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THE 2010 ENVIRONMENTAL LEGISLATIVE RECAP: PUBLIC POLICY PARALYSIS

By

Gary A. Lucks*

Preoccupied by another financial crisis and election year politics, the Legislature and the outgoing Governor concluded one of the most lackluster legislative sessions in decades. Despite the dearth of earth-shattering legislation, last year was eclipsed by significant ballot initiatives that may have far reaching implications in California and on the national stage.

This year was marked by the passage of Proposition 26 which changes the state Constitution so that some fees will require a two-thirds vote. Due to major fluctuations in the general fund from year-to-year, California environmental agencies have resorted to regulatory fees to support environmental programs. Proposition 26 could jeopardize some of these programs by recasting environmental fees as taxes, making it virtually impossible to obtain the requisite two-thirds vote for approval. This could have profound and wide-ranging impacts on implementing many California environmental laws including the Global Warming Solutions Act of 2006 (otherwise known as "AB 32").

Proposition 22 is another voter-approved initiative that will impact the fiscal picture for California. Because it restricts the state government's ability to collect local funds, it is expected to contribute another $1 billion gap to the projected $28.5 billion dollar budget deficit over the next 18 months. On the

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other hand, the electorate approved Proposition 25. This initiative eliminates the two-thirds requirement to approve spending; however, it is still necessary to produce a supermajority in the legislature to increase revenues.

Nonetheless, the recently closed legislative session produced noteworthy policy on product stewardship for carpet manufacturers; waste paint recycling, and limits on heavy metal content in bead blasting. The balance of the new laws addressed a number of technical clean up provisions affecting existing environmental programs.

Climate Change

With his approval ratings in the dumps, the lame duck governor salvaged his environmental legacy as one of the champions of Climate Change legislation. Proposition 23 went down to a resounding defeat in the November 2010 election thus preserving part of Governor Schwarzenegger's legacy as a green crusader. Proposition 23 would have indefinitely suspended AB 32, leaving California's pioneering efforts to tackle climate change in limbo. Assembly Bill (AB) 32 authorizes the California Air Resources Board (ARB) to craft strategies to reduce greenhouse gas (GHG) emissions to 1990 levels by 2020. Since enactment of AB 32, the ARB has been implementing a "scoping plan" that sets forth an ambitious set of regulatory strategies including a "cap-and-trade" scheme to reduce GHGs.

The ARB based its scoping plan conclusions on controversial carbon data representing the potential capacity for California forests to sequester carbon. The plan posited that forests currently sequester a net of approximately five million metric tons of carbon dioxide (CO_2) annually after taking into account emissions from fires, harvesting, land conversion, and decomposition. AB 1504 (Skinner) was introduced to address significant methodological limitations supporting the basis for the sequestration rate. One of the scoping plan strategies requires the California Department of Fire (CDF) and the Board of Forestry (BOF) to evaluate how it will continue to achieve this sequestration rate by 2020 implementing the Z'berg-Nejedly Forest Practices Act of 1973 (Forest Practices Act). Assembly member Skinner contends that since the mission of the Forest Practice Act does not specifically embrace the values of carbon sequestration, the CDF "may not be in the best position to complete the [sequestration] assessment objectively."

The wide-ranging mission of the Forest Practices Act is to, among other things, effectuate maximum sustained yield of high-quality timber products while considering recreation, watershed, wildlife, range and forage, fisheries, regional economic vitality, employment, and aesthetic enjoyment. AB 1504 (Skinner) expands the list of public values to include CO_2 sequestration. This law also requires the ARB's rules governing commercial tree harvesting to determine whether state forests have the capacity to sequester enough CO_2 to meet or exceed the scoping plan GHG reduction target for the forestry sector.

In March 2010, the ARB tabled proposed rules designed to establish a vehicle cabin temperature standard known as "cool cars" or the vehicle cabin temperature standard. The cool cars policy is premised on reducing fuel consumption, GHGs and other pollutant emissions by maintaining cooler interior temperatures for cars and

light trucks. Due to scheduling challenges with the rule-making process, the ARB withdrew the proposed regulation in the spring of 2010. The ARB plans to refashion these rules to affect the 2017 model year. Senate Bill (SB) 1328 (Lowenthal) provides ARB policy guidance for use when reworking these rules. It requires the ARB to consider potential reductions in air-conditioning use that can be achieved while a motor vehicle is moving. In addition, the agency must consider potential conflicts between, and relative benefits of these temperature reduction requirements and technologies that provide motor vehicle GHG emission reductions. Finally, ARB must consider the flexibility necessary to achieve overall maximum GHG reductions from motor vehicles.

AB 1507 (Lieu) expands opportunities to fund projects to reduce GHGs. Prior to this law, the Carl Moyer Program was primarily targeted at funding heavy-duty vehicle emission projects to reduce conventional air emissions from diesel engines in order to meet federal ambient air quality standards. The program historically funded the incremental cost to purchase heavy-duty vehicles using alternative fuels, such as transit buses and trash trucks, along with engine replacements for agricultural irrigation pumps, construction equipment, and marine vessels. This law is intended to level the playing field for technologies that both reduce conventional pollutants as well as GHGs. The Assembly floor bill analysis points out that a 2010 diesel truck and a 2010 compressed natural gas (CNG) truck emit the same amount of criteria pollutants emissions; however, CNG trucks emit significantly fewer GHG emissions. Without increasing the Carl Moyer subsidy, fewer CNG trucks would be purchased because they cost more than diesel trucks. This law requires the ARB to revise the cost-effectiveness calculation used pursuant to the Carl Moyer Program. The revised guidelines must be completed by July 1, 2011.

Among other functions, the Strategic Growth Council is authorized to support the planning and development of sustainable communities to manage and fund green projects for the urban environment. These projects can include, among others, community green space; greening of public lands and structures; permeable storm water surfaces and collection basins; and urban streams. SB 1006 (Pavley) expands the list of eligible urban green projects to include special districts and joint power authorities.

Finally, SB 855 (Committee on Budget and Fiscal Review) is an urgency law that became effective October 19, 2010. This law requires the Governor to employ zero-based budget methodology regarding the 2011–12 fiscal year for implementing AB 32.

Air Quality

The Legislature delivered a number of laws promoting cleaner, more efficient vehicles while making some reforms to the smog check program. Other legislation is designed to ease the transition to electric vehicles and

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plug-in hybrids by providing financial assistance to home owners seeking to install electrical charging stations. New laws also provide direction on how air districts use their enforcement authority while offering clarity for penalty assessments involving air quality violations. Finally, we saw limits on regulating air emissions from Mexican power plants selling power in California.

SB 535 (Yee) is one of several bills designed to promote low emission vehicles along with the infrastructure to support electric vehicles. This law extends the types of low emission vehicles that can use the high-occupancy vehicle (HOV) lanes regardless of vehicle occupancy. Beginning on January 1, 2012, up to 40,000 enhanced advanced technology partial zero-emission vehicles will be extended this privilege. This law additionally extends until July 1, 2011, the HOV privilege for single-occupant hybrid vehicles with a fuel economy rating of at least 45 miles per gallon or greater fuel economy highway rating that meets specified design standards such as ultra low emission vehicles and super ultra-low emission vehicles.

Last year, the Legislature passed SB 626 [see Stats. 2009 SB 626 (Kehoe)], which required the California Public Utilities Commission (PUC) develop strategies to overcome barriers to widespread use of plug-in hybrid vehicles by July 1, 2011. By 2020, the State Energy Resources Conservation and Development Commission (otherwise known as the CEC) expects the number of electric vehicles (EVs) such as light-duty plug-in hybrid EVs and full-size battery EVs to reach 1.5 million by 2020. SB 1455 (Kehoe) responds to this projected demand for EVs and assists potential EV buyers in making an informed decision about home charging, electrical features, and safety measures to consider.

This law requires the CEC, by July 1, 2011, in consultation with the California Public Utilities Commission (CPUC), to maintain a Web site with links providing information on plug-in hybrids and fully electric vehicles. The Web site must include, among other sources of information, resources on obtaining a utility service upgrade along with basic charging circuit requirements.

California's smog check program uses an outmoded smog check methodology involving tailpipe, visual, and functional testing for new model-year cars according to Inspection and Maintenance Review Committee the United States Environmental Protection Agency considers this methodology to be cost-ineffective. The California Bureau of Automotive Repair (BAR) and the ARB sponsored AB 2289 (Eng). This law replaces the first generation smog check technology (loaded mode dynamometer or 2-speed idle testing) only on model year 2000 and newer vehicles with onboard diagnostic systems, beginning no earlier than January 1, 2013, This second generation equipment is a more cost-effective and effective testing procedure.

Prior to this law technicians violating the smog check program were not issued monetary penalties, rather, they were only required to receive additional training. The law authorizes the Department of Consumer Affairs (Consumer Affairs) to adopt regulations that require referees to inspect smog stations or technicians where "prohibitive or unusual inspections circumstances" exist. This law additionally strengthens the penalty structure for stations and technicians who perform improper or incomplete inspections of the smog check requirements. This law authorizes Consumer Affairs to cite violators of smog check requirements by issuing an order of abatement or to assess administrative fines between $100 and $5,000 and civil penalties up to $5,000. It also requires Consumer Affairs to develop inspection standards to evaluate whether smog check stations are performing their duties appropriately.

According to the ARB, 75 percent of motor vehicular air pollution is caused by approximately 25 percent of the oldest vehicles. The BAR's consumer assistance program (CAP) provides financial assistance for eligible consumers whose vehicles fail the biennial smog check. This law allowed a car owner whose car failed the smog check to retire the vehicle in exchange for $1,500 or more, if cost-effective. Consumers were required to pay $100 towards the repair and BAR was required to pay an additional $400 to even wealthy vehicle owners. AB 787 (Hill), among other things, limits financial assistance to vehicle owners whose income level is 225 percent of the federal poverty level. In addition, this law reduces the amount the BAR will pay to a person seeking to retire his or her high-polluting vehicle who does not qualify as low-income from $1,500 to $1,000.

With auto manufacturers gearing up to sell new electric vehicles and plug-in electric vehicles in California there will be a need for consumers to make electrical improvements in their homes to accommodate these vehicles. SB 1340 (Kehoe) was introduced to help bridge the funding gap to provide additional funds to install residential electrical charging stations. Specifically, this law provides legislative authority for the CEC to design a program to offset these infrastructure costs. The CEC is now authorized to fund electrical charging stations under the Alternative and Renewable Fuel and Vehicle Technology Program [see Stats. 2007, AB 118 (Nunez)] which annually generates approximately $120 million from vehicle registration fees and special identification license plates (known as the Alternative and Renewable Fuel and Vehicle Technology Program).

In addition, this law expands the authority for public agencies and property owners to voluntarily agree to be assessed in order to finance electric vehicle charging infrastructure. This law further prohibits public agencies from allowing property owners to participate in contractual assessment programs where the total assessments and taxes on their property exceeds five percent of the property's market value. This law also expands the Property Assessed Clean Energy (PACE) Reserve program to assist local jurisdictions in financing installation of electric vehicle charging infrastructure. It also allows the proceeds of the PACE bonds to finance qualified electric vehicle charging infrastructure. Finally, this law expands the definition of a PACE bond to include finance electric vehicle charging infrastructure.

AB 2037 (Perez) is aimed at power plants located in Mexico that share the air basin comprising California's border region. This law prohibits an investor-owned utility (IOU) or local publicly-owned electric utility from entering into long-term contracts with power plants that do not comply with Best Available Control Technology (BACT) standards for controlling air emissions. As a result, this law is intended to incent new Mexican power plants to also adopt California's BACT standards to control air pollution.

To minimize exposure to patients of particulate matter and other carcinogenic air emissions [see Stats. 2003, AB 390 (Montanez)], health care facilities (including hospitals, acute psychiatric hospitals, skilled nursing facilities, intermediate care facilities, special hospitals, intermediate care facilities for the developmentally disabled, and nursing facilities) no longer need to weekly test their diesel-powered backup generator. The law requires that health care facilities test their backup generators 12 times a year. AB 1863 (Gaines) extends the sunset date for this law from January 1, 2011 to January 1, 2016.

Senator Wright introduced SB 1224 to address instances where repeated and unsubstantiated odor complaints are lodged with an air district. For example, since 2007 over 80 complaints were lodged to the Bay Area Air Quality Management District against the Custom Alloy Scrap Sales (CASS) with no odor violations issued. SB 1224 (Wright) was introduced to give air districts freedom to manage their finite enforcement resources by authorizing them to issue rules giving them freedom to ignore repeated and unsubstantiated air quality complaints or complaints made in bad faith.

