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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

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RECENT STATE DECISIONS

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ENVIRONMENTAL NEWS

CALIFORNIA GOVERNOR NEWSOM ISSUES DROUGHT EXECUTIVE ORDER—AIMS TO INCREASE REGIONAL WATER CONSERVATION EFFORTS

California Governor Gavin Newsom's recently issued Executive Order N-7-22 (Executive Order) targets efforts to increase water conservation and bolster regional responses to the state's ongoing drought conditions.

Background

The Executive Order is the latest in a series of executive orders designed to reduce the impact of drought conditions in the state. Citing record-setting dry months in January and February, and third straight year of drought conditions, the Executive Order sets out a variety of new measures aimed at increasing conservation and drought resiliency throughout the state.

Water Shortage Contingency Plans

Governor Newsom directed the State Water Resources Control Board (State Board) to consider adopting emergency regulations related to urban water suppliers by May 25, 2022. For urban water suppliers that have submitted a water shortage contingency plan, these regulations would require suppliers to implement Level 2 response actions, which generally include actions responsive to water supply conditions being reduced by 20 percent. For suppliers that have not submitted a water shortage contingency plan, the State Board would establish Level 2 contingency plans based upon water shortage contingency plans submitted by other similar suppliers. The Executive Order also indicates that more stringent requirements should be expected if drought conditions persist throughout and beyond this year.

Non-Functional Turf

The Executive Order further directs the State Board to consider adopting regulations defining and banning irrigation of "non-functional turf." The Executive Order clarifies that these regulations would be aimed at decorative grass and would not apply to school fields, sports fields, and parks. The Governor's Office estimates that these regulations will result in annual water savings of several hundred thousand acre-feet.

Limitations on Certain New and Replacement Groundwater Wells

The Executive Order also seeks to limit the construction of new groundwater wells and the expansion of existing wells. Prior to issuing a permit for a new well or for alteration of an existing well, the responsible agency must determine that: 1) the proposal is not likely to interfere with existing wells nearby; and, 2) the proposal is not likely to adversely impact or damage nearby infrastructure. Additionally, the Executive Order imposes additional requirements for new or altered wells in a basin classified as medium- or high-priority under the Sustainable Groundwater Management Act (SGMA). Permits for new or altered wells in these areas will need to be accompanied by a written verification from the local Groundwater Sustainability Agency (GSA) certifying that the proposed well would not be inconsistent with any applicable Groundwater Sustainability Plan (GSP) and would not decrease the likelihood of reaching a sustainability goal for the area covered by a GSP.

These limitations do not apply to permits issued to individual domestic users with wells that provide less than two acre-feet of groundwater per year, or to wells that will exclusively provide groundwater to public water supply systems as defined in § 116275 of the Health and Safety Code.

Other Directives

The Executive Order also directs the California Department of Water Resources to take a number of steps to combat the impact of sustained drought. These include: 1) consulting with commercial, industrial, and intuitional sectors to develop strategies for improving water conservation, including direct

technical assistance, financial assistance, and other approaches; 2) working with state agencies to address drinking water shortages in households or small communities where groundwater wells have failed due to drought conditions; and, 3) preparing for implementation of a pilot project to obtain and transfer water from other sources and transfer it to high need areas. The Governor also directs the State Board to increase investigations in to illegal diversions and wasteful or unreasonable use of water and bring applicable enforcement actions.

The Executive Order rolls back regulations that limit the transportation of water outside its basin of origin and encourages agencies to prioritize petitions and approvals for projects that improve conditions for anadromous fish or incorporate capturing high precipitation events for local storage or recharge.

The Governor directed all state agencies to submit proposals to mitigate the effects of severe drought by April 15, 2022. Agency responses to that directive were in process at the time of this writing.

Conclusion and Implications

The Executive Order, though broad, is less aggressive in implementing conservation measures than prior orders during the 2012-2016 drought period. It focuses primarily on urban water suppliers and regulations to be implemented at regional and local levels. Though it does not include mandatory individual water use restrictions on California residents, the Governor signaled to Californians that unless conditions dramatically improve, such restrictions can be expected in the future. The Executive Order is available online at: https://www.gov.ca.gov/wp-content/uploads/2022/03/March-2022-Drought-EO.pdf. (Scott Cooper, Derek Hoffman)

REGULATORY DEVELOPMENTS

BIDEN ADMINISTRATION'S EPA RESTORES CALIFORNIA'S ABILITY TO SET MORE STRINGENT AUTO POLLUTION TAILPIPE RULES

On March 9, 2022 the U.S. Environmental Protection Agency (EPA) revived California's power to limit emissions from automobile tailpipes. The EPA action found in 87 Fed. Reg. 14332, (Mar. 14, 2022) rescinded a rule promulgated by the Trump administration that withdrew a federal Clean Air Act (CAA) waiver for California's Advanced Clean-Car Program, thereby allowing California to again set greenhouse gas (GHG) emission standards for new motor vehicles that are more stringent than federal regulations and permitting other states to adopt the California standards in their own territories.

Background

Clean Air Act § 209(a) generally preempts a state from adopting and enforcing its own standards related to the control of emissions from new motor vehicles and new motor vehicle engines. (42 U.S.C. § 7543, subd. (a).) However, § 209(b) contains an exemption from the preemption where the State of California may submit a request to waive preemption, and the EPA must grant the waiver unless it finds that the determination is arbitrary and capricious, the standards are not needed to meet compelling and extraordinary conditions, or the standards and accompanying enforcement procedures are not consistent with § 202(a) of the CAA. (*Id.* § 7543, subd. (b).) Additionally, § 177 of the CAA allows other states to adopt California's motor vehicle emissions standards when a valid waiver exists and if the standards adopted are identical.

In 2013, EPA granted California's waiver request for the state's Advanced Clean Car (ACC) program (ACC program waiver). (87 Fed. Reg. 14332, 14332 (Mar. 14, 2022).) California's ACC program includes both a Low Emission Vehicle (LEV) program, which regulates criteria pollutants and GHG emissions, as well as a Zero Emission Vehicle (ZEV) sales mandate. These two requirements are designed to control smog- and soot-causing pollutants and GHG emissions in a single coordinated package of requirements for passenger cars, light-duty trucks, and medium duty passenger vehicles. From 2013 to 2019, 12 other states adopted California's regulations as their own. However, in 2019 the EPA and National Highway Traffic Safety Administration (NHTSA) partially withdrew this waiver as part of an action titled "The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule Part One: One National Program" (SAFE 1). (84 Fed. Reg. 51310, 51310 (Sept. 27, 2019).)

2019 Rule Preempting State Regulation of New Motor Vehicle Emissions

In September 2019, EPA and NHTSA promulgated the SAFE 1 action finding that state regulations of carbon dioxide emissions from new motor vehicles are related to fuel economy and are therefore preempted under the Energy Policy and Conservation Act. Moreover, EPA supported the withdrawal of California's waiver by finding that the GHG standards and ZEV sales mandate did not meet compelling and extraordinary conditions under 209(b). SAFE 1 also included a new interpretation of CAA § 177 precluding states from adopting California's GHG emissions standards.

EPA's Reconsideration of SAFE 1 Rule

In November 2019, California and 22 other states filed a petition for reconsideration with the EPA to reconsider SAFE 1. Contemporaneously, the states also challenged NHTSA's rule preempting state regulation of vehicle emissions, NHTSA's rule preempting state limits on tailpipe GHG emissions, and EPA's withdrawal of the California waiver in federal court. The action against the EPA seeking vacatur of the decision to withdraw the CAA § 209 waiver was dismissed for lack of jurisdiction and the other two actions are currently pending. On January 20, 2021, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis*, which directed an "immediate review" of SAFE 1 and consideration to

suspend, revise, or rescind by April 2021. On April 28, 2021, the EPA issued a Notice of Reconsideration of SAFE 1 and sought public comment on whether the decision to withdraw portions of California's 2013 waiver was a valid exercise of the agency's authority. Concurrently, NHTSA repealed its conclusion that state and local laws related to fuel economy standards, including GHG standards and ZEV sales mandates, were preempted under EPCA and EPA revised the federal GHG emission standards for light-duty vehicles for 2023 and later model years, under CAA § 202(a), making the standards more stringent.

In the April 28 Notice of Reconsideration, EPA stated its belief that there were significant issues regarding whether SAFE 1 was a valid and appropriate exercise of agency authority, including the amount of time that had passed since EPA's ACC program waiver decision, the approach and legal interpretations used in SAFE 1, whether EPA took proper account of the environmental conditions in California, and the environmental consequences from the waiver withdrawal in SAFE 1. Further, EPA stated it would be addressing issues raised in the related petitions for reconsideration of EPA's SAFE 1 action.

The Notice of Decision by EPA

Ultimately, the EPA issued a Notice of Decision (NOD) on March 14, 2022 rescinding the SAFE 1 waiver withdrawal for several reasons. First, the EPA states it did not appropriately exercise its authority to withdraw a waiver once granted because § 209 does not provide EPA with express authority to reconsider and withdraw a waiver previously granted to California. Therefore, the NOD finds that EPA's authority stems from its inherent reconsideration authority and in reconsidering a waiver grant, that authority—EPA believes—is constrained by the three waiver criteria under § 209(b).

Second, EPA now argues it may only reconsider a previously granted waiver to address a clerical or factual error, or where information shows that circumstances or conditions related to the waiver have changed so significantly that the propriety of the waiver grant is called into doubt. EPA argues that this conclusion is evidenced by the fact that Congress' creation of a state and federal regulatory framework to drive motor vehicle emissions reduction intended technology innovation that depends upon a stable market, and manufacturers depend on the continuing validity of a waiver to justify the necessary investments in cleaner vehicle technology. Finally, EPA states it should exercise its authority within a *reasonable timeframe*.

Therefore, the waiver withdrawal in SAFE 1 was not an appropriate exercise of EPA's authority because: there was no clerical error or factual error in the ACC program waiver and SAFE 1 did not point to any factual circumstances or conditions related to the three waiver prongs that changed so significantly that the propriety of the waiver grant is called into doubt. Rather, the 2019 waiver withdrawal was based on a change in EPA's statutory interpretation, an incomplete assessment of the record, and another agency's action beyond the confines of § 209(b). Thus, EPA states it erred in reconsidering a previously granted waiver on these bases and it is rescinding its 2019 withdrawal of its 2013 ACC program waiver.

