their water use by 15 percent from their 2020 levels.

Primarily, the Governor's proclamation adds the eight counties not previously included in the drought state of emergency: Imperial, Los Angeles, Orange, Riverside, San Bernardino, San Diego, San Francisco and Ventura. With the lackluster conservation figures reported for the South Coast region in August, it immediately stands out that the counties of Los Angeles, Orange, San Diego, and Ventura all lie within this region, along with portions of San Bernardino and Riverside counties.

In addition to the inclusion of the remaining counties as being in a state of drought emergency, the proclamation also requires local water suppliers to implement water shortage contingency plans that are responsive to local conditions and prepare for the possibility of a third dry year. Noting that long-term weather forecasts for the winter rainy season, dire storage conditions of California's largest reservoirs, low moisture content in native vegetation, and parched soils magnify the likelihood that drought impacts will continue in 2022, the Governor's proclamation emphasizes that we are not out of the woods yet even with the winter months arriving.

Another notable inclusion in the Governor's proclamation is the grant of authority to the State Water Resources Control Board to adopt emergency regulations as needed to supplement voluntary conservation by prohibiting certain wasteful water practices. Among such "wasteful water practices," the proclamation includes the use of *potable* for: water for sidewalk and building washing; the individual private washing of vehicles; irrigation of ornamental landscapes including turf during and within 48 hours after

at least a quarter inch of rainfall; and for decorative fountains or the topping-off of decorative lakes and ponds.

Conclusion and Implications

With the rest of the state being brought under the umbrella of the drought emergency, the Governor continues to stress that this is a statewide problem necessitating statewide response. Furthermore, this statewide proclamation has since been complemented by the Metropolitan Water District, which declared a regional drought emergency shortly after, calling on local water suppliers to implement all conservation measures possible to reduce usage. This regional proclamation is a huge follow up to the Governor's statewide proclamation as MWD manages water deliveries to 26 agencies in six counties, including the aforementioned Los Angeles, Orange, San Diego, Riverside, San Bernardino, and Ventura counties. For more information on the proclamation, *see:* https://www.gov.ca.gov/2021/10/19/governor-newsom-expands-drought-emergency-statewide-urges-californians-to-redouble-water-conservation-efforts/; *and see:* https://www.gov.ca.gov/wp-content/uploads/2021/10/10.19.21-Drought-SOE-1.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

STUDY ADDRESSES EFFECTS OF DROUGHT INTENSITY ON DEEP GROUNDWATER AQUIFERS

A recent study on the relationship between multi-year precipitation droughts and groundwater aquifers without human management found that an increase in the severity of a drought can prolong the recovery of groundwater levels, particularly in aquifers with deeper groundwater tables. The study found an average groundwater recovery of three years for shallow aquifers. In addition to drought severity for deep groundwater aquifers, the study determined that the second most important factor controlling groundwater recovery time was mean annual recharge potential.

Background

The study, published in the *Journal of Hydrology*, analyzed observation wells in "unconfined" aquifers with a mean depth of eight meters across the conterminous United States. The study analyzed groundwater responses and recovery from multi-year droughts in aquifers with no appreciable human management, mostly in the northeast. (Despite most of the observation wells being located in the northeast, the study concluded that its findings were consistent for observation wells across the United States.) Specifically, the study relied on 266 observation wells within the coterminous United States, none of which were located in high or medium density development areas, and only nine were located in low density development areas. Each observation well had at least ten consecutive years of data available from the Climate Response Network maintained by the U.S. Geological Survey (USGS). None of the wells were located on irrigated lands.

Defining Drought

According to the study, "drought" can be defined in multiple ways, including "meteorological drought as a result of reduced precipitation," "hydrological drought affecting streamflow," "snow drought," "agricultural drought where declining soil moisture results in crop failure," and "groundwater drought due to decline in groundwater levels." Different definitions of drought entail different "spatial and temporal scales," and the study indicates that a key challenge in "quantifying groundwater response to meteorological drought is quantifying consistent drought periods for different hydrological metrics." The study focuses on the relationship between multi-year meteorological droughts and groundwater droughts, and addresses three questions:

> (1) Do precipitation or subsurface properties play a stronger role in controlling groundwater response time to precipitation drought initiation? (2) What factors influence the trajectory of groundwater recovery to drought? (3) Under what conditions are precipitation or geographic properties impacting lagged groundwater response to drought?

'Groundwater Lag Time'

To answer these questions, the study focuses on two variables called "groundwater lag time" and "recovery time." Groundwater lag time represents:

> . . .the time that it takes until changes in precipitation propagate through the vadose zone and/or changes in streamflow in a connected surface water-groundwater system impact groundwater levels.

In other words, groundwater lag time means the time it takes precipitation to impact groundwater levels. The recovery time consists of:

> . . .the lag time between the cessation of negative monthly precipitation and groundwater anomalies, and the time needed for the groundwater levels to rise to the 5-year average pre-drought groundwater levels.

In other words, recovery time means the time between the end of a multi-year drought and a return to five-year pre-drought average groundwater levels. Thus, the study looks at how long it takes rain or snow to impact groundwater levels relative to a multi-year drought, and how long it takes groundwater levels to return to pre-drought levels, *i.e.* to recover water lost from the aquifer during the drought.

As a general matter, the study found that wells in the western regions of the United States had longer groundwater lag times than wells in more humid regions of the eastern United States. Notably, the "drought intensity" is the "most significant factor influencing groundwater lag time" for areas with deep groundwater levels, followed by the "mean annual potential recharge." Areas with shallow groundwater levels are impacted most by geographic properties such as elevation, percent vegetation canopy cover, and temperature.

The study found that groundwater levels across "multiple aquifer systems" had recovered from drought within ten years the majority of the time (85 percent), and that storage recovery rate for aquifers is greatest during the first year following the end of a drought. However, the storage recovery rate declines in the following years. While the study acknowledges that it is still unclear if drought properties, such as intensity, severity, and duration, exert greater control over groundwater lag time than geographic properties such as temperature, the study:

> . . .suggests that if precipitation droughts become more intense in the future, the time-lag between precipitation drought and groundwater response may decrease.

That is, drought intensity may accelerate the impacts of drought on groundwater levels, thus increasing groundwater recovery time absent human management efforts.

In particular, the study concludes that there may be a significant lag time—up to 15 years—between precipitation and groundwater droughts, and the severity of a drought may increase the recovery time of an aquifer. Accordingly, the study suggests that:

> . . .in a changing climate, an important management consideration is to understand the most important set of factors that control groundwater [lag time].

Those factors, at least for deep groundwater aquifers, appear to be drought intensity and the annual recharge potential of an aquifer.

Conclusion and Implications

The study provides a broad observational analysis of the relationship between drought characteristics and groundwater response, as well as how geographical properties may impact groundwater response to drought. According to the study, for much of the western United States, deep groundwater levels are most likely to be impacted by the intensity of droughts, which may prolong recovery times for groundwater levels absent human management efforts. This may underscore the role active groundwater management plays in maintaining groundwater supplies, including maximizing recharge activities following prolonged droughts. The Study: appeared in the *Journal of Hydrology* 603 (2021) 126917, which is accessible online at: https://www.sciencedirect.com/science/article/abs/pii/S0022169421009677.
(Miles Krieger, Steve Anderson)

CALIFORNIA CITY LAUNCHES NEW DESALINATION SYSTEM AS DROUGHT RESPONSE WITH HELP FROM THE STATE WATER RESOURCES CONTROL BOARD

The current drought has taken its toll on many communities throughout California, but for the residents of Fort Bragg, a new desalination-reverse osmosis system could help ease the impacts the drought has had on the north coast city.

Background

The City of Fort Bragg's (City) primary water source comes from the Noyo River, the largest of the City's three surface water sources that serves the nearly 3,000 customer connections in the area. Suffering a similar fate as the Sacramento-San Joaquin River Delta, however, the Noyo River has suffered from increased saltwater intrusion as a result of lowered flows at the river's mouth as a result of the drought. This summer, in fact, flows in the Noyo reached such a low level that Fort Bragg's water system was considering pulling from its emergency reservoir to maintain a sufficient supply for the area's residents. Despite the grim situation the City was facing, it instead sought to utilize desalination to extract more drinking water supplies from the river, requesting emergency funding from the State Water Resources Control Board (SWRCB or State Water Board) to do so.

The Project and Funding

Working together with the SWRCB, the City's initial application for funding was approved in May 2021, and thanks to expedited approvals through the State Water Board's Emergency Drinking Water Program, the City and the SWRCB were able to have the desalination unit delivered by September 24 with testing the following week.

