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REGULATORY DEVELOPMENTS

U.S. FISH AND WILDLIFE SERVICE PROPOSES NEW EAGLE RULE TO CREATE A GENERAL INCIDENTAL TAKE PERMIT PROCESS FOR POWER LINE INFRASTRUCTURE AND WIND-ENERGY PROJECTS

On September 30, 2022, the U.S. Fish and Wildlife Service (FWS) proposed new regulations related to the issuance of permits for eagle incidental take and eagle nest take. (*See:* FWS, Permits for Incidental Take of Eagles and Eagle Nests, 87 Fed. Reg. 59,598 (Sept. 30, 2022).) The FWS' proposed rule includes the creation of a general permit option for qualifying power line infrastructure, wind-energy generation projects, and other activities that may disturb breeding bald eagles and bald eagle nests. The rule is the agency's latest attempt to revise implementation of the Bald and Golden Eagle Protection Act and increase both the efficiency and effectiveness of the incidental take permitting process while also increasing conservation efforts for eagles.

Background

The FWS is the federal agency tasked with the authority and responsibility to manage bald eagles and golden eagles under the Bald and Golden Eagle Protection Act (Eagle Act). (16 U.S.C. § 668 *et seq.*) The Eagle Act prohibits the take, possession, and transportation of bald eagles and golden eagles except pursuant to federal regulations. The Eagle Act also authorizes the Department of the Interior (via FWS) to adopt regulations to allow the "taking" of eagles including when "necessary . . . for the protection of wildlife or of agricultural or other interests in any particular locality" provided that the taking is also compatible with the preservation of bald eagles and golden eagles. (16 U.S.C. § 668a.) For purposes of the Eagle Act, "take" means "pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb;" and "transport" means:

> . . .ship, convey, carry, or transport by any means whatever, and deliver or receive or cause to be delivered or received for such shipment, conveyance, carriage, or transportation. (16 U.S.C. § 668c.)

The FWS established a permit process for the incidental take of eagles and eagle nests in 2009. Notably, the FWS took this action *after* bald eagles were delisted as endangered species and threatened wildlife under the federal Endangered Species Act.

In 2016, the FWS revised the permit process for the incidental take of eagles and eagle nests. Among other changes, the FWS extended the maximum tenure of permits for the incidental take of eagles from five to 30 years and imposed preconstruction monitoring requirements for wind-energy projects applying for incidental take permits.

Prior to the FWS' official publication of its latest rule, the FWS published an advance notice of proposed rulemaking to inform the public of changes the FWS was considering to help expedite the permit process for the incidental take of eagles. The FWS received almost 1,900 public comments on the advanced rulemaking. According to the FWS, many of the comments also expressed concerns with the efficiency of the current permitting process.

The 2022 Eagle Rule

The FWS' new proposed rule (2022 Eagle Rule) attempts to address some of the inefficiencies and delays associated with the current incidental take permitting process while also maintaining conservation efforts for bald eagles and golden eagles. More specifically, and consistent with the Eagle Act, the FWS has proposed new regulations authorizing take that is necessary for the protection of other interests in any particular locality. The regulations also include revised provisions for processing individual or project-specific permits and adds a general permit alternative for qualifying activities.

The FWS' general permit alternatives is intended for four main activities: (1) certain categories of bald eagle nest take (*e.g.*, emergency and health and safety); (2) certain activities that may cause bald eagle disturbance take (*e.g.*, construction and utility

line activities); (3) eagle incidental take associated with power-line infrastructure; and (4) eagle incidental take associated with certain wind-energy projects (*e.g.*, installation and operation of wind turbines in specific areas). Each general permit alternative outlines eligibility criteria and mitigation requirements to avoid, minimize and compensate for impacts to eagles. The general-permit applicants would self-identify eligibility and register with the FWS and provide the:

> . . .required application information and fees, as well as certify that they meet eligibility criteria and will implement permit conditions and reporting requirements.

The FWS' general permit rules also set forth certain conditions for power-line infrastructure and wind-energy projects. For example, general permits for power-line infrastructure will only be issued where new construction is "electrocution-safe" and there is both a reactive retrofit and proactive strategy to address high-risk poles when an eagle electrocution is discovered, and underlying applications must also consider eagle nesting, foraging, and roosting areas. Similarly, general permits for wind-energy projects must consider eagle abundance thresholds or data reflecting bald eagle and golden eagle populations and seasonal migrations or nesting habits.

Finally, it is worthwhile to point out that the FWS does not propose any changes to the current preservation standard or management objectives for bald eagle and golden eagle populations, which the FWS believes will continue to help promote conservation efforts for eagles. Indeed, FWS' rulemaking states that the current population size estimate for bald eagles for the conterminous United States is approximately 336,000. Data from 2019 estimated the population to be 316,708, which was a four-fold increase above previously published estimates for 2016. As for golden eagles, the estimated United States population is approximately 38,000, but the golden eagle take limit remains set at zero, unless there are offsets for compensatory mitigation.

The FWS will limit the general permits for incidental take to a maximum of five years, and a maximum of one year for disturbance take or nest removal. Any project that does not qualify for one of the proposed general permits would still be able to apply for a specific permit.

Conclusion and Implications

The Fish and Wildlife Service's 2022 Eagle Rule is expected to help increase efficiency and the effectiveness of the FWS' incidental take permit program under the Bald and Golden Eagle Protection Act, especially for projects related to power-line infrastructure and wind-energy projects. The FWS' current deadline to submit public comments is November 29, 2022. For more information see the Federal Register for the Rule at: https://www.federalregister.gov/documents/2022/09/30/2022-21025/permits-for-incidental-take-of-eagles-and-eagle-nests.
(Patrick Veasy, Hina Gupta)

CALIFORNIA DEPARTMENT OF WATER RESOURCES ANNOUNCES STEPS TO SUPPORT CALIFORNIA IN WATER CONSERVATION EFFORTS AMID SEVERE DROUGHT

As of October 2022, over 90 percent of California residents live in areas subject to severe drought, with over 37 million people affected statewide. *California Drought Monitor*, NIDIS, https://www.drought.gov/. Within the past four months, Governor Newsom presented the California Water Supply Strategy Plan and signed Assembly Bill (AB) 2142 and Senate Bill (SB) 1157 to, according to the state, help improve water conservation efforts in urban, residential, and commercial areas throughout California. In support of his plan, the Department of Water Resources (DWR) has announced efforts to implement and support actions that lower outdoor and indoor water usage, fund turf installation, and support tax-exemptions for financial assistance for turf transitions throughout California.

Background

DWR manages water resources throughout the state and works with water agencies to enhance water quality, efficiency, and restoration. One of DWR's goals is to help ensure long-term water supply and sustainability throughout the state. Recently, DWR began recommending policy, standards, and land use changes to reduce water usage during the current drought. *Mission*, Cal. Dep. Water Resources, https://water.ca.gov/about.

In September 2022, the Department of Water Resources made several recommendations to the State Water Resources Control Board (State Water Board) to lower urban water usage in outdoor residential and commercial industry areas, as well as changes to indoor residential water use standards, in conjunction with Assembly Bill 1668.

Proposed by Assembly Member Friedman in 2018, AB 1668 aimed to revamp the state's commitment to water conservation by advancing urban water use efficiency and creating new water use standards and special land use allowances, along with heightened performance measures for urban water suppliers. The goal of the legislation was to investigate and provide guidelines for water suppliers to abide by to receive state funding. This was intended to reduce water usage where possible. The bill went into effect in 2018 and its goals were supplemented this year with the announcement of Governor Newsom's water plan.

In June 2022, Governor Newsom released the California Water Supply Strategy plan, which describes efforts to advance water efficiency and make long-term changes to water conservation in the state. This plan includes several actions and policies to aid Californians in adapting to a hotter and drier future, including four proposals supported by DWR: outdoor water use recommendations, indoor water use legislation, financial assistance a transition to conservation, and turf tax exemptions.

These plans mirrored recent legislation including AB 2142: Turf Replacement and Water Conservation Program, and SB 1157: Urban Water Use Objectives. AB 2142 revised the California tax code to allow for gross income tax exceptions for funds paid by local government, state agencies and public water systems, for turf replacement water conservation program. This provided financial incentives to reduce consumption of water and improve the management of water. SB 1157 is designed to reduce urban retail goal water usage rates for 2025 from 52 gallons to 47 gallons per capita. These changes reflect DWR recommendations to increase water conservation, and the department doubled down on these plans in its most recent suggestions to the State Water Board. Now, DWR plans to implement and support further actions falling within noted categories of Governor Newsom's water plan.

New Standards and Frameworks

First, DWR recently submitted outdoor water use recommendations to the State Water Resources Control Board. The recommendations outline new standards and frameworks to help retail water suppliers, particularly in urban areas, decrease outdoor residential water usage and improvements to irrigation systems in large commercial and industrial landscapes. Among the highlighted recommendations are new outdoor residential water use efficiency standards (ORWUS) that phase in lower water use allowances for residential landscaping and construction zones. Additionally, DWR recommended changes to variances for unique water uses, to limit significant water use in horse corrals and animal exercise arenas, while expanding use during all major emergencies.

Second, DWR claims that SB 1157, along with its other outdoor use recommendations could save enough water to supply about 1.6 million homes or 4.7 million residents to meet annual indoor and outdoor water needs. When Governor Newsom signed SB 1157 into effect, the Legislature aimed to ensure California could preserve more water and improve water use efficiency during the ongoing drought, which is one of the major focuses of DWR.

Third, DWR proposed funding programs to better assist communities in their turf transition and water conservation projects. These programs provide grants to help finance turf installation and strengthen conservation efforts of underserved communities and local water agencies. DWR hopes these programs can provide a sense of security and equity among communities, and financially support urban water suppliers' conservation programs and residential and commercial landscapes turf transition.