Conclusion and Implications

Reinstating California's authority under the Clean Air Act to implement its own greenhouse gas emission standards and zero emission vehicle sales mandate is the latest step in President Biden's saga to further Executive Order 13990. EPA Administrator Michael S. Regan classifies the action as a "partnership with states to confront the climate crisis" and a reinstatement of "an approach that for years has helped advance clean technologies and cut air pollution for people not just in California, but for the U.S. as a whole." The action reasserts California's control over standards in its own state and allows for other states to again choose whether to adopt and enforce California GHG emissions standards in lieu of federal standards. Moreover, this actions likely renders the pending federal lawsuits currently challenging the old NHTSA and EPA actions moot.
(Jaycee Dean, Darrin Gambelin)

FERC REVISES POLICY STATEMENT ON NATURAL GAS FACILITIES CERTIFICATION TO BOLSTER CONSIDERATION OF GREEN HOUSE GAS IMPACTS AND ENVIRONMENTAL JUSTICE

On February 18, 2022, the Federal Energy Regulatory Commission (FERC) issued a Draft Updated Policy Statement on the certification of new interstate natural gas facilities (Updated Policy) and a Draft Policy Statement Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews (GHG Policy). The Updated Policy clarifies FERC's framework in weighing a Project's economic benefits against its impacts on the environment and environmental justice communities when making a determination of public convenience and necessity. The GHG Policy directs FERC's assessment of the impacts of natural gas infrastructure projects on climate change in its reviews under the National Environmental Policy Act (NEPA) and the Natural Gas Act (NGA). This certification followed two Notices of Inquiry seeking comments from members of the public and stakeholders on revisions to the Policy. FERC recently declared this Updated Policy a draft and is seeking additional public comment.

Background

FERC issues certificates of public convenience and necessity for the construction and operation of facilities transporting natural gas in interstate commerce pursuant to § 7 of the Natural Gas Act (NGA). (15 U.S.C. §717 *et seq.*) Section 7(e) of the NGA requires FERC to make a finding that the construction and operation of a proposed project "is or will be required by the present or future public convenience and necessity" before issuing a certificate to a qualified applicant.

In 1999, FERC issued a Policy Statement regarding issuance of public convenience and necessity stating its goals, which include to: 1) "appropriately consider the enhancement of competitive transportation alternatives, the possibility of over building, the avoidance of unnecessary disruption of the environment, and the unneeded exercise of eminent domain"; 2) "provide appropriate incentives for the optimal level of construction and efficient customer choices"; and 3) "provide an incentive for applicants to structure their projects to avoid, or minimize, the potential adverse impacts that could result from construction of the project." (1999 Policy Statement, 88 FERC at 61,737.)

Updated Policy Statement

In its Updated Policy, FERC maintains the same goals of the 1999 Policy Statement but it acknowledges the significant developments that have occurred since issuance of the 1999 Policy Statement that warrant revisions in the Updated Policy. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 2 (2022).) These developments include an increase in the available supply of gas from shale reserves due to development of domestic shale formations and new extraction technologies. This increased domestic supply has resulted in reduced prices and price volatility, and more proposals for natural gas transportation and export projects. The increase in domestic supply, however, has coincided with a concern from affected landowners and communities, Tribes, environmental organizations regarding the environmental impacts of project construction and operation, including impacts on climate change and environmental justice communities.

Federal Mandate to Focus on Environmental Justice and Equity

The Updated Policy also addresses the mandate for federal agencies to focus on environmental justice and equity arising from Executive Orders requiring agencies to identify and address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities of their actions.

Relevant Factors to Consider and Evidence

The 1999 Policy Statement set forth the policy to consider all relevant factors reflecting the need for the project, including, but not limited to precedent agreements, demand projections, potential cost savings to consumers, or a comparison of projected demand with the amount of capacity currently serving the market. (Certificate Policy Statement, Pub. L. 18-1-000, ¶ 53.) However, in implementing the

Updated Policy, FERC has relied almost exclusively on precedent agreements to establish project need. During the comment period, commentors argued that FERC should analyze additional factors, such as future markets, opportunity costs, federal and state public policies, and effects on competition. FERC agreed, finding that FERC should weigh other evidence in order to comply with the NGA and the APA. For instance, the Updated Policy includes applications to detail how the gas will ultimately be used and why the project is necessary to serve that use.

The Updated Policy also provides guidance on what type of evidence will be acceptable. Following the U.S. Court of Appeals for the District of Columbia's recent holding in *Environmental Defense Fund v. FERC* that "evidence of 'market need' is too easy to manipulate when there is a corporate affiliation between the proponent of a new pipeline and a single shipper who have entered into a precedent agreement," under the Updated Policy, affiliate precedent agreements will be insufficient to demonstrate need.

Consideration of Adverse Effects

The Updated Policy Statement declares that FERC will consider adverse effects in its determination to consider whether to issue a certificate of public convenience and necessity. These interests include: 1) the interests of the applicant's existing customers; 2) the interests of existing pipelines and their captive customers; 3) environmental interests; and 4) the interests of landowners and surrounding communities, including environmental justice communities. The Policy grants the commission authority to deny an application based on adverse impacts to any of these interests. FERC's necessary finding that the project will serve the public interest is based on a consideration of all the benefits of a proposal balanced against the adverse impacts, including economic and environmental impacts. Where the 1999 Policy directed FERC to consider the economic impacts of a project before consideration of the environmental impacts, the Updated Policy directs concurrent consideration of environmental and economic impacts.

Dissenting Commissioners

Commissioners Danly and Christie dissented to the Updated Policy arguing that the new requirements would put an undue burden on approvals for natural gas pipelines resulting in significant increases in costs for pipeline operators and customers. (*Id.* at Dissent.)

Greenhouse Gas Policy

FERC also simultaneously adopted a GHG Policy. The GHG Policy requires FERC to quantify a project's reasonably foreseeable GHG emissions including emissions from construction, operation, and the downstream combustion of natural gas when FERC is conducting environmental review under NEPA. (Consideration of Greenhouse Gas Emissions in Natural Gas Infrastructure Project Reviews, PL21-3-000 (2022) ¶28.) In 2016, FERC began to estimate GHG emissions on a more inclusive scale, including downstream combustion and upstream production. FERC then halted this practice in 2018 and several federal court decisions ensued. The GHG Policy implements decisions from federal courts holding FERC should gather information on downstream uses to determine whether downstream GHG emissions are a reasonably foreseeable effect of the project. (*Id.* at ¶¶11-14, citing *Sierra Club v. FERC* (2017) 867 F.3d 1357; *Birckhead v. FERC*, 925 F.3d 510, 518 (D.C. Cir. 2019).)

Congress is Briefed

On March 3, 2022, FERC commissioners appeared before the Senate Committee on Energy and Natural Resources on Thursday to discuss the Updated Policy. At the hearing, Senator Joe Manchin, Chairman of the Senate Energy and Natural Resources Committee and Senator John Barrasso expressed their opposition to the Updated Policy based on concerns that the Updated Policy will have on the nation's energy independence, jobs, and energy reliability and cost. Chairman Richard Glick and Commissioners Janes Danly, Allison Clements, Mark C. Christie, and William L. Philips gave testimony regarding the Updated Policy. Commissioners Danly and Christie expressed their opposition for the Updated Policy while Commissioners Glick, Clements, and Philips expressed their support.

Public Comment

On March 24, 2022, FERC designated the Updated Policy and the GHG Policy draft policy statements and is seeking further public comment. (178 FERC ¶

61,197.) The Update Policy and GHG Policy will not apply to pending project applications or applications filed before the Commission issues any final guidance in these dockets. The deadline to submit comments is April 25.

Conclusion and Implications

While the Updated Policy and GHG Policy seek to create greater balance in the consideration of greenhouse gas emissions impacts and environmental justice when FERC weighs public convenience and necessity, they have the potential to make certification of new interstate natural gas facilities more inconsistent and potentially more unlikely. This shift in policy represents the on-going tug-of-war between the competing priorities of reducing greenhouse gas emissions and maintaining energy security.
(Natalie Kirkish, Darrin Gambelin)

U.S. SECURITIES AND EXCHANGE COMMISSION PROPOSES RULE ON CLIMATE-RELATED DISCLOSURES

On March 21, 2022 the U.S. Securities and Exchange Commission (SEC) issued a Proposed Rule that would impose new standardized climate-related disclosure requirements on public companies under the Securities Act of 1933 and Securities Exchange Act of 1934.
The Proposed Rule adds sections to Regulation S-K (17 CFR § 229) and Regulation S-X (17 CFR § 210) that would require registrants to make climate-related disclosures in their registration statements and in periodic reports. Information regarding climate-related risks and associated metrics can have an impact on a public company's performance or position and may be of value to investors in making investment or voting decisions. Additionally, the SEC believes that more transparency and comparability in climate-related disclosures will foster competition. (Proposed Rule, p. 13.)

Background

Climate-related risks can pose significant financial risks to companies. Since the 1970s, the SEC has explored the need for disclosures related to material environmental issues. (Proposed Rule, p. 15). In 1982, the SEC adopted rules mandating disclosure of information related to litigation and other business costs that arose out of compliance with federal, state, and local environmental laws. Then in 2010, the SEC issued a guidance regarding when climate-related disclosures may be required under the existing reporting requirements. This guidance was in response to a rise in companies' voluntarily reporting climate-related information outside of their SEC filings. (Proposed Rule, p. 17.) As climate-related impacts and risks to businesses and the economy have grown, investors' demand for more detailed information about the effects of climate change and other climate-related risks have only increased. There are currently great inconsistencies in how companies disclose climate-related information. A central goal of this Proposed Rule is to address this issue by increasing consistency, comparability, and reliability of climate-related information for investors. (Proposed Rule, p. 21.)

Proposed Climate-Related Disclosure Framework

The Proposed Rule would require a registrant to disclose certain climate-related information, including information about its climate-related risks that are reasonably likely to have material impacts on its business or consolidated financial statements, and greenhouse gas (GHG) emissions metrics that could help investors assess those risks. A registrant may also disclose information about climate-related opportunities.