SB 1402 (Dutton) is an urgency law enacted to provide the regulated community clarity on how the ARB assesses penalties and to provide confidence that penalties will be issued in a consistent fashion for similar violations. This law requires the ARB to issue a specified written communication before issuing an administrative or civil penalty for air quality violations. The written communication must state how the penalty amount was calculated and the regulatory basis supporting the penalty assessment. Finally, if the penalty pertains to a law that limits specified pollution levels, then the ARB must indicate the quantity of the pollutant alleged to have been emitted. This information along with all final settlement agreements must be publicly available.

This law also requires the ARB and the courts to consider specified factors when calculating the administrative or civil penalties connected to vehicular air pollution control laws including, among others: the extent of harm to public health, safety, and welfare caused by the violation: the nature and persistence of the violation; the compliance history of the defendant; the preventive efforts taken by the defendant; the cooperation of the defendant during the course of the investigation; and the financial burden to the defendant.

The California Transportation Commission (CTC) allows local or regional agencies to advance their own funds to begin or continue a project under Proposition 1B (the Highway Safety, Traffic Reduction, Air Quality, and Port Security Act of 2006). This proposition authorizes $19.925 billion in general obligation bonds to be issued to fund transportation projects. Local or regional agencies can later seek reimbursement when the funds become available. These agencies assume the risk because the timing and amount of potential reimbursement is not guaranteed. A Letter of No Prejudice (LONP) is the vehicle used to effectuate this process. SB 1371 (Correa) is an urgency law that authorizes LONPs for $950 million generated from a general obligation bond for a high-speed passenger train system to fund intercity and commuter rail lines and urban rail systems. Alternatively, the funds can be advanced to fund capacity enhancements, modernization, rehabilitation, or safety improvements.

The Clean Air and Transportation Improvement Act of 1990 (Proposition 116) authorizes $1.99 billion in general obligation bonds to fund various rail and transit projects. ABX8 11 (Committee on Budget) allows the California Transportation Commission (CTC) to coordinate with local transportation agencies to expend these funds.

Energy

Since the enactment of AB 32 and establishment of the Renewable Portfolio Standard (RPS), the Legislature has devoted considerable effort to ensure the availability of reliable sources of renewable energy. This year, the Legislature served up a smorgasbord of policies addressing energy storage procurement targets; adjustments to feed-in tariff

provisions; a regional mitigation program to offset species impacts when permitting renewal energy projects; and expanding the PACE program. Other legislation restricts investment in Iran's energy sector; addresses disclosure of energy usage by customers; and addresses energy efficiency for appliances.

AB 2514 (Skinner) requires the CPUC to establish targets for IOUs to establish energy storage system procurement targets by October 1, 2013. These targets must be integrated into the utility's renewable energy procurement plans. The energy storage systems must, among other things, reduce GHGs or demand for peak electrical generation. The initial target for IOUs must be achieved by December 31, 2015, and a second target must be met by December 31, 2020. Publicly-owned electric utilities (POEUs) are required to determine their appropriate targets by October 1, 2014. The initial target for POEUs must be achieved by December 31, 2016, and a second target must be met by December 31, 2021. IOUs serving electricity to customers outside California and having no more than 60,000 customers inside California are exempt from these requirements.

In 2007, the legislature created the California Solar Initiative (CSI), which established a goal for IOUs and publicly owned utilities (POUs) to install 3,000 megawatts of photovoltaic solar energy in California by 2017. The CSI requires that the solar energy system be located on the participating rate payer's premises and must offset part or all of that their electricity demand. AB 1947 (Fong) was enacted to assist POUs in their efforts to meet the CSI goal by exempting the POU from these offsetting requirements if its capacity is less than five megawatts and meets other specified conditions.

The RPS requires at least 20 percent of electricity delivered to ratepayers be sourced from specified renewable energy such as wind, solar, and geothermal energy. AB 1954 (Skinner) addresses a financial impediment to financing renewable energy known as a feed-in tariff where utilities are required to reimburse eligible renewable energy projects that deliver up to three megawatts of power to the transmission and distribution grid. AB 1954 allows the CPUC to ensure that electrical corporations reflect transmission costs in their retail rates established by the federal Energy Regulatory Commission. This must occur upon granting a certificate of public convenience and necessity for new transmission facilities to achieve the renewable energy objectives established by the RPS.

AB 2724 (Blumenfield) is a feed-in tariff law that directs the CPUC to authorize the award of monetary incentives to state agencies for generation of up to 5 MW of power. The incentive rebate payments will be capped at 25 MWs and will be in place through January 1, 2013.

SBX8 34 (Padilla) is an urgency law that facilitates siting solar thermal and solar photovoltaic projects in the Mojave and Colorado desert regions of California. This desert region—known as in the Desert Renewable Energy Conservation Plan (DRECP) planning area—is being developed by the Department of Fish and Game (DFG), CEC, federal Bureau of Land Management and the United States Fish and Wildlife Service, to serve as a regional habitat conservation plan. This plan is designed to fully mitigate under the California Endangered Species Act (CESA) the "take" of endangered, threatened, or candidate species resulting from the construction and operation of power plants. This law employs a regional advance mitigation approach that allows an applicant to pay the DFG a one-time permit application fee of $75,000.

Power projects that are eligible to participate in this program include those where the power developer has: (1) submitted a completed permit application to the CEC, which was received by February 1, 2010; and (2) where the developer or owner applied for and qualifies for federal American Recovery and Reinvestment Act (ARRA) funding. ARRA funding can offset up to 30 percent of project costs as long as construction was begun by December 31, 2010. This law also loans $10 million from the Renewable Resource Trust Fund to the Renewable Energy Resources Development Fee Trust Fund and authorizes DFG to use these funds to purchase mitigation lands or conservation easements for later use by energy developers. This law also requires DFG to develop an interim mitigation strategy that must include, among other things, a description of how it will preserve and restore habitat within the DRECP planning area. Finally, this law clarifies that it does not affect the mitigation authority under CESA, California Environmental Quality Act (CEQA), or the Warren Alquist Act which governs the siting of power facilities.

As more fully discussed elsewhere in this article, SB 855 (Committee on Budget and Fiscal Review) is an urgency law that expands the authority of the CEC to use ARRA funds for loan guarantees, loan loss reserves, and credit enhancement for energy projects. SB 855 also increases the fee for an application for certification (AFC) for siting a thermal power plant or electric transmission line to $250,000 plus $500 per megawatt while capping the fee at $750,000. In addition, this law increases the annual fee to $25,000.

AB 1873 (Huffman) builds upon the success of AB 811 [see Stats. 2008, AB 811 (Levine)], which authorized local government to provide home-owners up-front funds to pay for energy efficiency or renewable energy projects while the participating property owner repays the loan annually over time. AB 1873 expands this program (otherwise

known as the local PACE) state-wide by authorizing the state to purchase bonds to finance distributed generation renewable energy sources or energy or water efficiency improvements via PACE programs. Specifically, the State Treasurer, the California Public Employees Retirement System Board (CalPERS), and the State Compensation Insurance Fund (SCIF) are authorized to purchase the bonds. This law additionally authorizes joint powers authorities (JPA) to purchase, and a local agency to sell, the right, title, and interest in a PACE assessment contract.

AB 1106 (Fuentes) is an urgency law that, among other things, indefinitely extends the CEC's contracting authority to issue competitive grants and loans supporting innovative technologies to help attain the state's climate change policies. Specifically, this law authorizes the CEC to contract with the Treasurer to issue competitive grants and loans. The funds are designed to support innovative technologies to transform the state's fuel and vehicle types. These grants can be issued to public agencies, vehicle and technology entities, businesses and projects, public-private partnerships, workforce training partnerships and collaboratives, fleet owners, consumers, recreational boaters, and academic institutions. This law additionally authorizes the CEC to contract with small business financial development corporations (FDCs), which are authorized to use funds from the Alternative and Renewable Fuels and Vehicle Technology Program [see Stats. 2007, AB 118 (Nunez)].

AB 1809 (Smyth) authorizes a home inspection to include, if requested by the customer, a Home Energy Rating System (HERS) audit that meets the requirements of the State Energy Resources Conservation and Development Act.

AB 1650 (Feuer) prohibits persons from bidding on or entering into contracts with a public entity for goods and services of $20 million or more in Iran's energy sector. Further, beginning June 1 2011, financial institutions are prohibited from extending $20 million or more in credit to persons providing goods or services to Iran's energy sector. Beginning June 1 2011, this law additionally prohibits persons from contracting with a public entity for goods or services of $1 million or more in Iran's energy sector.

The Consumer Electronics Association sponsored SB 1198 (Huffman). This law is designed to delay implementation of the CEC's television energy use disclosure and labeling requirement until July 1, 2011. The CEC was poised to implement energy efficiency standards for new televisions that would reduce energy consumption on average by 33 percent effective January 1, 2011, and 49 percent effective 2013. This will allow the Federal Trade Commission (FTC) time to develop energy efficiency labeling requirements for electronics products, including televisions.

SB 1476 (Padilla) requires an IOU or POU using smart meters to safeguard from unauthorized access their customer's energy usage data. Specifically, this law prohibits electrical corporations or gas corporations from disclosing customer's electrical or gas consumption data. These utilities must employ reasonable security practices to protect a customer's unencrypted electrical and gas consumption data from unauthorized access, destruction, use, modification, or disclosure. This law also prohibits these utilities from selling a customer's energy consumption data or any other personally identifiable information for any purpose.

California Environmental Quality Act

Those attempting to reform CEQA to accomplish consensus-driven objectives often come up short. This is because the environmental community is loathe to open the door for even consensus-driven beneficial changes, fearing that other CEQA provisions could be compromised. This year, legislative results belied this axiom. New laws were approved promoting mediation of CEQA disputes; allowing the use of cumulative impact analysis from a previous environmental document; and expanding use of focused environmental impact reports (EIRs). Other changes to CEQA included allowing a lead agency to use a prior finding of overriding consideration in approving a new EIR. Finally, lead agencies are authorized to charge for the costs of printing environmental documents.

CEQA has procedures to resolve law suits through settlement meetings that can be held concurrently with any judicial proceedings. CEQA also permits challenges to be resolved via mediation proceedings. SB 1456 (Simitian) is an urgency law that, until January 1, 2016, allows mediation proceedings to also run concurrently with any judicial proceedings. Specifically, beginning July 1, 2011, this law allows a plaintiff to request mediation within five days after the filing of a notice of determination. If the lead agency does not respond within five business days of receiving a request for mediation, the notice for mediation is denied. This law, until January 1, 2016, authorizes the Attorney General to issue a motion in court seeking an expedited schedule to resolve an action. In addition, this law empowers courts to penalize parties bring frivolous CEQA challenges on or before December 31, 2015. Finally, this law, until January 1, 2016, permits a lead agency to rely upon a prior cumulative effect analysis previously addressed in an EIR, mitigated negative declaration, or negative declaration evaluating a program, plan, policy or ordinance. The lead agency must determine that the cumulative effect was adequately examined in a prior environmental analysis as long as the later project is

consistent with (1) the program, plan, policy, or ordinance for which an EIR was prepared and certified; and (2) with applicable local land use plans and zoning in which the later plan would be located.

Under limited circumstances, CEQA allows a lead agency to approve a project notwithstanding significant adverse impacts that cannot be mitigated to less than significance. In this instance, the lead agency is required to find the existence of "overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." Under current law, a lead agency can adopt a statement of overriding consideration for an EIR for a General Plan (or other plan, policy or ordinance) pursuant to a tiered EIR. AB 231 (Huber) is an urgency law that authorizes a lead agency when using a tiered EIR based on a prior EIR to use the prior finding of overriding consideration in approving a new EIR. This is allowed if the lead agency determines the project is consistent with the program, plan, policy, or ordinance that creates the same adverse environmental impact; however, the impact must be not greater or different at the project level than at the plan level. In addition, the later project's significant environmental impacts must be not greater than or different from those identified in the earlier EIR.

AB 1846 (Perez) authorizes a lead agency under CEQA to use a "focused" EIR to evaluate the potential environmental effects associated with a proposed regulation requiring pollution control equipment or a performance standard or treatment requirement adopted to reduce GHG emissions to comply with AB 32. This law additionally requires the use of a focused EIR for rules requiring pollution control equipment adopted by the CEC and the CPUC.

SB 855 (Committee on Budget and Fiscal Review) requires the SWRCB to publish a report to the Joint Legislative Budget Committee on the effectiveness of directly contracting with environmental consultants to prepare CEQA environmental documents. SB 855 also requires that report to evaluate the effectiveness of recovering from water rights applicants and petitioners the costs of preparing environmental documents. The report must be published and displayed on the agency's website by July 1, 2013.

AB 2565 (Ammiano) allows lead agencies to charge and collect a reasonable fee from members of the public to receive a copy of an initial study, negative declaration, draft and final EIR, among others. The fee must not exceed the cost of reproducing the environmental document. This law also provides that the environmental document may be provided in an electronic format.