Fourth, DWR endorsed the signing of AB 2142 and bringing its mandates into action, namely, grants, rebates, and other financial assistance awarded for turf transitions as exempt from state income tax through 2027. DWR views this exemption and the associ-

ated funding programs as useful aids to Californians in conserving water during and after the current drought, without the associated financial burden or obligation.

Conclusion and Implications

Following, DWR's recommendations, the State Water Resources Control Board will meet to evaluate and analyze the plan, as well as allow for public comment on the recommendations before giving a final decision on the matter. For more information, *see: DWR Takes Actions to Support State's Future Water Supply Strategy*, CA Dept. Water Resources (Sept. 29, 2022) https://water.ca.gov/News/News-Releases/2022/Sep-22/DWR-Takes-Actions-to-Support-Future-Water-Supply-Strategy.
(Elleasse Taylor, Steve Anderson)

CENTRAL VALLEY IRRIGATED LANDS REGULATORY PROGRAM SEES SIGNIFICANT UPDATES

Central Valley Regional Water Quality Control Board (Regional Board) staff recently engaged with State Water Resources Control Board (State Water Board) representatives to discuss updates to the Irrigated Lands Regulatory Program (ILRP). The updates were specifically related to implementing the State Water Board's General Order WQ 2018-02, which was the first irrigated lands general order adopted in the Central Valley Region. The State Water Board's order focuses on the East San Joaquin Water Quality Coalition, which consists of around 700,000 acres and 3,000 members.

Background

The Irrigated Lands Regulatory Program was initiated by the State Water Board 2003. The purpose of the ILRP was originally to prevent and mitigate agricultural runoff from affecting surface water quality. In 2012, regulations were added to the ILRP to also protect groundwater. ILRP is implemented by regulating irrigated agricultural lands through nine general water discharge requirements (WDRs). Growers in the Central Valley are organized through 14 agricultural water quality coalitions (Coalitions).

The Coalitions act effectively as intermediaries between the growers and the State Water Board, but they do not enforce the WDRs. The Coalitions provide data to the State Water Board to help determine its members' compliance with the ILRP.

Updates to Central Valley ILRP

Enrollment in the ILRP

To determine who should be enrolled in the ILRP, State Water Board staff use data from the Department of Water Resources (DWR) to determine which areas in the region are used for agriculture. Regional Board staff recently reported that there are approximately 6.2 million acres of commercial irrigated lands in the Central Region, of which 5.5 million acres are currently enrolled. Regional Board staff further indicated that the remaining 700,000 acres are spread over 40,000 parcels that would require inspection.

External Review of Surface Water Monitoring Framework

To address ILRP implementation, Regional Board and State Water Board staff are exploring conducting an expert review of the Central Valley Surface Water Monitoring Framework. In 2019, the Southern California Coastal Water Research Project facilitated a review of the East San Joaquin Water Quality Coalition's surface water monitoring framework. Before developing its findings and final report, it formed a stakeholder advisory group, held public meetings, and visited monitoring locations.

ILRP staff reported the findings of the review of the water monitoring framework, which was that the surface water monitoring program is appropriately designed and implemented to meet the overarching program goals.

Update on Monitoring of Pesticides

Another topic recently discussed between Regional Board and State Water Board staff is methods for monitoring certain widely used pesticides. The Regional Board has been working with the Environmental Laboratory Accreditation Program to obtain accreditation for several methods to analyze one such pesticide, imidacloprid. These methods are meant to provide a lower minimum detection level for the pesticide which would trigger tighter regulation of its use and mitigation requirements.

Further, Regional Board staff recently updated the pesticide evaluation protocol by updating the list of pesticides registered for agricultural use. Moving forward, staff intend to review the protocol on an annual basis.

Management Practice Evaluation Program

ILRP update discussions also addressed the management practice evaluation program. The management practice evaluation program includes three components: (1) management practice assessments; (2) groundwater protection values and targets; and (3) groundwater quality management plans. Management practice assessments are used to determine whether the existing and new practices serve to protect groundwater quality. The groundwater protection values provide the current estimated loading to groundwater, while the targets provide the loading rate that is necessary to achieve compliance. The groundwater quality management plans provide information on the actions needed to achieve compliance, and the timelines for implementing those actions.

Public Comments

The Regional Board also provided an opportunity for public comment on the presented updates. Some expressed concern over the groundwater protection targets, asserting that the targets will not, for example, reduce nitrogen loading rates and do not comply with the State Water Board general order in order to adequately protect groundwater supplies. Others, including representatives for some Coalitions, expressed support for the program and a commitment to continue its implementation.

Conclusion and Implications

The Central Valley ILRP is intended to regulate water quality through management and reduction of agricultural runoff to surface water and groundwater sources. The recent ILRP updates are designed to utilize broader and more detailed data sets to better inform management processes. Successful implementation will, of course, require not only input from but also implementation through the Coalitions, growers and other stakeholders. Additional ILRP program and updated information is available on the Regional Water Quality Control Board website at: https://www.waterboards.ca.gov/centralvalley/water_issues/irrigated_lands/.

(Christina Suarez, Derek Hoffman)

RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS AGENCIES HAVE DISCRETION TO OPERATE TWITCHELL DAM TO AVOID ENDANGERED SPECIES ACT 'TAKE'

San Luis Obispo Coastkeeper v. Santa Maria Valley Water Conservation District, 49 F.4th 1242 (9th Cir. 2022).

Environmental organizations brought a lawsuit against the U.S. Bureau of Reclamation and the Santa Maria Valley Water Conservation District, claiming that operation of a dam interfered with the endangered Southern California steelhead's reproductive migration, thereby constituting an unlawful take in violation of the federal Endangered Species Act (ESA). The organizations sought declaratory relief and an injunction requiring properly timed water releases. The U.S. District Court granted summary judgment in favor of the agency defendants, and the Ninth Circuit Court of Appeals then reversed, finding that the agencies had discretion to operate the dam to avoid take.

Factual and Procedural Background

The Twitchell Dam, constructed in 1958 within the Santa Maria River watershed, has contributed to the endangerment of Southern California steelhead populations, a federally endangered species. It is operated to retain water during high precipitation periods. As a result of dam operations, the Santa Maria River has insufficient flow to sustain Southern California steelhead migration to the ocean, preventing them from completing their reproductive cycle.

Construction of the dam was authorized by Public Law 774 (PL 774), which authorized the Secretary of the Interior:

> . . .to construct the project for irrigation and the conservation of water, flood control, and for other purposes, on Santa Maria River, California, pursuant to the laws of California relating to water and water rights, and, otherwise substantially in accordance with the recommendations of the Secretary of the Interior dated January 16, 1953 [the "Secretary's Report"].

The Bureau of Reclamation and the Santa Maria Water District (collectively: Agencies) are jointly responsible for the dam's operation.

San Luis Obispo Coastkeeper and Los Padres ForestWatch sued, claiming that operation of the dam interferes with Southern California steelhead's reproductive migration, which constitutes an unlawful take under the ESA. They sought declaratory relief and an injunction requiring properly timed water releases of appropriate magnitude and duration to support Southern California steelhead reproduction. The Agencies moved for summary judgment, claiming that PL 774 affords no discretion to release dam water to preserve Southern California steelhead and, thus, they could not be liable for take under the ESA. The U.S. District Court agreed with the Agencies and granted summary judgment, and the environmental organizations appealed.

The Ninth Circuit's Decision

Because the parties assumed that agency discretion is required to establish proximate cause under the ESA, the Ninth Circuit framed the operative question as whether, under PL 774, the Agencies have any discretion to release any amount of water from the Twitchell Dam to avoid take of endangered Southern California steelhead. The Ninth Circuit found that they do.

The Ninth Circuit first found that PL 774 expressly authorizes Twitchell Dam to be operated for "other purposes" in addition to the enumerated purposes of "irrigation and the conservation of water [and] flood control." This expansive language, the Ninth Circuit concluded, reflected a congressional intent to grant the Agencies discretion to operate the dam for a variety of purposes, including to accommodate changed circumstances such as the enactment of new statutes. Had Congress intended to limit operations solely to enumerated purposes, the Ninth Circuit found, it knew how to do so and would have used limiting language rather than broad language. The Ninth Circuit also found that the statutory requirement of substantial compliance—rather than strict compli-

ance—with the Secretary's Report granted discretion to the Agencies.

The Ninth Circuit also found that this interpretation was supported by the principles of statutory construction. Namely, it found that it was possible to harmonize PL 774 and the ESA, and that there was no clear congressional intent to preclude the dam from being operated to avoid take of Southern California steelhead. Nor was there any implied conflict. Rather, Twitchell Dam could be operated to provide modest releases at certain times of the year and during certain water years while still satisfying the dam's primary purpose of conserving water for consumptive uses.

Based on this reasoning, the Ninth Circuit reversed the U.S. District Court ruling and remanded for further proceedings consistent with its opinion. It did not reach the question of how the Agencies might be required to exercise their discretion in order to come into compliance with the requirements of the ESA and instead left that for consideration by the U.S. District Court.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the scope of agency discretion regarding operation of the Twitchell Dam, statutory interpretation principles, and the relationship of federal statutory regimes and the ESA. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/23/21-55479.pdf.
(James Purvis)

NINTH CIRCUIT AFFIRMS JUDGMENT FOR FISH AND WILDLIFE SERVICE BASED ON CLAIM PRECLUSION IN A CHALLENGE UNDER THE ENDANGERED SPECIES ACT

Save the Bull Trout v. Williams, ___F.4th___, Case No. 21-35480 (9th Cir. Sept. 28, 2022).