While the speed in which the SWRCB and the City were able to get the desalination up and running is obviously an impressive enough feat, the State Water Board also funded 100 percent of Fort Bragg's grant request, totaling $691,796. Using the funding and assistance from the State Water Board, the City was able to get the desalination-reverse osmosis system up and running with the additional support of a new shallow groundwater well treatment system that can produce an 57,000 gallons of water per day, providing the City with a much needed boost to its current supplies.

Fort Bragg's new desalination unit is designed to release desalinated water into a raw water pond that flows into the City's existing full-sized treatment plant. Mounted on a concrete skid, the unit can produce 200 gallons a minute of desalinated water. Although the unit has a maximum running time of 12 hours per day, the unit is capable of processing up to 144,000 gallons in a 24-hour period when factoring in the run time restrictions.

Perhaps as a gage of the desalination plant's success, in late October 2021, and *after* the recent state wide drought proclamation by Governor Newsom, the city council passed a resolution rescinding the Stage 2 Water Warning and lifting all mandatory water conservation restrictions within the Fort Bragg water service area. (*See:* https://www.mendocinobeacon.com/2021/11/01/fort-bragg-city-council-lifts-all-water-conservation-restrictions/)

Commenting on the project, Joe Karkoski, deputy director of the State Water Resources Control Board's Division of Financial Assistance stated:

> Fort Bragg came to us with a creative solution, and our team worked with them to address any obstacles to making it happen quickly. . . .Expedited approvals through our Emergency Drinking Water Program allow us to help people in communities like Fort Bragg who are struggling with drought impacts.

Conclusion and Implications

The impact this new desalination system will have on the City of Fort Bragg is undeniable and helps the City work towards a more reliable water system, but the City's project may have big implications throughout the state. The State Water Resources Control Board has worked to fund countless drought assistance projects for other cities, water systems, and households throughout the state to repair or replace wells, provide hauled or bottled water, install point-of-use treatment systems, conduct well testing and

provide technical assistance. When push comes to shove, the State Water Resources Control Board and the City of Fort Bragg seem to have proven that these drought assistance programs can also be conducted in an expedited timeframe. Within the span of just four months, for example, the City of Fort Bragg was able to have its initial application approved and a desalination unit delivered and ready to use only a few weeks later.

The timeline in which Fort Bragg was able to receive the much-needed aid provided by the State Water Resources Control Board may be the exception and not the rule, but it at least shows that the State Water Board is capable of working together with local water systems to quickly resolve problems brought on by the drought. For more information, *see:* https://www.waterboards.ca.gov/press_room/press_releases/2021/pr10122021-fort-bragg-desalination.pdf. (Wesley A. Miliband, Kristopher T. Strouse)

REGULATORY DEVELOPMENTS

EPA PROPOSES METHANE EMISSION REGULATIONS FOR OIL AND GAS OPERATIONS

On November 2, 2021 the U.S. Environmental Protection Agency (EPA) proposed new rulemaking under the federal Clean Air Act (CAA) specifically targeting emissions of harmful air pollutants from the Crude Oil and Natural Gas source category. (86 Fed. Reg. 63110 (Nov. 15, 2021).) The proposed rulemaking under the CAA (Methane Rule) collectively regulates the oil and gas source category through three distinct actions: 1) revised New Source Performance Standards (NSPS) for methane and volatile organic compounds (VOCs); 2) emissions guidelines for states to follow in developing, submitting, and implementing plans for reduced emissions from existing sources; and 3) several actions related to Congressional disapproval of the President Trump era EPA's September 2020 Policy Rule.

Background of the Clean Air Act Methane Regulations

The CAA regulates air emissions from both stationary and mobile sources. (42 U.S.C. § 7408 (2020).) Section 111 of the CAA authorizes the EPA to develop technology based standards applicable to specific categories of stationary sources, known as New Source Performance Standards. The CAA requires that a source category be included on the list if it causes, or contributes significantly to, air pollution which may "reasonably be anticipated to endanger public health of welfare." Traditionally, NSPS applies to new, modified, and reconstructed facilities in specific source categories (*e.g.* manufacturers) and are delegated to the states for enforcement, though EPA retains enforcement power as well.

In June of 2016, the Obama administration EPA introduced an NSPS rule for new, modified, and reconstructed oil and gas facilities, addressing methane from these sources for the first time. (81 Fed. Reg. 35825 (June 3, 2016).) The rule was promulgated to promote President Obama's *Climate Action Plan: Strategy to Reduce Methane Emissions* enacted to curb methane emissions from the oil and gas industry. The final 2016 rule covered facilities across the oil and gas industry (production, processing, transmission, and storage) for facilities newly constructed or modified in 2015 and later, therefore exempting existing facilities.

In 2020, the Trump administration EPA issued two final rules effectively rescinding the 2016 rule. (85 Fed. Reg. 57018 (Sept. 14, 2020).) The 2020 amendments rescinded the methane-specific requirements of the NSPS that were applicable to sources in production and processing. However, in response to this rule, Congress passed a joint resolution of congressional disapproval of the 2020 rescission therefore effectively nullifying the September 24, 2020 rule. (H.J.Res. 34, 117th Cong. (2021).)

On January 20, 2021 the Biden administration issued Executive Order 13990 directing federal agencies to review Trump era regulations. (*Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*). The executive order explicitly called for immediate consideration by the EPA of a proposed rule to suspend, revise, or rescind the September 2020 methane emissions rule. Additionally, the executive order called for regulations to establish comprehensive standards of performance and emission guidelines for methane and VOC emissions from *existing* operations in the oil and gas sector. In response, the EPA issued the proposed Methane Rule aimed at "mitigating climate-destabilizing pollution and protecting human health" through the reduction of methane and VOC emissions.

The 2021 Proposed Methane Rule

The EPA grounds its newest proposal in the proposition that, in the United States, the oil and gas industry is the largest industrial source of methane emissions, emissions that contribute to warming from greenhouse gases. The Methane Rule proposes to take a significant step toward reducing emissions from the oil and gas industry by establishing comprehensive standards for emissions through three distinct groups of rulemaking actions.

The first action is a set of proposed standards for new, modified, and reconstructed sources (Proposed NSPS). The Proposed NSPS is promulgated under authority granted in CAA § 111(b)(1)(B) and seeks to revise standards for the oil and gas source category originally proposed in the 2016 rule. Second, the EPA is proposing amendments to resolve inconsistencies between the 2016 rule and the 2020 amendments. Lastly, and most significantly, pursuant to § 111(d) of the CAA, the EPA is proposing the first ever nationwide emissions guidelines for states to limit methane emissions from some existing sources in the oil and gas source category. Some key features of the proposed rulemaking, as identified by the EPA, include: a monitoring program for new and existing well sites and compressor stations; requirements that states engage with underserved communities in developing state plans, and a zero-emission standard for new and existing pneumatic controllers.

While the proposed Methane Rule outlines and provides background for the specific actions to be taken by the EPA, the actual text of the proposed rule is not included in the November 15, 2021 document. Instead, the proposal indicates that there will be issuance of a supplemental proposal in 2020. The supplemental proposal will provide the actual regulatory text and expand or modify the 2021 proposed Methane Rule in response to public comments.

The EPA is now in the phase of seeking public input on the potential regulatory text and is taking public comment on further information about additional sources of emissions, ways to include underserved communities, and information on technologies for community monitoring programs. Public comments are due by January 14, 2022.

Conclusion and Implications

The EPA proposed Methane Rule, which was released in conjunction with United States attendance at the 2021 United Nations Climate Change Conference amid discussions of global methane reductions, could be the most stringent federal methane regulations adopted to date in the United States. However, because EPA took the unusual approach of publishing the proposal without regulatory language, the details of the regulations remain to be seen. Stakeholders in the oil and gas industry as well as environmental groups are likely to submit significant public comments to shape the details of the final rule, expected in early 2022. For more information regarding the Methane Rule, *see:* https://www.epa.gov/newsreleases/us-sharply-cut-methane-pollution-threatens-climate-and-public-health.
(Jaycee Dean, Darrin Gambelin)

CALIFORNIA PROPOSES SETBACK REQUIREMENT FOR NEW OIL AND GAS WELLS—HOW DOES IT MEASURE UP?

On October 21, 2021, the California Department of Conservation's Geologic Energy Management Division (CalGEM) released a draft regulation that would prohibit new oil and gas wells and facilities within 3,200-feet from homes, schools, hospitals, and other sensitive locations (https://www.conservation.ca.gov/calgem/Documents/public-health/PHRM%20Draft%20Rule.pdf) If approved, California's setback requirement would become the nation's largest statewide buffer zone between oil wells and communities. Colorado currently has the nation's largest setback requirement from oil wells as 2,000 feet; but it has several exceptions. Therefore, as proposed, California's setback requirement is significantly larger than Colorado's and lacks exceptions. As California continues the rulemaking process, it is valuable to see how the rule compares to the nation's current most stringent buffer zone.

