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CALIFORNIA LAND USE™ LAW & POLICY Reporter

FEATURE ARTICLE

SCOTUS LIMITS WOTUS: JURISDICTIONAL WATERS AND WETLANDS UNDER THE CLEAN WATER ACT MUST BE RELATIVELY PERMANENT, STANDING, OR CONTINUOUSLY FLOWING BODIES OF WATER

By Nicole Granquist and Jaycee Dean

On May 25, 2023, the U.S. Supreme Court released its highly anticipated opinion in *Sackett v Environmental Protection Agency* (*Sackett*), delineating the appropriate "standard to determine" waters of the United States (WOTUS) under the federal Clean Water Act (CWA). The Supreme Court significantly reduced the reach of WOTUS from earlier jurisprudence by holding that under the CWA, the word "waters" refers only to geographical features that are described in ordinary parlance as "streams, rivers, oceans, and lakes" and adjacent wetlands that are indistinguishable from those bodies of water due to a continuous surface connection. The ruling is a critical blow to the "significant nexus" standard originally penned by Justice Kennedy in *Rapanos v. United States,* 547 U.S. 715 (2006) and recently memorialized by the Biden administration's Revised Definition of Waters of the United States. The "significant nexus" standard set a controversially expansive definition of WOTUS and required in-depth, arduous, and often expensive consultant and legal analysis for applicability.

Regulatory Background and Jurisprudence to Date

Historically, the regulation of water pollution was achieved through common law nuisance suits against dischargers with state's gradually shifting to enforcement by regulatory agencies. Federal regulation was limited to interstate waters that were either *navigable in fact* and used in commerce or readily susceptible to use in commerce. (Rivers and Harbors Act of 1899, 20 Stat. 1151). In 1948, Congress enacted the Federal Water Pollution Control Act as an effort to directly regulate water pollution. (62 Stat. 1156.)

In 1972, Congress enacted the CWA to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1252, subd. (a).) The CWA extends to all navigable waters, defined as "waters of the United States, including the territorial seas" and prohibits those without a permit from discharging pollutants into those waters. (*Id.* §§ 1362(7), 1311(a).) Those in violation of the CWA potentially face criminal and civil penalties. (*Id.* §§ 1319(c), 1319(d).) The term "waters of the United States" is not defined further within the CWA thereby leaving federal agencies, through regulation and policy guidance, to attempt to define the what constitutes a WOTUS—including what wetlands are WOTUS. Courts have then been tasked, and rarely reached consensus, on identifying the boundaries of the geographic reach of "waters of the United States" to guide the scope of regulatory jurisdiction under the CWA.

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers (Corps), (collectively: Agencies) jointly enforce the CWA and have modified the WOTUS definition more than a handful of times. Upon initial enactment of the CWA, the Corps adopted the traditional judicial term for navigable waters—that the waters must be "navigable in fact." (39 Fed. Reg. 12115, 12119 (Apr. 3, 1974).) In 2008, after the U.S. Supreme Court decision in *Rapanos*, the Agencies released guidance for the CWA asserting jurisdiction over "wetlands adjacent to traditional navigable waters." (EPA and Corps, Memorandum on Clean Water Act Jurisdiction Following U.S. Supreme Court's Decision in *Rapanos v. U.S.* (2008).) In 2015, under the Obama administration, the Agencies issued

the Clean Water Rule that amended the WOTUS definition to include eight categories of jurisdictional waters, including non-adjacent wetlands and other non-navigable water bodies. (80 Fed. Reg. 37054 (June 29, 2015).) In 2019, under the Trump administration, the Agencies repealed the 2015 rule and restored the pre-2015 WOTUS definitions. (84 Fed. Reg. 56626 (Dec. 23, 2019).) Then, in 2020, the Agencies under the Trump administration issued the Navigable Waters Protection Rule (85 Fed. Reg. 22250 (Apr. 21, 2020)), which narrowed the conditions upon which non-adjacent wetlands would be considered WOTUS, but this rule was vacated in 2021 by a federal District Court in Arizona (*Pascua Yaqui Tribe v. United States Environmental Protection Agency*, Case No. CV-20-00266-TUC-RM, 2021 WL 3855977 (D. Ariz. 2021)), thereby prompting the Agencies' re-implementation of the pre-2015 WOTUS definitions. On March 20, 2023, under guidance from the Biden administration, the Agencies most recent regulation, the "Revised Definition of Waters of the United States" went into effect. (88 Fed. Reg. 3004 (Jan. 18, 2023).) The 2023 WOTUS Rule relies heavily on the pre-2015 regulatory framework and associated case law, while simultaneously reinvigorating the "significant nexus" standard delineated by Justice Kennedy in *Rapanos*.

Contemporaneous to the Agencies' various iterations of the WOTUS definition, the Supreme Court has, over the years, provided parallel jurisprudence guiding the interpretation of WOTUS. In 1985, the Court held that wetlands actually abutting traditional navigable waterways were considered WOTUS. (*United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985).) In 2001, the Court held that WOTUS does not include "nonnavigable, isolated, intrastate waters" in its decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 121 (2001). Most relevant here, in 2006, the Court issued its fragmented opinion in *Rapanos v. United States*, holding that the CWA does not regulate all waters and wetlands, but failing to provide a majority approach to determining WOTUS jurisdiction. Justice Scalia, writing for the plurality, argued that wetlands that have a contiguous surface water connection to regulated waters "so that there is no clear demarcation between the two" are adjacent and may then be regulated as WOTUS. (574 U.S. at 742.) The concurring opinion, authored by Justice Kennedy, advanced a broader "significant nexus" test that would allow regulation of wetlands as WOTUS if wetlands "alone or in combination with similarly situated lands…significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense." (*Id.* at 780.)

The Sacketts

In 2004, near Idaho's Priest Lake, the Sacketts purchased a residential lot that they planned to develop. In 2007, shortly after the Sacketts began filling the lot with sand and gravel, the EPA issued an administrative compliance order stating that the property contained wetlands subject to CWA protection. According to EPA the wetlands on the Sackett's lot are "adjacent to" an unnamed tributary on the other side of a 30-foot road. The unnamed tributary feeds into a non-navigable creek, which feeds into Priest Lake (an intrastate body of water that the EPA designated as traditionally navigable). In 2008, the Sacketts initially brought suit against the EPA asserting that the agency's jurisdiction under the CWA did not extend to their property. Various aspects of the case have been slowly making their way up and down the federal court system. In 2021, the Ninth Circuit Court of Appeals considered whether the Sackett's Idaho property contained wetlands subject to CWA jurisdiction. (*Sackett v. U.S. Envtl. Prot. Agency*, 8 F.4th 1075 (9th Cir. 2021).) The Sacketts argued that Justice Scalia's reasoning in *Rapanos* controlled because their property does not have a continuous surface connection to a navigable water. The Ninth Circuit disagreed and ultimately upheld Justice Kennedy's "significant nexus" test as the controlling authority in the Ninth Circuit. On September 22, 2021, the Sacketts submitted their petition for writ of *certiorari* to the Supreme Court requesting that the Court revisit its decision in *Rapanos* and on January 24, 2023, the petition was granted. (595 U.S. __ (2022).)

The May 25, 2023 Supreme Court Opinion

The Supreme Court granted the Sackett's petition to consider whether the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under CWA § 502(7). In its May 25, 2023 ruling, the Supreme Court reversed and remanded the matter for further proceedings, consistent with

the holding that the CWA extends only to waters or wetlands with a continuous surface connection with WOTUS—*i.e.*, relatively permanent, standing or continuously flowing bodies of water connected to a traditional interstate navigable water—such that it is difficult to determine where the traditionally navigable water ends and the adjacent wetland begins.

In striking down the Ninth Circuit's reliance on Justice Kennedy's "significant nexus" test, the Supreme Court provided that, in order to assert jurisdiction over an adjacent wetland under the CWA, a party must establish that the wetland: (1) is adjacent to a WOTUS and (2) has a continuous surface connection with that WOTUS. The majority opinion was delivered by Justice Alito with Justices Barrett, Gorsuch, Roberts, and Thomas joining. Justices Thomas, Kagan, and Kavanaugh each filed concurring opinions. In the majority decision, Justice Alito considered: (1) the extent of the CWA's geographical reach and (2) whether the Court should defer to the Agencies' interpretation of WOTUS in the 2023 Revised Definition.

Extent of the CWA's Geographical Reach

In considering the geographical reach of the CWA, the Supreme Court in *Sackett* held that "waters" encompasses only relatively permanent, standing, or continuously flowing bodies of water for several reasons. First, the Supreme Court looked to the plural use of "waters" in Section 502(7) of the CWA, with the Court stating such use typically refers to bodies of water like streams, oceans, rivers, and is difficult to reconcile with classifying "lands" (wet or otherwise) as waters. (*Sackett* at 14; 33 U.S.C.§ 1362(7).) The Supreme Court also noted that use of the word "navigable" signals that the definition principally refers to navigable bodies of water. Second, the use of the term "waters" in other portions of the CWA (*e.g.*, CWA section 117) confirmed for the Supreme Court that the term refers to "bodies of open water" (*Sackett* at 16 and 33 U.S.C. §1267(i)(2)(D) pertaining to the waters of the Chesapeake Bay). Third, the CWA expressly "protects the primary responsibilities and rights of states to prevent, reduce, and eliminate pollution" and the Supreme Court found that the state's role would not remain primary if the "EPA had jurisdiction over anything defined by the presence of water." (*Sackett* at 17 and 33 U.S.C. § 1251(b).)

Moreover, in determining CWA jurisdiction, the Supreme Court noted that while the ordinary meaning of "waters" might seem to exclude all wetlands, statutory context shows that some wetlands qualify as WOTUS. (*Sackett* at 18.) For example, Congress amended the CWA in 1977 to add CWA section 404(g)(1),) which authorizes state permitting programs to regulate discharges into any waters of the United States, except for traditional navigable waters, including wetlands adjacent thereto. (33 U.S.C.§1344(g)(1)) Justice Alito opined that while some wetlands are WOTUS, the above cited provision must be harmonized with CWA section 502(7) "water of the United States" language. (33 U.S.C. §1362(7); *Sackett* at 19) Because "adjacent wetlands" are included within water of the United States, Justice Alito found that these wetlands must qualify as WOTUS in their own right, *i.e.*, the wetlands must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. (*Id.*) Therefore, the Supreme Court concluded wetlands that are separate from traditional navigable waters cannot be considered part of those waters, even if they are located nearby.

As it now stands, the jurisdictional reach of the CWA extends to only those waters or wetlands that are "indistinguishable" from traditionally defined WOTUS, which must be relatively permanent, standing or continuously flowing bodies of water. As the Supreme Court noted, it must be difficult to determine where the "water" ends and the "wetland" begins. (*Sackett* at 22.)

Impacts to the 2023 Biden Administration's Definition of WOTUS

Justice Alito's majority opinion directly addresses the current Agencies' definition of WOTUS, and the majority of Justices agreed that finding jurisdiction based on a "significant nexus" to traditional navigable waters "lacks merit." (*Sackett* at 22-27.) Given the number of legal actions challenging the Agencies' new definition of WOTUS, alleging many of the same theories used by Justice Alito to criticize the new rules, the Supreme Court's opinion is likely to reverberate through the judicial system. (*See State of Texas v. U.S. EPA, Case* No. 3:23-cv-0007 (S. D. Tx. 2023); *Kentucky Chamber of Commerce v. U.S. EPA*, No. 3:23-cv-00008-GFVT (E. D. K.); *West Virginia, et al v. U.S. EPA*, No. 3:23-cv-00032-ARS (D. N. D.).)