In a September 28, 2022 decision, the United States Court of Appeals for the Ninth Circuit affirmed the U.S. District Court in Montana's judgment in favor of the U.S. Fish and Wildlife Service (USFW) in a federal Endangered Species Act (ESA) action brought by plaintiff environmental groups. The court held that claim preclusion barred the claim, because plaintiffs had previously brought the same fundamental challenge in the U.S. District Court in Oregon, and the claim had been dismissed.

Statutory Background

The Endangered Species Act is a comprehensive statutory scheme intended to protect endangered and threatened species. The ESA requires the U.S. Fish and Wildlife Service to develop recovery plans for listed species within their jurisdiction. A recovery plan generally must describe management actions to achieve conservation and survival of the species, criteria for delisting species, and estimates of the time and costs required to achieve the plan's goals. The ESA contains a citizen-suit provision, which provides a private cause of action for a party seeking to enforce nondiscretionary duties established by the ESA.

Factual and Procedural Background

The Oregon Litigation

Pursuant to the ESA, USFW released the Bull Trout Recovery Plan (Plan) in 2015. The Plan focused on managing primary threats to the endangered bull trout populations across the United States. Two of the plaintiff environmental groups, Friends of the Wild Swan and Alliance for the Wild Rockies (collectively: Friends) brought suit in the District Court of Oregon to challenge the Plan under the ESA's citizen suit provision.

The Oregon District Court determined that Friends failed to state a claim for violation of a nondiscretionary duty. As a result, the court determined that it lacked jurisdiction over the citizen-suit claim. The court therefore dismissed the claim but granted Friends leave to amend. When Friends did not amend the complaint, the court entered judgment.

Friends appealed the dismissal to the Ninth Circuit, arguing for the first time that USFW had omitted required statutory elements from the Plan, constituting a failure to perform a nondiscretion-

ary duty. The Ninth Circuit affirmed the dismissal without considering the merits of Friends' argument and noted that Friends had chosen to appeal instead of amending their complaint in the district court to include the new argument.

Friends filed a motion in the District Court under Federal Rules of Civil Procedure 60(b) and 15, seeking relief from the judgment and to amend the complaint. The court adopted the magistrate judge's recommendation to deny the motion and declined to affirm the magistrate judge's suggestion that Friends could replead their claims to survive a motion to dismiss and be heard on the merits. Friends did not appeal the court's denial of the motion to amend.

The Montana Litigation

Friends added Save the Bull Trout as a plaintiff and challenged the Plan in the U.S. District Court for Montana, again under the ESA's citizen-suit provision. USFW moved to dismiss based on claim preclusion, but the court concluded that the Oregon dismissal was not a final judgment on the merits, and thus declined USFW's motion. However, the court granted summary judgment on the merits in favor of USFW, and the plaintiffs appealed the judgment to the Ninth Circuit.

The Ninth Circuit's Decision

Standing

The Ninth Circuit first held that the plaintiffs had standing to challenge the Plan. Because members of the plaintiff environmental groups demonstrated aesthetic, recreational, and conservation interests in bull trout, and because the ESA's procedures serve to protect those interests, the plaintiffs established that they had suffered a procedural injury caused by USFW. Additionally, the court concluded that the plaintiffs had met their burden of showing that the revisions to the Plan that they were seeking could influence USFW's bull trout conservation actions, thus redressing the plaintiffs' alleged harm.

Claim Preclusion

Contrary to the Montana District Court, the Ninth Circuit did not reach the merits of the new claims. Instead, the court held that the claim preclusion doctrine barred the plaintiffs' claim. First, the Court of Appeals explained that the litigation in both the Oregon and Montana District courts involved the same issue—whether USFW's Plan complied with the ESA. Although the plaintiffs added new claims alleging that USFW had violated a nondiscretionary duty, the court reasoned that the plaintiffs could have amended their complaint to include those claims in the Oregon litigation.

Second, the court found that the Oregon and Montana cases involved "identical parties or privies," because two of the three plaintiffs were parties to the Oregon litigation, and all three plaintiffs shared a common interest in wildlife and habitat conservation. Thus, the court determined that Save the Bull Trout was in privity with the plaintiffs who had been parties to the prior suit.

Finally, the court concluded that the suit in Oregon had ended with a final judgment on the merits. It explained that, for the purposes of claim preclusion, dismissal for failure to state a claim is a judgment on the merits. The court also noted that, although the plaintiffs could have amended the Oregon complaint to bring the new claims, they declined to do so and instead appealed the judgment. Thus, the Court of Appeals held that the plaintiffs were "not entitled to a do-over."

Conclusion and Implications

This opinion demonstrates that a U.S. District Court's determination that it does not have jurisdiction over a challenge brought under the ESA's citizen-suit provision due to lack of allegations of a failure to perform a nondiscretionary duty reaches the merits of the suit. In this case, determining whether the District Court had jurisdiction necessarily required consideration of the merits. Friends abandoned their suit after it was dismissed for failure to state a claim in the District of Oregon; this strategic decision ultimately prevented the plaintiffs from bringing additional related claims in the District of Montana. Thus, in affirming the district court judgment for USFW, the Ninth Circuit passed no judgment on the merits of the plaintiffs' new claims. The Ninth Circuit's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2022/09/28/21-35480.pdf.
(Bridget McDonald)

TENTH CIRCUIT REFUSES EXCLUSIVE JURISDICTION ON FERC-LICENSED PROJECT BECAUSE PETITION INSTEAD CHALLENGED THE CORPS' SECTION 404 PERMIT

Save the Colorado, et al. v. Spellmon, et al., ___F.4th___, Case No. 21-1155 (10th Cir. Sept. 30, 2022).

The U.S. Court of Appeals for the Tenth Circuit found on a claim-by-claim basis that conservation organizations' challenges to a municipality's application for a Section 404 permit to dredge fill material issued by the U.S. Army Corps of Engineers (Corps) and consideration by the U.S. Fish and Wildlife Service (FWS) did not inhere in the controversy of the Federal Energy Regulatory Commission's (FERC) decision granting the municipality an amended license to operate a larger dam. The court applied a narrow interpretation of the Federal Powers Act that gives appellate courts exclusive jurisdiction over FERC orders. The claims did not attack the merits of FERC's approval of an amended license. Therefore, the U.S. District Court erred in dismissing the petition for lack of subject-matter jurisdiction.

Background

The Denver Board of Water Commissioners (municipality) needed to complete two federal applications for permission to implement a project intended to boost the City of Denver's water supply: (1) an amendment to its existing license with FERC to operate an expansion of the Gross Reservoir and Dam in Boulder County, Colorado; and (2) a discharge permit from the Corps to discharge fill materials during construction. To issue the discharge permit, the Corps had to comply with the National Environmental Policy Act (NEPA), the Endangered Species Act, and to consult with FWS. FERC cooperated with the Corps in reviewing the municipality's compliance with federal laws; FERC helped it draft an environmental impact statement and participated in consultations with the FWS regarding endangered species. The Corps issued the discharge permit.

FERC later issued an amendment to the municipality's existing license, finding that the project would not cause significant environmental damage. Meanwhile, the conservation organizations filed a petition in U.S. District Court, arguing the Corps violated several federal laws when it issued the discharge permit: the NEPA, the federal Clean Water Act, the federal Endangered Species Act, and the Administrative Procedure Act.

After FERC granted the municipality's license amendment, the municipality sought to dismiss the petition in District Court, arguing the appeals court had exclusive jurisdiction. Federal courts of appeal have exclusive jurisdiction to hear challenges to decisions made by FERC under 16 U.S.C. § 825*l*(b). U.S. District Courts have jurisdiction to hear challenges to decisions made by Corps. Despite the conservation organizations' framing of their petition as a challenge to a Corps-issued permit, the District Court granted the municipality's motion to dismiss, concluding that jurisdiction lay exclusive in the federal courts of appeal. The conservation organizations' appealed the dismissal.

The Tenth Circuits' Decision

On appeal, the court first considered whether the grant of exclusive jurisdiction under 16 U.S.C. § 825*l*(b) extended beyond FERC orders to any issue "inhering in the controversy" or "sufficiently related" to a FERC order. The municipality, Corps, and FWS urged the court to adopt a broad reading of the statute. They argued that because both Corps and FERC developed an environmental impact statement and because FERC weighed in on its environmental impact statement, that the analyses were intertwined and therefore subject to the jurisdictional statute.

The Court of Appeals rejected a broad application of the jurisdictional statute, reasoning that statute only restricted jurisdiction to the courts of appeal to actions that challenge FERC orders, not collateral attacks on those orders.

The court next considered whether, under the narrow reading of the jurisdictional statute, the District Court had jurisdiction to hear the conservation organizations' claims. The court's analysis proceeded on a claim-by-claim basis.

Clean Water Act Claim

Beginning with the conservation organizations' Clean Water Act claim, the court found that the conservation organizations' claims were unrelated to FERC's approval of the amended license for two reasons. First, FERC does not have the authority to review Corps permits under FERC precedent. Second, while both agencies analyzed the project under the Clean Water Act, their tasks differed. The Corps was tasked with selecting the least environmentally damaging practical alternative and properly evaluate the project's costs, whereas FERC only had to consider whether reasonable alternatives existed. The conservation organizations only challenged the Corps' tasks, which were not inherent in the controversy of considering reasonable alternatives. The court further reasoned, that even if the jurisdictional statute otherwise applied, it could not cover the claims at issue because FERC lacked authority to decide those issues.