In particular, the Proposed Rule would require registrants to disclose information about:

(1) the oversight and governance of climate-related risks by the registrant's board and management; (2) how any climate-related risks iden-

tified by the registrant have had or are likely to have a material impact on its business and consolidated financial statements, which may manifest over the short-, medium-, or long-term; (3) how any identified climate-related risks have affected or are likely to affect the registrant's strategy, business model, and outlook; (4) the impact of climate-related events and transition activities on the line items of a registrant's consolidated financial statements and the impacts on financial estimates, and assumptions used in the financial statements. (Proposed Rule, p. 42.)

Registrants that already analyze climate-related risks, have developed transition plans, or have publicly announced climate-related targets would have additional disclosure requirements regarding such activities. Specifically, these companies would be required to disclose:

(1) the registrant's process for identifying, assessing, and managing climate-related risks and whether any such processes are integrated into the registrant's overall risk management system; and (2) the registrant's climate-related targets or goals, and transition plan. (Proposed Rule, p. 42.)

Disclosure Requirements

Additionally, the Proposed Rule imposes disclosure requirements regarding GHG emissions. The Proposed Rule utilizes a standard developed by the GHG Protocol [https://ghgprotocol.org], which is the most widely-used global greenhouse gas accounting standard. (Proposed Rule, p. 38.) The GHG Protocol is a joint initiative of the World Resources Institute and World Business Council for Sustainable Development. The GHG Protocol standard classifies emissions by "Scopes." Scope 1 emissions are direct GHG emissions that occur from sources owned or controlled by the company. Scope 2 emissions are those primarily resulting from the generation of electricity purchased and consumed by the company. Scope 3 emissions are all other indirect emissions not accounted for in Scope 2 emissions, meaning they are a consequence of the company's activities but are generated from sources that are neither owned nor controlled by the company. Examples of Scope 3 emissions include emissions associated with the production and transportation of goods a registrant purchases from third parties, and employee commuting or business travel.

Under the proposed rule, a registrant would be required to disclose metrics regarding Scopes 1 and 2 GHG emissions. Scope 1 and Scope 2 emissions must be disclosed separately and include metrics that are: 1) disaggregated by constituent GHGs; 2) aggregated; and 3) in absolute and intensity terms. Registrants may also be required to disclose Scope 3 emissions if material or if the registrant has set a GHG emissions target or goal that includes Scope 3 emissions. (Proposed Rule, p. 42-43.)

Attestation Requirement

The proposed rule also includes an attestation requirement for accelerated filers and large accelerated filers with regard to GHG emissions. Such filers would be required to provide an attestation report covering, at a minimum, their Scope 1 and Scope 2 emissions. The attestation report must be from an independent attestation service provider. (Proposed Rule, p. 43-44.)

Other Accommodations to be Phased In

The Proposed Rule includes a phase-in period and other accommodations for complying with the proposed disclosure requirements. The phase-in period will have compliance dates dependent on the registrant's filer status. There would be an additional phase-in period for Scope 3 emissions disclosures and a safe harbor for Scope 3 emissions disclosures. (Proposed Rule, p. 46.)

Conclusion and Implications

The Proposed Rule seeks to provide investors with consistent, comparable, and reliable information regarding climate-related risks. The Proposed Rule is far reaching and public companies will need to develop plans to comply with the rule, if adopted as final. However, the climate disclosures rule will likely face hurdles before it is finalized and its final iteration may differ from the Proposed Rule. This is a significant rule and may take years to finalize and may be legally challenged when finalized. It is key that stakeholders understand the proposed requirements

and provide the SEC with meaningful feedback in this early stage of the rulemaking process. Interested parties can submit comments on the Proposed Rule until May 20, 2022 on regulations.gov. The proposed rule is available online at: https://www.sec.gov/rules/proposed/2022/33-11042.pdf.
(Breana Inoshita, Hina Gupta)

DROUGHT CAUSES CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO WARN SURFACE WATER RIGHTS HOLDERS TO EXPECT CURTAILMENTS

The California State Water Resources Control Board (State Board or SWRCB) recently warned thousands of surface water rights holders that their use may be restricted or completely cut off in 2022 due to limited water supplies affected by the ongoing drought.

Background

The State Board manages surface water rights in California. In addition to issuing and enforcing permits for surface water rights, the SWRCB has authority to restrict water use during times of limited supply and drought. January and February 2022 were the driest on record for most of California, as the state enters a third consecutive year of drought.

State Board Issues 'Dry Year Letter' in March 2022

On March 21, 2022, the State Board issued a "Dry Year Letter" to approximately 20,000 water rights holders in the Sacramento River and San Joaquin River watersheds—the two largest rivers in the state—in addition to the watersheds of the Russian River, Scott River, Shasta River, Mill Creek and Deer Creek. These water rights holders include a vast spectrum of users, including cities, industrial users and farmers. The Dry Year Letter warned water rights holders to expect partial or total curtailments to their water rights this water year. It also reminded water rights holders of the requirement to timely report their water use. The Dry Year Letter states that in addition to fulfilling water rights holders' legal obligations to report, the information provided by the reports provides the SWRCB with the data it relies upon to manage water supplies, tailor anticipated curtailment orders and more precisely manage needs of water users and the environment.

Curtailment of Water Rights

The Dry Year Letter indicates that when curtailment orders are issued, curtailments would be begin with most junior water rights holders, namely appropriators with most recently issued diversion permits. The SWRCB indicates that if necessary, even senior water rights holders—those with pre-1914 appropriative rights and riparian rights—could see their use curtailed, and that curtailment orders may also be tailored to the needs and supplies of each water system, meaning the timing and extent of the curtailment may vary from watershed to watershed.

In 2021, the SWRCB ordered curtailment of water use in the late summer month of August; whereas, the recent Dry Year Letter warned water rights holders to expect curtailment even earlier in 2022. Prior to 2021, broad curtailment orders were issued during 2014-2016, 1987-88, and 1976-77. Certain regions have seen more frequent curtailments. The SWRCB's anticipation of a second year of curtailments beginning even earlier in the year reflects the severity of the threat to this year's water supplies.

Limitations on Other Water Sources

Water rights holders experiencing surface water curtailments may have difficulty supplementing from other sources. The federal Central Valley Project announced in February that due to shortage of supplies, it anticipated delivering zero percent of the contracted water supplies to most contractors this year. On April 1, 2022, the Central Valley Project reduced allocations to only that necessary for "public health and safety" for those municipal and industrial contractors who had previously been excepted from the zero percent allocation. Similarly, California's State Water Project recently announced reductions its initial allocations down to just 5 percent of contracted

supplies.

In prior years, surface water users have often relied more heavily on groundwater supplies during drought years. However, as the Sustainable Groundwater Management Act (SGMA) moves deeper into implementation, supplementing with groundwater may become more difficult. Groundwater basins subject to SGMA have now adopted Groundwater Sustainability Plans (GSPs)and begun regulating groundwater use in their areas including through pumping restrictions, allocations and volumetric pumping fees.

Conclusion and Implications

Ongoing drought conditions have yet again prompted anticipated and extensive SWRCB surface water curtailments and restrictions. As water users seek out alternative supplies, these conditions will likely result in an early test of SGMA implementation during a drought year and how local agencies will respond to urgent water needs while also staying on course to achieve long-term groundwater sustain-

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD ANNOUNCES NEW PROPOSED STANDARD FOR HEXAVALENT CHROMIUM

After years of waiting following the invalidation of California's previous standard for Hexavalent Chromium in drinking water, the State Water Resources Control Board (State Board) has finally announced a new standard that could take effect as early as 2024. As made famous by Julia Roberts in Erin Brockovich, the cancer-causing contaminant known as Hexavalent Chromium, or Chromium-6, is found in the drinking water of millions of Californians. With the new standard announced by the State Board, which would be the first standard nationwide targeting specifically hexavalent chromium, the state will finally have an enforceable standard for hexavalent chromium on the books.

The Proposed Standard

Back in 2011, a public health goal was set for hexavalent chromium at a mere 0.02 parts per billion. At this concentration, California scientists were able to say that it poses a negligible, one-in-a-million lifetime risk of cancer. Under the State Board's proposal, the Maximum Contaminant Level (MCL) would be set at 10 parts per billion—500 times the public health goal for negligible cancer risks. But while it's easy to say a more stringent standard should be adopted, the State Board has already had a previous MCL standard for hexavalent chromium overturned by California courts.

In July of 2014, an MCL standard of 10 parts per billion for hexavalent chromium was approved by the Office of Administrative Law. In 2017, however, the Superior Court of Sacramento County issued a judgment invalidating the MCL standard because the California Department of Public Health had failed to consider the economic feasibility for water suppliers to comply with the standard. Now five years later, the State Board has come back with the standard of 10 parts per billion, only this time with the accompanying feasibility analysis.

Among the findings of the State Board's look into the economic feasibility of implementing this standard, it was obvious that such water treatment standards would not be cheap. Rates for small water systems with fewer than 100 connections could see costs increase by around $38 per month if suppliers install Point-of-Use treatment technologies in households. Larger systems with 100 to 200 connections could see even higher increases ranging from $44 to $167 per month, based on installing reverse osmosis or other costly treatment systems, according to the State Board's estimates. The largest water providers would be much more capable of diffusing the costs across all customers, but even these large systems could see monthly rate increases up to $45.

Compliance Period

As a way to help alleviate some of these costs, the State Board is planning to provide up to four years for water providers to comply with the new standard should it be adopted. Under the current proposal,

systems with more than 10,000 service connections would be required to comply with the standard within two years of adoption, systems with 1,000 to 10,000 would be required to comply within three years of adoption, and systems with less than 1,000 service connections would be given the most time, being required to reach compliance within 4 years of adoption.

Technologically and Economically Feasibility

In concluding its Staff Report on the proposed standard, the State Board emphasized that the Health and Safety Code § 116365 requires that to the extent technologically and economically feasible the MCL be set at a level that is not only as close to the public health goal as feasible, but also avoids any significant risk to public health.