Solid Waste

Although the solid waste field is relatively settled, the Legislature made some changes including establishing a fee to mitigate closed solid waste landfills. Other legislation requires manufacturers of compostable bags to meet specified labeling requirements. Finally, the Legislature extended for another ten years a loan program that assists recycling businesses.

AB 1004 (Portantino) extends by six months the dates by which operators of solid waste landfills may opt into a trust fund. This fund was established last year to insure against liability associated with potential future cleanup costs during the closure/postclosure phase of the life of a landfill. During the 2009 legislative session, the same author [see Stats. 2009, AB 274 (Portantino)] established the Postclosure and Corrective Action Trust Fund. The fee is intended to provide a safety net to mitigate potential environmental impacts created during the post-closure phase of solid waste landfills. According to the provisions of that law, the trust fund would only become operative if 50 percent of the operators choose to participate in the program by July 1, 2011. AB 1004 was enacted to allow additional time to accommodate the time necessary to transition from the former Integrated Waste Management Board (IWMB) to the new Department of Resources Recycling and Recovery (DRRR) along with the transition from the Schwarzenneger administration to the new Brown administration.

SB 228 (DeSaulnier) builds upon a California law that prohibits the sale of plastic bags labeled "compostable" or "marine degradable" unless the bag complies with a specified ASTM standard. This law requires manufacturers of compostable bags, beginning July 1, 2011, to ensure that the compostable plastic bag is readily and easily identifiable from other plastic bags, is labeled with a certification logo indicating the bag meets the ASTM D6400 specification and is labeled "compostable." Manufacturers must abide by the Federal Trade Commission Guides for the Use of Environmental Marketing Claims and may not sell or distribute compostable plastic bags that display a recycling symbol (e.g., a chasing arrow).

The California's Recycling Market Development Zone (RMDZ) Loan Program was developed to promote recycling businesses by providing low-interest loans to businesses and non-profit organizations located within RMDZs. The objective is to increase diversion of nonhazardous solid wastes from class III landfills and to expand market demand for "secondary and post consumer materials." SB 390 (Kehoe) extends the sunset on the RMDZ Loan Program from July 1, 2011 to July 1, 2021. The RMDZ Loan Program provides direct low-interest loans to businesses and non-profit organizations located

in RMDZs that increase diversion of non-hazardous solid waste from California landfills and that promote market demand for secondary and post consumer materials.

Storage Tanks.

The Legislature offered a handful of changes to the management of above and below ground storage tanks. One law increases the petroleum storage fee to fund backlogged underground storage tank (UST) claims while another establishes a limited exemption for UST construction and operational requirements. Finally, the definition of a "tank facility" for aboveground storage tanks was changed.

AB 1188 (Ruskin) is an urgency law intended to address a shortfall in the Underground Storage Tank Cleanup Fund (Barry Keene Underground Storage Tank Cleanup Act of 1989) which pays for certain costs to clean up petroleum releases from USTs. The fund is overspent by approximately $80 million, which has resulted in the suspension of payments to businesses and consulting firms for work already performed. This law temporarily increases the petroleum storage fee paid by owners and operators of petroleum USTs by $0.006 per gallon of petroleum stored, between January 1, 2010, and December 31, 2011. These revenues are intended to fund the currently backlogged claims. This law also expands the eligibility for use of State Water Resources Control Board (SWRCB) grants and loans to gas station operators subject to the Enhanced Vapor Recovery (EVR) regulations established by the ARB. This law revises the definition of "project tank" to include one or more tanks that are upgraded to comply with the Enhanced Vapor Recovery Phase II regulations. If the ARB received an applicant's grant application on or before April 1, 2009, grant funds can be used to reimburse up to 100 percent of the applicant's costs to meet the Enhanced Vapor Recovery Phase II regulations.

AB 1674 (Saldana) provides exemptions for specified petroleum USTs from current design, construction, installation, and monitoring requirements. It allows a certified unified program agency and other local agencies to exempt tanks installed on or after July 1, 2003. The exemption can be granted if (1) the local agency determines the tank meets or exceeds the requirements for USTs installed after January 1, 1984; and (2) any portion of a vent line, vapor recovery line, or fill pipe that is beneath the surface of the ground is regulated as a "pipe." This law deletes a prior requirement that the local agency determination needed to be made without objection from the SWRCB. This law additionally exempts vaulted tanks (i.e., below-grade tanks that are not buried in the ground) that are connected to an emergency generator tank system that meets specified conditions. These tanks do not have to comply with all standards imposed on USTs installed after July 1, 2004, which include, among other things, pressure monitoring between the soil and the exterior walls of the tanks. The tank must be (1) situated above the surface of the floor in such a way that all of the surfaces of the tank can be visually inspected by either direct viewing or through the use of visual aids monitored through the use of a continuous leak detection and alarm system capable of detecting unauthorized releases; (2) for single-walled tanks the structure or a separate discrete secondary structure must be able to contain the entire contents of the liquid stored in the tank, and must be sealed with a material compatible with the stored product; (3) the owner or operator of the tank must keep a log of visual inspections conducted each time the emergency generator tank system is operated, or at least once a month; and (4) the tank or combination of tanks in the below-grade structure must have a cumulative capacity of 1,100 gallons or less of diesel fuel.

The Aboveground Petroleum Storage Act previously defined "tank facility" as one or more aboveground storage tanks, including any piping that is integral to tanks that contain petroleum and that are used by a single business entity at a single location or site. This law modifies the definition of "tank facility" as being used by an owner or operator.

Sustainability

In recent years, the Legislature has begun to fashion policies to shrink "environmental footprints" with product stewardship, including a new law requiring carpet manufacturers to adopt strategies to increase the recycling and collection of carpets in California. Another sustainability initiative paves the way for federal grants to promote green jobs in California. Former Assembly member Jones—now the new Insurance Commissioner—championed two other sustainability laws. One provides incentives to reduce driving and promote green buildings while another exempts private passenger cars used for personal vehicle sharing program (PVSP) from being considered commercial vehicles for insurance purposes.

The DRRR published a Statewide Waste Characterization Study in 2008 which estimated that 1.3 million tons of carpet are annually disposed in California landfills; this constitutes 3.2 percent of all solid waste disposed of in landfills. AB 2398 (Perez) was enacted to increase the rate of landfill diversion for carpets and addresses one of the barriers to increasing carpet recycling rates by establishing infrastructure to collect and process waste carpet. This law requires carpet manufacturers in California, by September 30, 2011, to submit to the DRRR a carpet stewardship plan. This plan is intended to increase carpet

recycling by implementing product design, use, and end-of-life management strategies.

Beginning July 1, 2011, a carpet manufacturer must add a $0.05 per square yard assessment on the purchase price for carpet sold in California. Retailers and wholesalers are obligated to add this assessment to the purchase price. Beginning April 1, 2012, the law prohibits manufacturers, wholesalers, and retailers from selling carpets in California without a DRRR-approved stewardship plan. DRRR is required to post on its Internet Web site manufacturers that are in compliance with this law. The Department of General Services must revise its procurement rules so that carpet that is removed from state buildings is managed in accordance with AB 2398.

AB 1011(Jones) declares that the insurance industry can help reduce GHG emissions by increasing incentives to reduce driving, by promoting "green buildings," by investing in energy efficiency improvements and renewable energy projects, and conserving natural resources. The law additionally declares that by making investments that support community development financial institutions in low- and moderate-income communities in "green investments," the insurance community can help those communities better accommodate new growth in compact forms, de-emphasize car dependency, integrate new growth into existing communities, and support a diversity of affordable housing near employment centers, and create jobs. This law defines "green investments" as investments in low- and moderate-income communities that emphasize renewable energy, economic development, and affordable housing on infill sites, as well as investments that promote the reuse and rehabilitation of city centers including solar and wind power, multimodal transportation systems, transit-oriented development that advances economic development, housing and jobs.

This law additionally requires that the Insurance Commissioner post information on the Department of Insurance (DOI) Internet Website information on green investments pursuant to its biennial obligation to publish the results by insurance companies on their investments in development and community development infrastructure.

AB 1871 (Jones) provides that private passenger motor vehicles used for a personal vehicle sharing program (PVSP) are exempt from being classified as commercial vehicles for insurance purposes. The annual revenues generated by vehicle sharing must be less than the annual expenses of owning and operating the vehicle.

California received over $400 million from the federal American Recovery and Reinvestment Act of 2009 (ARRA) for the purpose of job training. AB 2696 (Bass) was enacted to assist in creating "green jobs" that may include energy efficiency building retrofits, green building, solar and green technology. This law allows the California Workforce Investment Board to accept grants and other funds, good and services from federal and state and other sources to implement AB 3018 [see Stats. 2008, AB 3018 (Nunez)]. AB 3018 established the Green Collar Jobs Council (GCJC) whose mission is to identify strategies to support green jobs in California. Under this new law, the GCJC must consult with state and local agencies to identify opportunities to use ARRA funds.

SB 855 (Committee on Budget and Fiscal Review) sets forth specified goals for biorefiners to meet in order to receive receiving loans from the Energy Commission's California Ethanol Producer Incentive Program.

Last year, the Legislature approved the streamlining of higher education-related reporting requirements [see Stats. 2009, AB 1182 (Brownley)]. The Sustainable Agriculture Research and Education Program (SAREP) operated by the University of California was inadvertently deleted from the law. AB 1891 (Committee on Higher Education) restores the SAREP in the statute.

Hazardous Materials and Green Chemistry

In recent years, the chemical policy focus has shifted up stream. Manufacturers must now identify more benign chemicals and reduce the toxicity and volumes of hazardous wastes downstream. To that end, the Legislature approved a product stewardship law requiring paint manufacturers to develop a paint stewardship plan to recover unused paint. Another law limits the use of brake pads containing specified metals and asbestos while other legislation prohibits specified levels of cadmium in children's jewelry.

Several years ago, the Department of Toxic Substances Control (DTSC) was authorized to remove mercury-containing vehicle light switches from vehicles. SB 346 (Kehoe) builds on this program by limiting for sale in California specified metals and asbestos from motor vehicle brake pads on and after January 1, 2014. Motor vehicle brake friction materials that exceed the following concentrations may not be solid in the state: 0.01 percent by weight for cadmium and its compounds, and 0.1 percent by weight for chromium (VI)-salts, lead and its compounds, mercury and its compounds. The prohibition applies to asbestiform fibers in any amount. In addition, beginning January 1, 2014, new motor vehicles sold in California must be equipped with brake friction materials that meet the limits specified above. In addition, this law prohibits copper in motor vehicle brake pads. By January 1, 2021, the limit is five percent by weight of copper and.5 percent by weight of copper by January 2025. A violation

of these limits subjects manufacturers to a civil fine of up to $10,000 per violation.

Manufacturers of vehicle brake pads must use the newly established Toxics Information Clearinghouse to evaluate and analyze potential alternatives to lower the potential hazard to public health and the environment. Finally, DTSC and the SWRCB, by January 1, 2023, must report to the Governor and the Legislature on how this law affects the total maximum daily load allocations for copper in impaired waters.

California law prohibits the manufacture or sale of toys contaminated with specified levels of lead, antimony, arsenic, cadmium, mercury, selenium, or barium contained in paint and lacquer coatings. SB 1365 (Corbett) updates this law and makes reference to the lead content allowed pursuant to the federal Consumer Product Safety Act and the Consumer Product Safety Improvement Act of 2008. This law prohibits the manufacture or sale to a toy retailer of chromium identified in ASTM [American Society for Testing and Materials] International Standard F963-08. Notwithstanding the recent developments with green chemistry regulation in California, SB 929 (Pavley) expands on prior legislation by the same author [see Stats. 2006, AB 1681 (Pavley)] that prohibited lead in jewelry. According to the author, jewelry manufacturers have since substituted lead with cadmium in children's jewelry products. Cadmium and cadmium compounds are known to the state to cause cancer and reproductive toxicity. Long-term exposure to cadmium could lead to kidney disease and cause fragile bones.

Commencing on January 1, 2012, this law prohibits a person from manufacturing, shipping, or selling children's jewelry that contains cadmium at any level above 300 parts per million. Toys regulated for cadmium exposure under California's Green Chemistry laws and the federal Consumer Product Safety Improvement Act of 2008 are exempt from SB 929.

Waste latex and oil-based paints generated by consumers in California represent the largest source of household hazardous waste (HHW) for consumers. With only five percent of California households using HHW programs, AB 1343 (Huffman) was introduced to establish an architectural paint recovery program to recover and properly manage leftover paint. According to the author, this new law will reduce the financial burden on local governments and protect the environment by requiring manufacturers to take responsibility for establishing and financing a safe and reliable system for the recovery and proper management of leftover paint. The program will be administered by the DRRR no later than April 1, 2012.