NEPA Claim

Turning next to the conservation organizations' NEPA claim, the court noted that FERC's supplemental environmental assessment disavowed consideration of Corps' environmental analysis involving expansion of the reservoir and that the environmental issues facing FERC were narrower than the issues facing the Corps. The court noted that FERC's cooperation with the Corps and the FWS in drafting the Environmental Impact Statement was separate and apart from FERC's license amendment process. Further, FERC's decision did not incorporate the Corps' findings. The Court of Appeals again pressed the nature of the conservation organizations' claims—that they only filed claims against the Corps' permitting process—not FERC's analysis in its decision regarding the license amendment. As a result, the jurisdictional statute did not extend to the Corps' action.

Endangered Species Act Claims

When addressing the conservation organizations' Endangered Species Act claims, the court noted that FERC did not incorporate the FWS decisions into the terms of FERC's amended license. The differences between the Corps and the FWS and FERC in their application of the Endangered Species Act to the project meant that even though all agencies reviewed the project's compliance with the statute, that the issue did not inhere in the controversy. FERC neither solicited nor adopted opinions from the other agencies on the effects of the project on an endangered species. As a result, the court of appeal concluded it lacked exclusive jurisdiction over challenges to FWS's opinions.

Issue of Exclusive Jurisdiction

Finally, the Corps and FWS argued the petition itself invoked the court's exclusive jurisdiction, because relief would interfere with the FERC-licensed project. The court rejected the attempt to lump all of the administrative actions together because they involve the same general project. It found that on a claim-by-claim basis, the challenges to the permit did not impact FERC's decision regarding the license, even where the result of the petition might impact the municipality's FERC-licensed project.

Therefore, the U.S. District Court erred when it dismissed the petition for lack of subject-matter jurisdiction because it did not invoke the Federal Power Act's exclusive jurisdiction provision. Specifically, the petition failed to raise any issues inhering in the controversy of FERC's order regarding the municipality's license amendment because the conservation organizations' claims only challenged the Corps and FWS decisions.

Conclusion and Implications

This case clarifies that an appellate court's exclusive jurisdiction over FERC orders under the Federal Powers Act is limited to FERC decisions and issues inhering in the controversy of those decisions. A party aggrieved by a FERC order must challenge the merits of FERC's decision in its petition for relief. This case provides a helpful in-depth factual analysis of the application of an exclusive jurisdiction statute where multiple agencies and multiple analyses are involved. The Tenth Circuit's opinion is available online at: https://www.ca10.uscourts.gov/sites/ca10/files/opinions/010110747304.pdf.
(Amanda Wells, Rebecca Andrews)

DISTRICT COURT DISMISSES THIRD PARTY SUIT FINDING STANDING ALLEGATIONS INADEQUATE IN CLIMATE ADAPTATION CASE

Conservation Law Foundation, Inc. v. Gulf Oil Limited Partnership, ___F.Supp.4th___, Case No. 3:21-CV-00932 SVN (D. Conn. Sept. 20, 2022).

On September 20, 2022 the U.S. District Court for Connecticut dismissed, without prejudice, allegations brought in a citizen suit where the plaintiff relied on future negative impacts of climate change to allege injury in fact for purposes of standing. The District Court found that nonprofit organization Conservation Law Foundation (Foundation) failed to allege injury in fact (and therefore failed to demonstrate Article III standing) when charging a Gulf Oil Limited Partnership bulk petroleum storage facility with inadequate infrastructure to weather future negative impacts of climate change. The September 2022 decision highlights a vital aspect of citizen suit standing when allegations rest on the future effects of climate change; flagging to plaintiff organizations that an injury alleged cannot merely rely on the future occurrence of major and foreseeable weather events but must particularize how those weather events would result in violations of the underlying environmental statutes.

Factual and Procedural Background

The defendant, Gulf Oil Limited Partnership (Gulf Oil), owns and operates a bulk petroleum storage terminal in New Haven, Connecticut. Tanker ships deliver oil products to the storage terminal where the products are stored in large aboveground storage tanks (ASTs). The storage terminal contains drainage systems to facilitate stormwater management and to prevent contaminant discharge into New Haven Harbor. The terminal is surrounded by berms to protect against flooding and provide additional support. Operation of the storage terminal is subject to Connecticut Department of Energy and Environmental Protection's General Permit for Discharge of Stormwater Associated with Industrial Activity (General Permit) implemented and enforced pursuant to the federal Clean Water Act (CWA). The General Permit delineates various requirements and restrictions for stormwater discharges. Relevant in this case, the General Permit requires that dischargers implement control measures to guard against the risk of pollutant discharges in stormwater and that operations be consistent with the goals and policies of the Connecticut Coastal Management Act. The Coastal Management Act provides for consideration of:

> . . .the potential impact of a rise in sea level, coastal flooding and erosion patters on coastal development so as to minimize damage and destruction of life and property. . . .

The plaintiff is a nonprofit organization that promotes conservation and protection of public health, environment, and natural resources. The Foundation has over 5,000 members nationwide, with more than 190 members residing in Connecticut. Some of the Foundation members use the area and waters near the storage terminal (New Haven Harbor) for recreational activities and asserted concern over discharge and release of pollutants into those waters. In bringing the action against Gulf Oil, the Foundation asserted violations of the CWA and the federal Resource Conservation and Recovery Act (RCRA) because the storage terminal was not designed, maintained, modified, or operated to account for the effects of climate change and that risk of pollutant discharge is exacerbated by climate change impacts (sea level rise, increasing sea temperatures, and increasing storm severity and flooding). The Foundation alleged in its 18 counts against Gulf Oil that the risk of climate change impacts were not merely theoretical, as evidenced by flooding at the storage terminal in October 2012 when Superstorm Sandy hit New Haven. [https://www.clf.org/wp-content/uploads/2021/07/Stamped-Gulf-Complaint.pdf]

In the action, the Foundation sought injunctive relief and civil penalties against Gulf Oil. In response, Gulf Oil moved to dismiss 12 of the counts for lack of subject matter jurisdiction—solely for the plaintiff's failure to allege injury in fact under the standing doctrine.

Article III Standing

Article III of the United States Constitution provides that federal courts have jurisdiction to hear cases and controversies arising under federal law. (U.S. Const. art. 3, § 2.) A case may be dismissed for lack of subject matter jurisdiction where the federal court lacks the "constitutional power to adjudicate… such as when the plaintiff lacks constitutional standing to bring the action." (*Corlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 417 (2nd Cir. 2015).) To establish Article III standing, the plaintiff must evince (1) that they have suffered an injury in fact that is concrete, particularized, and actual or imminent, (2) that the defendant caused the injury, and (3) that the injury will likely be redressed by the requested judicial relief. (*Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).)

The District Court's Decision

The U.S. District Court ultimately agreed with Gulf Oil that the Foundation failed to allege an injury in fact for purposes of standing in its citizen suit alleging Gulf Oil's failure to prepare its AST infrastructure for the impacts of climate change. The holding stemmed from two key findings: (1) the Foundation's arguments of imminent threat focused on harms to the environment and not harm to the Foundation's members, and (2) the Foundation's case failed to discuss how climate change impacts would result in the discharge of pollutants from Gulf Oil's storage terminal into waters the Foundation's members use and enjoy.

The District Court found that the Foundation focused predominantly on harms to the environment when the relevant showing for Article III standing is "not injury to the environment but injury to the plaintiff." Additionally, the District Court held that while the Foundation's "attempt to establish standing based on an increased risk of future harm is not without basis in law" and the "harms associated with climate change are serious and well recognized" the enhanced risk of future injury is only cognizable where the plaintiff alleges actual future exposure to that increased risk. The District Court found that the Foundation's reliance on allegations of longer-term impacts (increased frequency of storms, sea level rise, and the increased risk of flooding) over the next several decades stretched the imminence requirement "beyond its purpose, which is to ensure that the alleged injury is not too speculative." In addition, the Foundation failed to demonstrate a link between climate change driven weather events and "how such weather events would result in the discharge of pollutants, thereby validating [the] theory of increased risk of exposure to such pollutants." The District Court ultimately held that the failure of the Foundation to relate the impending impacts of climate change to a specific injury to Foundation's members was insufficient to demonstrate standing for the plaintiffs.

Conclusion and Implications

The U.S. District Court's decision highlights a tension in the District Courts regarding adequacy of standing as it relates to allegations of future harm from the impacts of climate change. While the United States Supreme Court has recognized the harms associated with climate change, this recent opinion demonstrates that plaintiff's must allege more than amorphous negative impacts of climate change. Citizen suits must allege how such impacts present a real and immediate threat of harm to the plaintiff and/or the plaintiff's members—not how the impacts present a real and immediate threat of harm to the environment.

(Jaycee Dean, Darrin Gambelin)

DISTRICT COURT REJECTS TAKINGS CLAIM BROUGHT BY DEVELOPERS STEMMING FROM THEIR REJECTION OF APPLICATION FOR WATER AND SEWER SERVICES

Windeler v. Cambria Community Services District,
__F.Supp.4th___, Case No. CV 19-6325 DSF (C.D. Cal. Sept. 6, 2022).

With water becoming more and more scarce throughout the state, communities throughout the state have been forced to implement moratoria on new development within their jurisdictions. Highlighting the seriousness of the situation that many locales face, the U.S. District Court for the Central District of California just settled the dispute of several landowners within the Cambria Community Services District (Cambria CSD) asserting that they had suffered a taking as a result of their rejected efforts to obtain water service. The landowners, none of whom are California residents, alleged that Cambria CSD and San Luis Obispo County wrongly deprived them of access to water and sewer services, therefore denying their right to build on their properties. The District Court, however, rejected this claim and found in favor of Cambria CSD's actions, concluding that no taking had occurred from any denial of water service or development permits to the landowners.