Background

A 2017 study approximates that 17.6 million people in the United States live within one mile of an oil or gas well. (Eliza Czolowski et al, *Toward Consistent Methodology to Quantify Populations in Proximity to Oil and Gas Development: A National Spatial Analysis and Review*, Environmental Health Perspectives (Aug. 23, 2017), *https://doi.org/10.1289/EHP1535*.) In October 2021, CalGEM's scientific advisory panel, organized to inform its setback requirement rulemaking released

responses to CalGEM's questions (hereinafter Panel Responses to CalGEM) for developing setback regulations, and found that living near oil and gas wells may increase certain health risks, including increased risk of respiratory disease, cancer, and reproductive harm (https://www.conservation.ca.gov/calgem/Documents/public-health/Public%20Health%20Panel%20Responses_FINAL%20ADA.pdf)(See Panel Responses t o CalGEM, at p. 1-11.) However, the scientific advisory panel also concluded that adequate setback requirements (also referred to as buffer zones) that establish minimum distances between oil and gas wells and locations that support human activities or natural ecosystems, can operate to protect the health and safety of communities most directly affected by oil and gas operations, and minimize these adverse health impacts. (*See*: Panel Responses to CalGEM, at p. 12-13.) While there is no consensus on the appropriate distance for protective setbacks from oil and gas operations; the panel's research showed that studies consistently demonstrate evidence of harm at distance less than one kilometer (approximately 3,200 feet) from oil and gas wells.

In absence of a federal setback requirement, some municipalities and states have imposed their own setbacks. Most major oil producing states have a setback requirement, including Texas, Colorado, and New Mexico. While California state law declares that any well drilled within 100 feet of a property line or public road a *de facto* nuisance; California is currently the only oil producing state without a statewide setback requirement. As such, in 2019, Governor Gavin Newsom directed CalGEM to strengthen health and safety protections for communities near oil and gas facilities. CalGEM spent two years developing the proposed setback regulations and accompanying proposed regulations, which include more protective pollution control measures for existing oil and gas wells and facilities. As California continues the rulemaking process, provided below is a comparison of how California's draft regulations compare with Colorado's rules for buffer areas for new oil and gas well regulations.

Colorado's Setback Requirement

In April 2019, Colorado approved Senate Bill (SB) 19-181, which overhauled the state's oil and gas well regulations. (Colo. Rev. Stat. Ann., § 34-60-102(1) (West).) In November 2020, as per the SB 19-181 requirements, Colorado's Oil & Gas Conservation Commission (COGCC) approved new rules for oil and gas well, including adoption of a 2,000-foot buffer zone between new wells and homes, school, and other occupied building. (*See*: COGCC Rule 604; https://cogcc.state.co.us/documents/reg/Rules/LATEST/Complete%20Rules%20(100%20-%201200%20Series).pdf) This 2,000-foot buffer was significantly larger than any other statewide buffer zone in the country.

Although Colorado's setback requirement is regarded as the most stringent in the nation, there are a series of practicable exceptions to the requirement. The exceptions allow operators to drill as close as 500 feet from homes, but they do not apply to schools. (*See:* COGCC Rule 604.) Operators can seek informed consent from tenants or property owners to drill within the buffer zone. (*Id.* at Rule 604(b)(1).) Operators can also drill within the buffer zone if the well is located within an approved Comprehensive Area Plan that organizes multiple drill sites. (*Id.* at (b)(2).) Additionally, the drill pad may be located in the buffer zone so long as the wells, tanks, and compressors are 2,000-feet from homes. (*Id.* at (b)(3).) Lastly, COGCC can allow an exception to the setback requirement if the conditions of approval will provide substantially equivalent protections. (*Id.* at (b)(4).)

In addition to the setback requirement for new wells, COGCC also approved more protective regulations for existing wells that include tougher protections for air quality and wildfire and more stringent requirements for well construction.

California's Proposed Setback Requirement

CalGEM released detailed draft rules for protection of communities from health and safety impacts of oil and gas production operations, including a proposal of requiring a 3,200-foot setback for new oil and gas wells from homes, schools, hospitals, nursing homes, and other sensitive locations before approving any Notice of Intention to drill a new well with a new surface location. (Proposed Cal. Code Regs., tit. 14 (hereinafter Proposed Rules), § 1765.)

It is worth noting that the proposed 3,200 feet buffer zone is notably larger than what other states have instituted, including nearly a quarter of a mile larger than Colorado's 2,000 feet buffer zone. But the California's proposed setbacks are based on CalGEM's

scientific advisory panel's recommendations after a review of epidemiological studies relevant to oil and gas production. Additionally, unlike Colorado's setback requirement, California's Proposed Rules lacks flexibility and exceptions. The only exception to the 3,200-foot setback requirement is when it is necessary to drill a well to actively alleviate a threat to public safety (for instance, to relieve underground pressure). (Proposed Rules, § 1765.)

The Proposed Rules also require approval and implementation of a Leak Detection and Response Plan by an operator of an existing wellhead or other production facility located within the setback mitigation area; and within two years of the rules' effective date, the operators shall stop production and injection operations within the setback mitigation area where a Leak Detection and Response Plan is not fully implemented. (Proposed Rules, § 1766.) The Proposed Rules also propose adding vapor venting prevention systems (and the requirements for such systems) for all permanent and temporary equipment used for oil and gas production that are located within the setback mitigation area. (Proposed Rules, § 1766.1.) The Proposed Rules further impose sound, lighting and dust control measures, and provide for gas and water quality sampling requirements for oil and gas production facilities and equipment located within the setback mitigation area. (Proposed Rules, §§ 1766.3–1766.7.)

In addition to the above requirements, the Proposed Rules also require that prior to commencing any work that requires a Notice of Intention under Public Resources Code § 3203, the operators shall notify the "property owners and tenants within a 1500-foot radius of the wellhead or within 500 feet of the surface representation of the horizontal path of the subsurface parts of the well in writing," and "offer to sample and test water wells or surface water on their property before and after drilling;" with the requirements for any water sampling and testing set forth in the Proposed Rules. (Proposed Rules, § 1766.2.) Prior to commencing drilling, the operator shall provide CalGEM with documentation of the effort to identify and notify property owners and tenants. (Proposed Rules, § 1766.2(c).)

Conclusion and Implications

California's Proposed Rules are still in the early stages of the rulemaking process. There are ample opportunities for interested parties to get involved in the rulemaking process and help shape California's overhaul of oil and gas regulations. CalGEM is taking public comment on the Proposed Rules through December 21, 2021, and details for submitting comments can be found in the Notice of Proposed rulemaking: (https://www.conservation.ca.gov/calgem/Documents/public-health/PHRM%20Notice%20of%20Public%20Comment%20Period%20and%20Workshop.pdf)

After the public comment period ends, CalGEM will conduct an in depth economic analysis and submit the Proposed Rules to the Office of Administrative Law for another process of receiving public comment and refinement.

As noted above, California's proposed setback requirement is significantly larger than Colorado's and lacks exceptions and flexibility. However, CalGEM is in the early rulemaking process and the rule may still change and flexibility may still be added to the setback requirement as interested parties continue to work with CalGEM in the rulemaking process. However, some see that the Proposed Rules send a strong message that California intends to pass strict oil and gas regulations.

(Breana Inoshita, Hina Gupta)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES AND SANCTIONS

Civil Enforcement Actions and Settlements—Air Quality

•October 25, 2021—Navistar Inc., an integrated manufacturer of trucks and diesel engines based in Lisle, Illinois, has agreed to mitigate at least 10,000 tons of oxides of nitrogen (NOx) emissions and pay a $52 million civil penalty in a consent decree to resolve violations of the federal Clean Air Act (CAA). In particular, Navistar illegally introduced into commerce on-highway Heavy-Duty Diesel Engines (HDDEs) that were not covered by EPA-issued certificates of conformity. Under the settlement, Navistar will pay a civil penalty of $52 million, forfeit its current account of NOx credits, and purchase and destroy enough older diesel engines to prevent 10,000 tons of future NOx emissions, a powerful air pollutant known to cause significant adverse health effects. The settlement requires Navistar to structure its mitigation of NOx emissions through one or more programs approved by EPA that will take into consideration geographic diversity and benefits to communities that are overburdened by air pollution. Navistar will report back to the EPA on its implementation of the program to ensure compliance with the environmental justice and geographic distribution requirements in the consent decree.