Whether the Biden administration will act to modify the Agencies' definition of WOTUS consistent with the *Sackett* decision remains to be seen.

First, the majority found that the Agencies' interpretation is inconsistent with the CWA because Congress was not clear that it wanted to alter the federal/state balance of power over private property when it enacted the CWA. (*Sackett* at 23.) The Supreme Court enunciated its standard that Congress must enact exceedingly clear language if it wishes to alter that balance, which it did not do here. (*Id.*) They concluded that an overly broad interpretation of the CWA's reach would impinge on state authority to regulate land and water use—the core of traditional state authority. (*Id.*)

Second, the Agencies' use of the "significant nexus" test to determine jurisdictional waters present a due process issue, as it gives rise to serious vagueness concerns in light of statutorily authorized criminal penalties. (*Sackett* at 24.) Due process requires Congress to define penal statutes "with sufficient definiteness that ordinary people can understand what conduct is prohibited." (*Id.*) The Court noted that the only thing preventing the Agencies from interpreting WOTUS to cover every water in the country is the "significant nexus" test, and the boundary between significant and insignificant is far from clear. (*Id.*) Further, the Court observed the "significant nexus" test takes another step into vagueness by introducing "similarly situated waters" in the aggregate that are subject to CWA jurisdiction. (*Id.*) The majority found that these inquiries "provide little notice to landowners of their obligations under the CWA" and the Agencies lack "the clear authority from Congress" to create such an indeterminate standard. (*Id.* at 25.)

Third, the Court rejected the Agencies' argument that Congress ratified the regulatory definition of "adjacent" when the CWA was amended to include reference to "adjacent" wetlands in CWA section 404(g)(1), finding that adjacency cannot include wetlands that are merely "nearby" covered waters, existing jurisprudence repeatedly recognizes that CWA section 404 does not conclusively determine construction of other CWA provisions, and the Agencies failed to provide enough evidence to support their interpretation in the face of Congress's failure to amend CWA section 502(7). (33 U.S.C. § 1362(7)).

The Concurring Opinions

Justice Thomas filed a concurring opinion and was joined by Justice Gorsuch, ultimately arguing for an even narrower construction of the CWA. (*Sackett*, Thomas, J concurring at 1.) Thomas argues that the majority opinion focused on "waters" without determining the extent how the terms "navigable" and "of the United States" limit the reach of the statute. (*Id.* at 2.) The concurrence argues that the CWA extends only to the limits of Congress' traditional jurisdiction over navigable waters.

Justice Kagan filed a concurring opinion and was joined by Justice Sotomayor and Justice Jackson, agreeing that textual construction is most important but arguing that "adjacent" is not only touching but includes nearby. (*Sackett*, Kagan, J concurring at 1.) Kagan argued a broader reading of adjacent would ultimately protect wetlands "separated from a covered water only by a manmade dike or barrier, natural river berm, beach dune, or the like" that have been regulated by the Agencies for decades. Kagan opined the majority's "continuous surface connection" test disregards the ordinary meaning of adjacent and narrows the CWA as Congress drafted it.

Justice Kavanaugh also filed a concurring opinion and was joined by Justice Kagan, Justice Sotomayor, and Justice Jackson essentially arguing similarly to Justice Kagan that the continuous surface connection test "departs from the statutory text, from 45 years of consistent agency practice, and from [the Supreme] Court's precedent," and that adjacency should include wetlands separated from a covered water by a man made barrier. (*Sackett*, Kavanaugh, J concurring at 2.) Kavanaugh argued that failing to include those wetlands will have "significant repercussions for water quality and flood control throughout the United States." (*Id.*)

Conclusion and Implications

While the *Sackett* ruling provides clarity to the regulated community, which has faced uncertainty with regard to the scope of federal CWA permitting and project approval(s) because of historic WOTUS ambiguity, the full ramifications of this ruling on project permitting remain to be determined. For example, in California, the regulated community will now have to more fully contend with the "State Wetland Definition and Procedures for Discharges of

Dredged or Fill Material to Waters of the State," (the "Procedures," effective May of 2020), for wetlands and waters that now fall outside the federal CWA's scope (losing the exemption the Procedures offered if the wetlands or waters were regulated under CWA section 404). This circumstance may increase, not lessen, regulatory permitting burdens. Project proponents should carefully evaluate (or re-evaluate) project features to determine the appropriate scope of federal and/or state requirements, and watch for guidance from the Agencies as to how projects that are in a current process of securing approvals (or recently approved but not yet commenced) might be handled in the face of shifting jurisdiction.

The now-defunct "significant nexus" test played a prominent role in the Agencies' 2023 Revised Definition of WOTUS. How the *Sackett* decision will procedurally and substantively impact the Agencies' recent rulemaking in the near term is still unclear, though the U.S. Supreme Court provided plenty of specific input as to the Agencies' rule's likely demise if the Biden administration does not take action and current judicial actions challenging the rule proceed. If there is anything the last three decades of WOTUS jurisprudence and regulatory rulemakings has taught, is not to get too comfortable with a defining "rule." Change in this arena is inevitable. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-454_4g15.pdf.

Nicole Granquist is a Partner at the law firm of Downey Brand, LLP, resident in the firm's Sacramento office. As Chair of the firm's Natural Resources department Nicole routinely negotiates NPDES Permits, WDRs, and water reclamation requirements with the State Water Board and Regional Water Boards for municipal wastewater, industrial process water, and all types of storm water discharges, as well as reclamation projects. She is also heavily involved in the development of TMDLS and all aspects of Basin Planning, and has positively influenced important statewide policies. Nicole is frequently retained to defend public and private entities against third-party citizen suits in federal court.

Jaycee Dean is an Associate at Downey Brand, LLP and her current practice encompasses a myriad of federal and state natural resources issues including the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, water quality, and environmental defense.

LAND USE NEWS

GOVERNOR NEWSOM SIGNS EXECUTIVE ORDER THAT MAY BENEFIT WATER STORAGE AND INFRASTRUCTURE PROJECTS

In May 2023, Governor Newsom signed Executive Order N-8-23 (Order), which calls for the streamlining and expediting of administrative processes related to various infrastructure projects in California, including water projects. The Order creates a Strike Team to identify projects that could benefit from the Executive Order's directives and helps prioritize important infrastructure projects for streamlining purposes. Executive Department State of California, *Executive Order N-8-23* (May, 19, 2023).

Background

California Governor Gavin Newsom signed Executive Order N-8-23 on May 19, 2023 in an effort to streamline and expedite permitting, construction, and ultimately operation of a variety of critical infrastructure projects throughout the state. Specifically, by facilitating and streamlining project approvals and completions, the Order is intended to maximize California's share of federal infrastructure funds and implement projects intended to advance the state's various clean energy and other large infrastructure goals in the future. California intends to invest up to $180 billion over the coming decade to advance clean energy projects.

Areas for improvements to California's ability to meet its infrastructure goals targeted by the Order include the following: (1) construction, (2) judicial review, (3) permitting, (4) CEQA procedures, and (5) the maximizing of federal funds. The Order directs the Senior Counselor on Infrastructure to convene an Infrastructure Strike Team (Strike Team), and directs the Strike Team to identify projects on which to focus streamlining efforts, to support coordination between agencies and governments, and to support infrastructure. The Order further directs working groups created by the Strike Team, one of which focuses on water, to prioritize funding projects that achieve multiple benefits. This funding is identified in the Order as coming from both the state of California and the federal government through the Infrastructure Investment and Jobs Act (IIJA)and the Inflation Reduction Act (IRA).

With respect to water, the Order specifically calls for adaption and innovation to diversity water supplies, expand water resources, efficiently use existing water resources, strengthen California's water resiliency, and modernize our water infrastructure.

Streamlining Projects

In tandem with the Order, Governor Newsom's office identified several examples of projects that could be streamlined. These included water storage projects funded by Proposition 1 and the Delta Conveyance Project. Notably, many of these such projects are identified in California's Water Resilience Portfolio. In 2020, state agencies developed the Water Resilience Portfolio in response to the Executive Order N-19-20, which directed state agencies to develop recommendations to meet California's challenges of rising temperatures, over drafted groundwater, aging infrastructure, and water security. In particular, the Water Resilience Portfolio identifies four broad approaches to support water systems in California, which are: (1) maintain and diversify water supplies; (2) protect and enhance natural systems; (3) build connections; and (4) be prepared. Each of these then have detailed recommendations and actions that fall underneath one of the approaches. Furthermore, the portfolio also breaks down each action by the agency that should pursue or perform the action. In sum, the Water Resilience Portfolio contains more than 100 separate detailed actions to be implemented to the extent resources are available. The 2023 Order presents an opportunity for more resources to be made available to implement these identified actions.

Proposition 1—Six New Water Storage Projects

For instance, under Proposition 1, six new water storage projects eligible for $2.7 billion in state water bond funding advancing their projects. This includes

the Sites Reservoir, Harvest Water Program, the Kern Fan Project, Los Vaqueros Reservoir Expansion Project, Pacheco Reservoir Expansion Project, and the Willow Springs Water Bank Conjunctive Use Project. Since the publication of the Water Resilience Portfolio, all the projects were deemed feasible and if completed they would together expand the state storage capacity of water by nearly 2.8 million acre-feet. Such storage could address the concerns of rising temperatures, drought, aging infrastructure, and water security —all of which are challenges that need to be met according to the Order. Thus, these projects could benefit from the streamlining that the Order calls for as well as the funding and could likely be projects that the Strike Team identifies and focuses on.

Strike Team to Identify Changes to Facilitate Streamline Project Approval

In addition to Proposition 1 projects, the working groups created by the Strike Team are also directed to:

> . . .[i]dentify potential statutory and regulatory changes to facilitate and streamline project approval and completion, and elevate propose changes to the Strike Team for consideration.

Proposals for such changes include authorizing expedited judicial review to avoid delays on the back end of projects without reducing environmental and governmental transparency provided for under the California Environmental Quality Act. Similarly, changes to accelerate permitting for certain projects, reduce delays, and reduce project costs are also being proposed. If implemented, such statutory and regulatory changes could facilitate completion of water-related projects that are delayed by administrative obstacles or legal challenges.

Conclusion and Implications

Projects for water storage and groundwater storage, such as those funded by Proposition 1, will likely be identified by the Strike Team as projects where federal and state funding opportunities can be maximized to increase water infrastructure and resiliency. Thus, they may benefit from not only additional funding, but from processes to streamline and expedite the projects. It remains to be seen what regulatory or other changes will be made to streamline and expedite proper review of such projects and whether those projects will move forward.
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

CALIFORNIA DROUGHT AND FLOOD STREAMLINING TRAILER BILL: FLOODWATER DIVERSION EXCEPTION AND DROUGHT CONTROL MEASURES

As California reckons with the likelihood of ongoing issues relating to flooding and drought, Governor Newson has put forward a trailer bill attached to the 2024 budget that would amend existing sections of the Fish and Game Code and the Water Code to streamline flood and drought responses. One of the central facets of the bill is an amendment to the Water Code that seeks to streamline water projects with an eye toward helping the state meet its climate goals.