Background

This case came as a consolidation of several lawsuits filed by five landowners within Cambria CSD's service area. As for the properties at issue that would have necessitated additional water supply, all of the properties in question are well under half-an-acre with several of the lots sitting very steep grades. Plaintiffs provided no evidence that any water existed beneath their lots or that installing a well or water tank could be accomplished without violating any state or local laws. All plaintiffs had owned their properties since at least the 1980s, with their properties sitting for decades before any plans to develop them had materialized. All the plaintiffs, according to the court, were aware of and refused to seek inclusion on Cambria CSD's wait list for water connections when it was open from 1986-1990.

Also relevant was the fact that Cambria was experiencing critical drought conditions such that it was in question whether the area could even sustain its current population. The community of Cambria boasts a modest population of roughly 5,000 residents. Cambria's sole source of water comes from well fields that divert groundwater from the nearby San Simeon and Santa Rosa creeks. In wet years, Cambria CSD's licenses allow it to divert up to 799 acre-feet per year (AFA) from San Simeon Creek and up to 218 AFA from the Santa Rosa Creek. In dry years, however, which have seemed more common than not as of late, Cambria CSD's licenses only allow for a maximum diversion—not factoring in other limitations on their production rights—of just 270 AFA from San Simeon and 155.3 AFA from Santa Rosa Creek.

In November of 2001, Cambria CSD was forced to declare a Drought Emergency pursuant to California Water Code § 350 and establish a moratorium on all new residential permits as its existing water supply was unable to accommodate its expanding population. This Drought Emergency has remained in effect ever since.

Cambria CSD's water supply struggles, the Santa Rosa Creek experienced MTBE contamination in 1999 and forced the closure of two wells along the creek, which seriously disrupted Cambria CSD's efforts to explore additional and alternative water sources. Even once Cambria CSD was able to recover from this contamination event, its efforts to investigate a $10 million desalination plant at the beachhead of either the San Simeon or Santa Rosa Creeks were halted by the California Coastal Commission (CCC).

The District Court's Decision

With all the foregoing covered in its findings, the U.S. District Court acknowledged that:

> The shortage of water claimed by Defendants is not a mere pretext to prevent growth, as suggested by Plaintiffs. There are legitimate public concerns about the ability of [Cambria CSD] to

> continue to provide sufficient water consistently to its current users, let alone any significant number of new users.

The court went on to continue this acknowledgement later in its findings as well, explaining that Cambria CSD had taken significant steps over the past decades to seek new sources of water and to find ways to reduce consumption.

The Takings Claims

Of all the topics addressed and ruled on, the court paid particular attention to plaintiffs' taking claims and spent much of its time rejecting the claim that a taking had occurred.

First, the court explained how plaintiffs' do not hold a compensable right in any potential connection to a government-controlled water supply source (citing *McMillan v. Goleta Water District*, 792 F.2d 1453 (9th Cir. 1986) and *Gilbert v. State of California*, 218 Cal.App.3d 234 (1990): "California law does not recognize potential water use as a compensable property right.").

Additionally, the court explained how plaintiffs:

> . . .have no protectable property interest in a County development permit to build a house on a waterless vacant lot because they failed to obtain a water and sewer connection, be placed on the [Cambria CSD] wait list, or obtain a [Cambria CSD] intent to serve letter, during the times that those avenues were available to plaintiffs, and because they did not, and cannot, present proof of 'adequate water and sewage disposal capacity available to serve the proposed development' required by County Code … and other state and local laws.

Next, the court rejected the plaintiffs' takings claims as being insufficient to meet the standards required by *Penn Central Trans. Co. v. City of New York*, 438 US 104 (1978). Under the *Penn Central* doctrine, a court must consider three factors in determining whether a regulatory taking has occurred: (1) the economic impact of the regulation; (2) the extent to which the regulation interfered with distinct investment-back expectations; and (3) the nature of the governmental action.

In addressing these factors, the District Court's conclusion that plaintiffs had no compensable right, as explained above, could well have immediately halted the conversation at point number one. Addressing point number two, however, the court focused not only on the lack of historical evidence of the plaintiffs' intent to develop their properties, but more distinctly on the unreasonableness of any expectation to an absolute right of water and sewer connections in Cambria.

In addition to the natural circumstances showcasing the severity of Cambria's water shortage, the court also pointed out the CCC's continuous and vehement refusal to authorize any future development in the area. Finally, as for the nature of the governmental action, the court determined that plaintiffs were treated identically to all other similarly situated landowners in the area—*i.e.* landowners with properties not connected to water and sewer utilities and that were never placed on the wait list for such connections.

Conclusion and Implications

In ruling on the claims at issue, the court's comprehensive decision ruled for Cambria CSD on virtually all other fronts in the dispute as well, with the court finding that: (1) the statute of limitations for claims such as the plaintiffs' expired long ago, (2) the CCC would not allow any new development in Cambria, meaning any harm to plaintiffs was not necessarily the result of Cambria CSD's actions, and (3) Cambria CSD had taken reasonable steps to both acquire new water sources and reduce existing water demand.

The idea that humans need water in order to develop and grow communities is far from a novel concept. Yet California has been expanding at light speed for decades now in an arid, drought ridden climate. The court's ruling in this case showcases how California's extraordinarily limited water supply can function as a hard cap on just how rapidly and densely the state is able to grow. While isolated communities such as Cambria are certainly more prone to reaching crisis-levels of water supply deficits—at least when it comes to urban and residential water use—even larger communities, such as those in Marin County, are being forced to implement significant restrictions on new development as a result of insufficient water supply. The legal issues of this case may seem to focus on classic 1L related topics a la regula-

tory takings under the *Penn Central* case, but it also provides an up-close look into how Californians are continually attempting to meet the state's insatiable demand for new development while simultaneously managing our relatively finite sources of water. For more information on the court's decision, *see:* https://www.documentcloud.org/documents/22345162-win-deler-judgment_findings-of-fact-and-conclusions-of-law_final?responsive=1&title=0.
(Wesley A. Miliband, Kristopher T. Strouse)

RECENT CALIFORNIA DECISIONS

FOURTH DISTRICT COURT REJECTS HOMEOWNERS' CLAIM THAT ORDINANCE SUNSETTING SHORT-TERM RENTAL LICENSES VIOLATED DUE PROCESS RIGHTS

Hobbs v. City of Pacific Grove, *Unpub.*, Case No. 18CV002411 (6th Dist. Oct. 14, 2022).

In an *unpublished* decision filed on October 14, 2022, the Sixth District Court of Appeal rejected claims by two homeowners that an ordinance adopted by the City of Pacific Grove to phase out several licenses for short term rentals violated their procedural and substantive due process rights. Typically, only adjudicatory acts by the government are subject to procedural due process review. The city's adoption of the challenged ordinance was a legislative. Moreover, the city's use of a random lottery to select the short-term licenses that would be discontinued involved no discretion and was a ministerial act not subject to procedural due process review. The court also rejected plaintiffs' claims that they had a vested right to renewal of their short-term rental licenses, which by their terms were limited to one-year terms. Finally, the court rejected plaintiffs' substantive due process claims, finding that the short-term rental ordinance did not impact a "fundamental right" and was rationally related to a legitimate governmental interest.

Factual and Procedural Background

In 2010, the City of Pacific Grove enacted an ordinance providing for the issuance of licenses that allowed for short term rentals of residences. Licenses were issued for a period of one year subject to earlier revocation for good cause. In subsequent years the city adopted multiple provisions that sought to reduce the number of active licenses. In 2016, the city capped the overall number of short-term rental licenses to 250 and established a density cap of 15 percent per block. In 2017, the city adopted an ordinance requiring a 55-foot buffer zone between licensed properties. The ordinance also made clear that licenses would not be automatically renewed, and that the city manager could delay or deny issuance of a new short term rental license for any reason.

By 2018, the city had issued 289 rental licenses, in excess of the 250-unit limit, and in some areas had exceeded the 15 percent density cap per block. To reduce the number of short-term rental units, the city sought to "sunset" several existing licenses after a grace period. To avoid "substantive favoritism." the city settled on a random lottery to reduce the number of licenses. The city conducted the lottery in May of 2018, selecting 51 licenses to sunset the following year.

On November 6, 2018, city voters approved Measure M, by which the city phased out all existing short term rental units in residential districts, except those in the city's coastal zone.

Plaintiffs were two families that had been issued short term rental licenses. The first family purchased their home in 2013 and had made approximately $50,000 in improvements before making it available for rent. The first family obtained a short-term rental license in 2013, which they reviewed every year until 2019. The second family owned a single-family home in the coastal zone, which held two short term rental licenses.

Pursuant to the 2018 lottery, the city terminated one of the first family's short term rental licenses. Measure M had the effect of permanently prohibiting the second family from any further short-term rentals.

At the Superior Court

Plaintiffs filed a complaint seeking declaratory and injunctive relief. In their first cause of action, plaintiffs alleged that the city was required to obtain a permit from the Coastal Commission before adopting the 2018 ordinance. In the second cause of action, plaintiffs argued that the ordinance violated their right to due process by arbitrarily limiting the number of homes that can be offered as short-term rentals.

Plaintiffs then filed a motion for summary adjudication. On the first cause of action related to Coastal

Commission approval, the trial court declared that the ordinance constituted development within the Coastal Zone and the city needed to obtain approval of a local coastal program or a coastal development permit. The trial court determined that plaintiffs failed to carry their burden of proof that they had a substantive or procedural due process right to renew the time-limited short-term rental licenses.

After failing to prevail on their second cause of action in their motion for summary judgment, plaintiffs sought dismissal of that cause of action with prejudice. Plaintiffs then timely appealed the order granting dismissal.