•November 1, 2021—EPA announced a settlement with K 2 Motor Corp., doing business as Spec-D Tuning, over Clean Air Act violations. K 2 Motor Corp, based out of the City of Industry, offered for sale and sold aftermarket auto parts that bypass or disable required emissions control systems, otherwise known as defeat devices. The company will pay $152,160 in penalties. This settlement is part of EPA's National Compliance Initiative, which focuses on stopping the manufacture, sale, and installation of defeat devices on vehicles and engines. The enforcement action was taken in collaboration with the California Air Resources Board (CARB). In addition to the EPA's case, CARB also settled with K 2 Motor Corp. for emissions violations related to the sale of non-exempt aftermarket vehicle parts in California and collected a penalty of $88,696. The penalty will be used to fund air quality education for students in the San Diego area as well as support CARB research projects.

•November 5, 2021—EPA will collect a $52,221 penalty from Postville, Iowa, fertilizer distributor Farmers Union Cooperative to resolve alleged violations of the federal Clean Air Act's Risk Management Plan Rule. According to EPA, the company stores 457,000 pounds of anhydrous ammonia, a regulated toxic substance, and failed to comply with regulations intended to protect workers and the surrounding community from accidental releases of regulated substances. After reviewing Farmers Union Cooperative's facility records, EPA determined that the company failed to update its plans for preventing the release of anhydrous ammonia and responding to a release. Violations also included the company's failure to update a hazard review, failure to maintain operating procedures, and failure to perform and maintain compliance audits.

•November 15, 2021—EPA announced a settlement with The Gas Company, LLC over Clean Air Act violations at their synthetic natural gas facility in Kapolei, Hawaii. The company will pay a $230,000 fine and carry out changes to improve safety by reducing the risk of releases of flammable substances. In addition to paying a penalty, The Gas Company agreed to modify equipment, address audit recommendations, train maintenance employees, and complete other compliance tasks.

•November 15, 2021—EPA reached a settlement with APlus Truck Sales, Inc. of Windham, Maine, resolving EPA allegations that from 2017 to 2019, the company tampered with emission controls on diesel vehicles by selling and installing aftermarket parts known as "defeat devices," in violation of the federal

Clean Air Act. Under the terms of the settlement, APlus Truck Sales will pay a penalty of $75,000. In its Complaint against APlus, EPA identified over 60 instances over a two-year period in which the company illegally tampered with vehicles. APlus has now certified to EPA that it has ceased the sale and installation of such defeat devices.

Civil Enforcement Actions and Settlements—Water Quality

•November 10, 2021—EPA fined the County of Hawai'i $28,500 for failure to meet the milestone requiring complete design of the Pāhala Wastewater Treatment Facility in Pāhala, Hawaii. In June 2017, EPA and the County of Hawai'i voluntarily entered into an order for the Pāhala Community Large Capacity Cesspools Closure Project. Under the agreement, approximately 272 properties served by the LCCs in the Pāhala and Nā'ālehu communities will be connected to the new County wastewater treatment facilities. An additional 95 properties not currently served by the LCCs in the Pāhala and Nā'ālehu communities will receive access to the new wastewater treatment facilities.

•November 15, 2021—EPA has assessed penalties totaling $81,474 against two commercial ships over inspection, monitoring, and reporting violations in California and Louisiana. The MSC Aurora container ship and the Western Durban bulk carrier both violated EPA's Vessel General Permit (VGP) issued under the federal Clean Water Act (CWA). From November 2016 to July 2021, the MSC Aurora failed to conduct required routine visual inspections for 11 voyages to Ports of Long Beach, Los Angeles, and Oakland. The MSC Aurora also failed to submit timely annual reports to EPA for 2016—2019. For these multiple inspections and reporting violations, Mediterranean Shipping Company, SRL has agreed to pay a civil penalty of $66,474 under the settlement. In August 2017, the Western Durban failed to perform monthly functionality monitoring and an annual calibration of the ballast water treatment system before discharging ballast water at the Port of New Orleans. The ship also failed to conduct required biological monitoring after the discharge. EPA assessed penalties totaling $15,000 to the Tokyo-based Victoria Ship Management company.

•November 17, 2021—The Berkeley County Public Service Sewer District in West Virginia will pay a $518,400 penalty, make extensive improvements to its sewer and stormwater systems, and implement a state-directed supplemental environmental project valued at $1.14 million under a settlement with federal and state authorities, the U.S. Department of Justice, U.S. Environmental Protection Agency (EPA) and West Virginia Department of Environmental Protection (WVDEP) announced. The settlement resolves chronic alleged violations of the federal Clean Water Act and the West Virginia Water Pollution Control Act. The settlement requires Berkeley to pay civil penalties of $432,000 to the United States and $86,400 to WVDEP. Berkeley will satisfy remaining penalties owed to WVDEP by implementing a supplemental environmental project. This project requires Berkeley to provide treatment for sewage from the White Bush Landing and Midway mobile home parks in Falling Waters, West Virginia, a project valued at $1,145,000. In addition to the penalty, the settlement requires extensive improvements to Berkeley's sewer and stormwater systems at an EPA-estimated cost of $50 million to ensure compliance with federal and state pollution control laws. Improvements include: 1) Establishing a comprehensive MS4 program; 2) Assessing capacity, mapping, and developing a medial measures plan for the sewage collection system; 3) Evaluating and taking corrective actions at underperforming treatment systems; training employees; 4) Developing and implementing a pump station inspection program and corrective action plan; 5) Conducting inspections and taking corrective actions to prevent stormwater and groundwater from entering sewer pipes; 6) Educating the public on handling/disposal of fats, oil and grease; and 7) Requiring reports to keep EPA and WVDEP informed of problems and progress toward various consent decree milestones.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•October 20, 2021—EPA reached a settlement with hazardous waste treatment company Clean Harbors for improper management of hazardous waste at its facility in San Jose, California. Improper storage and management of hazardous wastes poses threats to human health or the environment. The company has agreed to pay a $25,000 civil penalty. Clean Harbors' facility in San Jose provides wastewater treatment for

generators of corrosive liquids, as well as fuel blending. EPA conducted an inspection in 2019 under the federal Resource Conservation and Recovery Act and found that the facility was operating out of compliance with their California Department of Toxic Substance Control (DTSC) hazardous waste permit by failing to replace metal tags on equipment used to transfer hazardous waste, which can help readily distinguish the equipment required to be monitored under hazardous waste management regulations. In addition, Clean Harbors failed to separate containers of incompatible hazardous waste during storage, which can lead to employee injuries or a release to the environment through fire or explosives.

•October 22, 2021—EPA reached a settlement with EcoLab, Inc., in Tacoma, Washington over violations of federal hazardous waste and pesticides laws that resulted in a fire involving hazardous waste at the company's facility on the Tacoma Tideflats and the hospitalization of a nearby worker. Under the settlement, EcoLab addressed the violations and agreed to pay a total penalty of $214,407. The settlement resolves violations of the Resource Conservation and Recovery Act (PDF) and the Federal Insecticide, Fungicide and Rodenticide Act (PDF). EPA found EcoLab violated the hazardous waste management requirements of RCRA by failing to obtain an EPA transporter ID number; receiving dangerous waste from offsite generators without a permit; and storing and/or treating dangerous waste without a permit. The company agreed to pay $180,000 for the RCRA violations. EPA also found EcoLab violated FIFRA by disregarding the requirements of the pesticide's label, including: collecting partially spent aluminum phosphide dust in large drums where confinement of gas vapors occurred; piling multiple cloth bags/socks of partially spent aluminum phosphide together; and allowing the buildup of phosphine to exceed explosive concentrations. The company agreed to pay $34,407 for the FIFRA violations.

•October 25, 2021—EPA's Region 10 has reached settlements with 41 residential home renovators in Idaho, Oregon, and Washington for violations of federal lead-based paint regulations. Renovators of pre-1978 housing are required by federal law to obtain EPA Firm Certification under the Lead Renovation, Repair and Painting (RRP) Rule. They must also obtain renovator certification or assign certified renovators to projects; inform tenants and residents of possible lead-based paint and/or known lead hazards; and comply with work practice requirements intended to reduce lead-based paint exposure. Under the terms of the settlements, the companies agreed to pay civil penalties and to certify that they are complying with the Renovation, Repair and Painting certification requirements prior to offering and performing renovations, as required by the RRP Rule.

•November 9, 2021—EPA reached a settlement with the Phillips 66 Company for violation of limits on the Company's storage of hazardous waste at the Phillips 66 Carson, Calif. refinery. Under this agreement, Phillips 66 will pay a penalty of $87,276 and process the remaining excess oil-based hazardous waste into usable product by December 31, 2021. The company violated the Resource Conservation and Recovery Act (RCRA). Instead of disposing of the oil-based hazardous waste off-site, Phillips 66 has agreed to provide EPA more oversight of the excess material until it is recycled into useable product.