Background

The Drought and Flood Streamlining Trailer Bill (Drought and Flood Bill) was included as an amendment to the state budget. Such "trailer bills" are passed as part of the adoption of the state's budget in June without going through the typical committee process. A number of other measures aimed at advancing water policy have been included as trailer bills as part of the 2023-2024 budget process, including an infrastructure bill that would overhaul permitting and litigation for the Delta Conveyance Project. The use of trailer bills to implement substantive policy is controversial because such bills give lawmakers less opportunity to consider, amend, or challenge proposed policy.

Floodwater Diversion and Drought Control Measures

The Drought and Flood Bill includes a number of amendments aimed at streamlining floodwater diversion measures by excluding such activities from the usual restrictions included in Chapter 6 of the Fish and Game Code. The chapter provides for fish and wildlife protection and conservation by implementing the Lake and Streambed Alteration Program. The program requires that the Department of Fish and Wildlife review whether a proposed activity will substantially adversely affect an existing fish and wildlife resource and provides for steps an entity must take to proceed with the project while protecting those resources. Section 1610 includes an exemption for emergency work or projects. The Drought and Flood Bill would expand Section 1610's exemptions to include activities undertaken pursuant to Section 1242.2 of the Water Code, which concerns the diversion of flood flows for groundwater recharge. This amendment would therefore classify such diversions as emergency actions under Section 1610 that are exempt from the review and mitigation procedures otherwise required under Chapter 6. By exempting qualifying projects from California Department of Fish and Wildlife review, the Drought and Flood Bill is intended provide for faster project approval and implementation.

The Drought and Flood Bill would also amend Water Code section 1242 to clarify existing law to state that the diversion of flood flows for groundwater recharge is a beneficial use. The amendments to Water Code section 1242 would further provide that the beneficial use of such groundwater is not limited to only uses requiring subsequent extraction of the recharged water; protection of water quality may also be a beneficial use.

The Drought and Flood Bill would add section 1242.2 to the Water Code. If adopted, Water Codes section 1242.2, subdivision (a), would provide that the diversion of flood flows for groundwater recharge would not require an appropriative water right if a local or regional flood control agency, city, or county has alerted the public that flows downstream of the point of diversion are at immediate risk of flooding. To ensure that the diversion's purpose is confined to flood control, section 1242.2, subdivision (b) would provide that the diversions must cease when the flood conditions have abated. Section 1242.2, subdivision (c) would forbid the diversion of water to the following areas: (1) animal waste generating facilities, (2) agricultural fields where pesticides have been applied within 30 days, (3) areas where the release of water could cause infrastructure damage, and (4) areas that have not been actively irrigated for agricultural culti-

vation within the past three years, unless there is an existing facility on the land for groundwater recharge or managed wetlands. Section 1242.2, subdivision (c) would also forbid diversions to the Sacramento-San Joaquin Delta for the purposes of meeting flow requirements for achieving water quality or protecting endangered species in the Delta. Section 1242.2, subdivision (e) would address the use of existing infrastructure to facilitate diversions by requiring the use of existing facilities or temporary infrastructure where none is available. Section 1242.2, subdivision (e) would also emphasizes the temporary nature of the diversion by forbidding the person or entity making the diversion from claiming any water right based on that diversion. Last, section 1242.2, subdivision (g) would provide that preliminary and final reports must be filed by the party making the diversion. The ostensible purpose of exempting such diversions of floodwaters from the requirements for establishing or exercising appropriative water rights is to allow parties to capture floodwaters for recharge (perhaps with little warning) without first having to undertake the time-consuming permit application process otherwise required by the State Water Resources Control Board (SWRCB).

The Drought and Flood Streamlining Trailer Bill also amends a number of other Water Code provisions to include references to Section 1242.2. Specifically, Water Code section 1831d, subdivision (7) would provide that the SWRCB may issue a cease and desist order in response to a violation or threatened violation of a condition or reporting requirement for the diversion of floodwaters for groundwater recharge under Section 1242.2. Likewise, Water Code section 1846 would be amended to read that a person or entity may be subject to a maximum $500 fine for violating a condition or reporting requirement under Section 1242.2.

The Drought and Flood Bill would also amend Water Code section 13198 to provide the definitions for the provisions relating to drought relief in Article 6 of the Water Code. The amendment would add the phrase "water use reduction and efficiency equipment" to Water Code section 13198, subdivision (c)(1)(G) to define "interim or immediate relief" to include construction or installation of water use and efficiency equipment. The amendment would also add Section 13198, subdivision (c)(1)(K) to include groundwater recharge projects pursuant to the proposed Section 1242.2 as additional tools for drought relief.

Last, the Drought and Flood Control Bill would amend Water Code section 1398.2 to exempt information related to drought emergency activities from the public posting and notice requirements of Government Code sections 7405 and 11546.7. State agencies would alternatively be required to post an accessible version of any materials related to the emergency response as soon as practicable.

Conclusion and Implications

If adopted as currently drafted, the Drought and Flood Bill will have potentially broad implications for the capture and use of floodwaters for groundwater recharge and for drought response more generally. The use of a trailer bill to bring this measure before the Legislature as part of the budget process remains controversial, and the nature of the trailer bill may obscure a careful analysis of the bill's impacts or the extent of opposition to the substance of the bill. For example, it remains to be seen whether the bill will affect pending water rights petitions for flood flows pursuant to existing rules for appropriating water. The full text of the Drought and Flood Bill is available online at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/910.

(Brian Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

NATIONAL MARINE FISHERIES SERVICE MAINTAINS ENDANGERED LISTING STATUS FOR SOUTHERN CALIFORNIA STEELHEAD

On May 2, 2023, the National Marine Fisheries Service (NMFS) issued its Five-Year Review (Review) of Southern California steelhead (*Oncorhynchus mykiss*) under the federal Endangered Species Act (ESA). The Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species.

Background

On August 18, 1997, NMFS listed Southern California steelhead as an endangered species under the ESA. (62 Fed. Reg. 43937.) Southern California steelhead are a distinct population segment (DPS) of *Oncorhynchus mykiss* that originate and reside below natural and manmade impassable barriers from the Santa Maria River south to the U.S.-Mexico border. (*See* 71 Fed. Reg. 834.) Southern California steelhead are one of 28 West Coast Pacific salmon and steelhead populations that NMFS listed in 1997 as a result of declining population numbers. NMFS attributed the declines to several factors, including loss of freshwater and estuarine habitat, poor ocean conditions due to anthropogenic activities such as water-supply and hydropower development, urban and agricultural land practices, overfishing and hatchery practices, and more recently, climate changes. (*See* 2023 Five-Year Review at 1.)

The ESA directs the Secretary of Commerce (who oversees NMFS) to review the listing classification of threatened and endangered species at least once every five years. (16 U.S.C. § 1533 (c)(2).) The purpose of the five-year review is to ensure that the listing classification remains accurate. To make this determination, NMFS examines the current biological viability of the species—including its abundance, productivity, spatial structure, and diversity—to determine whether and how its resilience and capacity to survive in the wild has changed. NMFS also uses any new information to analyze changes to the five factors considered in the original listing decision: (1) the present or threatened destruction, modification, or curtailment of the species' habitat or range; (2) overutilization for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; and (5) other natural or man-made factors affecting the species' continued existence. (*Id.* at § 1533(a)(1).)

After completing the Review, the Secretary of Commerce must determine if the species should be removed from the endangered species list or have its status changed. (16 U.S.C. § 1533(c)(2).) If the five-year review recommends a change to the listing classification (*e.g.*, from endangered to threatened), the recommended change will prompt a separate rulemaking process. (2023 Five-Year Review at 2.)

The last Review of Southern California steelhead occurred in 2016. On October 4, 2019, NMFS announced the initiation of the 2023 Five-Year Review. (84 Fed. Reg. 53117.) NMFS invited the public to submit any new information that had become available since the 2016 review, and received responses from federal, state, and local agencies, Native American Tribes, conservation groups, angling groups, and individuals. NMFS considered the information received and information it routinely collects to complete the 2023 Five-Year Review based on the best available science. (2023 Five-Year Review at 5-6.)

2023 Five-Year Review of Southern California Steelhead

The 2023 Five-Year Review found that current conditions warrant the continued protection of Southern California steelhead as an endangered species. (2023 Five-Year Review at 144.) Among other things, NMFS found that extended drought conditions coupled with wildfires since 2016 have elevated threat levels to Southern California steelhead. (*Id.*) Over the past five to seven years, drought and wildfire have diminished stream flow conditions to the point that adult steelhead were not present at all on most streams. (*Id.* at 45.) Where adult steelhead were observed, counts were in the single digits. (*Id.*)

NMFS determined that the systemic anthropogenic threats to Southern California steelhead identified at the time of initial listing have remained essentially unchanged over the past five years. (*Id.* at 144.) NMFS recognized significant progress in removing small-scale fish passage barriers in a number of core recovery watersheds. (*Id.*) NMFS also recognized the completion, or progress toward completion, of several Biological Opinions and other regulatory measures consistent with NMFS' recommended recovery actions. (*Id.* at 60.)

NMFS also revealed new research on the genetic architecture of anadromous Southern California steelhead and non-anadromous rainbow trout, which indicates that endangered steelhead populations may be reconstituted from populations of rainbow trout in drought refugia if they exhibit certain genetic features. (*See id.* at 32-33, 45, 144.) Nearly all drought refugia, however, are currently inaccessible to endangered steelhead due to impassible barriers or other altered flow regimes. (*See id.* at 32-33.) For this and other reasons, NMFS concluded that although "the overall level of threat to Southern California steelhead DPS remains the same," actions to promote recovery should remain a top priority. (*See id.* at 145, 147.)

Conclusion and Implications

In recommending future actions, NMFS focused on activities to address ongoing and emerging habitat concerns over the next five year period. (*See id.* at 147.) NMFS' recommended actions include specific "high-priority habitat restoration projects" to remedy barriers to the movement of adult and juvenile steelhead. (*Id.* at 147-48.) The recommended actions also include measures to prevent local extirpations of steelhead populations, improve research, monitoring, and evaluation, promote key ESA consultations, and improve enforcement of ESA protections. (*Id.* at 147-153.)

NMFS will issue its next status review of Southern California steelhead in approximately five years. The next review will examine whether any new conditions from now until approximately 2028 warrant a change to the species' listing status. The 2023 Five-Year Status Review is available at: https://media.fisheries.noaa.gov/2023-05/5-year-status-review-sc-steelhead.pdf.

(Holly E. Tokar, Sam Bivins)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DENIES NAVAJO NATION A COURT-MANDATED SOLUTION TO WATER ACCESS

Arizona et al. v. Navajo Nation, et al, ___U.S.___, Case No. 21-1484 (June 22, 2023).

The Supreme Court has issued its decision, in a 5 to 4 vote, in which the majority found that the 1868 Treaty and under the *Winters* doctrine:

> . . .do not support the claim that in 1868 the Navajos would have understood the Treaty to mean that the United States must take affirmative steps to secure [already scarce] water for the Tribe.

The majority opinion was penned by Justice Kavanaugh and joined by Justices Roberts, Thomas, Alito and Barrett. Justice Gorsuch issued a dissenting opinion joined by Justices Sotomayor, Kagan and Jackson which would have had the Court allow the Navajo Nation's claims to move forward—akin to the decision of the Ninth Circuit Court of Appeals.