This program requires paint manufacturers or a designated stewardship organization to develop and implement an architectural paint stewardship plan. The plan must be designed to recover and reduce the generation of and promote the reuse of postconsumer architectural paint. In addition, the plan must manage the end-of-life of postconsumer architectural paint in an environmentally sound fashion, including collection, transportation, processing, and disposal. The manufacturer or its stewardship organization must submit the plan to the DRRR for review and approval. The manufacturer must implement the plan three months after approval or not later than July 1, 2012. Manufacturers must submit to DRRR a report summarizing their paint recovery efforts each year, beginning on July 1, 2013. Manufacturers or retailers are prohibited from selling or offering for sale architectural paint unless the manufacturer is listed on DRRR's Internet Web site as meeting the requirements of this law. Failure to comply could subject a violator to civil penalties.

SB 70 (Committee on Budget and Fiscal Review) establishes an exemption to the Motor Vehicle Fuel Tax Law established under ABX8 6. This law was enacted to achieve revenue neutrality by raising the sales tax on storage, use, or consumption of diesel fuel (on or after July 1, 2011) by 1.75 percent and decreasing other specified taxes by a similar amount elsewhere. SB 70 exempts aviation gasoline from the motor vehicle fuel tax increase.

Hazardous Waste

The Legislature served up a few new laws addressing hazardous waste management, including a law requiring DTSC to develop guidance to achieve hazardous waste pollution prevention. Another new law limits the arsenic and lead content in blasting media. Other legislation expands the eligibility for grants involving lubricating oil.

The California Pollution Control Financing Authority (CPCFA) provides low-cost loans of up to $1.5 million for waste and recycling projects. SB 1477 (Committee on Environmental Quality) is an urgency law to clarify that eligible projects may include environmental projects that qualify for tax-exempt financing under federal tax law.

The DTSC is required to develop a technical assistance and outreach program to assist businesses in minimizing hazardous waste generation. The Hazardous Waste Source Reduction and Management Review Act of 1989 requires DTSC to develop model pollution prevention guidance for two categories of industrial hazardous waste generators every two years. AB 2379 (Feuer) increases from two to four the number of industrial categories to include in the source reduction technical assistance guidance. It further

requires that one of these industrial categories include businesses impacted by the Green Chemistry program.

Glass beads used to treat or otherwise to strip paint from parts and materials contain dust with elevated levels of toxic heavy metals. These metals present a health hazard to employees and an environmental risk to soil and water. AB 1930 (De La Torre) follows the lead of the United States military, which established maximum levels of arsenic and lead to protect individuals and the environment. AB 1930 adopts this standard and prohibits the manufacture or sale of glass beads containing arsenic or lead above specified limits if those glass beads will be used in blasting equipment. The law specifies that each container or bag of glass beads must be labeled: "Glass bead contents contain less than 75 ppm arsenic and less than 100 ppm lead."

The California Oil Recycling Enhancement Act is designed to prevent illegal disposal of used oil through curbside oil pickup programs and local collection facilities. This Act is administered by the DRRR, which is authorized to award grants "to develop and advance certain developments in lubricating oil including . . . oil recycling, collection, research, testing, and rerefining." SB 579 (Lowenthal) changes the purpose for which the grants are issued from "protecting" advancement and developments in lubricating oil to "product" advancements and developments in lubricating oil. Prior law required DRRR to pay an incentive to recycling facilities to produce rerefined lubricants, which was to become effective on January 1, 2014. SB 579 advances that date by one year to January 1, 2013. This law additionally revises the conditions governing the transfer of used oil to a registered or certified out-of-state recycling facility.

SB 855 (Committee on Budget and Fiscal Review) clarifies that accelerated remediation of orphaned oil facilities funded by increased fees imposed by the Department of Conservation (DOC) will last for only four years.

Water Quality

The Legislature postponed an $11 billion water bond for 2012, while expanding the eligibility to spend approved bond revenues to clean up groundwater. Another new law authorizes development of uniform recycled water criteria to reuse potable water for groundwater recharge and surface water augmentation. Other legislation requires adoption of graywater standards for indoor and outdoor uses in non-residential buildings. Finally, the Legislature adjusted procedures for review of RWQCB decisions.

As part of the Seventh Extraordinary Session of 2009–10, the legislature enacted the Safe, Clean, and Reliable Drinking Water Supply Act of 2010 [SB2 X7 (Cogdill)], which would have placed a $11.14 billion in general obligation bonds on the November 4, 2010,ballot to fund a number of water resources programs (to finance a safe drinking water and water supply reliability program). The bond would have included drought relief ($455 million); water supply reliability ($1.050 billion); Delta Sustainability ($2.250 billion); Statewide Water System Operational Improvement ($3 billion); Delta sustainability, conservation and watershed protection ($1.785 billion); groundwater protection and water quality ($1 billion); and water recycling ($1.25 billion). Given the difficult economic climate, the Legislature withdrew this water bond in an effort to maximize the potential for approval during the 2012 election cycle. AB 1265 (Caballero) is an urgency measure that delays the vote on this proposed water bond measure until 2012.

AB 153 (Hernandez) is an urgency law that further amends the proposed Safe, Clean, and Reliable Drinking Water Supply Act of 2012 (Water Bond), which authorizes $1 billion for groundwater protection. AB 153 expands the eligibility for expenditures, grants, and loans of at least $100 million to support groundwater cleanup projects.

According to Senator Pavley "each year, California discharges nearly four million acre feet of wastewater into the ocean . . . much of that water could be recycled." However, because the state has not adopted uniform safety standards, the permitting and design processes for building and operating water recycling facilities are unpredictable, discouraging local communities from tapping into this major water source. The Water Recycling Act of 1991 established a statewide goal to recycle 1,000,000 acre-feet of water each year by 2010. SB 918 (Pavley) expands the authority of the State Department of Public Health (DPH) to establish uniform statewide recycling criteria for recycled water beyond its existing authority to protect public health. This law requires DPH to adopt uniform water recycling criteria for indirect potable water reuse for groundwater recharge and surface water augmentation by December 31, 2013, and December 31, 2016, respectively. DPH is conditionally authorized to approve the water recycling criteria if an expert panel on uniform water recycling criteria determines the recycling criteria would adequately protect public health.

California law requires a statewide 20 percent reduction in urban per capita water use by December 31, 2020. To that end, urban retail water suppliers must develop urban water use targets and an interim water use target by July 1, 2011. Urban retail water suppliers were granted a six-month extension (to July 1, 2011) to adopt their urban water management plans (UWMP); however, SBX7 7 (Steinberg) unintentionally neglected to grant the same extension to wholesale water suppliers. SB 1478

(Committee on Natural Resources and Water) permits urban wholesale water suppliers the same six-month extension to adopt the UWMP. These provisions also apply to urban retail water suppliers that provide water to the United States Department of Defense military installations. AB 2277 (Fletcher) requires these urban retail water suppliers to consider the conservation of that military installation pursuant to Presidential Executive Order 13514 when preparing the implementation plan. This executive order, signed by President Obama, requires federal agencies to reduce water consumption intensity 26 percent by 2020.

The Governor's Climate Action team anticipates more frequent and more severe water shortages due to the effects of climate change and growing population. AB 518 (Lowenthal) builds upon recent legislation that promoted reuse of graywater by requiring the Department of Housing and Community Development to establish graywater standards for residential uses. Graywater is untreated wastewater such as from clothes washers and showers. This law requires the California Building Standards Commission to adopt building standards for indoor and outdoor uses in non-residential occupancies. In so doing, this law terminates prior authority of the Department of Water Resources.

SB 1169 (Lowenthal) makes numerous technical amendments to update and clarify the Water Code. Among other things, this law modifies the procedures governing appeal of a decision or order issued by the State Water Resources Control Board (SWRCB). SB 1169 clarifies that the SWRCB, on its own motion, may review RWQCB basin planning decisions. This law also provides that an aggrieved party must file a petition for reconsideration with the SWRCB to exhaust its administrative remedies if the SWRCB has authorized a petition for reconsideration via regulation. This law also modifies appeal procedures governing an aggrieved party challenging a CEQA decision by a RWQCB or reconsideration by the SWRCB. The administrative appeal begins upon the SWRCB's completion of that review or reconsideration. Finally, in order to achieve consistency and uniformity with other RWQCB member terms, this law extends the terms of two board members on each of the nine RWQCBs to September 30, 2014.

California law requires the SWRCB and RWQCBs to impose mandatory minimum penalties of $3,000 for each "serious" waste discharge violation. These penalties are also imposed where specified violations occur four or more times in any period of six consecutive months involving a water quality violation. Prior to SB 1284 (Ducheny), a serious water discharge violation included a failure to file a timely discharge monitoring report for a required 30-day interval. This law was introduced to narrow the definition of "serious violation," which penalized public agencies who failed to file a report even if it indicated there were no discharges. SB 1284 (Ducheny) provides that a failure to file a discharge monitoring report is not a serious waste discharge violation under specified circumstances. The discharger must submit a statement to the SWRCB or the RWQCB that "there were no discharges to waters of the United States reportable under the applicable waste discharge requirements during the relevant monitoring period." The statement must include the reason or reasons the required report was not submitted to the RWQCB by the deadline for filing that report. Until January 1, 2014, the law further limits the mandatory minimum penalty for failure to file each discharge monitoring report. Prior to this law the penalty could be imposed for each 30-day period after the deadline for submitting the report. Finally, this law increases from five to 10 years the time in which dischargers must comply with a permit requirement if the discharger can demonstrate the necessity in order to comply with effluent limitations.

The Sacramento-San Joaquin Delta Reform Act of 2009 was enacted to help ensure more reliable water supply and protection, restoration, and enhancement of the Delta ecosystem. SB 855 (Committee on Budget and Fiscal Review) requires the Governor to use zero-based budget methodology when submitting his 2011–12 fiscal year budget report to the Legislature for (1) addressing the costs to implement water and ecosystem restoration activities in the Sacramento-San Joaquin Delta; and (2) for the CALFED Bay-Delta Program.

SB 1450 (Simitian) is an urgency measure that allows the recently established Delta Stewardship Council (DSC) to use competitive but streamlined contracting procedures to hire consultants and engineers to develop the long-term Delta Management Plan.

Land Use

The Legislature fashioned a number of changes to the land use laws designed to promote "Smart Growth" policies; expand on siting new renewable energy facilities; and to promote land conservation and agricultural uses.

The Transit Village Development Planning Act of 1994 is designed to address unrestricted growth and sprawl. This Act establishes procedures to develop transit village plans within transit village development districts (TVDDs). A TVDD was originally required to include all land within at least 1/4 mile of the exterior boundary of the parcel containing a transit station. AB 987 (Ma) increases the scope of a TVDD to include all parcels located within

one half mile of the main entrance of the transit station. By increasing the planning horizon the author hopes to encourage local residents to live close to and use mass transit.

SB 1319 (Pavley) was enacted to expand siting of alternative energy generating facilities by clearing the way for commercial scale alternative energy facilities near existing transmission and distribution networks. This law is intended to steer these projects away from productive farmland or desert habitat by allowing the merger of smaller unbuildable lots. The law modifies provisions of the Subdivision Map Act (Map Act) to allow renewable energy corporations, among other parties, to defray the costs of merging together separate parcels. This law specifically provides that the Map Act may not prohibit a party from seeking state financial assistance to help defray the costs of merging parcels on private or public lands. In addition, the Map Act must not prohibit recovery costs for establishing or administering a joint powers authority to merge parcels to site renewable energy facilities. However, this law does not authorize the use of state funds to acquire real property for a parcel merger.

The Land Conservation Act (otherwise known as the Williamson Act) allows property owners to receive lower property taxes in exchange for limiting land uses to agricultural and open space. Land owners enter into voluntary contracts with cities and counties that restrict the land uses. Cities and counties have historically been reimbursed for the shortfall in property taxes through state subventions. Governor Schwarzenegger virtually eliminated the state subvention in the 2009–10 state budget which has made it more difficult for municipalities to promote the Williamson Act contracts to farmers and ranchers. AB 2530 (Nielsen), until January 1, 2015, authorizes counties to revise Williamson Act contracts where state revenues fail to defray the lost property tax revenues. They can renegotiate the terms of a contract allowing counties to recoup a portion of lost revenues from the state. This law provides that a landowner may choose to nonrenew and begin the cancellation process.

Land that is restricted pursuant to a Williamson Act contract may not be subdivided so that parcels are too small to support agricultural uses. To facilitate a lot line adjustment, prior law allowed a municipality and land owner to agree to simultaneously rescind and create a Williamson Act contract conditioned on meeting seven findings. AB 1965 (Yamada) extends to January 1, 2013, the sunset date for local officials to rescind a contract under the Williamson Act to facilitate a lot line adjustment.