•November 10, 2021—EPA penalized Nutrien Ag Solutions Inc. for allegedly applying pesticides that were cancelled by the federal government and applying them in a manner inconsistent with the products' labeling. The Colorado-based company, which sells, distributes, and applies pesticides mainly for farming operations, will pay $668,100. According to EPA, Nutrien Ag Solutions violated the Federal Insecticide, Fungicide, and Rodenticide Act when it allegedly used two dicamba products in a manner inconsistent with the approved label on at least 27 occasions, in violation of the Agency's cancellation order. Further, EPA alleged that the company violated the law on 33 occasions when it applied other dicamba products on multiple Kansas farms during periods of high wind speeds in violation of pesticide label requirements.

•November 10, 2021—EPA announced a settlement with Welcome Market, Inc., doing business as 99 Ranch Market, for selling G-Sol Antibacterial spray, an unregistered product making disinfectant claims in violation of federal law. The settlement follows a series of enforcement actions the Agency has taken to protect human health and the environment

from misleading and harmful claims during the COVID-19 public health emergency. 99 Ranch Market has agreed to pay a $206,805 civil penalty.

•November 15, 2021—EPA announced a settlement with US Technology Media (UST Media) to resolve alleged violations of hazardous waste environmental laws at UST Media's facilities in Georgia, Ohio, and Utah. Under this settlement agreement, UST Media will pay a $200,000 civil penalty. This settlement resolves alleged violations of the Resource Conservation and Recovery Act (RCRA) and related state laws and regulations. The alleged RCRA violations include improper management and storage of hazardous waste without a RCRA permit. UST Media generated a spent blast media (SBM) that is toxic for cadmium, chromium and lead and accumulated it at all three of UST Media's facilities. As part of this settlement, UST Media will cease receipt of SBM at all facilities until the company disposes of the 3.4 million pounds of this material currently on site in compliance with the Consent Agreement. If the company chooses to accept hazardous SBM in the future, it will do so in compliance with all applicable hazardous waste laws.

•November 15, 2021—EPA has issued a "stop sale" order to CHS Inc., headquartered in Inver Grove Heights, Minnesota, to immediately stop the sale or use of the cancelled pesticide Engenia in violation of the Federal Insecticide, Fungicide, and Rodenticide Act. EPA issued a final cancellation order in June 2020 for three dicamba-based pesticides, including Engenia (EPA Reg. No. 7969-345), which prohibited the sale or use of such pesticides after July 31, 2020. In September 2021, the Minnesota Department of Agriculture documented the sale of Engenia at a CHS store in Herman, Minnesota.

•November 17, 2021—EPA recently finalized a settlement with MacDermid Enthone Inc. (MacDermid), a chemical manufacturer, to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA) at the company's facility in West Haven, Conn. EPA performed an inspection of the facility and found several RCRA regulatory violations, including the failure to determine if some of its waste chemicals were hazardous, the failure to properly label hazardous waste containers and a hazardous waste tank, and the failure to provide adequate aisle space in the facility's hazardous waste storage area for employees and emergency personnel. Under the settlement, MacDermid agreed to pay a penalty of $86,769 for alleged violations of RCRA regulations at its chemical manufacturing facility. The company has certified that it corrected its violations and will maintain compliance with federal and state hazardous waste laws. As a result of EPA's enforcement action, MacDermid corrected its RCRA violations and established new compliance procedures, including new procedures to ensure that the facility's hazardous wastes are properly identified and handled. MacDermid also permanently closed and removed a 500-gallon underground hazardous waste storage tank from the facility.

•November 18, 2021—EPA announced a settlement with pesticide applicator TriCal Inc., based in Gilroy, California, resolving violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The EPA partnered with State and Fresno County authorities on this case. Under the terms of the settlement, TriCal will pay a civil penalty of $44,275. In November 2016, after receiving multiple complaints from neighbors reporting health effects consistent with pesticidal exposure, inspectors from the Fresno County Agricultural Commissioner's office investigated TriCal's commercial application of a fumigant called Tri-Clor at an almond field near Selma, California. The California Department of Pesticide Regulation, in collaboration with Fresno County, referred the case to EPA, which determined that TriCal misused the fumigant by not meeting all its labeling requirements. TriCal did not comply with the label's soil surface compacting requirement, its site-specific Fumigation Management Plan was missing numerous required elements, and its Post-Application Summary was inaccurate.

Indictments, Sanctions, and Sentencing

•October 26, 2021—A Tennessee woman pleaded guilty to fabricating discharge monitoring reports required under the Clean Water Act and submitting those fraudulent documents to state regulators in Tennessee and Mississippi. According to court documents and information in the public record, DiAne Gordon, 61, of Memphis, was the co-owner and chief executive officer of Environmental Compliance and

Testing (ECT). ECT held itself out to the public as a full-service environmental consulting firm and offered, among other things, sampling and testing of stormwater, process water and wastewater. Customers, typically concrete companies, hired ECT to take samples and analyze them in a manner consistent with Clean Water Act permit requirements. Gordon claimed to gather and send the samples to a full-service environmental testing laboratory. The alleged results were memorialized in lab reports and chain of custody forms submitted to two state agencies, Mississippi Department of Environmental Quality (MDEQ) and the Tennessee Department of Environment and Conservation (TDEC), to satisfy permit requirements. In reality, Gordon fabricated the test results and related reports. She even forged documents from a reputable testing laboratory in furtherance of her crime. Gordon then billed her clients for the sampling and analysis. Law enforcement and regulators quickly determined that Gordon created and submitted, or caused to be submitted, at least 405 false lab reports and chain of custody forms from her company in Memphis to state regulators since 2017. Pursuant to the terms of her plea agreement, Gordon will pay $201,388.88 in restitution to the victims of her crime.

•November 15, 2021—Under a proposed settlement to resolve liability for natural resource damages, Honeywell International Inc. and others have agreed to a settlement with a value of approximately $6.25 million to restore natural resources and their services, and to preserve, in perpetuity, over more than 70 acres of natural undeveloped habitat along the Buffalo River in Buffalo, New York. The complaint alleges that Honeywell is the successor to Allied Chemical Corp./Buffalo Color Corp., which manufactured dyestuffs and/or organic chemicals at a facility along the river, and discharged process and cooling waters containing hazardous substances into the river from the mid-1960s to the early 1970s. As part of the proposed settlement, Honeywell entered into separate agreements with ten other entities that were also allegedly responsible for releasing hazardous substances into the river. The settlement will restore native species on over 70 acres of land that will be preserved in perpetuity in its undeveloped condition along the Buffalo River in an otherwise predominantly urban environment. The settlement also includes the payment of $4.25 million for proposed natural resource restoration projects to create natural habitat and access to the river for the use and enjoyment of the public. A portion of the recovery will also be used to fund cultural and ecological restoration programs on behalf of Tuscarora Nation.

•November 18, 2021—San Diego-based JM Fisheries LLC, G.S. Fisheries Inc., the companies' manager, and the chief engineer of the commercial fishing vessel Capt. Vincent Gann have agreed to pay a total of $725,000 in civil penalties to settle federal Clean Water Act claims related to oil pollution violations on the vessel. The companies and their manager have also agreed to perform corrective measures to prevent future Clean Water Act violations. The United States alleges in the complaint that, on April 20, 2018, the defendants discharged oil and oily mixtures from the fishing vessel Capt. Vincent Gann's engine room bilge into Pago Pago Harbor, American Samoa, while performing repairs on the vessel. The complaint further alleges a host of violations of pollution control regulations, including a failure to properly maintain and operate the vessel's onboard oily water treatment system and a non-approved bypass modification to the system. To resolve the claims in the complaint, the consent decree requires the companies and company manager James Sousa to perform corrective measures on all vessels they own or operate. The stipulated settlement agreement requires the Capt. Vincent Gann's chief engineer, Edward DaCosta, to pay a civil penalty of $5,000 to resolve the claims alleged against him in the complaint. This penalty amount is based on a demonstrated limited ability to pay a higher penalty.
(Andre Monette)

RECENT FEDERAL DECISIONS

FIRST CIRCUIT FINDS AGENCY'S EXPRESS INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS INSUFFICIENT TO AVOID MOOTING A GROUNDWATER CONTAMINATION CLAIM

United States v. Puerto Rico Industrial Development Company, ___F.4th___, Case No. 19-1874 (1st Cir. Nov. 17, 2021).

Applying the U.S. Supreme Court's decision in *County of Maui v. Hawaii Wildlife Fund*, ___U.S.___, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the First Circuit Court of Appeals has clarified that property owner liability for Superfund clean-up costs of groundwater contamination does not depend on the U.S. Environmental Protection Agency establishing the exact process by, or location at, which release of the contaminant occurred.