Background

The Navajo Tribe is one of the largest in the United States, with more than 300,000 enrolled members, roughly 170,000 of whom live on the Navajo Reservation. The Navajo Reservation is the geographically largest in the United States, spanning more than 17 million acres across the States of Arizona, New Mexico, and Utah. To put it in perspective, the Navajo Reservation is about the size of West Virginia.

In 1849, the United States entered into a Treaty with the Navajos. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850). In that 1849 Treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain "perpetual peace" with the United States. *Ibid.* In return, the United States agreed to "designate, settle, and adjust" the "boundaries" of the Navajo territory.

Two treaties between the United States and the Navajo Tribe led to the establishment of the Navajo Reservation.

For the next two decades, however, the United States and the Navajos periodically waged war against one another. In 1868, the United States and the Navajos agreed to a peace treaty. In exchange for the Navajos' promise not to engage in further war, the United States established a large reservation for the Navajos in their original homeland in the western United States. Under the 1868 Treaty, the Navajo Reservation includes (among other things) the land, the minerals below the land's surface, and the timber on the land, as well as the right to use needed water on the reservation. [Majority Opinion]

The 1868 Treaty was to put an end to "all war between the parties." The United States "set apart" a large reservation "for the use and occupation of the Navajo tribe" within the new American territory in the western United States. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667–668 (ratified Aug. 12, 1868). Importantly, the reservation would be on the Navajos' original homeland, not the Bosque Redondo Reservation. The new reservation would enable the Navajos to once again become self- sufficient, a substantial improvement from the situation at Bosque Redondo. The United States also agreed (among other things) to build schools, a chapel, and other buildings; to provide teachers for at least ten years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn. [Ibid]

Under the 1868 Treaty, the Navajo Reservation includes not only the land within the boundaries of the reservation, but also water rights. Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use

needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation. [Ibid]

The Navajo Reservation lies almost entirely within the Colorado River Basin, and three vital rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation. To meet their water needs for household, agricultural, industrial, and commercial purposes, the Navajos obtain water from rivers, tributaries, springs, lakes, and aquifers on the reservation. [Ibid]

Over the decades, the Federal Government has taken various steps to assist tribes in the western States with their water needs. The Solicitor General explained that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation.

Nature of the Legal Dispute

In the Navajos' view, however, those efforts did not fully satisfy the United States' obligations under the 1868 Treaty. The Navajo Nation sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 Treaty and sought to "compel the Federal Defendants to determine the water required to meet the needs" of the Navajos in Arizona and to "devise a plan to meet those needs." App. 86. The States of Arizona, Nevada, and Colorado intervened against the Tribe to protect those States' interests in water from the Colorado River.

According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argued that the United States also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. [Ibid]

At the District Court and Ninth Circuit Court of Appeals

The U. S. District Court for the District of Arizona dismissed the Navajo Tribe's complaint. In relevant part, the District Court determined that the 1868 Treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe.

The U. S. Court of Appeals for the Ninth Circuit reversed, holding in relevant part that the United States has a duty under the 1868 Treaty to take affirmative steps to secure water for the Navajos. *Navajo Nation* v. *United States Dept. of Interior*, 26 F.4th 794, 809–814 (2022). The Supreme Court granted *certiorari*. 598 U. S. ___ (2022) [Ibid]

The Majority Opinion

With this backdrop of the history of the formation of the Navajo Nation's Reservation land, the Treaties, and the *Winters* doctrine, in an arid West, the Court found that the United State's obligations did not go so far as to include the duty to take affirmative steps to secure water supply:

> Of course, it is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos' current water needs 155 years later, in 2023. Under the Constitution's separation of powers, Congress and the President may update the law to meet modern policy priorities and needs. To that end, Congress may enact—and often has enacted—legislation to address the modern water needs of Americans, including the Navajos, in the West. Indeed, Congress has authorized billions of dollars for water infrastructure for the Navajos. . .But it is not the Judiciary's role to update the law. And on this issue, it is particularly important that federal courts not do so. Allocating water in the arid regions of the American West is often a zero-sum gain situation. . . And the zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the Treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

The Court went on the emphasize its interpretation of the Treaty and in the end, it's conclusion as to implications of a duty on the part of the United States to supply water to the Tribe:

> The 1868 treaty granted a reservation to the Navajos and imposed a variety of specific obligations on the United States—for example, building schools and a chapel, providing teachers, and supplying seeds and agricultural implements. The reservation contains a number of water sources that the Navajos have used and continue to rely on. But as explained above, the 1868 treaty imposed no duty on the United States to take affirmative steps to secure water for the Tribe.

The Dissenting Opinion

In the Dissent, Justice Gorsuch, along with Justices Sotomayor, Kagan and Jackson found that the Navajo Nation's claims should move forward, along the lines of the Ninth Circuit's decision:

> This case is not about compelling the federal government to take "*affirmative steps* to secure water for the Navajos." *Ante*, at 2. Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

Looking to the "promises" made pursuant to the Treaty and establishment of a "homeland," Justice Gorsuch went on to state:

> The Treaty of 1868 promises the Navajo a "permanent home." Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.

But Justice Gorsuch opined why quantifying those water rights by this Court was repugnant to the Majority, especially in light of the *Winters* and *McGirt* decisions

> Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. . . . It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home for the relevant Tribe. See *McGirt* v. *Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 5). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in *Winters* v. *United States*, 207 U. S. 564 (1908). . . . For these reasons, the agreement's provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of water. . . because the Treaty of 1868 must be read as the Navajo "themselves would have understood" it, *Mille Lacs Band*, 526 U. S., at 196, it is impossible to conclude that water rights were not included. Really, few points appear to have been *more* central to both parties' dealings. What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established?

Conclusion and Implications

In the West and especially amongst the Lower Basin States, competition for Colorado River water is fully in play with scarcity forming the basis for a voluntary agreement for water sharing [and conservation efforts]. With this as a backdrop, the Navajo Nation claims water rights and ongoing water *supply*, with a duty imposed on the U.S. to assist in this, pursuant to trust theory, the 1868 Treaty and the Supreme Court's *Winters* decision. The Supreme Court, while recognizing the Treaty's obligations, including water, found duties on the part of the United States only extended so far under the Treaty—that those obligations did *not* apply to affirmative actions to secure ongoing water supply in an arid West with, as the Court states, classifies as a "zero-sum gain." The Court looked to the four-corners of the Treaty and found no affirmative duty to provide water supply and further, found that under the U.S. Constitution's [and the current Treaty] only the President and Congress may change the U.S. obligations relating to water—but the courts are not the vehicle to achieve this result. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf. (Robert Schuster)

RECENT CALIFORNIA DECISIONS

FIRST DISTRICT COURT AFFIRMS UC BERKELEY EIR ANALYSIS OF SHADING, VIBRATION AND WILDFIRE POTENTIAL ENVIRONMENTAL IMPACTS

Berkeley Citizens for a Better Plan v. Regents of University of California, ___Cal.App.5th___, Case No. A166164 (1st Dist. May 5, 2023).

In this second appeal from the Superior Court decision upholding the Environmental Impact Report (EIR) for the University of California Berkeley's (Berkeley) long range development plan (Plan), the First District Court of Appeal in *Berkeley Citizens for a Better Plan v. Regents of University of California* upheld the trial court's decision denying a writ of mandate for alleged failure to analyze shading, wildfire, vibration and baseline conditions in the EIR. The first appeal in *Make UC a Good Neighbor v. Regents of University of California* was determined on February 24, 2023, and was previously reported in the April version of the *California Land Use Law & Policy Reporter*.

Factual and Procedural Background

The EIR concerns Berkeley's 2021 Plan and two student housing projects, Anchor House and People's Park. The EIR here is a hybrid: a program EIR that addresses the broadly defined policies and concepts in the long-range development plan, as well as more detailed, project-level analyses of the housing projects.

In this appeal, Berkeley Citizens for A Better Plan (Citizens) challenge the EIR on the grounds that it: (1) should have analyzed the impacts of shadows from the People's Park housing project on two historical buildings; (2) inadequately addressed mitigation for impacts of construction-related vibrations; (3) inadequately addressed impacts relating to wildfire; and (4) did not properly describe baseline environmental conditions.

Background on the Issue of Shade

The two neighboring historical buildings are a school and a church. The school buildings including the first brown-shingled building in Berkeley that helped launch the Arts and Crafts movement. The church is regarded as an Arts and Crafts masterpiece. The school is listed in the National Register of Historic Places; the church is a National Historic Landmark.

The church features a window wall of hammered Belgian glass that, in the spring and early summer, is infused with purple light from wisteria that blooms on the west facade.

The People's Park housing project consists of two buildings, one of which will have 17 stories. The EIR concedes that the building will dwarf the one- and two-story historical buildings. Because the size and scale of the project are incompatible with the nearby historical resources, the EIR finds that the project will have a significant and unavoidable impact on them.

The EIR did not consider whether shadow from the housing project would also negatively affect the school and the church, treating that as a policy concern, not an environmental effect under CEQA. The Regents also concluded that an exemption under the California Environmental Quality Act (CEQA) for urban infill projects bars them from considering aesthetic impacts of the People's Park project.

The Regents commissioned a shade and shadow study, which shows that the People's Park project will partially shade the church for about three and one-half hours in the late afternoon and evening at the summer solstice, and from 4:00 p.m. to 4:50 p.m. at the winter solstice. The project will shade much of the school at the winter solstice. A licensed landscape architect concluded that the wisteria will receive ample sunlight—four to six hours per day.

Background on the Issue of Vibration

The EIR disclosed that impacts from vibrations generated by construction equipment could exceed the EIR's threshold of significance for architectural damage, in part due to uncertainty about the future projects and their construction methods. This would

be a *potentially significant* impact." The EIR therefore proposed NOI-2, a three-step mitigation measure for any project tiered off the long-range development plan EIR anticipated to involve vibration-causing construction methods.

The three steps involve screening, alternative construction methods to pile driving, and, if no feasible alternatives, a vibration monitoring program, including potential corrective measures and repair to vibration-damaged buildings.

Background on the Issue of Wildfire

Most of the Plan development proposed would be urban infill in densely populated areas of Berkeley; the EIR found it is not expected to significantly exacerbate the wildfire-related risks. The EIR also concluded the Plan would not impair emergency access or interfere with adopted emergency response plans.

It did find, however, that potential development in a currently undeveloped area (called Hill Campus East), which is in a high-risk zone for wildfire and is characterized by rough terrain and heavy vegetation, may expose occupants to wildfire pollutants.

Despite adopting mitigation measures, the Regents determined the impact was significant and unavoidable at this early stage of the planning process, given the uncertainty of any development in the Hill Campus East area. Similarly, the Regents found that potential new infrastructure may exacerbate fire risk and expose people to post-fire hazards, despite mitigation, again largely due to uncertainty about such development in the Hill Campus East area.

The two site-specific projects, Anchor House and People's Park, are urban infill projects that are near (but outside the borders of) areas zoned as high fire risks. The Regents found that neither project would cause significant impacts with respect to any of the fire risks discussed in the EIR.

The Court of Appeal's Decision

Under the fair argument standard for requiring additional analysis of environmental impacts, the Court of Appeal affirmed the trial court's judgment regarding the EIR's analysis of Plan impacts on historical buildings, construction-related vibrations and wildfire, finding those contentions meritless and thus warranting no change from the *Good Neighbor* disposition on the EIR.