Comparing the California Standard

This new standard is expected to reduce the number of cancer and kidney toxicity cases, but at the proposed MCL of 10 parts per billion, the cancer risk is still 500 times greater than at the public health goal. This equates to a lifetime risk for individuals that 1 person out of 2,000 exposed to drinking water at 10 parts per billion for 70 years might experience cancer—a far cry from the goal of one-in-a-million, but admittedly much better than no standard at all. Comparing this standard to the 69 MCLs currently adopted in California, the proposed MCL standard for hexavalent chromium of 10 parts per billion would place it as the seventh least protective MCL, with 63 current MCL standards more protective of human health.

Conclusion and Implications

Throughout California, 331 community water wells exceed the proposed hexavalent chromium limit of 10 parts per billion over a ten-year average. The highest levels throughout the state were reported in parts of Ventura, Los Angeles, Yolo, Merced and Riverside counties with some areas like Los Banos showing up to three times the proposed standard. Alarmingly, the highest level reported by the state was in Ventura County, where one drinking water well reported 173 parts per billion.

The current proposal is only an administrative draft at this time. Before the new standard can be implemented, the MCL must be considered for final adoption by the State Water Resources Control Board after a period for public comment and after any recommended changes have been considered. In any case, the proposal is still a huge step towards the establishment of an MCL standard for hexavalent chromium. For more information on the State Water Resources Control Board's proposed hexavalent chromium standard *see*: https://www.waterboards.ca.gov/press_room/press_releases/2022/pr03212022-hexavalent-chromium.pdf and https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/Chromium6.html.

(Wesley A. Miliband, Kristopher T. Strouse)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•March 30, 2022—The U.S. Environmental Protection Agency (EPA) announced settlements with Canadian-based Crescent Point Energy U.S. Corp. (Crescent Point) and Houston, Texas-based EP Energy E & P Company, L.P. (EP Energy) resolving alleged violations of the federal Clean Air Act at oil and gas production facilities in Utah's Uinta Basin. Both settlements were filed in the U.S. District Court for the District of Utah simultaneously with complaints that the two companies' oil and gas production operations in the Uinta Basin violated requirements to control VOC emissions from storage tanks. The Crescent Point settlement requires the company to pay a civil penalty of $3 million for violations of requirements to control volatile organic compound (VOC) emissions from storage tanks at 30 previously owned oil and gas production facilities. The EP Energy settlement resolves similar violations across 246 production facilities and requires the company to pay a civil penalty of $700,000, take extensive measures to ensure future compliance, and implement a $1.2 million mitigation project to install pollution controls at facilities that are not otherwise subject to control requirements. The $3 million Crescent Point civil penalty will be split evenly between the United States and the State of Utah. Crescent Point has agreed to deposit $1.2 million of the $1.5 million civil penalty owed to Utah into the state's Environmental Mitigation and Response Fund for air quality-related projects across the state. Under the Consent Decree, EP Energy will implement extensive design, operation, and maintenance improvements at 246 oil and gas production facilities. The Consent Decree requires EP Energy to post verifications of facility design, required certifications, and the final mitigation report on its website.

•April 4, 2022—EPA will collect civil penalties from two companies that allegedly sold illegal "defeat devices" designed to render automobile emission controls inoperative, in violation of the federal Clean Air Act. Baillie Diesel Inc. of Nixa, Missouri, agreed to pay $18,000; and D & K Repair LLC of Rock Valley, Iowa, will pay $90,000. As part of the settlements, the companies agreed to demolish their inventories of defeat device components and certified that they have stopped selling devices that disable vehicle emission controls.

•April 7, 2022—EPA announced a settlement with JTR Heating and Air Conditioning, Inc. in Monee, Illinois, to resolve alleged violations of Clean Air Act stratospheric ozone regulations. EPA's consent agreement and final order with JTR resolves alleged violations of regulations regarding the protection of the stratospheric ozone layer. JTR handles the maintenance, service, repair and disposal of appliances containing ozone-depleting refrigerants and their substitutes. EPA regulations prohibit anyone from knowingly venting or otherwise releasing refrigerant to the environment during work on appliances. EPA alleged that on at least two separate occasions, JTR knowingly vented R-22 and R-410a refrigerant during servicing of those appliances. Under the settlement, JTR will pay a $28,919 civil penalty and resolve the alleged violations.

•April 11, 2022—On Thursday, March 31, 2022, the U.S. District Court for the District of Columbia denied a challenge to EPA's successful litigation of significant Clean Air Act vehicle importation violations, upholding the agency's right to enforce the law and protect the public from dangerous air pollution. The challenge was brought by Taotao USA, Inc, Tao-

tao Group Co., Ltd., and Jinyun County Xiangyuan Industry Co., Ltd. (plaintiffs). Specifically, plaintiffs challenged an Environmental Appeals Board decision that affirmed plaintiffs violated Clean Air Act §§ 203(a) and 213 by importing for sale 109,964 motorcycles and recreational vehicles with catalytic converters that did not comply with certification requirements. In addition to affirming plaintiffs' liability, the District Court also affirmed the $1,601,150 civil penalty assessed by the Administrative Law Judge. Certification requirements ensure that vehicles brought into commerce conform to design specifications for pollution control equipment.

Civil Enforcement Actions and Settlements—Water Quality

•March 22, 2022—EPA has issued emergency orders under the Safe Drinking Water Act (SDWA) to four mobile home park water systems, requiring the mobile home park owners to comply with federal drinking water safety requirements and to identify and correct problems with their drinking water systems that present a danger to residents. The mobile home parks— Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park—are all located on the Torres Martinez Desert Cahuilla Indians' Reservation in California. None of the water systems were previously registered with EPA and will now be required to comply with SDWA regulations. Under the terms of EPA's emergency orders, the owners of Arellano Mobile Home Park, Castro Ranch, Gonzalez Mobile Home Park, and Sandoval Mobile Home Park are required to provide at least one gallon of drinking water per person per day at no cost for every individual served by the system; submit and implement an EPA-approved compliance plan to reduce arsenic below the MCL; and properly monitor the systems' water and report findings to EPA.

•March 31, 2022—EPA announced that GT Metals & Salvage LLC of Longview, Washington has agreed to pay a $50,300 penalty for repeated Clean Water Act violations. EPA found the company failed to comply with Washington's Industrial Stormwater General Permit EPA Website, which resulted in regular discharges of stormwater into ditches that eventually reach the Columbia River. Industrial stormwater from sites like GT Metals may include metals, polychlorinated biphenyls (PCBs), fuel oil, hydraulic oil, brake fluids, lead acid, and lead oxides. These pollutants and other debris can harm aquatic life and affect water quality. During inspections on February 2020, EPA found that the company failed to develop a Stormwater Pollution Prevention Plan (SWPPP); implement best management practices; conduct required sampling of discharges; conduct monthly visual inspections; and complete, submit, and maintain records.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•April 8, 2022—EPA announced a settlement with Two Chicks and a Hammer, Inc., of Indianapolis, Indiana, to resolve alleged violations of the Lead Renovation, Repair and Painting Rule that were depicted on the television program "Good Bones." EPA alleged that beginning in 2017, Two Chicks and a Hammer performed or directed workers to perform renovations in three Indianapolis residential properties constructed prior to 1978 without complying with applicable RRP Rule requirements. Since being contacted by EPA, the company has obtained RRP firm certification, certified it is complying with the RRP Rule and agreed to comply with the RRP Rule in all future renovation activities. Under the settlement, Two Chicks and a Hammer, Inc. will pay a civil penalty of $40,000 and produce a video about renovations involving lead-based paint, primarily featuring Mina Starsiak Hawk. The company will also post another video on social media about protecting children from lead exposure.

Indictments, Sanctions, and Sentencing

•April 8, 2022—The Sanitary District of Highland, Indiana, and the Town of Griffith, Indiana, have agreed to construction projects and capital investments that will eliminate discharges of untreated sewage from their sewer systems into nearby water bodies, including the Little Calumet River. In two separate consent decrees, Highland and Griffith have each agreed to implement plans that will significantly increase the amount of wastewater they send to the neighboring town of Hammond for treatment and eliminate points in their sewer systems that overflow when their systems become overloaded.

Together, the towns will spend about $100 million to improve their sewer systems. In addition, Highland will pay a civil penalty of $175,000 and Griffith will pay a civil penalty of $33,000. The two consent decrees would resolve the violations alleged in the underlying complaint filed by the United States and the state of Indiana, which alleges that Highland's sanitary sewage collection system overflowed on 257 days since 2012, resulting in discharges of untreated sewage into the Little Calumet River or a tributary to the river. The complaint also alleges that Griffith discharged sewage into a wetland adjacent to the Little Calumet River on 16 days since 2013. Finally, the complaint alleges that both Highland and Griffith failed to comply with previous orders by EPA to stop these illegal discharges. Under the proposed consent decrees, Highland and Griffith will also implement plans that will improve operations and maintenance of their sewer system and ability to address and respond to any unforeseen sanitary sewer overflows in the future. Highland and Griffith will submit semi-annual progress reports to the United States and the state until all work has been completed and all of the reports and deliverables required will be available to the public on their municipal websites.
(Andre Monette)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS NEPA DOCUMENT FAILED TO SUFFICIENTLY ANALYZE GHG EMISSIONS AND CLIMATE IMPACTS FROM PROPOSED MINING EXPANSION PROJECT

350 Montana v. Haaland, ___F.4th___, Case No. 20-35411 (9th Cir. Apr. 4, 2022).

The United States Department of the Interior (DOI) approved a proposed mining expansion in the State of Montana, finding in a 2018 Environmental Assessment (EA) under the National Environmental Policy Act (NEPA) that the project would not have a significant impact on the environment relative to cumulative statewide, national, and global greenhouse gas (GHG) emissions. Plaintiffs challenged, claiming DOI failed to take a "hard look" at the effects of the expansion's GHG emissions and failed to provide a convincing statement of reasons for the finding that the expansion would not have a significant effect on the environment. The Ninth Circuit Court of Appeals found that DOI's analysis failed to satisfy NEPA and remanded for further proceedings.

Factual and Procedural Background

Signal Peak Energy, LLC sought to expand its mining operations in south-central Montana. The expansion was expected to result in the emission of 190 million tons of GHGs. In 2018, DOI published an EA in which it explained that the amount of GHGs emitted over the 11.5 years that the mine is expected to operate would amount to 0.44 percent of the total GHGs emitted globally each year. The 2018 EA also calculated the project's GHG emissions as a percentage of U.S. annual emissions and Montana's annual emissions, but these domestic calculations only included the emissions generated by extracting and transporting the coal. Emissions from combustion of the coal (which account for 97 percent of the projected GHG emissions) were not included in the domestic calculations. Based on the various comparisons, DOI found that the project's GHG emissions would not have a significant impact on the environment.