The Court of Appeal's Decision

Standing

The Court of Appeal began by noting that the first plaintiff family had sold their home after the trial court decision. As a result, their claims were no longer affected by the trial court's ruling and were therefore moot. The second family's claims related to Measure M were likewise moot because their home was in the coastal zone and thus not subject to Measure M's prohibition against short term rentals in non-coastal areas. The court did have standing to consider constitutional claims with regard to the 2018 ordinance and lottery termination of one of their short-term rental licenses. The court rejected plaintiffs' procedural and substantive due process claims.

Procedural Due Process

Regarding plaintiffs' procedural due process claims, the court noted that only those governmental decisions which are adjudicative in nature are subject to review under procedural due process principles. Legislative and ministerial decisions are generally not subject to such requirements. The city's adoption of the 2018 lottery ordinance was legislative and therefore not subject to procedural due process requirements.

The court then turned to the city's use of the lottery to sunset plaintiffs' short term rental license. Because the random selection process adopted as part of the 2018 lottery involved no exercise of discretion or judgment, it was purely ministerial and therefore not subject to procedural due process review. Courts have long recognized that a random lottery held by a public agency is a legitimate means of selection, even where a substantial right is implicated.

Vested Rights Claims

Plaintiffs tried to get around the limitations on their procedural due process claims by asserting that they had a vested right in renewal of their short-term rental licenses. Under the vested rights doctrine relating to land use and development, a property owner acquires irrevocable rights to complete construction "notwithstanding an intervening change in the law that would otherwise preclude it."

However, plaintiffs did not establish any vested right of renewal of their licenses beyond their one-year term, even though they spent thousands of dollars and numerous hours to improve and maintain the properties to offer as short-term rentals. In order to establish vested rights, a plaintiff must show some reasonable detrimental reliance, here no such reasonable detrimental reliance existed with relation to the renewal of plaintiffs' short term rental licenses beyond their one-year term.

Substantive Due Process

With regard to their substantive due process claims, plaintiffs argued that strict scrutiny applied because the city violated their:

> . . .fundamental right to allow guests to stay in their home and right to rent their home to overnight guests and as a result their freedom to associate under the First Amendment.

However, nothing in the record indicated that the city infringed on plaintiffs' rights to entertain guests, host overnight visitors, or rent the premises for periods of 30 days or more. Plaintiffs failed to state any authority for the proposition that their economic preference for short-term over long term rental income is "implicit in the concept of ordered liberty."

Under the deferential rational basis test, the court found that the 2018 ordinance served a legitimate government interest—to reduce the proliferation of online host sites that resulted in an overabundance of short-term rentals in the city. The city's adoption of the lottery to randomly reduce the number of short-term rentals in the city was rationally related to this purpose.

Conclusion and Implications

Although *unpublished*, the *Hobbs* decision provides a helpful discussion of the legal standards that apply to vested rights, and procedural and substantive due process. A copy of the court's opinion is available online at: courts.ca.gov/opinions/nonpub/H047705.PDF. (Travis Brooks)

SECOND DISTRICT COURT AFFIRMS DECISION FINDING NO REASONABLE CONNECTION BETWEEN AMOUNT OF DEVELOPMENT IMPACT FEE AND BURDEN OF STORAGE USE

Pismo Beach Self-Storage, LP v. City of Pismo Beach,
___Cal.App.5th___, Case No. B310289 (2nd Dist. Sept. 12, 2022).

The Second District Court of Appeal in *Pismo Beach Self-Storage, LP v. City of Pismo Beach* affirmed the trial court's decision that the City of Pismo Beach's (City) fee schedule for self-storage facilities failed to establish a reasonable relationship between a development fee assessed by a public agency and the burden that type of development places on the City's infrastructure under the Mitigation Fee Act (Gov. Code, § 66000, *et seq.*).

Factual and Procedural Background

Pismo Beach Self Storage, LP (PBSS) owns a 6.4 acre parcel in the City. PBSS demolished a 15,000 square-foot storage facility and presented plans to the City for a new 109,509-square-foot self-storage facility.

The City's existing fee schedule (2004-Maximus) estimated impact fees for residential, mobile homes, hotels, recreational vehicle (RV) parks, retail and office uses, but did not consider self-storage or light industrial uses. PBSS requested a study specifically for self-storage uses.

The City retained RCS to conduct an impact fee study for self-storage and light industrial uses. The City had been applying the office and retail use categories from the 2004 Maximus study to all business-related developments. But the demands placed on the City's infrastructure from light industrial and self-storage uses are statistically less.

The RCS study attempted to create a reasonable nexus for impact fees for light industrial and self-storage uses by replicating the 2004 Maximus study calculations as though light industrial and Self- Storage Units categories had been included.

The RCS study assumed that the light industrial category would include uses generally found in business parks such as appliance repair, woodworking, automobile repair, and "light warehousing (self-storage units). The RCS study used an average of two employees/users per thousand square feet of development to calculate the infrastructure impact of both light industrial and self-storage uses.

With respect to water demand, the RCS study stated:

> Water demand estimates from academic sources can be found that with greater and lesser demands for Light Industrial Uses as is also the case for Retail/Service and Office Uses. It is difficult to determine what demand the City's Water Master Plan consultants would have assigned to Industrial Uses as such uses were not anticipated by the City at that time. As a result, RCS recommends the application of the same 0.196 acre-feet per year as the two other business land-use development impact fee categories.

The study recommended impact fees for both light industrial and self-storage uses of $1,061 for water system facilities, $6,572 for state water contract charges, and $3,761 for recycled water facilities per 1,000 square feet of development. That totals $11,394 per 1,000 square feet or $1.135 million for water impact fees for a 100,000-square-foot facility.

The City's chief financial administrator, Nadia Feeser, recommended that the City keep the water

fees the same as the current fee for the office category. She said she studied the historic water use of the former 15,500-square-foot self-storage facility that had been on the property. She said the water use for the former self-storage facility was 25 to 176 percent compared to other properties in the office classification.

When PBSS received the RCS study, it retained Cannon Engineers (Cannon) to review the study. Cannon analyzed the actual impacts of water use at a self-storage facility and comparable impact fees imposed in neighboring cities. Cannon concluded the RCS study overstated the water use and number of employees for a self-storage facility. Cannon stated that the expected water use is 0.9 acre-feet per year. Cannon recommended a fee of $8,210 for water system facilities, $17,479 for state water, and $36,800 for recycled water, for a total water fee of $62,489.

PBSS also disputed Feeser's assertion that the prior use of the property consumed between 25 and 176 percent more water than other properties. The historic water use came from the operation of the construction yard where there was a regular practice of washing equipment on-site.

PBSS offered data on water use at its other self-storage facilities. PBSS asserted that its self-storage facility will have only two employees, not two per 1,000 square feet as estimated in the RCS study. PBSS stated that if it would help move the matter along, it would agree not to allow RV washing on the premises.

The City's staff recommended two different impact fee schedules for self-storage facilities depending on whether RV's were stored and washed on-site. If RV's were stored and washed on-site, the fee schedule for water would be as suggested in the RCS study. If the water is used indoor only, the staff recommended impact fees of $216 for the water system improvements, $900 for the state water supply, and $3,761 for recycled water development per 1,000 square feet. The alternative indoor use only fees were calculated at 20 percent of the fees charged in the office use category.

Based on the RCS study and the City's staff report, the City passed a resolution establishing impact fees for self-storage use and self-storage only indoor water use. For self-storage the fees were as recommended by the RCS study, that is, the same as light industry. For self-storage only indoor water use, the fees were as recommended by the staff report, that is, 20 percent of the office use category fees.

PBSS paid the fees in protest, and then petitioned the trial court for a writ of mandate directing the City to vacate its fee resolution and refund the contested fees, alleging there is no reasonable relationship between the fee imposed and the type of development on which it is imposed.

The trial court granted the writ of mandate, finding that RCS's reliance upon the Maximus study defies logic, and that the findings about employee number and water use were not supported by the evidence. The trial court also found that the City's use of the fees would to reimburse the City for infrastructure already completed would violate the Mitigation Fee Act

The Court of Appeal's Decision

The Court of Appeal, applying the deferential narrow standard of arbitrary, capricious or entirely lacking substantial evidence for quasi-legislative fee determination decisions, affirmed the trial court decision.

The Mitigation Fee Act

The Mitigation Fee Act was enacted by the California Legislature in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to the development projects.

Section 66001, subdivision (a) provides in part:

> In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following: (1) Identify the purpose of the fee. (2) Identify the use to which the fee is to be put. . . . (3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed. (4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

Such fees are justified only to the extent that they are limited to the cost of increased services made necessary by the development. A local agency must show that a valid method was used to arrive at the fee, one that establishes a reasonable relationship between the fee and the burden created by the development.

Analysis of the City's Fee

Analyzing whether the City used a valid method under the arbitrary and capricious standard, the Court of Appeal noted that self-storage is not a new type of business. Such facilities have been operating in this state for decades.

The Court of Appeal found that, instead of a study of self-storage facilities, the City relied on the RCS study. That study assumes, without evidence or even an explanation, that self-storage is similar to light industry. The study simply lists "light warehousing (self-storage units)" as a light industrial use, as if that were explanation enough.

The Court of Appeal further found that the RCS study is purported to be based on the Maximus study. But the Maximus study does not consider light industry or self-storage. The RCS study states that it can create a reasonable nexus for self-storage impact fees by replicating as close as possible the 2004 Maximus study calculations as though self-storage unit categories had been included in the 2004 effort.