Shade

CEQA carefully limits the scope of relevant impacts to historical resources. A project may have a significant environmental impact if it may cause a substantial adverse change in the significance of an historical resource. (CEQA, § 21084.1; Guidelines, § 15064.5, subd. (b).) A:

> . . .[s]ubstantial adverse change. . .[means the]. . .physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. (Guidelines, § 15064.5, subd. (b)(1))

Taken together, these provisions circumscribe the impacts on historical resources that require consideration in an EIR. It is not enough to identify evidence in the record that shading from the People's Park project will have some sort of impact on the church or school. To warrant environmental review, Citizens must identify evidence supporting a fair argument that it would materially and adversely impair a specific physical characteristic of these buildings that conveys their historical significance.

The EIR historical resources report states only that the project could adversely affect its neighbors because "its scale and proportion would likely not be compatible with those historical resources." It does not discuss shade at all, much less any aspect of the buildings' historical significance that would be diminished by shade.

Vibration

Citizens contend NOI-2 is illusory because Step 2 allows the Regents simply to list alternative construction methods (i.e., methods that would not cause vibration damage) on a project's building plans but does not actually require them to use those methods. This is not a fair reading of the EIR.

Where alternatives to vibration-causing construction methods are feasible, Step 2 requires the Regents to incorporate them in the building plans. If alternative methods are not used, the Regents would have to operate under the burdensome requirements of step 3, which includes hiring a consultant, surveying nearby sensitive properties, installing sensors, monitoring the properties for damage, halting construction if damage occurs, and repairing the damage.

Wildfire Threat

An EIR should consider significant environmental impacts caused or exacerbated by locating people and development in areas subject to wildfires. This includes impacts the project may have on residents' ability to evacuate the area according to an adopted evacuation plan. The Guidelines also advise considering whether aspects of a project, such as slope or prevailing winds, would expose people to pollutants from a wildfire; whether infrastructure such as power lines may exacerbate wildfire risks; and whether the project would expose people to downslope flooding or other risks that may follow a wildfire.

The EIR captures the relevant point—the presence of humans increases the risk of wildfires. Of course, most of the area at issue here is already densely populated. No more discussion is required.

Second, the EIR adequately discusses the risk that new development (as opposed to people) may increase fire risks. The EIR examines the increased risk of fire caused by development in the so-called wildland-urban interface—an area where development meets, or is comingled with, undeveloped wildland or vegetation. It identifies the specific areas of proposed development that would be in these areas.

The EIR also discusses factors that would exacerbate wildfire risks, such as vegetation, and features of the project that are intended to limit the risks. It concludes that some fire-related impacts must be deemed significant and unavoidable, largely due to the lack of specific development proposals at this early stage, which precludes a detailed analysis of development in hazardous areas such as Hill Campus East. Given the uncertainties and limited detail of the long-term Plan, the discussion is sufficient.

The EIR concluded that, although the additional people could add congestion during commute times, the project would not impair or physically interfere with the applicable evacuation plans or impede emergency access. The project includes features to reduce fire risks by managing vegetation, complying with street design criteria for access, identifying evacuation areas, and improving evacuation routes. It would not change circulation patterns or interfere with evacuation routes. Most of the development would be infill in an area that is already densely populated, and it proposes no changes to the existing roadway system. The two site-specific developments, Anchor House and People's Park, are designed to accommodate the relevant emergency response and evacuation plans, including protocols for access during construction activities.

Conclusion and Implications

This opinion by the First District Court of Appeal provides significant guidance on how to analyze impacts on historical resources by focusing on the aspects that make those resources historical. It also provides significant guidance on how to analyze wildfire impacts by focusing on the analysis of fire safety design and mitigation measures and maintaining existing evacuation routes. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A166164.PDF.
(Boyd Hill)

FIRST DISTRICT COURT FINDS EIR'S WILDFIRE FUEL MANAGEMENT PROJECT DESCRIPTIONS NEED NOT INCLUDE A TREE-BY-TREE INVENTORY

Claremont Canyon Conservancy v. Regents of the University of California, ___Cal.App.5th___, Case No. A165012 (1st Dist. June 9, 2023).

In a *partially published* opinion, the First District Court of Appeal in *Claremont Canyon Conservancy v. Regents of the University of California*, reversed the trial court's decision, which found that the project descriptions in an Environmental Impact Report (EIR) for UC Berkeley's wildland vegetative fuel management and removal projects were not "accurate, stable and finite," rendering them inadequate under the California Environmental Quallity Act (CEQA). The court held that the EIR contained sufficient information to

analyze the projects' environmental impacts, even if it did not specify the identities or number of trees to be removed.

Factual and Procedural Background

The Wildland Vegetative Fuel Management Plan

The Regents of the University of California, Berkeley (Regents) worked with a wildland fire manager and fire ecologist to develop a Wildland Vegetative Fuel Management Plan (Plan) for an 800-acre fire-prone parcel of land on UC Berkeley's "Hill Campus." The Campus, which is heavily forested and located in a "Very High Fire Hazard Severity Zone," has experienced wildfires in the past; most recently in 2017 when the Grizzly Fire burned approximately 24 acres. The Plan proposed several vegetation removal projects, including one fuel break project and three fire hazard reduction projects, with the goal of reducing the wildfire risk on Hill Campus. In developing the Plan and selecting the project locations, the Regents relied on fuel models to predict fire behavior, which considered the different vegetation types across Hill Campus. The Plan proposed removing dead, unhealthy, or structurally unsound trees, trees that would torch or burn with high fire intensity, and certain understory shrubs.

The Regents prepared an EIR for the plan, containing both programmatic and project-level review, and certified the Final EIR in early 2021. The EIR identified objective criteria for tree removal and proposed "variable density thinning," which considers site specific conditions to create gaps in canopy cover to reduce canopy fire spread. The precise number of and specific trees to be removed would be determined by a certified arborist and registered professional forester by applying the objective criteria and the principle of variable density thinning.

At the Trial Court

Two organizations, the Claremont Canyon Conservancy and Hills Conservation Network (Petitioners), filed petitions for writ of mandate challenging the adequacy of the EIR's description of the vegetation removal projects. Despite opposition from the Regents, the trial court consolidated the cases.

The trial court ruled in favor of the plaintiffs, concluding that the EIR's project descriptions were "uncertain and ambiguous" because the EIR provided "vague conceptual criteria" but no concrete information on how the "criteria will be implemented." The court thus ordered the Regents to vacate its EIR certification as to those projects. The Regents timely appealed.

The Court of Appeal's Decision

On appeal, the Regents argued that the trial court erred in determining that the project descriptions were not "accurate, stable and finite" and that it was not reasonably feasible to conduct a tree-by-tree inventory. The First District Court of Appeal applied a *de novo* standard of review, noting that it was only determining whether CEQA's statutory criteria were satisfied and that approval of an EIR cannot be set aside merely because an opposite conclusion is equally or more reasonable.

As the court pointed out, CEQA Guidelines § 15124 requires a project description to include the precise location and boundaries of the proposed project on a detailed map, a general description of the proposed project's objectives and technical, economic, and environmental characteristics, and a brief description of the EIR's intended uses.

The Projects' Environmental Impacts Could Be Analyzed

Petitioners argued that CEQA required the EIR to identify the specific trees that would remain in the fuel break area and that the project descriptions were "unclear and unstable," preventing meaningful comparisons between the plan and the project alternatives. They also contended that because the EIR failed to specify the number of trees that would be removed, it was not possible to evaluate and review the projects' environmental impacts. The court noted, however, that CEQA does not require a project description to "supply extensive detail beyond that needed for evaluation and review of the environmental impact," and nothing in the CEQA Guidelines requires an EIR to include a tree inventory.

Instead, the court concluded that the project descriptions contained all of the information required under Guidelines § 15124—*i.e.*, a detailed map identifying boundaries and project locations; the underly-

ing purpose of the project (to "reduce the amount and continuity of vegetation that increases wildland fire hazards"); a description of project characteristics ("the vegetation in each project area... objective vegetation removal criteria...methods used to remove vegetation"); and a summary of the "purpose of the projects and the EIR's intended use. Based on this, the court concluded that the EIR provided sufficient information to understand the projects' environmental impacts, which is all that the Guidelines require.

The court explained that the absence of a tree inventory did not violate CEQA because the projects' basic characteristics were "accurate, stable, and finite" and enabled decision-makers and the public to understand the projects' environmental consequences, contrary to the trial court's determination.

The court also noted that, where, as here, "a project is subject to variable future conditions," such as "unusual rainy weather, tree growth, impact of pests and diseases, [and] changing natural resources," a project description must "be sufficiently flexible" to account for those conditions.

Tree Inventory Not Reasonably Feasible

The Regents also argued that the EIR's omission of a tree inventory did not render it deficient because it was not reasonably feasible to prepare such an inventory. The court agreed, finding that there was sufficient evidence to support this conclusion. Specifically, the steep and rugged terrain of Hill Campus created a practical impediment to conducting a tree-by-tree inventory, which would have been economically costly. And, because the project area is subject to variable environmental conditions, on-the-ground realities could significantly change between the EIR's preparation and project implementation, making it impractical to identify specific trees to remove.

The court emphasized that "technical perfection, scientific certainty, and exhaustive analysis" are not required of an EIR; rather, a court looks at whether the EIR is adequate, complete, and represents a good-faith effort at full disclosure. While the EIR here did not identify each tree that would be removed, the court held that the Regents provided meaningful information about the projects while allowing for the flexibility to respond to changing conditions.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies what constitutes an adequate project description, particularly when a project contemplated by a programmatic EIR is subject to changing environmental conditions. An EIR for vegetative fuel management is legally adequate and provides the public with sufficient information to analyze a projects' environmental impacts, even if it does not identify the specific trees that will be removed. This decision suggests that the amount of flexibility that can be built into a project description is, in part, determined by potential fluctuations in baseline environmental conditions. It also confirms that an EIR must only include that which is reasonably feasible, which will be determined by on-the-ground realities. The court's *partially published* opinion is available online at: https://www.courts.ca.gov/opinions/documents/A165012.PDF. (Alina Werth, Bridget McDonald)

SECOND DISTRICT COURT AFFIRMS DENIAL OF WRIT TO RESTORE FATHER JUNIPERO SERRA REPLICA STATUE ON THE BASIS IT IS NOT AN HISTORICAL LANDMARK

Coalition for Historic Integrity v. City of San Buenaventura, ___Cal.App.5th ___, Case No. B319536 (2nd Dist. May 12, 2023).

The Second District Court of Appeal in *Coalition for Historic Integrity v. City of San Buenaventura* affirmed the trial court's decision that the bronze replica statue of Father Junipero Serra (Serra) in front of the City of Ventura (City) City Hall was not a historic landmark and therefore could be removed.

Factual and Procedural Background

In 1936, a nine-foot concrete statue of Serra was dedicated in front of the Ventura County courthouse on a rise overlooking the City's downtown. The County courthouse later became the City Hall. In

1974, a city resolution declared the statue to be a historic landmark, City Landmark No. 3. In 1989, the City replaced the cracking concrete statue with a bronze replica in 1989, placing a plaque at the base that stated, "Landmark No. 3."