The proposed mine expansion itself, even prior to the 2018 approval, had been subject to various litigation. Following DOI's 2018 actions, plaintiffs filed another legal action. Ultimately, the U.S. District Court granted summary judgment in favor of DOI on all but one claim: that DOI failed to consider the risk of coal train derailments along the corridor between the mine site and the port at Vancouver, British Columbia. The District Court vacated the 2018 EA, but not DOI's approval of the mine expansion, and remanded the matter for consideration of train derailment.

DOI subsequently published another EA that incorporated the 2018 EA and considered train derailment risks for the first time. Plaintiffs then filed this appeal.

The Ninth Circuit's Decision

Mootness

The Ninth Circuit first addressed Signal Peak's claim that the case was moot because plaintiffs challenged the 2018 EA, but the 2018 EA had been superseded by the EA that DOI prepared in 2020 after the U.S. District Court remanded the case for consideration of train derailments. The Ninth Circuit disagreed, finding that the 2018 EA retained relevance because the relevant portions (*i.e.*, the analysis of GHG emissions and the impact of those emissions on global warming, climate change, and the environment) were expressly incorporated into the 2020 EA and reissued. Accordingly, the Ninth Circuit retained the ability to order relief in the case.

Greenhouse Gas Emissions

The Ninth Circuit next addressed plaintiffs' claim that the EA violated NEPA by failing to provide a sufficient statement of reasons why the project's impacts were insignificant. The Ninth Circuit found that the 2018 EA had failed to articulate any science-

based criteria of significance in support of its Finding of No Significant Impact (FONSI), but instead relied on the arbitrary and conclusory determination that the mine expansion project's emissions would be relatively "minor." Comparing the emissions from the single project source against total global emissions, the Ninth Circuit found, "predestined" that the emissions would appear relatively minor, even though for each year of its operation the coal from the project would be expected to generate more GHG emissions than the single largest point source of GHG emissions in the United States. The Ninth Circuit also found that the EA's domestic comparisons failed to satisfy NEPA because DOI did not account for the emissions generated by coal combustion, obscuring and understating the magnitude of the project's emissions relative to other domestic sources of GHGs.

The Ninth Circuit disagreed, however, that DOI was required to use a "Social Cost of Carbon" metric (a method of quantifying GHG impacts that estimates the harm, in dollars, caused by each incremental ton of carbon dioxide emitted into the atmosphere in a given year) to quantify the environmental harms that would result from the project's GHG emissions. The Ninth Circuit also held that it was less clear whether DOI had any other metric available to assess the impact of the project. Because additional fact-finding therefore was necessary to decide whether an Environmental Impact Statement (EIS) was required, and because the record concerning the consequences of vacatur was not developed, the Ninth Circuit remanded to the District Court.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the sufficiency of analysis for greenhouse gasses and climate change in NEPA documents. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/04/04/20-35411.pdf.
(James Purvis)

NINTH CIRCUIT AFFIRMS SUMMARY JUDGMENT IN FAVOR OF U.S. FISH AND WILDLIFE SERVICE, FINDING THE 'BARRED OWL REMOVAL EXPERIMENT' DID NOT VIOLATE NEPA

Friends of Animals v. United States Fish and Wildlife Service, 28 F.4th 19 (9th Cir. 2022).

On March 4, 2022 the Ninth Circuit affirmed summary judgment in favor of the U.S. Fish and Wildlife Service (FWS or the Service) in an action that challenged the Service's "barred owl removal experiment" under the federal Endangered Species Act (ESA) and the National Environmental Policy Act (NEPA). The court's panel held that the experiment, which would remove barred owls from the threatened northern spotted owl's habitat, would produce a "net conservation benefit," and that the Service was not required to issue a supplemental Environmental Impact Statement (EIS) because an earlier analysis adequately contemplated the experiment.

Factual and Procedural Background

The northern spotted owl is one of three subspecies that commonly resides in mature and old-growth forests in the Pacific Northwest and northern California. Due to its dwindling population, the owl is considered "threatened" under the ESA. Conversely, the unrelated barred owl is an abundant species native to eastern North America. Over the past century, the barred owl population has grown and expanded westward, in turn encroaching upon the spotted owl's habitat.

The FWS' 2011 Northern Spotted Owl Recovery Plan found that barred owls negatively impacted northern spotted owl survival and reproduction. Barred owls competed for food and nesting/roosting sites; at times, attacking their spotted owl brethren. As part of the agency's broader efforts to preserve spotted owl populations, the Recovery Plan charged FWS with designing and implementing large-scale control experiments to assess the effects of barred owl

removal and spotted owl site occupancy, reproduction, and survival.

In 2013, FWS issued a Record of Decision (ROD) and EIS authorizing a "barred owl removal experiment." The experiment would lethally remove barred owls from certain areas to measure their environmental and demographic effect on spotted owls, including the effects on rates of occupancy, survival, reproduction, and population. The experiment designated four "study areas" across the spotted owl's range, including a 500,000-acre stretch along the Oregon Coast. Within that area, FWS designated "treatment areas," from which approximately 3,600 barred owls would be removed over four years. The EIS concluded that the experiment would have a negligible effect on the barred owl population, and only minor and short-term negative effects on spotted owls; with the overall experiment yielding a net positive benefit by providing FWS the data necessary to craft long-term recovery strategies for the spotted owl.

Enhancement of Survival Permits and Safe Harbor Agreements

The ESA generally prohibits the "take" of any threatened or endangered species. As an exception, ESA allows FWS to issue "Enhancement Survival Permits" (ESP), which authorize "take" for "scientific purposes or to enhance the propagation or survival of the affected species." FWS may issue these permits and implement their terms via "Safe Harbor Agreements" (SHA), which the agency concurrently enters into with non-federal landowners whose lands the agency seeks to use for conservation efforts. In doing so, FWS must find that the SHAs provide a "net conservation benefit" to the affected species by contributing to its recovery.

FWS issued ESPs and entered into SHAs with four non-federal landowners within the Oregon Coast study area. Each permittee allowed FWS to access their property to remove barred owls and agreed to support onsite surveys. In exchange, the permittees could continue harvesting timber in areas where no spotted owls resided. The permits thus authorized incidental take only in "non-baseline" sites—*i.e.*, where no resident spotted owl had been observed within the last three to five years.

Biological Opinions and Environmental Impact Statements

FWS issued a series of Biological Opinions (BiOps) pursuant to ESA, which concluded the ESPs would not jeopardize the spotted owl or its critical habitat. Instead, the permits would confer an overall benefit based on the information gained from the experiment.

FWS also prepared an Environmental Assessment for each permit, pursuant to NEPA. The EAs made a Finding of No Significant Impact (FONSI) because the permits only authorized incidental take on non-baseline sites, which are unlikely to be recolonized by spotted owls unless barred owls are removed.

At the U.S. District Court

In June 2017, Friends of Animals (Friends) sued FWS challenging the ESPs and SHAs. Friends alleged FWS violated ESA by: 1) issuing a permit that failed to achieve a "net conservation benefit"; 2) failing to use the best biological and habitat information to form baseline conditions; and 3) failing to analyze the SHA's effect on critical habitat. Friends also alleged FWS violated NEPA because it: 1) failed to prepare a Supplemental EIS; and 2) failed to discuss the experiment and permits in a single EIS, as required for "connected actions."

The U.S. District Court in Oregon rejected each of these contentions and granted summary judgment in favor of FWS. Friends timely appealed.

The Ninth Circuit's Decision

A three-judge panel for the Ninth Circuit Court of Appeals affirmed the District Court and rejected Friends' renewed ESA and NEPA claims.

'Informational Benefits' Constitute 'Net Conservation Benefits' under the ESA

As to Friends' first contention, the court agreed with FWS that the "informational benefit" gleaned from the removal experiment constituted a "net conservation benefit" under ESA. ESA's regulations authorize FWS to enter into SHAs with non-federal landowners whose lands the agency wants to use for conservation efforts where the proposed actions are reasonably expected to provide a net conservation benefit to the affected species. Contrary to Friends'

characterization, ESA's definition of "conservation" includes research activities aimed at collecting information, such as the efficacy of removing barred owls as a conservation strategy. Thus, by extension, "net conservation benefit" includes the informational and research benefits contemplated by the removal experiment. These benefits, in turn, indirectly aid the recovery of the northern spotted owl, as contemplated by the ESA.

FWS Reasonably Described Baseline Conditions Using Resident Owl Survey Data

The court rejected Friends' contention that FWS improperly defined the baseline sites that would not be subject to the permits' incidental take authorizations. For each SHA, FWS designated a site as "baseline" if a single spotted owl had been observed there between 2013 to 2015. By doing this, Friends claimed FWS determined the sites were "effectively abandoned," even though the agency's policy states that 3 to 5 years of survey data cannot establish site "abandonment." The Court of Appeals quickly debunked this, explaining that nowhere in the Safe Harbor Policy does it mention "abandonment" in its discussion of baseline conditions. Moreover, for each SHA, FWS determined that the baseline sites were "*unoccupied*," not "*abandoned*"—two wholly separate terms with differing requirements.

The court also rejected Friends' assertion that FWS needed to consider non-resident "floater" spotted owls in its baseline considerations. Here, FWS found floaters would likely not contribute to specie recovery because there was no evidence that they could successfully breed. Therefore, because the Safe Harbor Policy instructs FWS to be flexible, it was reasonable for FWS to set baseline sites based on the "resident" owls that are of primary concern.

FWS Adequately Analyzed the Small Critical Habitat Affected by the Oregon Permit

Friends objected to the BiOps for each permit, claiming they failed to analyze their overlap with critical habitat on state lands. The court rejected this, noting that Friends failed to point to anything in the administrative record to show that FWS failed to analyze affected critical habitat. Rather, because the amount of critical habitat that would be destroyed was unknown, FWS took a conservative approach, which still concluded that less than 0.04 percent of spotted owl habitat would be destroyed.