Pesticides

The Legislature produced a number of laws designed to protect farm workers from chemical exposure, modify educational requirements for the Department of Pesticide Registration (DPR) licensed professionals, and streamline and reform the organic registration process.

AB 1963 (Nava) was introduced to enhance monitoring of farm workers for exposures to organophosphates and carbamate pesticides that suppress cholinesterase levels. When the cholinesterase nerve enzyme is suppressed, it can lead to impaired reproductive function; birth defects; a weakened immune system; an increased risk of non-Hodgkin's lymphoma and leukemia; nerve damage; severe neurological effects; and even death. The state cholinesterase medical supervision program requires that farm workers who are regularly using organophosphate and carbamate pesticides must undergo medical supervision to monitor whether the pesticides are suppressing the workers' cholinesterase levels. Employers must remove from the work environment employees whose cholinesterase levels are suppressed. In order to improve the effectiveness of the cholinesterase medical supervision program, AB 1963 requires clinical laboratories to electronically submit the cholinesterase testing data to DPR. This enables the employer to satisfy his or her responsibilities for medical supervision of employees who regularly handle organophosphates and carbonates. The same data must also be reported in response to alleged cholinesterase inhibitor exposures or known exposures resulting in illness. DPR must share this data with the Office of Environmental Health Hazard Assessment and DPH on an ongoing basis.

AB 2122 (Mendoza) makes adjustments to minimum education and continuing education requirements for DPR licensed professionals. This law provides that the curriculum must include, among other subjects, organic and sustainable practices, water and air monitoring and residue mitigation, maximum residue levels, quarantine practices, and on-farm storage of fumigants.

Prior to enactment of AB 2612 (Committee on Agriculture), registrants of agricultural- or structural-use pesticide products were required to establish a specified recycling program. The program was required for pesticides packed in rigid, non-refillable, high-density polyethylene (HDPE) 55 gallon containers or smaller. The law required that the recycling program be certified by an accredited third-party organization. AB 2612 deletes the third-party certification provision and instead requires the registrant to establish a recycling program, or prove participation in a recycling program ensuring that HDPE containers are recycled.

This law also streamlines and reforms the organic registration process which, according to the bill analysis, "is a complex and time consuming process that duplicates much of the information collected by accredited certifying agencies." Registered organic producers must list all substances applied to the crop, soil, or irrigation water. This law exempts organic producers who sell $5000 or less from submitting more extensive registration information. They now must only provide information on the precise location of the farm where their products are produced to allow agricultural commissioners to identify their location.

The Farmland Conservancy Program provides grants to purchase conservation easements to help willing farmers and ranchers keep their lands in agricultural production. State law provides that these grant funds may not impose restrictions on any commercial agricultural activities taking place on the conservation easements. This limits land owners with property capable of being used for other uses including flood corridors or wildlife habitat. SB 1142 (Wiggins) creates the California Farmland Conservancy Program Fund, which allows the DOC authority to fund the protection of riparian zones, wildlife habitat or flood corridors while maintaining agricultural uses on the farmed portions of the property.

AB 1736 (Ma) modifies the appointment process for three of the seven members of the Structural Pest Control Board within DPR. This Board provides licensure and regulation of structural pest control operators. This law authorizes the Governor to appoint three licensed board members. This law additionally prohibits a manufacturer from being appointed to the Board.

Natural Resources

The Legislature preserved and expanded exemptions to CESA, clarified the judicial standard of review for enforcement actions involving oil, gas, and geothermal wells, and required establishment of a blue ribbon commission to improve statewide management of fish and wildlife resources. Another law modifies the process for districts to accept donations of park lands.

As part of a legal settlement that reestablishes the historic flow of the San Joaquin River, spring-run Chinook salmon must be reintroduced into the river. Because Chinook salmon are protected under the CESA and the federal Endangered Species Act (FESA), it is possible that the introduction process could violate these Acts by creating fish mortality. Under the FESA, the salmon can be reclassified as an "experimental population" permitting the Secretary of Commerce to allow "take." Prior to SB 1349 (Cogdill), the CESA did not have a comparable provision. This new law amends CESA by authorizing the incidental take of spring run Chinook salmon in the San Joaquin River if the Director of the DFG finds that an enhancement of survival permit will further the conservation of the species.

CESA provides an exemption for the accidental take of candidate, threatened, or endangered species that occur on a farm or a ranch "in the course of otherwise lawful routine and ongoing agricultural activities." SB 1303 (Wolk) extends the sunset date for this exemption from January 1, 2011, to January 1, 2014.

AB 2453 (Tran) clarifies the judicial standard governing enforcement actions involving the State Division of Oil, Gas, and Geothermal resources. This agency is part of DOC, which regulates oil and gas operations and geothermal wells. This law establishes the standard of review to evaluate the efficacy of an enforcement action by the State Oil and Gas Supervisor or a district deputy attorney. This law requires an appellate court to apply the more deferential "substantial evidence" standard as opposed to the "independent judgment standard." The former will increase procedural safeguards for oil, gas, and geothermal wells operators. In addition, this law establishes an appeal process governing enforcement actions before an Administrative Law Judge.

Assembly member Huffman introduced AB 2376 to respond to long-standing interest in reforming the DFG. A number of reports over the years by the Legislative Analyst's Office, the State Auditor, and the Little Hoover Commission have called for reforming the DFG. This law requires the Secretary of the Natural Resources Agency to create a state agency-level committee to develop a strategic vision to better manage fish and wildlife resource management. This committee will be assisted by a blue ribbon commission and stakeholder advisory group. The Secretary must produce the vision for DFG and the Fish and Game Commission in a report due to the Governor and Legislature before July 1, 2012.

Prior to enactment of AB 1929 (Hall), the law prohibited the possession, importation, shipment and transport of dreissenid mussels in California. This law now exempts an operator of a water delivery and storage facility from civil and criminal liability for introducing mussels as long as they implement a prescribed plan to control or eradicate dreissenid mussels. These operators are also exempt from the prohibition to possess, import, ship or transport the mussels.

Prior to enactment of AB 1962 (Chesbro), landowners wishing to dedicate real property for parks or open space were first required to make an irrevocable offer of real property to a city or a county. The local government

would then transfer the land to a regional park, regional park and open-space, or regional open-space district. This law was introduced to streamline the process by allowing districts to directly accept dedications while awaiting satisfaction of details associated with planning, financing and regulatory compliance. This law permits a district to defer acceptance of an offer of land, allowing it to respond to changing circumstances. In the event that the district decides that the acquisition is not in the public's interest, it can avoid the premature commitment of funds or resources to acquire the property.

The Ocean Protection Council (OPC) coordinates efforts of state agencies to protect and conserve coastal waters and ocean ecosystems. AB 2125 (Ruskin) addresses inefficiencies in accessing key technical and environmental information before issuing permits or long-term planning decisions. This law requires the OPC to evaluate the needs of multiple state agencies to share in scientific and geospatial information to protect and manage coastal and ocean-relevant decision-making.

AB 2163 (Mendoza) is an urgency law that allows four one-year extensions to complete a timber harvesting plan on which work has commenced but not been completed if, among other things, "good cause" is shown.

Health and Safety

The Legislature established a program to regulate the testing of carbon monoxide devices. Other legislation increases enforcement for motorcycles violating noise standards, while other laws require healthcare facilities to record radiation doses involving CT examinations.

SB 183 (Lowenthal) enacts the Carbon Monoxide Poisoning Prevention Act of 2010, requiring houses with a fossil fuel burning appliance, a fireplace, or an attached garage to install a carbon monoxide (CO) device approved by the State Fire Marshal (SFM). CO devices must be installed no later than July 1, 2011, for all existing single-family dwelling units intended for human occupancy and by January 1, 2013, for all other dwellings intended for human occupancy. These requirements allow owners or their agents to test and maintain carbon monoxide devices in rental units. This law allows the owner or the owner's agent to enter the rental unit to install, repair, test, and maintain CO devices. Before entering the premises, the owner must provide at least 24 hour notice to a tenant to install, repair, test or maintain a CO device. Tenants are obligated to notify the manager or owner of a rental unit if the CO device is not working. The SFM must certify and approve CO devices for residential use. Sellers of real property are required to provide specified notices to the prospective purchaser regarding the installation of smoke detectors and bracing, anchoring, or strapping of water heaters. This law also revises the disclosure forms, to provide a confirmation that requirements for smoke detectors, water heaters and CO devices will be met at the close of escrow.

SB 435 (Pavley) gives state and local law enforcement authority to issue citations for operating motorcycles that do not comply with federal noise control standards. Specifically, this law establishes a crime for persons operating a California-registered motorcycle, equipped with after-market exhaust system equipment manufactured on or after January 1, 2013, not labeling the equipment with a specified noise emission control label. According to the American Lung Association-the law's sponsor-this "will increase enforcement of current anti-tampering and noise-level statutes for motorcycles, and ensure that motorcycles on California roads operate with approved emission control systems."

AB 2001 (Harkey) transfers to the California Standards Commission (CBSC) the responsibilities of the DPH pertaining to building standards.

SB 1237 (Padilla) was enacted to protect the patients from overexposure to radiation that can lead to an increased risk of cancer. Beginning July 1, 2012, hospitals and clinics that use imaging procedures that involve computed tomography X-ray systems (CT) for human use must record radiation doses on every CT studies and examinations. Unless the facility is accredited, radiation doses must be verified annually by a medical physicist. In addition, facilities furnishing CTs must be accredited and must report radiation events resulting in an overdose to the DPH.

Looking Ahead

The last legislative session was once again mired in financial crisis, owing to the insurmountable supermajority required to pass a budget. The Legislature and outgoing Governor recently closed a $19 billion dollar budget hole in October 2010 ending the longest budget impasse in legislative history. Without significant structural changes, we can expect $20 billion annual shortfalls for the next five years.

After two decades, Jerry Brown returns to Sacramento as a third term governor facing this crippling budget deficit. During his absence, the political climate in Sacramento became more polarized and dysfunctional. Amid this backdrop, Governor Brown appears poised to tackle the state's irrational budgeting system. He is expected to call for a special election to raise revenues, which may well embrace rethinking some aspects of Proposition 13. The outcome of this effort has the potential to dominate his

administration and distract from policy making in the near term. However, if he can succeed in reforming California's fiscal process, he would finally break the fiscal log jam. By removing a significant barrier to generating meaningful policy in Sacramento, he would indeed deliver an encore performance.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Cases

EIR for Road Extension Improperly Used 2020 as Baseline for Assessing Impacts

Sunnyvale West Neighborhood Ass'n v. City of Sunnyvale City Council
No. H035135, 6th App. Dist.
2010 Cal. App. LEXIS 2118
December 16, 2010

The city violated CEQA by using projected traffic conditions in the year 2020 rather than current existing conditions as the baseline in an EIR for road construction.

Plaintiffs sought to compel defendant city council to set aside its approval of the proposed Mary Avenue Extension (MAE) project until a legally adequate EIR had been prepared and considered. Plaintiffs filed a petition for writ of mandate, alleging that the EIR prepared for the project was legally deficient because it used the year 2020 as a "baseline" for assessing the project's impacts. The final EIR did not consider the project's traffic and related impacts on the existing environment.

The trial court granted the petition. It concluded that the administrative record did not contain substantial evidence supporting the city's decision to deviate from the normal procedure of using a baseline of current environmental conditions and to instead "use estimates of the conditions in the year 2020 that assumed a complete buildout of projects in the City's General Plan." The trial court further concluded that this decision "constituted a failure to proceed in the manner required by law." It determined that the "decision had the effect of minimizing potential project impacts on traffic, noise, and air quality and tainted the comparison of the proposed project with project alternatives."

The trial court stated that, under cited case law, deviation from normal procedures is limited to "unusual circumstances properly documented in an administrative record." It found that this case resembled the circumstances in *Woodward Park Homeowners Assn., Inc. v. City of Fresno* [(2007) 150 Cal. App. 4th 683, 58 Cal. Rptr. 3d 102], in which the City of Fresno approved new commercial development on vacant land based on an EIR that "in many instances" "evaluated environmental impacts by comparing the project's impacts with those of the maximum buildable development under existing zoning and plan designations." *Woodward* agreed that the EIR would have been legally sufficient if it had "evaluated the proposed project's impacts in relation to both a vacant lot and a large development permissible under existing zoning and plan designations." *Woodward* also determined that "the EIR's air pollution discussion" was inadequate because "it proceeded from the wrong environmental baseline, assessing the project's impacts as slight because they are not much greater than the impacts of a builtout development under preexisting zoning and plan designations."