In 2002, the City created a list of historic landmarks, placing the bronze replica on the list designated as Landmark No. 3. At the City's request, the Ventura County Recorder recorded the 1974 minute order designating the original Serra statue as a historic landmark. In 2005, the environmental impact report for the City's General Plan included the bronze replica on a list of landmarks in an appendix to the report. The General Plan marks the location of the statue as a historical site.

In 2007, as part of the Downtown Specific Plan (Specific Plan), the City commissioned the Historic Resources Group (HRG) to conduct a survey to determine whether existing landmarks retain sufficient historic integrity to remain eligible for that designation. The survey identified the bronze replica as one of the previously designated landmarks that remain eligible for that determination. The Specific Plan lists the bronze replica as a historic resource.

In the summer of 2020, after the bronze replica was protested and vandalized, the City's mayor met with a representative from the Barbareno/Ventureno Band of Mission Indians (Chumash) and the pastor of the Mission San Buenaventura. The mayor, the Chumash representative, and the pastor signed a letter expressing the belief that the statue should be "moved to a more appropriate non-public location."

The City again hired the HRG to conduct a historic analysis of the original concrete statue and the bronze replica. This time the HRG report concluded that the bronze replica did not meet the criteria for a historic landmark. Among the reasons given was that an object must be at least 40 years old to be eligible for a local historic designation and the 1989 bronze replica did not qualify.

Based on the 2022 HRG report, the City's Historic Preservation Committee voted that the bronze statue is not Landmark No. 3, and not eligible for historic landmark status. Thereafter, the city council adopted three findings: (1) The bronze statue does not meet the criteria for a historic designation; (2) The decision to relocate the bronze statue is exempt from the California Environmental Quality Act (CEQA) under the "common sense" exemption because the removal of a non-historic statue will not have a significant effect on the environment; (3) The bronze statue will be relocated to the San Buenaventura Mission.

In July 2020, the Coalition for Historical Integrity (Coalition) petitioned the trial court for a writ of mandate and injunctive relief. The petition stated four causes of action. First, removal of the landmark designation was not supported by substantial evidence. Second, removal of the statue violates the City's Specific Plan. Third, removal of the statue violates CEQA. Fourth, removal of the statue violates state and municipal law.

The trial court denied the Coalition's petition for a writ of mandate and preliminary injunction, as well as their *ex parte* application for temporary restraining order to prevent removal of the bronze replica. Thereafter, the City removed the bronze replica.

The Court of Appeal's Decision

The Court of Appeal held that substantial evidence supported the trial court's decision that the bronze replica was not a historical landmark and that the City could properly take the quasi-legislative policy decision to have it removed.

Not a Historical Resource Under CEQA

The environment the California Environmental Quality Act protects includes "objects of historic or aesthetic significance." (Public Resources Code, § 21060.5.) Public Resources Code § 21084.1 provides in part:

> Historical resources included in a local register of historical resources, as defined in subdivision (k) of Section 5020.1, . . . are presumed to be historically or culturally significant for purposes of this section, unless the preponderance of the evidence demonstrates that the resource is not historically or culturally significant.

The Coalition argued that the bronze replica qualifies as presumptively historical. The City contended that only the original concrete statue was designated as a landmark. The bronze replacement was never so dedicated and is not entitled to presumptive historical status.

But even if the replica is presumptively historical, § 21084.1 expressly provides that the presumption

may be rebutted by a preponderance of the evidence. Based on the 2020 HRG report, the City found that the statue is not historically significant. Having found the bronze statue now has no historical significance, the CEQA common sense exemption applies.

The Specific Plan Does Not Prevent Removal

The Coalition contended that removal of the bronze replica violated the City's Specific Plan. The City's Specific Plan lists the bronze replica as among the City's historic resources. The Coalition argued that the Specific Plan provides for the preservation of historical resources. It does in part. But § 5.20.020 of the Specific Plan also allows for the demolition of a historical resource.

The Specific Plan provides that the demolition of a historical resource may require review by the Historic Preservation Committee, the committee that approved removal of the bronze replica. Nothing in the Specific Plan prohibits the destruction or removal of a statue that is listed as a historical resource upon a finding that on reexamination it, in fact, never had historical value.

Conclusion and Implications

This opinion by the Second District demonstrates the reasoning which government and courts use in siding with current popular culture in removal of certain landmarks of historic controversy. There was significant historical meaning in the placement of the replica and its identification with historical events. Many historical landmarks have been repaired or restored and could now be in jeopardy. The court's opinion is available online at: (https://www.courts.ca.gov/opinions/nonpub/B319536.PDF.
(Boyd Hill)

SECOND DISTRICT COURT UPHOLDS WATER CODE EXEMPTION—REJECTS ATTEMPT TO EXPAND CEQA REVIEW TO REGIONAL WATER BOARD APPROVAL OF WASTE DISCHARGE PERMITS

Los Angeles Waterkeeper v. State Water Resources Control Board, ___Cal.App.5th___, Case No. B309151 (4th Dist. June 2, 2023).

In a modified opinion filed June 2, 2023, the Second District Court of Appeal rejected petitioner's attempt to avoid a statutory exemption in Water Code § 13389 that exempts waste discharge permits issued by Publicly Owned Water Treatment Works (POTWs) from review under the California Environmental Quality Act (CEQA). Petitioner argued that § 21002 of the Public Resources Code, which sets out a policy goal of CEQA gave rise to substantive and procedural obligations by POTWs outside of CEQA's substantive environmental review provisions found in Chapter 3 of the CEQA statutes. Section 13389 expressly exempted POTW issuance of waste discharge permits from the provisions of Chapter 3. The court decided, in the narrow context of a POTW waste discharge permit that is the equivalent of a permit issued under the National Pollutant Discharge Elimination System (NPDES), that § 21002 of the Public Resources Code does not itself set forth any self-executing procedural or substantive environmental review obligations on POTWs.

This summary will only discuss the CEQA related portions of the decision.

Factual and Procedural Background

Los Angeles Regional Water Quality Control Board (LA Board) renewed four waste discharge permits for Publicly Owned Treatment Works in the Los Angeles area that discharge millions of gallons of treated wastewater into the Los Angeles River and then into the Pacific Ocean.

Petitioner, Los Angeles Waterkeeper, filed a lawsuit to challenge the issuance of the permits. The primary allegation in the lawsuit was that Article X, § 2 of the California Constitution and Water Code §§ 100 and 275 imposed a duty on the LA Board and the State Water Board to prevent the waste of water from POTWs.

Petitioner also brought CEQA claims that argued the Regional Board and State Water Resources Control Board (State Board) had a duty to analyze whether there were feasible alternatives to the POTW discharge levels. Petitioner also claimed that the LA Board needed to analyze cumulative impacts from the waste discharge permits.

The LA Board and State Board filed a demurrer to petitioner's CEQA claims on the basis that state Water Code section 13389 fully exempts waste discharge permits from CEQA review. The trial court granted the demurrer and petitioner appealed.

In an initial decision issued by the Second District, the Court of Appeal agreed with the LA Board and State Water Board with respect to both the issues raised under the California Constitution and state Water Code CEQA issues.

After a rehearing, the Second District issued a slightly modified decision, which is summarized with respect to CEQA issues below.

The Court of Appeal's Decision

With respect to CEQA issues, the Second District focused on an argument raised by petitioner that Chapter 1 of CEQA imposes substantive and procedural requirements or obligations on lead agencies that are enforceable by mandamus. Chapter 1 of CEQA states broad CEQA policies whereas Chapter 3 contains the substantive and procedural provisions with regard to preparing an Environmental Impact Report (EIR).

As the court noted, petitioner:

> . . .contends that Public Resources Code section 21002, located in CEQA chapter 1, obliges the Regional Board…to make findings as to whether the project has significant and unavoidable impacts, including cumulative impacts resulting from multiple approvals of [waste discharge requirements for POTWs, and if so, whether there are feasible alternatives or mitigation measures that would substantially lessen those impacts.

Public Resources Code Section 21002

The only CEQA provision that petitioner alleged the water boards violated was § 21002, so the court limited its review to the specifics of that section. Section 21002 reads as follows:

> The Legislature finds and declares that it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which would avoid or substantially lessen such significant effects.

Essentially petitioner was arguing that § 21002 imposes obligations on lead agencies apart from their obligation to prepare EIRs and perform other forms CEQA review as set forth in Chapter 3 of CEQA.

The court disagreed, citing Water Code § 13389's CEQA exemption language providing that:

> Neither the state board nor the regional boards shall be required to comply with the provisions of Chapter 3… of Division 13 of the Public Resources Code prior to the adoption of any waste discharge requirement.

Chapter 3 referenced above is the portion of CEQA governing EIRs and how CEQA's policies are actually implemented. The court found support in the language of Public Resources Code sections 21002.1 and 21081 which both speak in terms of applying CEQA policy through the preparation of EIRs. The court also cited to multiple appellate court decisions that had held in other circumstances that Chapter 3 of CEQA is how the environmental review process is implemented.

In rejecting petitioner's claims, the court highlighted that EIRs are how CEQA policies set forth in § 21002 and Chapter 1 are actually implemented. Section 21002 does not, itself give rise to any self-executing obligations.

A Narrow Decision?

In its modified decision issued after hearing, the court clarified that the scope of its decision with regard to CEQA was narrow, and only applied to waste discharge permits that are the equivalent of National Pollutant Discharge Elimination System permits:

> The Boards contend in their modification request that the CEQA exemption under Water Code section 13389 applies only to waste discharge permits that are the state equivalent of federal NPDES permits, and not to waste discharge permits issued pursuant to other provisions of the Water Code. Because the waste discharge permits at issue in the instant case are NPDES-equivalent permits, and the parties do not dispute the permits are subject to the Water Code section 13389 exemption, we need not, and do not decide whether the exemption applies to other types of waste discharge permits not at issue in this case.

The court nonetheless maintained its disagreement with petitioner's contention that Public Resources Code § 21002 somehow imposes environmental review requirements independent of CEQA's EIR procedures from which NPDES permits are exempt.

Conclusion and Implications

Although the decision appears narrow at first glance, the decision is important because the court rejected an interpretation of CEQA that could have significantly broadened CEQA review obligations to scenarios where approvals are expressly exempt from the obligations set out in Chapter 3 of CEQA.

A copy of the decision can be found here: https://www.courts.ca.gov/opinions/documents/B309151A.PDF.

(Travis Brooks)

IN THE FACE OF CEQA CHALLENGES, FOURTH DISTRICT COURT UPHOLDS HOUSING DEVELOPMENT PROJECT ON PARKING LOT USED BY ADJACENT COMMERCIAL PROPERTY OWNER

Olen Properties Corp v. City of Newport Beach, *Unpub.*, Case No. G061427 (4th Dist. June 8, 2023).

The Fourth District Court of Appeal, in an *unpublished opinion*, upheld a trial court judgment rejecting a neighboring property owner's challenge of a 312-unit housing development project. Plaintiff alleged that the city's approval of the project was inconsistent with the city's General Plan land use policies and that the city improperly adopted an addendum to a 2006 Environmental Impact Report (EIR) instead of preparing a project specific EIR. The Fourth District Court of Appeal agreed with the trial court and upheld its judgment rejecting each of petitioner's claims.