Friends also argued the BiOps were arbitrary and capricious because they only analyzed one subset of designated critical habitat—nesting/roosting—and ignored impacts to others, such as foraging, transient, or colonization habitats. Contrary to Friends' claim, the court determined that the BiOps did analyze the permits' effects on those sub-habitats, and concluded they would not be appreciably reduced due to their scattered nature. Even absent this analysis, it would not have been arbitrary and capricious for FWS to only focus on nesting/roosting habitats because they are the most indicative in determining whether owls can support themselves.

A Supplemental EIS under NEPA Was Not Required

NEPA does not specifically identify when an agency must prepare and issue a supplemental EIS. Guidance from the Council on Environmental Quality explains that a supplemental EIS is required if the agency makes substantial changes to the proposed action that raise environmental concerns, or there are significant new circumstances that bear on the proposed action or its environmental impacts. A supplemental EIS is not required if the new alternative is a minor variation or qualitatively within the spectrum of one of those discussed in the original EIS.

Contrary to Friends' contention, FWS did not make "substantial changes" to the removal experiment by issuing ESPs and SHAs that authorized the incidental take of spotted owls. Rather, the permits were merely a "minor variation" of the broader experiment because, even in their absence, the experiment could still proceed without access to non-federal lands. The permits and SHAs were also "within the spectrum of alternatives" discussed in the 2013 EIS. Therefore, it would have been "incongruous" with NEPA to require FWS to proceed with the experiment until such specifics were fleshed out in a supplemental EIS.

Finally, FWS took the requisite "hard look" in determining that the permits were not environmentally significant. FWS prepared an EA for each permit and concluded an incidental take of spotted owls would occur only if the experiment increased the species' population in non-baseline areas. Because barred owls would resume displacing spotted owls after the experi-

ment ended, spotted owl population gains would be temporary, therefore, the experiment's environmental effects would be the same with or without the permits.

A Single EIS Was Not Required under NEPA

Lastly, the Ninth Circuit held that the permits and experiment were not "connected actions" that required a single EIS. Friends argued that each permit and SHA depended on the experiment's informational benefit to satisfy the "net conservation benefit" requirement, therefore, FWS erred in analyzing the experiment separately.

Under NEPA, actions are considered "connected" if they "cannot or will not proceed unless other actions are taken previously or simultaneously," or if they are interdependent parts of a larger action on which they depend. If one project could be completed without the other, they have independent utility. Under this framework, the permits are not "connected" to the broader removal experiment because the experiment could proceed without the permits. Though the permits granted access to non-federal lands, such access was not "necessary" to complete the experiment; and any failure to access those lands would only delay, rather than inhibit, the overall experiment. Finally, the permits possess "independent utility" from each other because the issuance of one did not depend on the issuance of another. For these reasons, FWS did not have to assess their environmental impacts in a single EIS.

Conclusion and Implications

The Ninth Circuit Court of Appeals' opinion offers a straightforward analysis of basic Endangered Species Act and National Environmental Policy Act principles. As demonstrated by the barred owl removal experiment, an experiment designed to gain information about species survival can properly satisfy the "net conservation benefit" prescribed by ESA's "Safe Harbor Policy." In crafting these experiments, the agency may appropriately use survey data to distinguish between pre-existing "resident" species vs. temporary "floaters" to establish baseline conditions. And while the agency may issue permits and Safe Harbor Agreements to access non-federal lands to carry out these experiments, those permits are not necessarily "connected," such that they would require a single or supplemental EIS under NEPA. The Ninth Circuit's opinion is available at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/03/04/21-35062.pdf.

(Bridget McDonald)

ELEVENTH CIRCUIT CLARIFIES PLEADING STANDARD FOR AESTHETIC INJURY UNDER THE CLEAN WATER ACT

Glynn Environmental Coalition, Inc., et al. v. Sea Island Acquisition, LLC, 26 F.4th 1235 (11th Cir. 2022).

The U.S. Court of Appeals for the Eleventh Circuit recently vacated a lower court's ruling denying standing to an environmental group petitioner. The court held that the petitioner's allegations were sufficient to establish and injury in fact and confer Article III standing.

Factual and Procedural Background

Sea Island Acquisition owns a half-acre parcel of land near Dunbar Creek in Glynn County, Georgia. The parcel is considered a wetland under the federal Clean Water Act (CWA). When Sea Island sought to fill that parcel with outside materials, the CWA required a Section 401 water quality certification from the State of Georgia and a CWA Section 404 permit from the U.S. Army Corps of Engineers (Corps).

In 2012, the Georgia Environmental Protection Division issued a conditional Section 401 water quality certification for all projects authorized by Nationwide Permit 39—the general permit that was issued to Sea Island for its project. On January 10, 2013, Sea Island submitted a pre-construction notification to the Corps for its plan to fill the wetland for the purpose of constructing a commercial building. On February 20, 2013, the Corps issued a preliminary jurisdictional determination determined that the

parcel might be a wetland, and the Corps "verified authorization" of the proposed project for two years or until Nationwide Permit 39 was modified, reissued, or revoked.

Sea Island filled the wetland between February 20, 2013, and March 27, 2013, but did not erect or intend to erect any buildings or structures on the wetland. Sea Island led the Corps to believe it was constructing a commercial building on its wetlands when it only intended to landscape over the wetland with fill material.

Two environmental organizations, and Jane Fraser, sued Sea Island. The organizations are Georgia nonprofit corporations. Some of their members, including Fraser, reside in Glynn County near the wetland. Fraser was a 20-year resident of Glynn County who loved to the area because of the unique ecology and native habitat, wildlife, and vegetation. Fraser alleged that the fill of the wetland was the partial cause of a noticeable deterioration of the natural aesthetic beauty, water quality, and habitat of the area.

Sea Island moved to dismiss the amended complaint for lack of standing and for failure to state a claim upon which relief could be granted. Sea Island argued that the allegations did not establish that any of the parties had suffered an injury in fact. The U.S. District Court dismissed the complaint for lack of standing on the ground that the plaintiffs failed to allege an injury in fact.

The Eleventh Circuit's Decision

The threshold issue is whether plaintiffs suffered an injury in fact to confer standing under Article III of the U.S. Constitution. At the motion-to-dismiss stage, a court evaluates standing by determining whether the complaint clearly alleges facts demonstrating each element. An individual suffers an aesthetic injury when the person uses the affected area and is a person for whom the aesthetic value of the area will be lessened by the challenged activity. An individual can meet the burden of establishing that injury at the pleading stage by attesting to use of the area affected by the alleged violations and that the person's aesthetic interests in the area have been harmed.

Sea Island put forward three arguments in defense of the dismissal. First, it argued that the U.S. District Court properly concluded Fraser did not allege that she visited the wetlands before the fill, only that she enjoyed the aesthetics of the wetland. Second, it argued that Fraser must have entered the wetland to have an aesthetic interest in it. Third, it argued that there is no interest in a wetland that is private property.

The Court of Appeals first noted that Fraser did specifically allege that she derived aesthetic pleasure from the wetland before the fill, and concluded that Fraser did not need to visit the wetland to derive the pleasure.

Second, the court noted that Fraser need not physically step foot on the wetland to have an aesthetic pleasure from it. Finally, the court held that even if the wetland was private property, Fraser alleged an aesthetic injury from the fill. Therefore, Fraser adequately alleged that an injury to aesthetic interests in the wetland from viewing the wetland, deriving aesthetic pleasure from its natural habitat and vegetation, and now deriving less pleasure from the fill of the wetland.

Injury

In analyzing whether plaintiffs' met their burden of establishing an injury, the court noted that Fraser "plausibly and clearly alleged a concrete injury" to aesthetic interest. The court highlighted the fact that Fraser gains aesthetic pleasure from viewing wetlands in their natural habitat. Fraser regularly visited the area to see the wetland. After the wetland was replaced with sodding, Fraser derived less pleasure from the wetland because the habitat and vegetation were unnatural. Thus, Fraser's injuries were sufficient at the pleading stage.

Conclusion and Implications

This case highlights the pleading requirements for environmental plaintiffs alleging an injury to aesthetic interests. It highlights that an individual member of an environmental organization alleges sufficient facts to withstand a motion to dismiss by alleging the individual viewed the wetland, derived aesthetic pleasure from its natural habitat and vegetation, and derives less pleasure from the altered site. https://scholar.google.com/scholar_case?case=10481156572434704205&hl=en&as_sdt=6&as_vis=1&oi=scholarr
(Marco Ornelas Lopez, Rebecca Andrews)

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SIXTH CIRCUIT AFFIRMS DISMISSAL OF CLEAN WATER ACT CITIZEN SUIT AGAINST SEWER DISTRICT

South Side Quarry, LLC v. Louisville & Jefferson County Metro. Sewer District, 28 F.4th 684 (6th Cir. 2022).

The U.S. Court of Appeals for the Sixth Circuit recently affirmed a decision by the U.S. District Court to dismiss a quarry owner's federal Clean Water Act (CWA) claims against a sewer district for diverting flood flows into a quarry. The appellate court's decision explains the types of CWA violations that a plaintiff may bring a citizen suit to enforce, the procedural requirements a plaintiff must satisfy to successfully bring a CWA claim, and the differences between a discharge and a diversion.

Factual and Procedural Background

Under the CWA, a discharge of pollutants to navigable waters is prohibited, except as authorized by a permit issued in accordance with the CWA; without such a permit, a discharge is unlawful. The CWA allows states to issue permits under the CWA's National Pollutant Discharge Elimination System (NPDES). Kentucky issues NPDES permits for waters within the Commonwealth (KPDES permits). In limited circumstances, the CWA permits citizen suits to enforce violations of the CWA.

A body of water named Pond Creek drained into a large watershed in the Louisville area. The watershed had the potential to cause massive flooding issues, therefore the U.S. Army Corps of Engineers (Corps) undertook a plan to address the flooding by creating a separate channel for a tributary to Pond Creek, which would divert the tributary's excess water into Vulcan Quarry. Vulcan Quarry would serve as a detention basin, and the Corps planned to build a pipe that would allow the water to from Vulcan Quarry to drain back into the tributary as the flooding subsided. The Corps partnered with a sewer district to complete the project, where the Corps designed and constructed the project, and the sewer district acquired necessary property rights, including a flowage easement affecting the whole quarry, and operated and maintained the system. For 12 years, until the plaintiff acquired Vulcan Quarry, the project diverted excess stormwater from the tributary into Vulcan Quarry without issue.