The trial court noted that the only grounds advanced by the city to justify the use of projections for the year 2020 as the environmental baseline in the EIR were that such projections were used by the Santa Clara Valley Transportation Authority ("VTA") in its Transportation Impact Analysis Guidelines (2004), as part of the VTA's responsibilities under the Congestion Management Law [Gov. Code §§ 65088–65089.10], and that the proposed MAE would not be complete and in use until the year 2020. The trial court concluded that, as to the latter, there was not substantial evidence in the record establishing when the proposed project would be complete and statements by city personnel in the record were inconsistent. With respect to the former, the trial court found that efforts undertaken by the VTA and local governments to comply with the Congestion Management Law are irrelevant to whether a proposed project complies with CEQA.

The trial court stated that "even if [the city's] claim (presently unsupported by substantial evidence) that there is little or no practical difference in project impacts measured against present conditions versus 2020 estimates proves correct, that does not justify the decision to use 2020 as a baseline in the EIR without an analysis of present conditions." The court granted a peremptory writ of mandate, ordering the city council to set aside its approvals of the MAE project and its certification of the

FEIR and desist from any further action to approve the project without prior preparation and consideration of a legally adequate document using current conditions as a baseline. The city council appealed, and the court of appeal affirmed.

August 2007 Draft EIR. The August 2007 draft EIR explained that Mary Avenue extended north from Homestead Road in south Sunnyvale and terminated at Almanor Avenue just south of U.S. Highway 101, and provided local access to residential and commercial properties in Sunnyvale. The proposed project involved a four-lane northerly extension of Mary Avenue over U.S. Highway 101 and State Route 237 to Eleventh Avenue at E Street. It included construction of a bridge over the two freeways and light-rail transit tracks. The stated objectives of the project were to provide an alternative "north-south connector to lands north of US 101 and SR 237 (including the Moffett Park area)" and to "alleviate existing and future traffic congestion in the Moffett Park area and other areas adjacent to Mary Avenue."

The draft EIR discussed the project's impact in 12 categories, including transportation, noise, and air quality. It also contained sections on the project's growth-inducing impacts and cumulative impacts. The section concerning transportation impacts described the existing roadway network. It contained tables indicating the existing traffic conditions in terms of the average traffic volume on particular roadway segments and the qualitative level of service (LOS) 4 at certain intersections and on certain freeway segments. The draft EIR then described "future transportation conditions in the year 2020 in the project area without the proposed extension of Mary Avenue" using the city's traffic demand model. The draft EIR stated that this model "accounts for both existing traffic as well as future traffic based on the buildout of the land uses identified in the adopted Sunnyvale General Plan" and for "projected growth in neighboring jurisdictions" affecting traffic volumes on Sunnyvale streets. In analyzing the transportation impacts, the draft EIR assumed numerous roadway improvements in the project area to be in place by the year 2020 regardless of the proposed project.

Table 2.6 compared average daily trips (ADTs) on various segments of Mary Avenue and surrounding roadways. As to each roadway segment, it specified the number of ADTs under current circumstances, under projected conditions in 2020 without the project, and under projected conditions in 2020 with the project. The court observed that the table did not provide information about the ADTs under existing conditions with the project and therefore, no direct comparison could be made to the existing conditions without the project. The table set forth the percent change in traffic volume from the "2020 no project" scenario to the "2020 project" scenario. The draft EIR explained that the table's data indicated that the "future traffic volumes would be substantially greater than existing ADT volumes" and stated that "such increases are the result of planned growth in Sunnyvale and the surrounding areas" and "this increase will occur irrespective of any decision to approve the proposed Mary Avenue Extension."

The draft EIR described a number of thresholds of significance [CEQA Guidelines section 15064.7(a)] with regard to transportation impacts, including the following: A transportation impact is significant if the project would "cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e. result in a substantial increase in either the number of vehicle trips, the volume to capacity ratio on roads, or congestion at intersections)" or if the project would "exceed, either individually or cumulatively, a level of service standard established by the county congestion management agency or the City of Sunnyvale for designated roads or highway." The draft EIR emphasized that the "proposed project is designed to accommodate existing and projected traffic demand" and "would not change overall traffic volumes in the area." It further stated that "because the project consists of a new north-south roadway connection, its primary effect will be to change the traffic distribution in the area."

The draft EIR discussed the 2020 traffic volumes with the project and reiterated that "the project will redistribute traffic in the area since it will provide an alternative north-south connection across two major freeways." It noted that the major effects of the project in terms of increased traffic volume would occur on Mary Avenue north of Central Expressway and minimal change in traffic patterns were expected south of Central Expressway. In addition, it stated that the project would cause some traffic to shift from Mathilda Avenue, a major north-south arterial roadway, to Mary Avenue. It indicated that the project's impacts on traffic volume would not be significant.

The projected LOS in 2020 with and without the project was compared to determine the impact on intersection operations. The draft EIR stated, and the data reflected, that the project would generally improve intersection operations with some exceptions under 2020 conditions. The draft EIR concludes that the project would cause a significant deterioration in operations at one intersection (Mary Avenue/Maude Avenue) during the p.m. peak hour. It identified a mitigation measure to reduce that impact to a less than significant level. Otherwise, no significant transportation impacts are found.

The draft EIR's section regarding noise impacts explained that "noise is measured on a 'decibel' scale." It stated that "for traffic noise, ten times as many vehicles

per hour results in ten times as much sound energy, resulting in a ten-decibel increase, and perceived doubling of loudness'' while ''twice as many vehicles per hour means twice the sound energy, resulting in a three-decibel increase, and a just-noticeable increase in loudness.'' It indicated that ''twenty-six percent more vehicles per hour'' would result ''in a one-decibel increase, usually considered to be an imperceptible increase in loudness.'' In addition, it explained: ''The speed of traffic also affects noise levels: for every five mph increase in speed there is a 1 to 2-decibel increase in average noise levels.''

The stated thresholds of significance for noise impacts included ''a substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project.'' The draft EIR indicated that it was using the city's general plan definition of significant noise impact from new development, under which a project-caused noise increase of more than five dBA is significant if existing and post-project noise levels are in the ''normally acceptable'' category and a project-caused noise increase of more than three dBA is significant if ''the existing noise level on the site is in the 'normally acceptable' category but the post-project noise level on the site exceeds the 'normally acceptable' category'' or if ''the existing noise level on the site exceeds the 'normally acceptable' category. . . .'' The draft EIR described the existing noise conditions and indicated that ambient noise measurements were made. It stated that ''traffic-related noise exceeds the City's General Plan goal of having an outdoor L[dn] or Day-Night Level (24-hour average of noise levels) of no greater than 60 dBA at residences.

The draft EIR discussed construction-related noise impacts in relation to the existing ambient noise environment. In assessing the long-term noise impacts, however, it compared ''future 2020 traffic volumes without the project and future 2020 traffic volumes with the project'' and calculated ''noise level increases resulting from the build-out of the General Plan and as a result of the project plus General Plan build-out.'' The draft EIR considered the long-term noise impacts with regard to the ''nearest residential receivers'' for whom noise levels were expected to increase ''about four to six dBA L[dn] by the year 2020'' without the project. It concluded, based on future 2020 traffic volumes, that the proposed project ''would be responsible for a traffic noise level increase by less than one dBA L[dn] above the noise levels expected as a result of General Plan build-out,'' which ''would not be measurable or perceptible, and would not exceed the significance criterion of three dBA L[dn] established by the City of Sunnyvale.'' The draft EIR concluded that ''for this reason, project-generated traffic would not result in significant noise impacts.''

With respect to air quality, the draft EIR explained that ''both ozone and PM[10] [particulate matter with a diameter of less than 10 micrometers] are considered regional pollutants in that concentrations are not determined by proximity to individual sources.'' It recognized that carbon monoxide is ''a local pollutant because elevated concentrations are usually only found near the source.'' It reported that the Bay Area is considered in nonattainment for both ozone and PM[10].

The draft EIR set forth thresholds of significance for air quality impacts. In discussing long-term air quality impacts, the draft EIR explained that the ''project would provide an alternative to the existing north-south connections in the city and help alleviate regional operation deficiencies.'' It stated that ''the proposed project would accommodate existing and future traffic rather than generate traffic.'' The draft EIR found no significant long-term air quality impacts. It concluded that ''the proposed project would improve long-term air quality by providing an alternate north-south route of travel as well as alleviating congestion on existing north-south connections such as Mathilda Avenue.'' It also concluded that carbon monoxide would not ''exceed standards along Mary Avenue'' based on published data from the Bay Area Air Quality Management District (BAAQMD).

The draft EIR's discussion of growth-inducing impacts of the MAE project reported that ''the proposed project will likely have an indirect growth-inducing effect since it increases the capacity of the area's transportation network'' and ''[t]o the extent that the provision of an adequate transportation network is essential to growth, the lack of such capacity is a constraint to growth.'' It further states: ''The environmental effects of growth would generally include increased traffic, noise, air pollution, and water pollution.''

As to cumulative traffic impacts, the draft EIR stated that the ''proposed project would not generate any new traffic, and therefore, would not contribute to the cumulative increase in the traffic in the project area.'' It indicated that the traffic analysis for the project ''utilized the City's traffic forecasting model, which takes into account existing traffic, as well as any increases in traffic from future planned development'' and stated that this ''methodology accounts for the effects of cumulative growth in the project area.'' With respect to cumulative noise impacts, the draft EIR stated: ''The largest source of increased noise in the immediate project area is motor vehicle traffic. Cumulative traffic-related noise will continue to increase as traffic volumes increase. . . .'' The discussion regarding cumulative air quality impacts addressed the short-term construction-related air quality impacts but did not address the long-term cumulative impacts.

The draft EIR considered a number of alternatives to the proposed MAE project. The discussion regarding the "no project" alternative was brief, stating in summary that "although the No Project Alternative would avoid all significant environmental effects of the proposed project, it would not meet any of the project objectives." A table compared delay and LOS at various intersections under existing conditions without the project and under future traffic conditions in 2020 without the project, with the project, and with two alternatives.

Review by Environmental Planner. The administrative draft EIR was peer reviewed by an environmental planner (Skewes-Cox), who stated in a letter to the transportation and traffic manager in the city's Department of Public Works (Witthaus) that her "greatest concern" was whether the EIR had adequately "evaluated the project's impacts as related to the 'existing condition.' " She stated: "Using the base year of 2020 can underestimate the impacts, especially if the project is constructed before that year. Project impacts should be more correctly shown in relation to current day conditions, especially as related to noise, air quality, and traffic. Any future comparisons (i.e. 2010 or 2020) could be additionally done, but should be secondary to comparing existing conditions." She warned that "recirculation may be necessary because the 'Existing' condition should be the basis of comparison for the project and new, significant impacts may be identified."

Witthaus responded that "The traffic impacts of the project were evaluated against future 'background' conditions in accordance with the procedures described in VTA's Transportation Impact Analysis Guidelines (2004). . . . The future horizon year of 2020 was chosen because it approximates the time when the Mary Avenue Extension, if approved, would be open to traffic. . . . There is currently no funding for the project. Even assuming full funding becomes available in the next few years, an assumption which is questionable in the current transportation funding environment, it would take several years to design and construct the project." He also asserted: "The City believes that utilizing the 2020 scenario best describes the reasonably foreseeable consequences of the project, and better represents the true time frame that this project may be realized. It is also the approach outlined in VTA's guidelines for preparation of Transportation Impact Analyses."

Skewes-Cox responded that, based on her CEQA experience, assessing project impacts in light of assumed "background" conditions rather than the "existing" conditions "may not comport with the CEQA Guidelines." She acknowledged that the city's methodology in selecting 2020 "would seem to comport with the VTA Guidelines," but also stated, "while you have followed the VTA Guidelines for impact analyses, the adequacy of this under CEQA remains unclear." The correspondence between Witthaus and Skewes-Cox regarding the adequacy of the administrative draft EIR was not included in the final version.

Final EIR. The final EIR included the draft EIR, responses to comments received on the draft EIR, and revisions to the draft EIR. A large number of comments expressed the view that the project's negative impacts on the residents and neighborhoods in the vicinity of Mary Avenue had not been adequately considered. Many comments voiced concern that the MAE project would reduce the quality of life for Sunnyvale residents in the vicinity of Mary Avenue as a result of increased traffic, noise, and air pollution.

Master response No. 1 discussed the origins of traffic growth due to planned development in the City of Sunnyvale and surrounding cities. Master response No. 10 regarding air quality issues acknowledged that "various comments on the Draft EIR expressed concern that the project would result in significant air quality impacts to residents living along Mary Avenue" and "commentors questioned why a quantitative analysis was not undertaken for the Mary Avenue Extension to determine the extent to which such air quality impacts might occur." The response recognized that "with regard to local pollutants, carbon monoxide (CO) is the pollutant of greatest concern because concentrations tend to be higher along major roadways." The response explained why a quantitative carbon monoxide analysis was not done for the MAE project, including that (1) the Bay Area is classified as an "attainment" area for carbon monoxide under the federal and state standards, (2) BAAQMD's published data show background concentrations of carbon monoxide were "sufficiently low" that it is unlikely that clear air act standards would be exceeded, (3) in 2006, the city determined that worst case carbon monoxide concentrations along Lawrence Expressway, described as a "roadway with traffic volumes and congestion substantially greater than Mary Avenue," would not exceed the federal or state standards, from which it was inferred that carbon monoxide standards would not be exceeded anywhere along Mary Avenue as a result of the project, and (4) carbon monoxide emissions would continue to decrease as older vehicles were replaced by newer and cleaner vehicles. The response reiterated that the MAE project "will not generate additional traffic in the Sunnyvale area" but "will provide additional capacity, which will reduce congestion." It was stated that "[a] reduction in congestion typically leads to a reduction in emissions because overall emissions are highest in idling and stop-and-go conditions."