The Court of Appeal concluded:

> How one can replicate calculations that never existed remains a mystery. It also remains a mystery how the City's staff concluded that if only indoor water use were allowed, the fees would be 20 percent of the fee in the office use category. It seems a number pulled out of nowhere.

Conclusion and Implications

This opinion by the Second District Court of Appeal demonstrates that cities cannot rely on other categories of use as a valid method for determining development impact fees for a distinct category of use, but must study the actual impacts of that use. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/B310289.PDF. (Boyd Hill)

FIRST DISTRICT COURT HOLDS CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION VIOLATED CEQA BY RENEWING A REGISTRATION WITHOUT REEVALUATING ENVIRONMENTAL IMPACTS

Raptors are the Solution v. Superior Court, *Unpub.*, Case No. A161787 (1st Dist. Sept. 27, 2022).

In a September 27, 2022 *unpublished* decision, the First District Court of Appeal in *Raptors are the Solution v. Superior Court* reversed the trial court's denial of Raptors Are the Solution's petition for writ of mandate filed against California Department of Pesticide Regulation (Department). The Court of Appeal held that the Department abused its discretion by failing to proceed in the manner required by law by declining to reevaluate diphacinone, a registered rodenticide.

Regulatory Background

Pesticide Registration

The California Department of Pesticide Regulation is responsible for the registration, renewal, and reevaluation of pesticides that are manufactured or sold in California. After a pesticide is registered by the U.S. Environmental Protection Agency (EPA), the Department evaluates the pesticide's potential adverse environmental effects and determines whether to register the pesticide. Pesticide registrations must be renewed annually, generally within 60 days of the Department receiving a satisfactory renewal application. At any time, the Department may reevaluate a registered pesticide. The Department must investigate all reports of a pesticide's adverse environmental impacts and reevaluate the pesticide if the investigation reveals that a significant adverse impact has occurred or is likely to occur or that an alternative is available that may significantly reduce such an impact.

When registering, renewing, or reevaluating a pesticide, the Department must post its proposed decision for a 30-day public review and comment pe-

riod. If the Department intends to renew a pesticide without a reevaluation, it must also make a written finding that it did not receive sufficient information to require a reevaluation.

Under the California Environmental Quality Act (CEQA), the Department's pesticide program is a certified regulatory program that is exempt from certain CEQA procedural requirements. While EIR requirements, for example, are not applicable to the program, CEQA still requires evaluation, disclosure, and, where feasible, avoidance of significant adverse environmental effects.

Factual Background

In December 2017, in response to the Department's proposed decision to renew various registered rodenticides, plaintiff Raptors Are the Solution (Raptors) requested reevaluation of several first- and second-generation anticoagulant rodenticides (FGARs and SGARs). Raptors provided the Department with information and data to support its claim that the rodenticides would have significant cumulative impacts on wildlife. In April 2018, the Department published a final decision renewing the rodenticides without reevaluation.

At the Trial Court

In June 2018, Raptors filed a petition for writ of mandate, alleging that the Department's decision to renew the rodenticides without reevaluation violated both CEQA and the Department's own regulations. The Department notified Raptors in November 2018 that it would reevaluate the SGARs but not the FGARs, explaining in its investigation report that FGARs had lower rates of exposure to non-target wildlife than SGARs. The Department then filed a demurrer arguing that the Department was not required to place a pesticide into reevaluation during the 60-day renewal period. The trial court sustained the demurrer with leave to amend. In May 2019, Raptors filed an amended petition challenging the Department's November 2018 decision to not reevaluate diphacinone, one of the FGARs. In November 2020, the trial court denied Raptors' amended petition, holding that the Department did not abuse its discretion because its decision to not reevaluate diphacinone was supported by substantial evidence in the record. Raptors appealed.

The Court of Appeal's Decision

CEQA Applicability

Contrary to the Department's argument that CEQA does not apply to decisions to *not* act, the First District Court of Appeal held that CEQA applied to the Department's decision to not reevaluate diphacinone. The court explained that, in making its decision, the Department had effectively approved the continued use and sale of the rodenticide. Additionally, the court reasoned that because CEQA requires certified regulatory programs to evaluate and avoid significant adverse environmental effects where feasible, it would frustrate CEQA's purpose to conclude that decisions to reevaluate, but not decisions to *not* reevaluate, could be challenged under CEQA.

CEQA Violations

After holding that CEQA's substantive mandates applied to the Department's decision, the court reviewed the Department's compliance with CEQA *de novo*. The court concluded that the Department abused its discretion by failing to perform a cumulative impacts analysis as required by CEQA. Additionally, the court determined that some of the Department's information disclosures were deficient.

The court explained that the Department was required to perform a cumulative analysis that considered diphacinone's incremental effect when used alongside other anticoagulant rodenticides. Instead, the Department improperly declined to reevaluate diphacinone and other FGARs based on a comparative analysis of the environmental effects of FGARs compared to those of SGARs. Alternatively, the court noted that if the Department had determined that concerns about diphacinone's cumulative effect were too speculative, it was required to state that conclusion and its basis.

Additionally, the court found that the Department's investigation report failed as a CEQA informational document because it contained misleading information about of diphacinone. By grouping diphacinone with the other FGARs, which the Department characterized as having generally low exposure rates, the Department obscured the fact that diphacinone more closely resembled an SGAR in terms of prevalence and toxicity.

While the court held that the Department had disclosed misleading information about diphacinone, it concluded that the Department was not incorrect or misleading in its characterization of two studies which separately analyzed rodenticide exposures in non-target wildlife. Raptors argued that the Department had abused its discretion by failing to discuss both a preliminary study assessing exposures in owls and a hypothesis that that the impacts of FGARs on bobcats was underestimated. Ultimately, the court did not agree with Raptors that the omissions constituted legal error.

Conclusion and Implications

As a result of the Department's CEQA violations, the First District Court of Appeal reversed the trial court's judgment denying Raptors' petition for writ of mandate. The court remanded with instructions for the Superior Court to issue a writ of mandate directing the Department to analyze the cumulative environmental effects of diphacinone and to reconsider the reevaluation decision.

This *unpublished* opinion provides one example of a regulatory scheme that is not subject to CEQA's procedural requirements nevertheless falling short of CEQA's substantive mandates. By amending its petition to focus more narrowly on a single FGAR, Raptors successfully demonstrated to the court that the Department's decision to analyze classes of rodenticides, rather than individual rodenticides, resulted in inadequate disclosure of adverse environmental effects. A copy of the First District Court of Appeal's opinion is available at: https://www.courts.ca.gov/opinions/nonpub/A161787.PDF.
(Bridget McDonald)

FOURTH DISTRICT COURT DENIES MOTION TO DISMISS APPEAL BUT AFFIRMS DECISION FINDING THAT A FOCUSED EIR DID NOT VIOLATE CEQA

Save the Field v. Del Mar Union School District,
___Cal.App.5th___, Case No. D079480 (4th Dist. Sept. 26, 2022).

The Fourth District Court of Appeal in *Save the Field v. Del Mar Union School District* denied a motion to dismiss the appeal of Save the Field (appellant), but affirmed the trial court's decision that Del Mar Union School District's (District) focused Environmental Impact Report (EIR), as a follow-up to a previously invalidated Mitigated Negative Declaration (MND), did not violate the California Environmental Quality Act (CEQA—Pub Resources Code, § 21000, *et seq.*).

Factual and Procedural Background

The Project is to demolish, redesign and rebuild the Del Mar Heights Elementary School, expanding the school's footprint by approximately 14,400 square feet to about 66,800 total square feet, and building additional paved parking on existing grass fields. The District determined the Project would have no significant adverse impacts on the environment and on May 2020, the District's governing board adopted a MND and approved the Project.

Appellant filed a petition for writ of mandate challenging the MND, claiming that the MND failed to comply with CEQA in numerous respects, including by understating the severity and scope of the environmental impacts.

In December 2020, the trial court issued a writ of mandate vacating the MND and the Project's approval, and suspending all activity until District fully complied with CEQA.

The trial court rejected many of appellant's claims. However, it found deficiencies with District's conclusions as to construction noise, traffic impacts on neighboring residential areas, and biological resources. More specifically, the court found that a significant environmental impact could result from noise levels for construction activities occurring closer to nearby residences. It found that increased vehicle access combined with construction of a new entry point (an Americans with Disability Act (ADA)-compliant ramp and stairs) onto the school grounds would

increase vehicle traffic on a neighboring residential cul-de-sac, a significant environmental impact. It also found the analysis lacked data on impacts to a particular chaparral habitat on which the Project would encroach and on a plant within that habitat.

In February 2021, the Superior Court ruled, citing § 21168.9, that in the event of a finding that a public agency has not complied with CEQA, it could not direct the agency to exercise its discretion in any particular way. It stated District had three choices if it chose to proceed with the Project: (1) prepare and circulate a complete Environmental Impact Report (EIR), (2) a "focused" EIR, or (3) a second mitigated negative declaration, any of which would satisfy CEQA requirements. The court left the decision to District's discretion.

The Superior Court entered a judgment on appellant's peremptory writ of mandate ordering District to set aside and vacate its resolutions approving the Project and decertify the Project's mitigated negative declaration; suspend effective December 22, 2020, all Project activities that could result in any change or alteration to the physical environment until District reconsidered its resolution and brought it into compliance with CEQA; comply with CEQA; and file a return to the writ of mandate within 30 days after service of the writ. The court gave appellant 20 days from the date of the return to file objections. It retained jurisdiction over the proceedings by way of a return to the writ until District complied with CEQA.