Factual and Procedural Background

Plaintiff owns commercial property in the City of Newport Beach (City) in a mixed-use development area near John Wayne Airport. In 2020 and 2021, the city approved a five story, 312-unit housing development project on an existing surface parking lot that served plaintiff's commercial property. To comply with the California Environmental Quality Act (CEQA), the city adopted an addendum to a 2006 EIR prepared for a General Plan update. The addendum considered a wide range of possible environmental impacts but concluded that project impacts "would either be the same or not substantially greater than those described in the 2006 EIR."

Plaintiff opposed the project during administrative hearings before the city and among other things, claimed that the project was inconsistent with multiple General Plan land use policies, and that the city could not rely on an addendum to the 2006 EIR and was required to prepare a full EIR for the residential project. Among other things, plaintiff alleged the project would result in significant impacts related to traffic issues, hazardous materials, violation of CC&Rs, geologic and soil issues, and violation of various city land use policies.

Regarding project inconsistencies with the city's General Plan land use policies, petitioner alleged the project violated a land use policy that allows "development of mixed-use residential villages each containing a minimum of ten acres and centered on a neighborhood park and other amenities…" Another policy required dedication and improvement of at

least 8 percent of the gross land area of the first phase development in each neighborhood with a total of at least 8 percent of the total residential village area, or one acre whichever is greater, and must have a minimum dimension of at least 150 feet. Plaintiff alleged the project's residential village was comprised of only 3.41 acres rather than the ten acres required by policy 6.15.6, and the park was an irregular shape, with some dimensions of 20 feet or less rather than the 150 feet required by the above policy.

Regarding traffic, plaintiff alleged that an addendum was inappropriate because the 2006 EIR used an older measure of traffic impact under a level of service (LOS) model, and not a vehicle miles traveled (VMT) model, which has been part of the CEQA guidelines since 2015. The traffic study prepared for the project was conducted in 2020, but also used the LOS measure because the purpose of the study was to compare the effects of the project to the 2006 EIR.

Plaintiff also claimed that the project would have hazardous materials impacts because of its proximity to the site of a preexisting semiconductor plant. Plaintiff provided a letter from a consulting firm describing potential problems for the project arising from the presence of various chemicals released from the semiconductor plant. The city countered with an expert report of its own, which indicated that plaintiff's expert was working from outdated information, and that recent testing of groundwater demonstrated that there was no environmental issue.

Plaintiff also claimed that the addendum was inadequate because it failed to consider CC&Rs, which plaintiff alleged barred construction of the homes. The city concluded that the CC&Rs were covenants between private parties, not the city, and were not environmental issues under CEQA.

Plaintiff also argued that the addendum was internally inconsistent on geological mitigation conditions. Specifically, plaintiff argued the addendum itself called for only "standard conditions" for handling soils on the project, while appendix B to the addendum, which was an analysis by a geotechnical engineer, that described mitigation measures necessitated by conditions at the project site.

The trial court denied plaintiff's petition raising each of these arguments and entered judgment for the city.

The Court of Appeal's Decision

The Fourth District Court rejected each of plaintiff's arguments on appeal.

Project Was Not Inconsistent with General Plan and Land Use Policies

Plaintiff argued that the project was inconsistent with two General Plan land use policies.

First, plaintiff argued that the project was inconsistent with a policy requiring a "residential village" to contain a minimum of ten acres, and that the city planning commission improperly included adjacent and nearby land governed by a different land use category, thus impermissibly extending the project's 3.41 acres to ten by improperly including adjacent land. The court rejected this argument because the term "residential village" was not defined in city policies. The city planning commission defined a "residential village" as including the entire surrounding commercial center including office buildings and parking as part of a larger "mixed use" environment where future residents could walk or bike to work, retail locations, and transit. It was within the city's discretion to do so.

The court also rejected plaintiff's arguments that the project violated various parks policies, including an argument that the project park's irregular shape did not conform with the 150 foot "minimum dimension" requirement in the General Plan. The court concluded that the city acted within its discretion in deeming that the park was consistent with the policies cited by plaintiff, these policies were sufficiently ambiguous with respect to the park in question for the city to conclude that the project was consistent with them.

CEQA Claims—Traffic

The court also rejected each of plaintiff's claims related to CEQA.

Regarding traffic, the court rejected plaintiff's claims that the city erred by using the level of service (LOS) measure of traffic impact, despite the state's adoption of CEQA Guideline 15064.3, which requires use of the vehicle miles traveled (VMT) method. However, CEQA guideline 15064.3 operates only prospectively and it is settled law in California that changes to the guidelines are not new information that would require the preparation of a new EIR

so long as the underlying environmental issue was understood at the time of the initial EIR. If the rule were different, the court noted, and each change to the guideline constituted new information, a new EIR would be required by Public Resources Code 21166 every time any change is made to a project no matter how inconsequential.

Hazardous Materials

Regarding plaintiff's claims related to hazardous material claims. Although there were two competing expert opinions under the deferential substantial evidence standard of review, the one expert opinion concluding that the project would not have any hazardous material impacts was substantial evidence in support of the city's position that hazardous waste will not create environmental problems for the project.

CC&Rs

The court also rejected plaintiff's claims regarding the project's supposed violation of existing CC&Rs. Plaintiff contended this was more than a "private matter" because it involves "known use restrictions that are being ignored or improperly overridden by the city." To the extent the CC&Rs addressed underlying concerns or policy goals that were environmental issues, however these issues were already discussed in the 2006 EIR and addendum. The CC&Rs themselves, by contrast, were covenants between private parties conveying private property rights.

Geology and Soil Issues

Last, the court rejected plaintiff's argument that a subsequent EIR was required to analyze geological or soil-related issues. One of these issues involved a geotechnical report that identified technical recommendations for construction of the project. Plaintiff claimed that these recommendations demonstrated that the impacts associated with geology and soils could be significant, and that project-specific mitigation measures were required to reduce them to less than significant. However, the court noted that the technical recommendations were not aimed at mitigating environmental or soil issues, but rather at ensuring that the project could be successfully built and remain intact.

Conclusion and Implications

The *Olen* decision provides a helpful discussion of several common land use issues. The decision provides a helpful illustration of the level of deference that courts give to a city when that city is interpreting its own regulations. The decision also discusses some key CEQA issues, including the prospective application of the CEQA Guideline's 2015 Vehicle Miles Traveled method of calculating traffic impacts. Many municipalities are struggling to develop housing and placement at point so transit are becoming common place.

The court's *unpublished* decision can be found online at: https://www.courts.ca.gov/opinions/nonpub/G061427.PDF.

(Travis Brooks)

FIFTH DISTRICT COURT WATERS DOWN PRELIMINARY INJUNCTION STANDARD IN CEQA CASES

Tulare Lake Canal Co. v. Stratford Public Utilities District, ___Cal.App.5th___, Case No. F084228 (5th Dist. June 7, 2023).

In *Tulare Lake Canal Co. v. Stratford Public Utilities District*, the Fifth District Court of Appeal reversed the trial court's denial of a request for a preliminary injunction against the proposed development of an irrigation pipeline that would have run under Tulare Lake Canal Company's canal. On an issue of first impression, the Court of Appeal held that the trial court was required to consider procedural or informational harm to the public, even without evidence of environmental harm, in balancing the harms after deciding that the petitioner had a strong likelihood of success on the merits of its California Environmental Quality Act (CEQA) claim.

Factual and Procedural Background

The Irrigation Pipeline Project

Real Parties in Interest Sandridge Partners, L.P. and Roller Land Company (Sandridge) own and a plot of land and irrigation system in Kings County, which it uses for farming and grazing. The plot is divided by an irrigation canal and right-of-way owned and operated by Tulare Lake Canal Company (TLCC)—a mutual water company that operates the Tulare Lake Canal to deliver water to its shareholders.

In the summer of 2021, Sandridge sought to upgrade its irrigation system by running a 48-inch pipe from one portion of its land to another. To maximize efficiency and conservation, Sandridge chose a route that ran four feet under TLCC's canal and across land owned by Stratford Public Utilities District (SPUD), located approximately half a mile away from the canal crossing. Construction of this portion of Sandridge's irrigation project would require any residual water in TLCC's canal to be dammed for five days. Sandridge also discussed with the Angiola Water District about its potential future use of the pipeline.

In October 2021, SPUD gifted Sandridge a 20-foot-wide easement across 380 feet of their land to complete a small portion of the irrigation project. Though SPUD is a public utility district whose decisions are subject to CEQA, SPUD did not conduct any environmental review before gifting the easement to Sandridge.

In November 2021, the president of TLCC's board and a member of Angiola Water District's board discussed the installation of the water pipeline under the Tulare Lake Canal. In January 2022, the TLCC board president informed the Angiola board member that TLCC required a common use agreement before they would allow Sandridge to excavate under their canal and associated right-of-way. The following week, TLCC's board president discovered that Sandridge had already begun excavation.

TLCC thus filed separate trespass and CEQA actions and sought injunctions to prevent Sandridge from installing any piping under TLCC's canal.

At the Trial Court

In the trespass action, TLCC alleged that Sandridge's unapproved construction activity on TLCC's canal right-of-way would preclude TLCC from making water deliveries with a trench cut across its canal and that, if any errors were made in constructing the pipeline, TLCC might not be able to make future water deliveries to its shareholders. In the CEQA case, TLCC sought a preliminary injunction to prevent Sandridge from continuing to work on their irrigation system and pipeline, alleging that SPUD's failure to conduct any environmental review when gifting the easement to Sandridge violated CEQA.

In the trespass action, the trial court granted TLCC's preliminary injunction against Sandridge, which the Court of Appeal separately affirmed, thus barring Sandridge from taking any actions towards installing the pipeline. In the CEQA action, the trial court applied California's interrelated factors test to determine that, although TLCC was likely to prevail on its CEQA claim, the relative balance of harms from granting or denying injunctive relief favored denial. The court explained that there was nothing in the record that addressed how allowing the project to move forward pending SPUD's CEQA review would cause harm to the public. TLCC appealed.

The Court of Appeal's Decision

As the party seeking a preliminary injunction, TLCC needed to prove both elements of the two-pronged interrelated factors test. First, it must be reasonably likely that TLCC will succeed on the merits. Second, the balance of the harms, including the public interest, must weigh in favor of granting the preliminary injunction against Sandridge.

Under this test, the Fifth District concluded that TLCC had a very high likelihood of succeeding on the merits of its CEQA claim because SPUD is a public entity and the decision to gift an easement to Sandridge was a discretionary action subject to CEQA. SPUD was thus required to undertake preliminary review, conclude that the pipeline is a project subject to CEQA and, at a minimum, determine whether the pipeline was exempt from further environmental review. Because the court concluded it was a "near certainty" that SPUD had violated CEQA, TLCC's burden under the second prong of the interrelated factors test was significantly reduced.

TLCC argued the public was harmed due to a lack of public disclosure and informed decision-making, as required by CEQA. TLCC was particularly concerned that Sandridge's irrigation pipeline would be used to

transport water out of the county, even though Sandridge's irrigation pipeline started and ended on its own property located within the county's border, and despite the absence of evidence to suggest otherwise.

Sandridge noted that if a mere CEQA procedural error—which often exists in tandem with an underlying CEQA claim—could be used to satisfy the second prong of the interrelated factors test, nearly every CEQA claim would qualify for a preliminary injunction. Sandridge argued there must be some environmental harm that would result from a denial of the preliminary injunction. The court rejected this argument, finding, at least where the alleged procedural error occurs at the first step of the CEQA review process, no evidence of environmental harm needed to be provided.