Master response No. 11 addressed the issue of future traffic with regard to overall growth versus project impacts. It emphasized that roadways do not create traffic but rather accommodate demand, and planned growth would cause an increase in overall traffic with or without the project. It explained that not building a planned roadway improvement would simply divert traffic to alternate streets.

An individual response to a comment concerned with increased traffic congestion on Mary Avenue and the resulting pollution and noise reiterated that the MAE project would not cause overall traffic to increase but instead would provide an alternate to the existing north-south connections in the city and "help to alleviate regional deficiencies," which would "decrease overall congestion" and "reduce emissions as higher emissions are associated with congested conditions." Other responses addressing concerns with traffic on Mary Avenue indicated that Mary Avenue had been designated as a class 2 arterial in the city's general plan for many years rather than a local or collector roadway and that "the General Plan Land Use and Transportation Element identifies the extension of Mary Avenue north of Almanor as one of the traffic improvements needed as mitigation for the buildout of the General Plan. . . ."

A response to a comment regarding the prospective increase in noise pollution stated that the project would have a minimal effect on traffic volumes south of Central Expressway and referred to the draft EIR's table regarding traffic volumes (under 2020 conditions). It pointed out that the table showed that the project as compared to "no project" (both in the year 2020) "would result in the percentage changes of average daily trips of -3 percent to 4 percent for the portion of Mary Avenue south of Central Expressway." Another response explained that traffic-related impacts on the residential areas along the southerly portion of Mary Avenue "were not discussed since the project will have only a negligible effect on traffic volumes at that location. . . ." It stated that the draft EIR indicated that the project would result in a less than one decibel increase in noise for residences along Mary Avenue in the vicinity of Maude Avenue (above the noise resulting from projected traffic volumes in 2020).

The text revisions to the draft EIR included additional information regarding the land use setting, which clarified that the predominant land use along Mary Avenue south of Central Expressway was residential. The table regarding traffic volumes was revised to additionally state the percent change between the ADTs under existing conditions and under 2020 conditions without the project. The table indicated considerable increases in traffic on all segments by 2020 without the project, impliedly from other causes. Two additional alternatives to the proposed MAE project were added to the FEIR. The table comparing delay and LOS at certain intersections was revised to add the two new alternatives (considered under future traffic conditions in 2020).

At the meeting at which the city council certified the EIR and approved the MAE project, the staff explained that the traffic impacts of the project were evaluated against future background conditions, in accordance with the procedures described in the Valley Transportation Authority's Transportation Impact Analysis Guidelines.

Environmental Baseline. The CEQA Guidelines provide with regard to an EIR's description of a proposed project's environmental setting: "An EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant" [Guidelines section 15125(a)]. With regard to an EIR's evaluation of a proposed project's significant impacts on the environment, the Guidelines section 15126.2(a) provides: "An EIR shall identify and focus on the significant environmental effects of the proposed project. In assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area as they exist at the time the notice of preparation is published, or where no notice of preparation is published, at the time environmental analysis is commenced. Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects."

The court stated that case law makes clear that "an EIR must focus on impacts to the existing environment, not hypothetical situations," citing *County of Amador v. El Dorado County Water Agency* [(1999) 76 Cal. App. 4th 931, 91 Cal. Rptr. 2d 66 (citing *City of Carmel-by-the-Sea v. Board of Supervisors* [(1986) 183 Cal. App. 3d 229, 227 Cal. Rptr. 899]; *Environmental Planning & Information Council v. County of El Dorado* [(1982) 131 Cal. App. 3d 350, 182 Cal. Rptr. 317])]. The court observed that it is "only against this baseline that any significant environmental effects can be determined," citing *County of Amador* and Guidelines sections 15125, 15126.2(a).

The court noted that in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* [(2010) 48 Cal.4th 310, 106 Cal. Rptr. 3d 502] the

California Supreme Court concluded that the South Coast Air Quality Management District abused its discretion in evaluating a petroleum refinery project by using a "baseline" of the maximum operating capacity of the equipment under existing permits. The district had "treated any additional NOx emissions stemming from increased plant operations within previously permitted levels as part of the baseline measurement for environmental review. . . ." The court held that the district "erred in using the boilers' maximum permitted operational levels as a baseline" because "operation of the boilers simultaneously at their collective maximum was not the norm."

The Supreme Court stated: "By comparing the proposed project to what could happen, rather than to what was actually happening, the District set the baseline not according to 'established levels of a particular use,' but by 'merely hypothetical conditions allowable' under the permits. (*San Joaquin Raptor Rescue Center v. County of Merced* [(2007) 149 Cal. App. 4th 645, 658, 57 Cal. Rptr. 3d 663.) Like an EIR, an initial study or negative declaration 'must focus on impacts to the existing environment, not hypothetical situations.' " The Supreme Court concluded that "the District's use of the maximum capacity levels set in prior boiler permits, rather than the actually existing levels of emissions from the boilers, as a baseline to analyze NOx emissions from the Diesel Project was inconsistent with CEQA and the CEQA Guidelines."

The Supreme Court explained: "An approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." The Supreme Court stated that "a long line of Court of Appeal decisions holds, in similar terms, that the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework. This line of authority includes cases where a plan or regulation allowed for greater development or more intense activity than had so far actually occurred, as well as cases where actual development or activity had, by the time CEQA analysis was begun, already exceeded that allowed under the existing regulations. In each of these decisions, the appellate court concluded the baseline for CEQA analysis must be the 'existing physical conditions in the affected area' [citation], that is, the 'real conditions on the ground' [citations], rather than the level of development or activity that could or should have been present according to a plan or regulation." The Supreme Court cited *Woodward Park Homeowners Assn., Inc. v. City of Fresno*, relied on by the trial court here, as one such example.

The court here stated that the Supreme Court recognized that some flexibility existed for the determination of baseline conditions: "Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence." The Supreme Court indicated that, since environmental conditions may vary from year to year, the baseline might take into consideration conditions that have existed over a range of time. It stated that "in some circumstances, peak impacts or recurring periods of resource scarcity may be as important environmentally as average conditions. Where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project, project effects might reasonably be compared to predicted conditions at the expected date of approval, rather than to conditions at the time analysis is begun. A temporary lull or spike in operations that happens to occur at the time environmental review for a new project begins should not depress or elevate the baseline; overreliance on short-term activity averages might encourage companies to temporarily increase operations artificially, simply in order to establish a higher baseline." The court here stated, however, that the Supreme Court never sanctioned the use of predicted conditions on a date subsequent to EIR certification or project approval as the "baseline" for assessing a project's environmental consequences.

The court noted that in *Communities for a Better Environment*, the Supreme Court recognized that refinery operations fluctuate over time. However, the court stated that the Supreme Court made it clear that, regardless of the method ultimately adopted, the district had to compare "existing physical conditions" without the project to the conditions expected to be produced by the project because "without such a comparison, the EIR will not inform decision makers and the public of the project's significant environmental impacts, as CEQA mandates."

The court observed that in addition to assessing potential significant effects, an EIR must include a description of feasible project alternatives that would substantially lessen the project's significant environment effects, citing *In re Bay-Delta etc.* [(2008) 43 Cal.4th 1143, 77 Cal. Rptr. 3d 578; Pub. Res. Code § 21100(b)(4) (EIR must include a detailed statement setting forth the alternatives to the proposed project) and CEQA Guidelines 15126.6(a) (EIR "must consider a reasonable range of

potentially feasible alternatives that will foster informed decisionmaking and public participation''). *In re Bay Delta* explained that ''under CEQA, the range of alternatives that an EIR must study in detail is defined in relation to the adverse environmental impacts of the proposed project. . . . The project's environmental effects, in turn, are determined by comparison with the existing 'baseline physical conditions,' '' citing Guidelines section 15125(a) and *County of Amador*, *above*.

The court also observed that Guidelines section 15126.6(e)(1) requires ''the specific alternative of 'no project' '' to ''be evaluated along with its impact.'' Section 15126.6(e)(1) further provides that ''the no project alternative analysis is not the baseline for determining whether the proposed project's environmental impacts may be significant, unless it is identical to the existing environmental setting analysis which does establish that baseline (see Section 15125).''

Baseline Determination Did Not Comply with CEQA. The court stated that the only cases cited by the city council to support the use of the traffic conditions predicted for the year 2020 as a ''baseline'' were *Fairview Neighbors v. County of Ventura* [(1999) 70 Cal. App. 4th 238, 82 Cal. Rptr. 2d 436] and *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* [(2001) 87 Cal. App. 4th 99, 104 Cal. Rptr. 2d 326]. The court noted, however, that *Fairview Neighbors* and similar decisions were distinguished in *Communities for a Better Environment*: ''The District and ConocoPhillips cite several Court of Appeal decisions as supporting the use of maximum operational levels allowed under a permit, rather than existing physical conditions, as a CEQA baseline. In each of these decisions, however, the appellate court characterized the project at issue as merely a modification of a previously analyzed project and hence requiring only limited CEQA review under section 21166 and CEQA Guidelines section 15162 or as merely the continued operation of an existing facility without significant expansion of use and hence exempt from CEQA review under CEQA Guidelines section 15301, or both.'' The court stated that the project here was not previously analyzed under CEQA and was not entitled to a categorical exemption for existing facilities.

The court noted that in *Save Our Peninsula*, the issue was whether the Monterey County Board of Supervisors acted within its discretion in selecting a particular formula for determining baseline water usage based on evidence contained in the EIR. The court stated: ''If the determination of a baseline condition requires choosing between conflicting expert opinions or differing methodologies, it is the function of the agency to make those choices based on all of the evidence. . . . If an EIR presents alternative methodologies for determining a baseline condition, however, we believe CEQA requires that each alternative be supported by reasoned analysis and evidence in the record so that the decision of the agency is an informed one. We further find that the EIR must set forth any analysis of alternative methodologies early enough in the environmental review process to allow for public comment and response.'' The court continued, ''For instance, where the issue involves an impact on traffic levels, the EIR might necessarily take into account the normal increase in traffic over time. Since the environmental review process can take a number of years, traffic levels as of the time the project is approved may be a more accurate representation of the existing baseline against which to measure the impact of the project.'' The court here stated that this dictum was impliedly approved by the Supreme Court in *Communities for a Better Environment* when it suggested that the baseline might be the ''predicted conditions at the expected date of approval'' ''where environmental conditions are expected to change quickly during the period of environmental review for reasons other than the proposed project. . . .''

The court noted that *Save Our Peninsula* concluded that the EIR's baseline discussion of water usage was inadequate for a number of reasons. *Save Our Peninsula* observed that ''although the agency's factual determinations are subject to deferential review, questions of interpretation or application of the requirements of CEQA are matters of law. While we may not substitute our judgment for that of the decision makers, we must ensure strict compliance with the procedures and mandates of the statute. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 276 Cal. Rptr. 410, 801 P.2d 1161.)'' The court stated that the same was true in this case.

The court stated that while *Communities for a Better Environment* endorsed the use of a baseline consisting of the reasonably foreseeable conditions on the expected date of project approval under limited circumstances, the FEIR in this case did not use the anticipated traffic conditions on the expected date of project approval, which actually turned out to be October 28, 2008. Rather, the lead agency chose the projected conditions in the year 2020, more than a decade after approval, as the ''baseline'' against which to assess the traffic and related impacts of the proposed project.

The court stated that the city council had not cited any decision upholding the use of a future ''baseline'' beyond the expected date of project approval. The court did not construe the word ''normally,'' as used in CEQA Guidelines section 15125(a) (the ''physical environmental conditions in the vicinity of the project, as they exist at

the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced" "normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant"), to mean that a lead agency has carte blanche to select the conditions on some future, post-approval date as the "baseline" so long as it acts reasonably as shown by substantial evidence.