After three returns on the writ to demonstrate to the Superior Court its decision to prepare and its progress on a focused EIR, in June 2021, District issued and certified its final focused EIR. The District approval resolution states that focused EIR was prepared to analyze the two remaining environmental issues of the Project: (1) potential impacts to the Southern Maritime Chapparal habitat and any endangered plant species caused by the Project; and (2) potential impacts of construction noise on adjacent residential sensitive receptors. It incorporated by reference findings of fact from the MND with respect to all other Project environmental impacts, and included a Mitigation and Monitoring Program.

In July 2021, District filed a final return requesting that the court discharge the peremptory writ of mandate. On July 19, 2021, the court issued an order discharging the peremptory writ of mandate, stating District had complied with and fully satisfied the judgment, the writ of mandate, and CEQA.

On August 6, 2021, appellant filed a notice of appeal of the court's judgment on the grounds that a focused EIR was not appropriate. On September 15, 2021, appellant filed an amended notice of appeal of the court's July 19, 2021 order discharging the writ.

The District then filed a motion to dismiss the appeal, claiming that the appeal was moot because the District had vacated the MND, and also claiming that appellant should have filed a new writ following the District's notice of determination to file a focused EIR.

The Court of Appeal's Decision

The Court of Appeal denied the District's motion to dismiss, determining as a matter of law that a new writ was not required and that the appeal was timely filed following the focused EIR and following the discharge of the writ.

The Court of Appeal, applying the deferential abuse of discretion standard of review, held that the Superior Court determination to allow a focused EIR incorporating the MND was not an abuse of discretion, given that the MND also doubled as an Initial Study, thus satisfying the requirement for an EIR to study and analyze all potential environmental effects of the Project.

The Motion to Dismiss

The District's motion to dismiss was based on two grounds. First, the District argued that the appeal was moot because the District had vacated the MND. The Court of Appeal held that the appeal was not moot because it does not challenge the District's preparation of the MND, but instead the Superior Court's later decision given the District the option of preparing a limited or focused EIR rather than a full EIR. The District's compliance with the Superior Court's remedy will not render moot an appeal that challenges the validity of that remedy. The Superior Court reserved continuing jurisdiction and the appeal challenged the remedy of the focused EIR, which was finally implemented before the appeal.

Second, the District argued that appellant was barred by the CEQA statute of limitations from challenging the focused EIR. Appellant was not required to object to the various returns to the writ or to file

a new, separate writ challenging the focused EIR when the District filed a notice of determination to prepare a focused EIR. There is but one writ required for the first notice of determination for the Project. The CEQA limitations period starts running on the date the Project is approved by the public agency and is not retriggered on each subsequent date that the public agency takes some action toward implementing the project. Appellant's writ proceeding was still pending at the time of the District's decisions relating to its focused EIR.

The Focused EIR

Appellant argued that a focused EIR is never an appropriate remedy when the Superior Court vacates a MND. The law requires a full EIR to analyze all potential environmental effects when an MND is vacated. The District countered that CEQA does not mandate post-trial remedies, but instead gives broad discretion to the Superior Court to determine to vacate an MND only in part. The District also argued that its MND was also its Initial Study, and that the District was entitled to rely on its Initial Study to determine whether environmental impacts needed further study.

The Court of Appeal agreed with the District that the focused EIR complies with CEQA's informational mandate to describe the Project, its potential environmental effect, an alternatives analysis, a cumulative impact analysis, and a mitigation and monitoring program.

However, the Court of Appeal noted that an EIR can meet these requirements even when information about environmental impacts mitigated to a level of insignificance or mitigation measures is contained in an Initial Study, if that study is available in its entirety and incorporated into the EIR. The Court of Appeal must not elevate form over function, but instead ask whether the information is adequate to facilitate informed agency decision-making and informed public participation.

The focused EIR met all of the requirements with its incorporation of the Initial Study and its mitigation and monitoring program.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal demonstrates that, although a petition for writ of mandate remains pending once an MND has been invalidated, pursuant to reserved jurisdiction on the Superior Court, a challenge to the return EIR must be to the essential requirements of the EIR, including whether it properly addresses the potential environmental impacts of the Project. The challenge to the format of the return EIR in this instance fell short of a challenge to an EIR requirement. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/D079480.PDF.
(Boyd Hill)

FOURTH DISTRICT COURT UPHOLDS CITY OF ENCINITAS' DENIAL OF APPLICATION TO MODIFY PERMITS ORIGINALLY ISSUED IN 2005

Surfer's Point, LLC v. City of Encinitas, *Unpub.*, Case No. D079271 (4th Dist. Sept. 20, 2022).

Surfer's Point LLC (Surfer's Point) applied for modifications of permits that originally had been issued in 2005. The City of Encinitas (City) planning commission (Planning Commission) denied the application, finding that the permits already had expired, and the city council (City Council) subsequently denied Surfer's Point's appeal. Surfer's Point then filed a lawsuit, which was denied to the extent Surfer's Point sought an order requiring the City of Encinitas to approve the application. Following an appeal, the Court of Appeal affirmed the Superior Court ruling with one modification in an *unpublished* decision.

Factual and Procedural Background

Years after the original development permits for its project issued by the City of Encinitas had expired by operation of law, Surfer's Point attempted to resume its development project by applying for modifications to the original permits. The Planning Commis-

sion denied the application for modifications of the four original development permits, finding that the previously issued permits had expired, and the project was inconsistent with certain design recommendations. Surfer's Point then timely appealed to the city council.

The City Council denied the appeal of the Planning Commission's decision, finding that the required findings could not be made. Surfer's Point then filed a petition for writ of mandate and complaint for declaratory relief in the Superior Court. The Superior Court denied the writ petition to the extent that Surfer's Point sought an order requiring the City to approve its application, but granted in part a request for declaratory relief. Surfer's Point then appealed.

The Court of Appeal's Decision

On appeal, Surfer's Point claimed that the Superior Court erred by denying its request for writ relief, contending that: (1) substantial evidence did not support the findings that the City Council made in support of its denial of Surfer's Point appeal of the Planning Commission decision; (2) equitable estoppel and/or promissory estoppel applied to bar the City Council from denying its appeal and instead required that the City Council approve Surfer's Point's application; and (3) Surfer's Point's modification application was "deemed approved" under Government Code § 65956 given the Planning Commission's failure to timely act on the application.

Substantial Evidence Supporting City Council Findings

The Court of Appeal first addressed Surfer's Point's claim that the Superior Court erred because substantial evidence did not support the City Council's findings in support of its denial of Surfer's Point's appeal from the Planning Commission action that denied the development application. The Court of Appeal disagreed, finding that there was substantial and undisputed evidence to support the City Council's findings that Surfer's Point's original development permits had expired by operation of law years before Surfer's Point attempted to resume the project. Construction had not started within the required time and there was no request to renew the previously issued permits within the time prescribed by the ordinance. Thus, they were null and void. The Court of Appeal also rejected the claim that the City was required to hold a hearing prior to the permits expiring. Because an application for modification requires existing valid permits, the Court of Appeal found, neither the City Council nor the Planning Commission could approve Surfer's Point's application for modification of those permits.

Equitable and/or Promissory Estoppel

The Court of Appeal next addressed Surfer's Point's claim that, even if there was substantial evidence to support the City's denial, the Superior Court erred by not finding that the doctrine of equitable estoppel and/or promissory estoppel applied to preclude the City from denying Surfer's Point's application for the development permits and/or from finding that the 2005 permits had expired by operation of law. Surfer's Point cited evidence that City staff represented to it that the 2005 permits remained valid and that it only was required to apply for modifications to be able to resume development of the project. The Court of Appeal disagreed, finding that the doctrines of equitable estoppel and promissory estoppel did not apply under the circumstances.

In particular, the court found that Surfer's Point did not have a building permit (or its functional equivalent) and therefore did not have a vested interest that could be protected by application of estoppel. Surfer's Point also had waited 15 years after issuance to seek equitable relief. The court also noted that developers generally cannot reasonably rely on statements of public agency employees who are not authorized to make land use decisions. Nor could Surfer's Point claim it was unaware of the relevant local ordinances regarding the various permits. The court also found that public policy considerations did not weigh in favor of granting relief. For all these reasons, the Court of Appeal rejected both equitable and promissory estoppel.

Deemed Approved

The Court of Appeal next addressed Surfer's Point's argument that, even if the 2005 development permits expired by operation of law, its application for modifications of those permits must be "deemed approved" under Government Code § 65956(b) because the Planning Commission did not timely approve or disapprove its application. The court again disagreed,

finding that, although the Superior Court had not explicitly addressed this issue, the record contained sufficient findings to support the Superior Court's implied findings that the application was not deemed approved, but rather was withdrawn at a certain hearing. When the project was later resubmitted, the Planning Commission timely denied the applications.

Declaratory Relief

Finally, the Court of Appeal addressed the Superior Court's award of certain declaratory relief to Surfer's Point. In its judgment granting in part and denying in part Surfer's Point's request for declaratory relief, the Superior Court found that because the City had not provided Surfer's Point with notice that the issue of the validity of the 2005 permits would be considered by the City Council at its August 2020 hearing, the City Council was without power to find that the 2005 permits had expired and were null and void. Although the City had not filed a cross-appeal challenging the judgment, the Court of Appeal exercised its inherent discretion to address the issue, finding that the notice that was provided satisfied applicable statutory requirements as well as procedural due process concerns. Accordingly, the Court of Appeal concluded that the Superior Court erred by directing the City to remove from the City Council's resolution denying Surfer's Point appeal its finding that the permits were null and void.

Conclusion and Implications

The case is significant because it contains a substantive discussion regarding the lifetime of permit approvals and the potential applicability of the doctrines of equitable and/or promissory estoppel. The *unpublished* decision is available online at: https://www.courts.ca.gov/opinions/nonpub/D079271.PDF. (James Purvis)

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