When plaintiff took ownership of Vulcan Quarry, it provided the sewer district with notice that the plaintiff intended to sue the sewer district under the CWA. The notice alleged the sewer district was discharging stormwater and pollutants into Vulcan Quarry in violation of the CWA's general prohibition on dumping pollutants into waters of the United States, the easement, a consent decree, and various permits. After providing such notice, Plaintiff sued the sewer district.

The sewer district filed a motion to dismiss for failure to state a claim; and the District Court granted the sewer district's motion. The District Court found that some of plaintiff's claims were time-barred under a five-year statute of limitations, and that plaintiff gave the sewer district insufficient notice for the other claims. Plaintiff appealed.

The Sixth Circuit's Decision

Adequacy of Pre-Suit Notice

The appellate court's decision turned on whether plaintiff satisfied the CWA's pre-suit notice requirement. The court noted that plaintiff's CWA claims appeared to be contradictory—most CWA claims alleged violations of existing regulations, permit, or property rights, while the remaining claims alleged the sewer district discharged without a KPDES permit.

The court first considered the adequacy of the pre-suit notice in relation to the CWA claims alleging violations of six existing regulations, permits, or property rights: 1) the sewer district's easement; 2) the sewer district and the Corps' construction permit; 3) a consent decree between the sewer district, the EPA, and the Kentucky Cabinet; 4) agreements about upstream point sources; 5) the CWA's general prohibition on the discharge of pollutants; and 6) the sewer district's various KPDES permits. The court determined the notice was inadequate as to each. As to the first four, the court determined the easement was not an "effluent standard or limitation" under the

CWA; the construction permit was not a KPDES permit; the notice did not reference the consent decree, and plaintiff lacked standing to enforce the consent decree; and the notice did not identify the owners, tracts of land, location of polluting sources, or any applicable effluent limitations or standards that might apply to the agreements.

The court also ruled that the CWA's citizen-suit provision does not authorize citizen suits for violating the general prohibition against discharging without a permit when the alleged discharger possesses a permit. Finally, the court determined the pre-suit notice was inadequate because it failed to identify any specific standard, limitation or order in the sewer district's existing KPDES permits that were violated.

Waters Flowing Through Tributary and Quarry Were Not Meaningfully Distinct Bodies of Water

The court next addressed plaintiff's claims that the sewer district was diverting water from the tributary into the quarry without a permit under the CWA. Plaintiff argued the diversion of water and pollutants from the tributary into the quarry was a discharge that required a KPDES permit, and that the sewer district was violating the CWA by discharging without a permit. The court disagreed, reasoning that the CWA only requires permits for "discharges," which are defined as "any addition of any pollutant to navigable waters from any point source." The court stated that when water simply flows from one portion of a body of water to another, rather than being removed from and then returned to the body of water, no discharge of pollutants occurs. The court then reasoned the waters flowing through the tributary and the quarry were not meaningfully distinct bodies of water: the diversion from the tributary into Vulcan Quarry was simply water moving from one portion of the body of water to another, and was not a discharge. In coming to this conclusion, the court relied on the Corps' plan for the project and a recent letter from the Corps that indicated the tributary and Vulcan Quarry were the same body of water. As a result, the notice failed to allege any discharge under the CWA.

Even if District Bodies of Water, Water Transfer Rule Exemption Would Apply

Furthermore, the court opined that even if the tributary and the quarry were separate bodies of water, the sewer district still would not need a KPDES permit because of the EPA's Water Transfer Rule. The Water Transfer Rules exempts water transfers, defined as activities that convey or connect waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial use, from the NPDES permitting system. The court indicated that the diversion of water from the tributary to the quarry fell within the rule, and therefore that the sewer district would not need a permit even if these were two separate bodies of water.

Therefore, the court affirmed the District Court's judgment and rejected plaintiff's claims.

Conclusion and Implications

This case serves as an important reminder that plaintiffs must give violators proper pre-notice suit, including indicating specific standards, limitations, or orders under the CWA alleged violated. Although a court is required to construe a complaint in the light most favorable to a plaintiff during a motion to dismiss, this decision serves as a reminder that a court may, nevertheless, carefully evaluate the alleged facts to determine whether they support a plausible inference of wrongdoing. The court's opinion is available online at:https://www.opn.ca6.uscourts.gov/opinions.pdf/22a0047p-06.pdf.
(William Shepherd, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL FINDS COUNTY'S EIR FOR A SPECIFIC PLAN AND REZONING PROJECT VIOLATED CEQA AS TO AIR QUALITY, WATER QUALITY AND CLIMATE CHANGE IMPACTS

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer, 75 Cal.App.5th 63 (3rd Dist. 2022).

Conservation groups filed petitions for writ of mandate alleging that Placer County's (County) approval of Specific Plan and rezoning to permit residential and commercial development in Martis Valley did not comply with the California Environmental Quality Act (CEQA) and the Timberland Productivity Act. The cases were consolidated, and the Superior Court issued a petition for writ of mandate directing the County to vacate its approvals only as they pertained to emergency evacuations for wildfires and other emergencies. The conservation groups appealed, and the County and landowner cross-appealed. The Court of Appeal for the Third Judicial District, on February 14, 2022 affirmed, upholding the County's analysis of emergency evacuation but finding several other CEQA violations.

Factual and Procedural Background

Real Party in Interest Sierra Pacific Industries (SPI) owns two large parcels of land in Martis Valley, an unincorporated area of Placer County between Truckee and Lake Tahoe. The west parcel is about 1,052 acres and the east parcel is about 6,376 acres. Both are undeveloped coniferous forest. Both parcels border, and in some small instances cross into, the Lake Tahoe Basin to the south. The west parcel is designated as Forest and zoned as Timberland Production Zone (TPZ), which restricts the land's permitted uses to growing and harvesting timber and other compatible uses. Most of the east parcel is designated Forest and zoned TPZ. About 670 acres of it is zoned for development of up to 1,360 dwelling units and 6.6 acres of commercial uses.

SPI has been engaged with conservation groups regarding conservation issues in Martis Valley for many years. In 2013, they signed an agreement to facilitate a transfer of the east parcel's development rights to portions of the west parcel and preserving the east parcel as permanent open space via purchase of a fee simple interest or conservation easement. Although cooperation among the parties ended, SPI and its partners applied to the County in 2013 for a Specific Plan they believed was consistent with the primary terms of the agreement. The Specific Plan would amend the Martis Valley Community Plan and zoning to: allow development of up to 760 residential units and 6.6 acres of commercial use on a 775-acre portion of the west parcel and withdraw those lands from the TPZ zone; and designate all of the east parcel as Forest and TPZ. Upon approval, SPI would sell the east parcel for conservation of place it in an easement.

It is these actions (not any approval of actual development) at issue in this case. The County released a Draft Environmental Impact Report (EIR) in 2015 and a Final EIR in 2016. After two hearings, the planning commission recommended the County deny the proposed Specific Plan. In October 2016, the County board of supervisors (Board) certified the EIR and approved the Specific Plan. The Board also found that the immediate rezoning of the west parcel out of the TPZ was consistent with the purposes of the Timberland Productivity Act and was in the public interest.

At the Superior Court

Conservation groups sued, alleging the County violated CEQA and the Timberland Productivity Act.

The Superior Court found in favor of the County on all claims except for the EIR's analysis of the project's impacts on adopted emergency response and evacuation plans. The court ordered that a writ of mandate issue directing the County to vacate its certification of the EIR and approval of the project as they pertained to emergency evacuations for wildfires and other emergencies. Conservation groups

appealed, and the County and real parties cross-appealed.

The Court of Appeal's Decision

The parties' appeals raised numerous issues, resulting in a Court of Appeal opinion some 120 pages in length. Broadly, in one appeal, the Court of Appeal found: 1) the EIR's analysis of impacts on Lake Tahoe was insufficient; 2) a greenhouse gas (GHG) mitigation measure did not comply with CEQA; and 3) the EIR's evaluation of impacts on evacuation plans was sufficient. In the other appeal, the Court of Appeal found: 1) the same GHG mitigation measure was inadequate; 2) substantial evidence did not support the County's finding that no additional feasible mitigation measures existed to mitigate the project's transportation impacts; and 3) the EIR's energy analysis was insufficient.

An overview of the Court of Appeal's conclusions is as follows:

- The County did not abuse its discretion in the way it described the regional air quality setting. It used reliable data specific to the Tahoe Basin that was available. Substantial evidence supported the County's determination in making the description.

- The County abused its discretion by not adequately describing Lake Tahoe's existing water quality, which could be impacted by traffic generated by the project.

- The County did not abuse its discretion by analyzing air quality impacts by reference to a threshold of significance approved by the Placer County Air Pollution Control District. The County had discretion to reasonably formulate standards different than those used by the Tahoe Regional Planning Agency (TRPA). The County did not err in failing to adopt and use a VMT threshold used by TRPA as a threshold of significance.

- Substantial evidence supported the County's decision not to recirculate the Draft EIR after the Final EIR added information regarding climate change impacts. At no time did the Final EIR state that the project's greenhouse gas emissions would impact the environment more severely than what was disclosed in the Draft EIR.

- A mitigation measure regarding greenhouse gas emissions that was to be applied to future projects was invalid and improperly deferred. The measure required the project to meet certain adopted future targets that did not currently exist and may never exist. Thus, the measure deferred the determination of the impact's significance to an unknown time and did not sufficiently commit the County and applicants to mitigating the impact.

- The County made the necessary findings under the Timberland Productivity Act required to immediately rezone the west parcel from TPZ to a zoning that would permit the proposed development. Those findings were supported by substantial evidence.

- Substantial evidence supported the County's finding that the project would not have a significant impact on emergency response and evacuation plans. Among other things, the project would provide emergency vehicle access by way of the main entrance and also two emergency vehicle access routes to the west parcel. The project also would not cut off or otherwise modify any existing evacuation routes. The project also would develop a fire protection plan that would include a project emergency and evacuation plan.