Background

Since at least 1968, the Puerto Rico Industrial Development Company (PRIDCO) has owned land in a southeastern coastal area of Puerto Rico in the Municipality of Maunabo (Property). Consistent with its purpose as a public corporation, PRIDCO developed the Property with "industrial structures" that, from 1969, were leased for manufacturing uses involving the production of modular circuit prints, biomedical and reactive instruments, solar panels, laminated bedroom furniture, fruit juice, guitars, and prefabricated piping for frame walls.

Maunabo Well #1, a municipal water supply well, is located adjacent to the southern boundary (and downgradient) of the Property. In the period between 2001 and 2004, tests detected elevated levels of volatile organic compounds (VOCs) including tetrachloroethene (PCE), trichloroethene (TCE), and cis-1,2-dichloroethene (cis-1,2-DCE) in the drinking water of municipal water customers from Well #1. Tests in 2002 revealed that the groundwater associated with the well contained the same compounds, with the concentration of PCE exceeding the federal maximum contaminant level.

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9601 *et seq*., authorizes the U.S. Environmental Protection Agency (EPA) "to investigate and respond to the release of hazardous substances, contaminants and pollutants into the environment," including by compiling a list of "contaminated sites for cleanup, commonly known as Superfund sites," undertake itself "the necessary response measures as to Superfund site[s]" and sue potentially responsible parties (PRPs) for reimbursement of the costs of those remedial actions. *Atl. Richfield Co. v. Christian*, ___U.S.___, 140 S. Ct. 1335, 1346 (2020). PRPs are defined in the statute to include:

> . . .the owner and operator of a vessel or a facility ... from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance. 42 U.S.C. § 9607(a).

EPA began investigating the Maunabo Area Groundwater Contamination Superfund Site (Site), which includes both the Property and Maunabo Well #1, in 2005, adding the Site to the National Priorities List in 2006. 71 Fed. Reg. 56399, 56403 (Sept. 27, 2006). The investigation identified a "contaminated plume," the cis-1,2-DCE plume' (or the PRIDCO Plume) as being located "under the surface of PRIDCO's property and extend[ing] downgradient towards Maunabo Well #1." Further details include that the PRIDCO Plume contains high concentrations of TCE and cis-1,2-DCE, a degradation product of TCE. The EPA reports show there are no test results which have detected these two contaminants on the Property in the soil directly above the PRIDCO Plume. Those same reports state that:

> [t]he configuration of the cis-1,2-DCE plume indicates that a release of Site-related contaminants ... occurred at or near the [PRID-

CO] property." That is where cis-1,2-DCE "exceed[ed] the groundwater screening criteria.

The parties agreed the contamination is not naturally occurring.

The investigation culminated in a 2021 Final Remedial Investigation/Feasibility Study Report, on which PRIDCO commented to contest its identification as a PRP. EPA replied that:

> . . .'site related contamination was detected in the groundwater on the [PRIDCO] property and immediately downgradient [thereof],' which follows the direction the groundwater flows.

EPA issued a Record of Decision selecting an active treatment method--air sparging--as the appropriate remedial treatment for the PRIDCO Plume, and subsequently sought from PRIDCO contribution for cleanup costs. The U.S. District Court entered summary judgment for EPA on the basis that the agency had established a prima facie case for PRIDCO's liability under CERCLA.

The First Circuit's Decision

CERCLA provides that:

> . . .the owner and operator of a ... facility. . .from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable. . . . 42 U.S.C. § 9607(a). . . . [P]roperty owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there. *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F.3d 112, 120 (2d Cir. 2010).

To establish a *prima facie* case for liability against PRIDCO as a property owner, EPA has the burden of proving that the Property constitutes a 'facility' as defined by 42 U.S.C. § 9601(9); PRIDCO owns the facility, *id.* §§ 9601(20), 9607(a); there was a release, or threatened release of a hazardous substance' from the facility, *id.* §§ 9601(14), (22), 9607(a); and, as a result, the United States incurred response costs 'not inconsistent with the national contingency plan,' *id.* §§ 9601(23)–(25), 9607(a).

This is in contrast with the agency's burden of proof to establish the liability of past owners and operators, arrangers, and transporters, with respect to whom EPA must prove that they engaged in "disposal" of the contaminants. 42 U.S.C. § 9607(a).

"Release" is defined under CERCLA as:

> . . .any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment. 42 U.S.C. § 9601(22) (emphasis supplied by the Court).

Courts have broadly construed this definition:

> . . .to include passive migration into the environment, *see United States v. CDMG Realty Co.*, 96 F.3d 706, 715 (3d Cir. 1996) (concluding that Congress used the term 'leaching' in its definition of 'release' but not of 'disposal' to include passive migration only for the former); *ABB Indus. Sys., Inc. v. Prime Tech., Inc.*, 120 F.3d 351, 358 (2d Cir. 1997) (same).

Thus, the First Circuit rejected PRIDCO's argument that EPA had failed to prove PRIDCO had taken an active part in the contamination of the Property. It further rejected PRIDCO's contention that EPA had failed to prove its allegation in the pleadings that the release occurred, actively, "at" the Property, rather than, passively, "from" the Property:

> It is the statute that governs here, not the language used by the United States in its pleadings. As just explained, the undisputed evidence satisfies the 'release' element as provided in the statute.

The presence of the contaminants linked to the Property in the downgradient PRIDCO Plume and Maunabo Well #1 was sufficient to establish PRIDCO's property owner liability.

Applying the *County of Maui* Decision

Applying *County of Maui v. Hawaii Wildlife Fund*, ___U.S.___, 140 S. Ct. 1462, 1473, 206 L.Ed.2d 640 (2020), the Court of Appeals rejected PRIDCO's argument that EPA was required to identify the specific

source of the contamination. In *County of Maui* the Supreme Court explained that:

> . . .in the context of groundwater pollution under the Clean Water Act, that 'the specific meaning of the word 'from" necessarily draws its meaning from context.'

As applied here, undisputed evidence established the presence of the contaminants in the groundwater at the Property, and that they had migrated into Maunabo Well #1 and in the tap water of municipal water customers supplied by Well #1:

> Because groundwater flows and is not static, the hazardous substances have migrated 'from' the groundwater in the facility, to the groundwater in the environment, constituting a release.

EPA was not required to establish soil contamination at the Property from which the groundwater contamination occurred.

Conclusion and Implications

The elements to establish strict liability of property owners for groundwater contamination continues to be clarified by the Courts of Appeal in the aftermath of *County of Maui*. Here, a clear chain of chemical evidence was sufficient to establish responsible party liability in the absence of any identification of a specific industrial process or release location. The Court of Appeals' opinion is available online at: http://media.ca1.uscourts.gov/pdf.opinions/19-1874P-01A.pdf. (Deborah Quick)

NINTH CIRCUIT FINDS THE CLEAN WATER ACT ALLOWS EPA TO CONSIDER COMPLIANCE COSTS IN APPROVING WATER QUALITY STANDARDS AND VARIANCES

Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency et al., 15 F.3d 966 (9th Cir. 2021).

The Ninth Circuit, on October 6, 2021, recently affirmed in part and reversed in part the judgment of the U.S. District Court for Montana, which concluded that: 1) the U.S. Environmental Protection Agency (EPA) reasonably interpreted the federal Clean Water Act (CWA) as allowing EPA to consider the economic impact associated with mandating compliance with the CWA's base water quality standards (affirmed); and 2) that EPA's 2017 approval of a 17-year variance (2017 Variance) from base CWA standards, as requested by the State of Montana, was arbitrary and capricious (reversed).

At issue on appeal was whether the District Court erred in 1) rejecting the plaintiff's claim that EPA violated the Administrative Procedure Act (APA) by considering compliance costs when granting the 2017 Variance; and 2) ordering that the grant of the 2017 Variance be partially vacated because it did not require compliance with "the highest attainable condition at the outset of the term" and with "Montana's base water quality standards by the end of the term."

Factual and Procedural Background

In 2017, Montana requested EPA approval of the 2017 Variance. The 2017 Variance would apply to 36 municipal wastewater treatment facilities for up to 17 years and would permit covered facilities to release into "wadeable streams" levels of nitrogen and phosphorous otherwise forbidden under the state's base water quality standards. In its application, Montana submitted evidence that achieving compliance with state base standards would necessitate the adoption of reverse osmosis technology at each facility, at high economic cost. Montana claimed that adopting this technology "would result in substantial and widespread economic and social impact on the surrounding communities."

EPA's regulations authorize states to seek a variance from base water quality standards where compliance can be shown to be infeasible. In evaluating whether a state's compliance with base water quality standards is feasible, EPA's regulations permit it to consider, among other things, whether compliance

with state standards "would result in substantial and widespread economic and social impact." Even then, a variance must set interim limits that "represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the variance," and may only last "as long as necessary to achieve the highest attainable condition." Prior to Montana's application, EPA had issued guidance that a substantial economic impact existed when the average annual cost per household of achieving compliance exceeded 2 percent of the median household income in the affected community.