Sandridge also argued the balance of harm weighed in favor of denying TLCC's request, for issuing the preliminary injunction would result in $800,000 to $2,000,000 in the form of crop loss. Sandridge further noted that a new city ordinance prohibiting the transportation of water outside the county without a permit rendered TLCC's alleged environmental harm moot (i.e., transportation of water outside the county). Finally, Sandridge maintained that SPUD's CEQA review and associated mitigation efforts were limited to SPUD's jurisdiction, which does not include the use and transportation of groundwater.

Unpersuaded, the court concluded that, while economic harm from crop loss could be relevant to balancing the harms, given the strong likelihood of TLCC's success on the merits, the trial court could decide that such harm to Sandridge is "self-inflicted." The court did not address the County's Groundwater Export Ordinance and held that, under CEQA Guidelines § 15041, subdivision (a), SPUD has authority to require Sandridge to mitigate and/or avoid environmental impacts of the entire pipeline.

Applying the Interrelated Factors Test

The court applied the interrelated factors test as a sliding scale, two-pronged inquiry, and found that TLCC's likelihood of success on the merits of their CEQA claim was very high. Therefore, the harm to the public resulting from a lack of public disclosure that would ordinarily accompany a proper CEQA analysis was enough to satisfy the second prong of the interrelated factors test.

The court therefore directed the trial court, on remand, to reconsider TLCC's preliminary injunction request in light of the evidence of informational harm to the public from SPUD's failure to obtain information from Sandridge about the scope of the pipeline, perform preliminary review, and determine whether the pipeline is exempt from CEQA before granting the easement to Sandridge.

Conclusion and Implications

The Fifth District Court of Appeal's decision shapes how trial courts consider preliminary injunction requests in CEQA actions. Notably, courts may consider purely procedural or informational harms to the public under the interrelated factors test. Where, as here, a petitioner can show a strong likelihood of success on the merits, a purely procedural or informational harm under CEQA—even without evidence of environmental harm—may be enough to issue a preliminary injunction. While the appellate court did not offer further guidance on how to quantify or qualify a "purely procedural harm," it suggested that such a harm could outweigh the financial or other harms to project proponents where, due to the high likelihood of success, the project proponents' harm could be categorized as "self-inflicted." Here, however, the procedural error was straightforward: SPUD did not consider CEQA *at all*. Therefore, it is possible that a more nuanced procedural violation that occurs later in the CEQA process may not weigh as heavily in the interrelated factors test, thereby requiring a petitioner to at least establish *some* environmental harm to secure a preliminary injunction. As a practical matter, developers often choose to stop work on projects during litigation to reduce the risk of wasting resources in case of an adverse ruling. In addition, when advising clients whether to continue construction during litigation, counsel may encourage the client to stop work on the project, especially if the likelihood of the plaintiff's success on the merits of their claim is very high. The Fifth District's opinion is available at: https://www.courts.ca.gov/opinions/documents/F084228.PDF.

(Blaine Dyas, Bridget McDonald)

TRIAL COURT UPHOLDS SENATE BILL 1439, WHICH BILL CONTAINS RESTRICTIONS ON CAMPAIGN CONTRIBUTIONS TO LOCAL ELECTED OFFICIALS

Family Business Association of California v. Fair Political Practices Commission, Case No. 34-2023-00335169-CU-MC-GDS (Sac County Super. Ct. May 25, 2023).

The State Legislature passed Senate Bill (SB) 1439, which, effective January 1, 2023, amended the Political Reform Act of 1974 (Act) to include restrictions on campaign contributions to local elected officials. The Family Business Association of California and several other entities and individuals (collectively: plaintiffs) filed a complaint for injunctive and declaratory relief against the Fair Political Practices Commission (FPPC) and the FPPC's Chair in his official capacity (collectively: defendants) asserting causes of action to have SB 1439 declared unconstitutional under § 10(c) of Article II of the California Constitution and under §§ 2 and 3 of Article 1 of the California Constitution as well as under the First Amendment of the United States Constitution—and enjoin SB 1439's implementation on those grounds. Both plaintiffs and defendants moved for judgment on the pleadings, and the trial court granted defendants' motion without leave to amend.

Factual and Procedural Background

In June 1974, the Political Reform Act of 1974 (Government Code §§ 81000 *et seq.*) was approved by state voters through the passage of Proposition 9—which had, a purpose, amongst other things, to put an end to corruption in politics. The Act includes Government Code § 84308, which places limitations on certain public officials' ability to take part in a proceeding involving a license, permit, or other entitlement for use when a party or participant in the proceeding has made certain contributions to said public official. The Act also includes a general conflict of interest provision, Government Code § 87100, which bars public officials from using their official position to influence any government decision in which said public official had reason to know they had a financial interest. The Act defines "financial interest" such that campaign contributions are excluded from the import of the general conflict of interest provision, Government Code § 87100.

On November 29, 2022, following passage of the State Legislature, Governor Newsom signed Senate Bill 1439 into law, which law became effective on January 1, 2023. SB 1439 amended the Act by making changes to Government Code § 84308. Prior to SB 1439, Government Code § 84308 expressly did not apply to local elected officials, only to persons appointed to certain government agencies. SB 1439 eliminated the prior exception for "local government agencies whose members are directly elected by the voters." SB 1439 did not directly amend the general conflict of interest provision of Government Code § 87100 or its associated definitions.

On February 22, 2023, plaintiffs Family Business Association of California and several other entities and individuals filed a Complaint for injunctive and declaratory relief against defendants Fair Political Practices Commission, which is the state agency empowered to both interpret and enforce the provisions of the Act, and the Chair of the FPPC in his official capacity. Specifically, plaintiffs asserted causes of action to have SB 1439 declared unconstitutional and to enjoin its implementation under § 10(c) of Article II of the California Constitution, which only authorizes the State Legislature to "amend or repeal an initiative statute by another statute [when] … the initiative statute permits amendment or repeal without the elector's approval," and under §§ 2 and 3 of Article 1 of the California Constitution as well as under the First Amendment of the United States Constitution on right to freedom and liberty of speech grounds.

Plaintiffs and defendants both moved for judgment on the pleadings with defendants raising plaintiffs' failure to allege facts sufficient to state a cause of action and dismissal of the Complaint without leave to amend.

The Superior Court's Decision

After stating the appropriate legal standard for a motion for judgement on the pleadings and addressing the parties' requests for judicial notice, the trial court substantively addressed the matter.

Plaintiffs Failed to Demonstrate that SB 1439 Violated Section 10(c) of Article II of the California Constitution

The plaintiffs alleged that SB 1439 violated § 10(c) of Article II of the California Constitution as the Act provides that it may be amended or repealed only if, amongst other things, the new law furthers the Act's purposes. The trial court listed the express purposes of the Act as set forth in Government Code §§ 81001 and 81002, but provided, citing case law, that courts are not constrained to the express statement of purposes in determining the purpose of an initiative. The trial court noted that the proponents of Proposition 9, which enacted the Act, sought "an end to corruption in politics" and highlighted the "special favors" individuals and organizations "contracting with local government" obtained in return from their contributions "to the campaigns of local officials."

The plaintiffs first contended that SB 1439, and its amendments to Government Code § 84308, was an unconstitutional amendment to the Act because the Act's definition of "financial interest," excludes campaign contributions from its general conflict of interest provision of Government Code § 87100 and as such SB 1439 conflicted with the Act and should be declared invalid. The trial court rejected this argument. The trial court held that SB 1439 does not conflict with the Act's general conflict of interest provision. Specifically, Government Code § 87100 is a general prohibition against public officials making decisions in which the public official may have a financial interest; whereas Government Code § 84308 addresses the situation where the contributor has a financial interest in the result of a decision. The former addresses the financial interest of the public official whereas the latter addresses the interest of the public official's supporters. The trial court determined that these were separate purposes of the Act, and held that even assuming these sections conflicted, pursuant to the canons of statutory interpretation dictating that the more specific statute controls over the more general, to the extent there is a conflict, Government Code § 84308 and its specific application to "a proceeding involving a license, permit, or other entitlement for us," carves out an exception to the general conflict of interest rules articulated in Government Code § 87100.

The plaintiffs next contended that SB 1439 was unconstitutional because its amendments did not further the purposes of the Act. Specifically, plaintiffs argued that the express exclusion of campaign contributions from Government Code § 87100 is itself a significant mandate of the Act, such that SB 1439's amendments did not further the purposes of the Act. The trial court rejected this argument. The trial court held that nothing in the Act's legislative history suggests that the exception for campaign contributions is a primary purpose of the Act. The trial court discussed several instances where courts struck down legislative amendments to laws passed by initiatives as unconstitutional under § 10(c) of Article II of the California Constitution and parsed those as instances where the Legislature attempted to expand exceptions, not eliminate them. The trial court held that, here, SB 1439 eliminated an exception to the Act and by doing so furthered the purposes of the Act, which was to "put an end to corruption in politics."

Plaintiffs Failed to Demonstrate that SB 1439 Violated the Freedom and Liberty of Speech Provisions of the United States and/or California Constitutions

The plaintiffs also alleged that SB 1439 was unconstitutional under §§ 2 and 3 of Article 1 of the California Constitution as well as under the First Amendment of the United States Constitution on right to freedom and liberty of speech grounds. The trial court, first, discussed the applicable standard of scrutiny to apply to these constitutional claims. Plaintiffs argued that a strict scrutiny standard of review applied. The trial court disagreed. The trial court cited to several United States Supreme Court and California Supreme Court cases to establish that a lesser standard is applied to challenges to campaign contribution limits. Specifically, the trial court determined that the applicable standard of review was the "closely drawn" standard in which an action would be sustained if the government agency demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgement of freedoms. The trial court held this "closely drawn" standard applies to both the United States and California constitutional challenges.

The trial court, next, analyzed the important interest prong and held, based on United States Supreme Court precedent, that the interest in preventing *quid*

pro quo corruption or its appearance is sufficiently important to meet the "closely drawn" standard. In doing so, the trial court rejected plaintiffs' argument that the Legislature needed to have empirical evidence or governmental findings of actual corruption requiring such legislative action. The trial court stated, citing case law, there "is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures" and that the judicially noticed documents, such as SB 1439's legislative history, demonstrate a valid concern with and are sufficient evidence of the state's important interest in preventing quid pro quo corruption or its appearance by local elected officials.

The trial court, next, analyzed the closely drawn prong and held that SB 1439 is closely drawn to avoid unnecessary abridgment of freedoms. The trial court reasoned that Government Code § 84308 is limited to "a proceeding involving a license, permit, or other entitlement for use," which means SB 1439 applies only to limited proceedings and moreover only to those who have a financial interest in those proceedings. Furthermore, SB 1439 includes remedies to cure any appearance of quid pro quo corruption by allowing the decision makers to either recuse themselves or return the contribution.

In sum, the trial court granted defendants' motion for judgment on the pleadings without leave to amend and denied plaintiffs' motion for judgment on the pleadings in its entirety.

Conclusion and Implications

The trial court decision is significant because it upholds Senate Bill 1439 and its restrictions on campaign contributions to local elected officials, which went into effect on January 1, 2023.
(Eric Cohn, E.J. Schloss)

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