- Substantial evidence supported the County's finding that cumulative conversion of forest land associated with the project would be less than significant. The Final EIR had found that estimating additional climate-related forest loss due to drought, wildfire, or bark beetle, as the conservation groups urged, would be speculative. The County reasonably relied on General Plan projections and conclusions to assess cumulative impacts.

- Substantial evidence did not support the County's conclusion that no additional feasible mitigation measures existed to mitigate the project's significant and unavoidable impact to traffic congestion on State Route 267, aside from payment of a traffic impact fee.

• The EIR's analysis of the project's energy consumption was insufficient under CEQA because it failed to address whether any renewable energy features could be incorporated into the project as part of determining whether the project's impacts on energy resources were significant.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding numerous important California Environmental Quality Act topics, including but not limited to CEQA thresholds of significance, mitigation measures, recirculation, emergency evacuation plan impacts, and energy. The Third District Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C087102.PDF.
(James Purvis)

CALIFORNIA COURT OF APPEAL FINDS CITY'S ANALYSIS OF AND COMMENT RESPONSES TO TRAFFIC IMPACTS IN FINAL EIR SUFFICIENT IN LIGHT OF AMENDMENTS TO CEQA GUIDELINES

Pleasanton Citizens for Responsible Growth v. City of Pleasanton, ___Cal.App.5th___, Case No. A161855 (1st Dist. Feb. 28, 2022).

The First District Court of Appeal in *Pleasanton Citizens for Responsible Growth v. City of Pleasanton* affirmed the trial court's decision rejecting Pleasanton Citizens for Responsible Growth's (PCRG) claims challenging the adequacy of the City of Pleasanton's (City) analysis and comment responses related to traffic and air quality impacts of the construction of a Costco Wholesale Corporation (Costco) retail store, gas station, and other commercial developments (cumulatively: Project) under the California Environmental Quality Act (CEQA), holding that PCRG's claims were moot in light of recent amendments to the CEQA Guidelines (Guidelines).

Factual and Procedural Background

In 2009, the City of Pleasanton (City) approved an update to its General Plan, which included an economic and fiscal element that contained "an aggressive program to retain and expand business." The Project at issue here is part of this program.

In September 2015, the City released the Draft Supplemental Environmental Impact Report (Draft SEIR) for the Project, which incorporated a transportation impact analysis. The analysis used a Level of Service (LOS) measurement to describe traffic congestion and delay at intersections based on the amount of traffic each roadway can accommodate in light of factors such as speed, travel time, delay, and freedom to maneuver. The Draft SEIR found that although certain traffic impacts would be less than significant, it also found that the Project would degrade traffic conditions below a LOS D rating at certain specified intersections and freeway ramps, resulting in significant impacts requiring mitigation measures.

The Draft SEIR also analyzed the Project's cumulative impacts on air quality, using the methodology identified by the Bay Area Air Quality Management District (BAAQMD), the regional agency responsible for developing air quality plans in the San Francisco Bay Area. The Draft SEIR concluded that the Project would result in significant and unavoidable cumulative air pollutant air quality impacts.

In March 2016, the City released the Final Supplemental Environmental Impact Report (Final SEIR), and in 2017, approved the Project and certified the Final SEIR.

In December 2017, PCRG filed a lawsuit to rescind the City's approval of the Project and certification of the Final SEIR, arguing that the City violated CEQA because it did not provide an adequate analysis of the Project's air quality impacts in the Final SEIR. In September 2018, the City voted to rescind the Project's approvals and conduct additional air quality analyses, and PCRG dropped its lawsuit.

In July 2019, the City circulated the Partial Recirculated Draft Supplemental Environmental Impact

Report (Draft RSEIR). The Draft RSEIR included the updated air quality analyses, and the City determined that the Project's air pollutant emissions were less than significant. The City received roughly 300 public comments in response. Specifically, some of the comments suggested that the Draft SEIR's analysis of traffic and air quality impacts did not account for future cumulative development in the region, due to other, nearby developments under consideration by an adjacent city.

In November 2019, the City prepared the Partial Recirculated Final Supplemental Environmental Impact Report (RFSEIR), containing the City's responses to the comments received in response to the Draft RSEIR. The City defended its traffic and air quality analyses, responding that "all of the Draft SEIR's analyses of these issues…were based on models that accounted for regional cumulative growth," and that the:

> . . .models have already effectively accounted for individual development projects such as those identified in the comment, as the models assume that future development will occur in a manner that is generally consistent with the general plan and zoning of each site.

The City's other responses reflect the same defense of its Draft SEIR, echoing that it already incorporated thorough analyses of traffic and air quality impacts.

In February 2020, PCRG sent a letter to the City criticizing the RFSEIR for not adequately considering other pending or approved projects. One of its arguments was that the City did not analyze the additional nearby projects and that the RFSEIR should be revised and re-circulated as a draft. On February 4, 2020, the City's Planning Commission approved the project and certified the RFSEIR.

At the Superior Court

On March 4, 2020, PCRG filed a petition for writ of mandate to urge the City to set aside the certification of the EIR and approval of the Project, arguing that: 1) the City did not include the other nearby projects within the RFSEIR's cumulative impact analyses on traffic and air quality, and 2) the City failed to respond to specific public comments with a "good-faith, reasoned analysis."

The City, joined by Costco, opposed the petition and argued that PCRG's arguments were subject to the substantial evidence standard, and that under that standard, PCRG failed to advance the evidence required to affirmatively prove the RFSEIR did not adequately analyze cumulative impacts by not including the other nearby projects in the analysis.

The trial court ruled in favor of the City and PCRG, holding that: 1) the substantial evidence standard is proper; 2) there was substantial evidence in the record showing that the RFSEIR adequately considered the other nearby projects in its cumulative impact analysis; and 3) there is substantial evidence in the record showing the City's responses to the specific comments included good faith reasoned analysis in compliance with the requirements of Guidelines § 15088.

The Court of Appeal's Decision

The Court of Appeal affirmed the trial court's decision, finding that: 1) due to the amendment to Guidelines § 15064.3 subdivision (a), PCRG's argument regarding the City's adequacy of traffic analysis and sufficiency of responses to comments is moot; and 2) PCRG failed to set forth any evidence concerning the RFSEIR's analysis of cumulative air quality impacts under a substantial evidence standard, and that the City's responses to the comments were sufficient.

The Court of Appeal reviewed the agency's determinations for substantial evidence and analyzed the challenges related to the traffic impacts, the air quality impacts, and whether or not the City's responses to public comments regarding the adequacy of those impact analyses were in compliance with CEQA.

Traffic Analysis

With regards to the traffic analysis argument presented by PCRG, the City and Costco argued that the Court of Appeal did not need to consider the arguments in light of recent amendments to the Guidelines. The Court of Appeal cited to both *Citizens for Positive Growth & Preservation v. City of Sacramento*, 43 Cal.App.5th 609, 625 (2019) and Guidelines **§** 15064 to support its holding that PCRG's arguments were moot.

Guidelines **§** 15064.3 "describes specific considerations for evaluating a project's transportation impacts" and provides that, except for roadway capacity

projects, "a project's effect on automobile delay shall not constitute a significant environmental impact." (Guidelines, § 15064.3, subd. (a).) The court explained that although this section of the Guidelines became effective after the City certified the RFSEIR and approved the project, it applied prospectively, and thus, PCRG's argument is moot.

Additionally, the court explained that due to the amended Guidelines section, PCRG's related argument that the City's response to public comments on the cumulative impacts is also moot. This is because, as the court explained, PCRG's claims rely on the premise that the Project's cumulative traffic impacts constitute significant impacts within the meaning of CEQA. However, the Project's traffic impacts as determined by the LOS study, cannot constitute a significant impact pursuant to the amendment.

Air Quality Analysis

In response to PCRG's challenge regarding the adequacy of the City's analysis of, and responses to public comments on the Project's cumulative impacts on air quality, the court also found in favor of the City and Costco. The court stated that PCRG did not raise a direct challenge to the air quality analysis, rather it "piggybacks" those claims onto those directed at the City's findings on traffic impacts. The court reasoned that PCRG only attacked the validity of the City's analysis with respect to traffic impacts, arguing that the City should have rerun its traffic model for the Project and nearby developments, relies on a letter prepared by its traffic consultant, does not summarize the RFSEIR's analysis of air quality impacts, does not explain specifically what part of the RFSEIR's analysis is defective, and refers to the adjacent projects as "traffic-intensive."

Substantial Evidence

Additionally, the court explained that PCRG failed to set forth any evidence under a substantial evidence standard that an appellant is required to provide when challenging an EIR for insufficient evidence. Instead, PCRG argued that the City should have rerun its traffic model to account for the adjacent projects, questioned the data and methodology of the traffic model, and that the Draft SEIR needed to be revised and recirculated. Citing to the trial court's analysis, the Court of Appeal wrote that PCRG's claim:

> . . .isn't a challenge to the scope of the impact analysis. This is a challenge to whether or not their rationale for not running an independent study or to update their traffic modeling is reasonable or not reasonable…

PCRG did not set forth the required evidence to show whether or not the City's rationale was reasonable.

Responses to Public Comments

The court similarly rejected PCRG's argument that the responses to public comments were inadequate. The court presented the standard for responses to public comments: "responses to comments need not be exhaustive; they need only demonstrate a 'good faith, reasoned analysis'" and that:

> . . .the sufficiency of the agency's responses to comments on the draft EIR turns upon the detail required in the responses, and where a general comment is made, a general response is sufficient. (citing *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal. App.4th 357, 378; Guidelines, § 15088, subd. (c).)

Where PCRG argues that the City's responses did not meet these standards, the court disagreed, asserting that the City's response "clearly cites and provides specific information from the draft SEIR as to whether and how it analyzed the new projects in its air quality impact analysis," and held that this level of detail was sufficient. Additionaly, the court explained, that where there is a disagreement over the responses, it does not mean the response is inadequate.

Conclusion and Implications

This opinion by the First District Court of Appeal deferred heavily to the CEQA Guidelines in making its determination, and gives deference to the City's analysis and responses. While both the trial court and Court of Appeal relied on the substantial evidence standard to analyze PCRG's arguments, the Court of Appeal's holding essentially came down to the CEQA

Guidelines and whether or not PCRG was able to meet the standard of evidence required to show if the City was justified in its actions. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/A161416.PDF.
(Lauren Palley, Boyd Hill)

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