EPA determined compliance would impose such costs on the local Montana communities and granted the 2017 Variance. It concluded that the 2017 Variance's interim limits were the highest attainable condition for each of the 36 facilities, and its 17-year term was no longer than necessary to achieve such conditions.

At the U.S. District Court

Plaintiff Upper Missouri Waterkeeper initiated suit against EPA, alleging the CWA prohibited EPA from taking economic compliance costs into account when considering a variance request.

The District Court ruled against the plaintiff on this claim, noting that EPA's interpretation of the CWA—that it was permitted to take the economic costs associated with attaining compliance into account—was reasonable. However, the court took issue with the 2017 Variance's 17-year term, deeming it "arbitrary and capricious" because it did not require compliance 1) "with the highest attainable condition at the outset of the term" and 2) "with Montana's base water quality standards by the end of the term." The court entered a summary judgment order of a partial *vacatur* of the 2017 Variance's approval.

On appeal, the plaintiff sought reversal of the lower court's rejection of its Administrative Procedure Act claim. EPA (joined by intervenor-defendants) sought reversal of the order partially vacating its approval of the 2017 Variance.

The Ninth Circuit's Decision

Administrative Procedure Act Challenge

EPA based its authority to consider compliance costs on its interpretation of 33 U.S.C. § 1313(c)(2)(A) (Provision). The Provision sets out factors to be considered in establishing water quality standards, but not in granting variances. The plaintiff alleged the Provision, which failed to expressly include compliance costs as one of the factors to be considered, provided EPA no authority to consider such costs when evaluating a variance. EPA's regulations interpret the Provision as requiring states to adopt water quality standards that protect identified "beneficial uses" unless a state can show, through a use attainability analysis, that attainment the water quality necessary to support an identified beneficial use is not feasible for one of several reasons, including that the controls necessary to protect those uses would result in substantial and widespread economic and social impact.

EPA's variance regulation built on this same framework, by first recognizing that states may decline to designate a use or remove a previously designated use by conducting a use attainability analysis and making the required showing that attainment of such a use is not feasible. If approved, that action would remove the designated use and associated water quality criteria from the water quality standard as applied to all dischargers and all pollutants. EPA next reasoned that the variance procedure was an environmentally preferable tool over changing a designated use, because variances retain designated use protection for all pollutants as they apply to all sources with the exception of those specified in the variance."

Satisfied that the Provision was relevant to the grant of variances generally, the court employed the *Chevron* two-step analytical framework to consider whether to defer to EPA's interpretation of the Provision here.

Chevron Analysis: Step One

As a preliminary step, the *Chevron* analysis asked the court to consider whether Congress had "directly spoken to the precise question at issue." Concluding at the outset that Congress remained silent on the precise issue of whether compliance costs could be considered, the Ninth Circuit determined that nothing in the text of the Provision or the wider CWA expressed an intent by Congress to foreclose EPA from considering such costs. Rather, it held that:

> Congress' silence as to costs in [the Provision] can be understood 'to convey nothing more than a refusal to tie the agency's hands as to

> whether cost-benefit analysis should be used, and if so to what degree.'

This step having been satisfied, the appellate court proceeded to step two.

Chevron Analysis: Step Two

The Ninth Circuit next considered whether EPA's interpretation of the Provision was "based on a permissible construction of the statute." The court concluded EPA's interpretation was appropriate for two reasons. First, the court reasoned that the Provision stated that water quality standards must protect the public welfare, and that term could reasonably be understood to encompass consideration of whether compliance costs would cause substantial and widespread economic and social impact. Second, the court reasoned EPA had reasonably construed the Provision's requirement that water quality standards "serve the purposes of this chapter" as incorporating the purposes referred to in the CWA's overall statement of its purpose.

The Ninth Circuit ultimately concluded, based on its *Chevron* analysis, that EPA reasonably interpreted the CWA as authorizing it to consider economic compliance costs in granting variance requests.

The District Court's Order Partially Vacating the 2017 Variance

Turning next to the District Court's order partially vacating the 2017 Variance, the Ninth Circuit examined the lower court's two-pronged justification that the 2017 Variance 1) did not "require compliance with the highest attainable condition at the outset of the term," and 2) did not "require compliance with Montana's base water quality standards by the end of the term." The appellate court reversed the District Court on both grounds.

On the first ground, observing that while the CWA provides "that the highest attainable condition specified in the variance shall apply through (or during) the variance's term," the Ninth Circuit held that the applicable provisions

> do not state that an individual discharger must be in compliance with the highest attainable condition on day one.

Rather, the court noted, EPA's variance regulation unambiguously provides that compliance with the highest attainable condition is not required at the outset. Ultimately, the court concluded that the purpose of a variance is to provide the time needed to achieve the attainable interim standard, and therefore that compliance with the highest attainable condition is required by the end of the variance's term, not at the beginning.

On the second ground, the Ninth Circuit concluded that the District Court had not based its rationale on any portion of EPA's variance regulation. While the plaintiff argued that permitting states to receive variances without mandating compliance by their end would free such states "to postpone compliance with the base standards indefinitely by securing one variance after another," the appellate court found this reasoning unconvincing. The Ninth Circuit noted that if, at the conclusion of a variance's term, compliance has become feasible, another variance could be granted. Further, it observed that the variance process set interim requirements that ensure incremental attainment of the base standards.

The Ninth Circuit affirmed the District Court's summary judgment order in part and reversed it in part, remanding the matter to the trial court with instructions to grant summary judgment to EPA in full.

Conclusion and Implications

This case sees the Ninth Circuit apply the *Chevron* two-step framework to uphold EPA's regulatory interpretation of the CWA—that economic costs may properly be considered in evaluating a variance from the CWA's water quality standards. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2021/10/06/19-35898.pdf. (Carl Jones, Rebecca Andrews)

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

D.C. CIRCUIT FINDS AGENCY'S EXPRESSED INTENTION TO READOPT REGULATIONS FOLLOWING WITHDRAWAL IS NOT SUFFICIENT TO AVOID MOOTING OF LAWSUIT

State of Alaska v. U.S. Department of Agriculture, ___F.4th___, Case No. 17-5260 (D.C. Cir. Nov. 16, 2021).

An appeal challenging the perennially-controversial Roadless Rule's application to National Forests in Alaska was set for oral argument before the D.C. Circuit when it was rendered moot, in part, by adoption of an exemption for Alaska's Tongass National Forest. That exemption was a result of a notice-and-comment rulemaking process by the Trump administration. The incoming Biden administration made clear its intention to initiate a new process to reimpose the Rule on the Tongass. Nonetheless, the D.C. Circuit Court of Appeals affirmed the dismissal of the state's challenge as moot.

Background

In 2001, the Forest Service, within the Department of Agriculture, adopted the "Roadless Rule," which prohibits road construction, road reconstruction, and timber harvesting in inventoried roadless areas on National Forest System lands. 66 Fed.Reg. 3244 (Jan. 12, 2001). The State of Alaska challenged the Roadless Rule on the basis of its impact on use of the Tongass and the Chugach National Forests, which together comprise vast areas of the state. The state's focus has been on the rule's impact on the timber harvesting industry and "the communities dependent on" the Tongass' "resources."

Alaska dismissed its first suit challenging the Roadless Rule when the Department of Agriculture agreed to exempt the Tongass. That 2003 exemption, however, was struck down by a U.S. District Court in 201—the current lawsuit promptly followed. This 2011 lawsuit was dismissed on statute of limitations grounds, reinstated by the District of Columbia Circuit, and then summary judgment was granted to the Department of Agriculture. Before oral argument on the state's subsequent appeal, in 2018 the agency agreed to initiate a new rulemaking process to, once again, exempt the Tongass from the Roadless Rule, and in 2021 "issued a final rule exempting the Tongass from the Roadless Rule." 36 C.F.R. § 294.50 (2021). However:

> . . .after the 2020 Presidential election, the Agriculture Department announced its intention to propose a new rulemaking that would 'repeal or replace the 2020 Tongass Exemption' from the Roadless Rule.

The D.C. Circuit's Decision

The 2021 exemption rendered moot that portion of the state's 2011 lawsuit challenging application of the Rule to the Tongass:

> Finding a case 'plainly moot' when the agency order has been 'superseded by a subsequent ... order' is so routine that our court usually 'would handle such a matter in an unpublished order.' Citing *Freeport-McMoRan Oil & Gas Co. v. FERC*, 962 F.2d 45, 46 (D.C. Cir. 1992).

The D.C. Circuit issued an opinion to address the state's arguments that 1) the "voluntary cessation" doctrine should be applied against a federal agency, and 2) "the prospect of a new regulation reimposing the Roadless Rule on the Tongass saves the case from mootness."

The Voluntary Cessation Doctrine

The voluntary cessation doctrine:

> . . .prevent[s] a private defendant from manipulating the judicial process by voluntarily ceasing the complained of activity, and then seeking a dismissal of the case, thus securing freedom to 'return to his old ways.' *Clarke v. United States*, 915 F.2d 699, 705 (D.C. Cir. 1990).

Clarke articulated "serious doubts" as to the appropriateness of applying this doctrine to federal agencies:

> [I]t would seem inappropriate for the courts either to impute such manipulative conduct to

> a coordinate branch of government, or to apply against that branch a doctrine that appears to rest on the likelihood of a manipulative purpose. 915 F.2d at 705.

The Circuit Court "reiterated" its concerns in *National Black Police Ass'n v. District of Columbia*, 108 F.3d 346, 352 (D.C. Cir. 1997), and endorsed those concerns once again by declining to assign these underhanded motives to the Department of Agriculture.

Analysis under the *National Wildlife Federation* Decision

The state's second argument relied on a Department of Agriculture's 2021 letter to the District Court, in which is stated its intention to initiate a new rulemaking process to eliminate the Tongass exemption from the Roadless Rule. The letter also stated:

> Upon publication, the proposed rule will be subject to notice and comment proceedings. As part of such proceedings—and before promulgating any new final rule to re-impose the 2001 Roadless Rule or similar management prescriptions to the Tongass National Forest—USDA will consider environmental impact reviews under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C), and timber market analysis under the Tongass Timber Reform Act, 16 U.S.C. § 539d, that were not available when USDA first promulgated the 2001 Roadless Road (without a Tongass Exemption). Unless and until USDA issues a new final rule for inventoried roadless areas within the Tongass National Forest, the 2020 Tongass Exemption will remain in effect and the Roadless Rule 'shall not apply to the Tongass National Forest.' *See* 36 C.F.R. § 294.50 (2021).

The Circuit Court found these circumstances to be "directly on point" with those presented in *National Wildlife Federation v. Hodel*, 839 F.2d 694, 742 (D.C. Cir. 1988), in which the defendant federal agency suspended a challenged rule when that rule was remanded for agency reconsideration by the District Court, at the same time announcing the intention "to propose new regulations." *Ibid.* The challengers in *that* case argued that their suit should not be mooted as the intent to impose new regulations presented an issue "capable of repetition, yet evading review." Quoting *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). This, however, was:

> . . .not a clever manipulation of regulatory and appellate procedure designed to escape review; it was merely a prudent response to the district court's remand order. *National Wildlife Federation v. Hodel*, 839 F.2d at 742.

Were new regulations adopted, they would then be challengeable.

A more fundamental problem with continuing to litigate in the absence of currently-applicable regulations is the federal court's lack of authority to issue advisory opinions. The court:

> . . .cannot presume that any such future rulemaking will repeal the Tongass exemption in toto [and d]oing so would be inconsistent with the purpose of notice-and-comment rulemaking under the Administrative Procedure Act.

Furthermore, the court stated:

> [T]o determine whether the Roadless Rule will be reapplied to the Tongass would require us to speculate about future actions by policymakers. The Rule itself has been controversial from its inception. *See Organized Village of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 979-81 (9th Cir. 2015) (*en banc*) (M. Smith, J., dissenting). New notice-and-comment rulemaking, and new environmental assessments, take time. Intervening events, such as elections or changes in policy priorities, bearing on these processes are unpredictable. The content of any future regulation is currently unknowable.

Thus, the dismissal as moot of the challenge to the Roadless Rule, as applied to the Tongass, was affirmed.

Conclusion and Implications

The dramatic shifts in policy aims and priorities of the executive branch over the past six years continue to percolate through the federal courts, as years-long litigations take dramatic twists and turns. Litigants,

having invested many years and substantial resources in a case, and with the potential for a changing of the guard (comparatively) just around the corner, are understandably loathe to see their claims mooted. Nonetheless, longstanding and deeply engrained principals of judicial restraint and economy virtually pre-ordained the outcome here. The court's opinion is available online at: https://www.leagle.com/decision/infco20211116147.
(Deborah Quick)

DISTRICT COURT HOLDS WET AND DRY SEASON INSPECTIONS ARE NOT DUPLICATIVE IN CLEAN WATER ACT CITIZEN SUIT CASES REGARDING STORMWATER DISCHARGES

California Open Lands v. Butte County Department of Public Works, et al.,
___F.Supp.4th___, Case No. 2:20-CV-0123-KJM-DMC (E.D. Cal. Oct. 27, 2021).

The U.S. District Court for the Eastern District of California recently issued an order compelling the Butte County Department of Public Works to allow a wet season inspection in addition to a previous dry season inspection of a facility allegedly discharging into navigable waters in violation of the federal Clean Water Act (CWA). This order confirms that separate inspections conducted during the wet season and dry season are not duplicative and that it is improper to rely on an agency's assertions regarding compliance when the compliance itself is in contention.

Factual and Procedural Background

The Clean Water Act prohibits the discharge of pollutants into "navigable waters" and defines this term as "the waters of the United States, including the territorial seas." To help enforce these rules, the Clean Water Act contains a citizen's enforcement provision which allows citizens, in relevant part, to bring a civil action against an entity who is allegedly in violation of an effluent standard.

In January 2020, California Open Lands filed a lawsuit challenging Butte County Department of Public Works' (County) compliance with the Clean Water Act at the Neal Road Recycling and Waste Facility (Facility). Specifically, California Open Lands alleged violations of California's General Industrial Permit for storm water discharges associated with industrial activities by allowing landfill leachate to comingle with stormwater and discharge from the Facility into the Sacramento River and the Sacramento-San Joaquin Delta.

On October 23, 2020, California Open Lands served the County with a request for inspection of land and property to give them the ability to inspect, photograph, and sample areas of the Facility during three rain events pursuant to Federal Rule of Civil Procedure 34. The County objected to this request on December 3, 2020.

Between December 3, 2020 and the briefing for this motion to compel, California Open Lands and the County attempted to settle the case on four separate occasions. The parties were not able to come to an agreement regarding settlement. As a result, the parties resumed active litigation and resumed the dispute regarding the wet season inspection. California Open Lands filed a motion to compel the wet weather site inspection.

The County objected on the grounds that the wet weather inspection was not proportional to the needs of the case, the inspection was not necessary, and the inspection would cause health and safety risks. Prior to briefing on the motion to compel the wet weather inspection, the California Open Lands inspected the Facility during the dry season with the County's permission. The County did not raise any of the objections presented in the wet water inspection request against the dry weather request.

The District Court's Decision

Proportionality

The U.S. District Court first considered if the County's objection regarding proportionality was proper. California Open Lands argued the proportion-

ality objection was an improper boilerplate objection. The County contended the wet weather inspection was a fishing expedition. The court agreed with California Open Land and determined that this was an improper boilerplate objection, reasoning the County did not explain why the inspection was not proportional to the needs of the case. California Open Lands alleged violations of state and federal law with respect to stormwater which mostly occurs during wet weather conditions. The court reasoned that a wet weather inspection was proportional to the need to inspect the Facility during wet weather when stormwater was present. Therefore, the court overruled the proportionality objection.

Necessity of an Inspection

Next, the court considered whether the inspection was necessary. The County argued a wet weather inspection was not necessary because the County was in compliance with the Permit. California Open Lands contended this objection was absurd. The court determined the inspection was necessary because the complaint involved allegations of illegal discharges in stormwater in violation of state and federal law. Because the inspection of the Facility during a wet season event would allow California Open Lands to discover facts related to the allegations, the inspection was necessary. Additionally, the court found the County's assertion that the inspection was not necessary because the County was in compliance with the Permit was improper because this was a disputed fact. The court overruled the County's necessity objection.

Health and Safety Risks

Finally, the court considered whether health and safety risks warranted preventing the wet weather inspection. The County argued a wet weather inspection would risk the safety of Facility workers and those conducting the inspection due to large equipment operations at the Facility. The court determined the County did not properly explain why the health and safety risk should prevent an inspection, especially after the dry weather inspection was conducted without incident. Because the County did not explain how the risk created by the inspection was different in the wet season versus the dry season, the court overruled the County's objection.

Conclusion and Implications

Although this order is not binding on other courts, it highlights the reasonableness of citizens seeking wet weather site inspections under Federal Rule of Civil Procedure 34 in a Clean Water Act citizen suit alleging stormwater discharge violations and the need for reasonable and well-articulated objections to such an inspection request. The court's opinion is available online at: https://www.leagle.com/decision/infdco20211028797#.
(Anya Kwan, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL UPHOLDS CEQA CATEGORICAL EXEMPTION FOR 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 section 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 created 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 held 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 created 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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