The court stated that it was important to keep in mind that the administrative regulations implementing CEQA [Pub. Res. Code § 21083] could not contravene that governing statute, which consistently requires a determination whether a project would significantly impact the existing environment. The court stated that the word "normally" as used in the regulation is most reasonably understood as recognizing, with respect to individual projects not previously analyzed under CEQA, that the physical conditions existing exactly at the time the notice of preparation is published or at the time the environmental analysis begins (if a notice of preparation is not published) may not be representative of the generally existing conditions and, therefore, an agency may exercise its discretion to apply appropriate methodology to determine the "baseline" existing conditions. The court stated that, for example, if traffic congestion and vehicular travel has temporarily decreased due to an unusually poor economy so that traffic conditions at the time specified by CEQA Guidelines section 15125 are inconsistent with the usual historic conditions, a lead agency might use appropriate methodology, perhaps historical data and traffic modeling, to determine the generally existing conditions. Similarly, it stated that when evidence shows traffic levels are expected to increase significantly during the environmental review process due to other development actually occurring in the area, the projected traffic levels as of the expected date of project approval may be the appropriate baseline.

No Exception for Transportation Improvement Projects. The city council contended that the MAE project was different from other development projects because it was not a "traffic generator" but rather a "traffic congestion-relief project." The court stated that the city council had not pointed to anything in CEQA, the implementing administrative guidelines, or case law that permits a roadway infrastructure project to be evaluated differently than other projects. It stated that CEQA requires the impact of any proposed project to be evaluated against a baseline of existing environmental conditions [Pub. Res. Code §§ 21060.5, 21100(d), 21151(b); CEQA Guidelines section 15125(a)], which is the only way to identify the environmental effects specific to the project alone.

The court stated that while "neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline" [*Communities for a Better Environment*, *above*], nothing in the law authorizes environmental impacts to be evaluated only against predicted conditions more than a decade after EIR certification and project approval. The court stated that the amici curiae briefs filed by the League of California Cities and the California State Association of Counties and by the VTA in support of the city did not supply any authority authorizing the use of such a future, post-approval "baseline." The court stated that use of such a "baseline" could not be upheld since that approach contravened CEQA regardless of whether the agency's choice of methodology for projecting those future conditions was supported by substantial evidence. The court stated that the "industry practice" of evaluating transportation improvement projects based on future scenarios did not alter CEQA's mandates.

Analysis of Future Conditions. The court emphasized that it was not saying that discussions of foreseeable changes and expected future conditions have no place in an EIR. Rather, it stated that such discussions may be necessary to an intelligent understanding of a project's impacts over time and full compliance with CEQA. It noted that although "in assessing the impact of a proposed project on the environment, the lead agency should normally limit its examination to changes in the existing physical conditions in the affected area" the EIR must still clearly identify and describe the "direct and indirect significant effects of the project on the environment" and give "due consideration to both the short-term and long-term effects," citing CEQA Guidelines section 15126.2(a). The court further noted that "where a proposed project is compared with an adopted plan, the [EIR's] analysis shall examine the existing physical conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced as well as the potential future conditions discussed in the plan," citing CEQA Guidelines section 15125(e).

The court further observed that an EIR must "discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable," which "means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects," citing CEQA Guidelines sections 15130(a) and 15065(a)(3), and Pub. Res. Code § 21083(b)(2).) An adequate discussion of significant cumulative impacts ordinarily includes either "a list of past, present, and probable future projects producing related or cumulative impacts" or "a summary of projections

contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect" [CEQA Guidelines section 15130(b)(1)]. "Previously approved land use documents, including, but not limited to, general plans . . ., may be used in cumulative impact analysis" in an EIR [Pub. Res. Code § 21100(e); CEQA Guidelines section 15130(d)].

The court stated that the city council's and the VTA's contention that use of existing traffic conditions as a "baseline" in this case may understate traffic-related impacts and the VTA's suggestion that use of a future "baseline" may place a greater burden on the lead agency to mitigate were red herrings. It stated that "an EIR should not discuss impacts which do not result in part from the project evaluated in the EIR," citing CEQA Guidelines section 15130(a)(1).) The court further stated, however, that an EIR must discuss the cumulative impact of a project when the project has any "cumulatively considerable" incremental effect and it must "examine reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects" [CEQA Guidelines section 15130(a), (b)(5)].

The court stated that increased future traffic expected to result from planned growth under approved general plans should also come to light in the EIR's discussion of the "no project" alternative. It noted that an EIR's "no project" analysis must "discuss the existing conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services" [CEQA Guidelines section 15126.6(e)(2)]. It further noted that "where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment" [CEQA Guidelines section 15126.6(e)(3)(B)].

The court stated that the EIR must provide sufficient information for meaningful evaluation of the comparative merits of the proposed project and each alternative, citing CEQA Guidelines section 15126.6(d). It noted that "drafting an EIR . . . necessarily involves some degree of forecasting" and "an agency must use its best efforts to find out and disclose all that it reasonably can" [CEQA Guidelines section 15144]. The court saw no problem with evaluating the project and each alternative under existing conditions and reasonably foreseeable conditions where helpful to an intelligent understanding of the project's environmental impacts.

The court stated that there was no doubt that comprehensive regional transportation planning must look at the big picture and take the long view. It emphasized that the methodologies for forecasting traffic conditions and planning sound transportation systems and projects were not being challenged here. It stated, however, that once a specific roadway project is proposed and becomes the subject of an EIR under CEQA, a straightforward assessment of the impacts produced by the project alone on the existing environment is the foundational information of an EIR even where secondary analyses are included. The court stated that nothing prevents an EIR from also examining a project's beneficial impacts over time, if reasonably foreseeable, but it must be kept in mind that the purpose of an EIR is to avoid or lessen each significant environmental effect of a proposed project whenever feasible, citing Pub. Res. Code § 21002.1(a), (b).

The court further observed that a roadway infrastructure project aimed at reducing regional traffic and related problems might still have growth-inducing impacts with indirect adverse impacts on the environment and might also result in adverse environmental impacts in the immediate vicinity of the project, such as a localized increase in traffic problems, noise or air pollutants, which may only become apparent when the project is evaluated directly against existing conditions. The court stated that even when such localized significant effects are uncovered, the lead agency may ultimately determine that the project's overriding benefits from a long-term, regional transportation point of view outweigh any unavoidable localized significant environmental effect, citing Guidelines section 15093(a) ("CEQA requires the decision-making agency to balance, as applicable, the economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposed project against its unavoidable environmental risks when determining whether to approve the project. If the specific economic, legal, social, technological, or other benefits, including region-wide or statewide environmental benefits, of a proposal project outweigh the unavoidable adverse environmental effects, the adverse environmental effects may be considered 'acceptable' ") and *Sierra Club v. Contra Costa County* [(1992) 10 Cal. App. 4th 1212, 13 Cal. Rptr. 2d 182 ("a statement of overriding considerations reflects the final stage in the decisionmaking process by the public body")].

The court stated that in this case, however, the decision makers and the public lacked complete information because an improper baseline was used for determining

traffic and related impacts. The court stated that this constituted a failure to proceed in the manner required by law.

No Substantial Evidence to Support Deviation from Norm. The court stated that even if it was to assume that the decision to use projected 2020 conditions as a "baseline" did not constitute a failure to proceed in a manner required by law, the administrative record did not contain substantial evidence to support the decision to deviate from the norm. The court noted that in response to Skewes-Cox's concern that the EIR used the projected 2020 conditions as a "baseline" instead of using existing conditions, Witthaus stated that "the future horizon year of 2020 was chosen because it approximates the time when the Mary Avenue Extension, if approved, would be open to traffic" since there was no current funding for the project and "even assuming full funding becomes available in the next few years, an assumption which is questionable in the current transportation funding environment, it would take several years to design and construct the project." Witthaus made the same comments to the city council at the meeting at which the council certified the EIR. The court stated that those remarks did not constitute substantial evidence.

The court noted that "substantial evidence" is defined in the CEQA Guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached" and "does not include speculation or unsubstantiated opinion" [CEQA Guidelines section 15384(a)]. Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts" [CEQA Guidelines section 15384(b)]. The court stated that Witthaus's comments indicated that the year of anticipated project completion was merely a guesstimate.

The court stated that the evidence that the city was relying on the VTA's TIA Guidelines was not substantial evidence supporting its decision to deviate from the normal existing conditions baseline. The court stated that the city council acknowledged in its reply brief that those guidelines did not require the city to use a 2020 "baseline" for CEQA purposes. The court noted that the VTA Guidelines warned that the TIA's were not intended to cover the requirements of CEQA. The city council nevertheless argued that VTA's TIA Guidelines "reinforce the sound principle . . . that regional traffic planners should account for future growth in a project area when assessing a traffic infrastructure project's environmental impact." The court stated that there was no issue in this appeal concerning the propriety of the methodology used to predict the traffic conditions in the year 2020 or the use of the VTA's TIA Guidelines to plan the proposed roadway project.

Showing of Prejudice. The court noted that "noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown," citing *Association of Irritated Residents v. County of Madera* [(2003) 107 Cal. App. 4th 1383, 133 Cal. Rptr. 2d 718]. The court cited Pub. Res. Code § 21005(a): "The Legislature finds and declares that it is the policy of the state that noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency, or noncompliance with substantive requirements of this division, may constitute a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions."

The court stated that in *Sierra Club v. State Bd. of Forestry* [(1994) 7 Cal.4th 1215, 32 Cal. Rptr. 2d 19], Pacific Lumber Company refused to provide information regarding the presence of old-growth-dependent wildlife species within the old-growth forest covered by proposed timber harvesting plans submitted for approval to the Department of Forestry and Fire Protection. The California Supreme Court concluded that the State Board of Forestry abused its discretion "when it evaluated and approved [Pacific Lumber's timber harvesting] plans on the basis of a record which lacked information regarding the presence in the subject areas of some old-growth-dependent species, information which both the [Departments of Forestry and Fire Protection] and Fish and Game had determined was necessary." The Supreme Court held that "by approving the plans without the necessary information regarding those species the board failed to comply with the obligation imposed on it" by CEQA and another statute.

The Supreme Court concluded that the failure of the board to proceed as required by law was prejudicial. It explained that "the absence of any information regarding the presence of the four old-growth-dependent species on the site" "made any meaningful assessment of the potentially significant environment impacts of timber harvesting and the development of site-specific mitigation measures impossible." The Court stated that "in these circumstances prejudice is presumed," citing *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* [(1989) 210 Cal. App. 3d 155, 258 Cal. Rptr. 147] and *Rural Landowners Assn. v. City Council* [(1983) 143 Cal. App. 3d 1013, 192 Cal. Rptr. 325].

The court stated that in *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* [(2008) 44 Cal.4th 459, 80 Cal. Rptr. 3d 28],

the California Department of Forestry and Fire Protection failed to consider certain public comments regarding Pacific Lumber's sustained yield plan (SYP). The Supreme Court considered the rule, articulated in *Rural Landowners Assn. v. City Council*, *above*, that an error consisting of a failure to comply with CEQA is prejudicial where it results in a subversion of the purposes of CEQA by omitting information from the environmental review process. The Supreme Court stated that the "rule emerges out of the difficulty courts have in assessing the effects of the omitted information, much of it generally highly technical, on the ultimate decision." It recognized that "a trial court's independent judgment that the information was of 'no legal significance' amounts to a 'post hoc rationalization' of a decision already made, a practice which the courts have roundly condemned," citing *Rural Landowners*. However, the Court also recognized that insubstantial or de minimis errors in the CEQA process are not prejudicial.

The Supreme Court concluded that "if it is established that a state agency's failure to consider some public comments has frustrated the purpose of the public comment requirements of the environmental review process, then the error is prejudicial." It held, however, that the department's failure to consider public comments was not prejudicial because the unconsidered comments were merely duplicative of other comments that had been considered. The Court stated that "when a SYP or EIR is challenged for failing to consider comments alleged to contain significant new information, it is the burden of the agency that erroneously omitted the comments to establish they are merely duplicative" unless "their duplicative nature essentially is not contested. . . ."

The court observed that use of an incorrect baseline for assessing the impacts of a proposed project is generally treated as a prejudicial abuse of discretion, citing, e.g., *Communities for a Better Environment* and *Save Our Peninsula*, *above*. The court stated that in this case, however, the city council argued that there was no prejudice because the project's traffic and related impacts were evaluated under future traffic conditions much worse than those presently existing, which resulted in a "more conservative and realistic" assessment and overstated the adverse effects of the project. The court stated that while the contention had some surface appeal, it had to be rejected on closer examination.

First, the court stated that in support of this claim, the city council merely pointed to Witthaus's own remarks to Skewes-Cox and at the hearing explaining why the 2020 horizon was chosen as the basis of comparison. The court stated that this contention was simply a repackaging of the argument that the projected 2020 traffic conditions, predicated on certain assumptions, were an appropriate "baseline." The court stated that it did not establish that the decisionmakers and ordinary citizens were provided with the essential information regarding the project's traffic and related impacts on the existing environment.

Second, the court stated that the argument did not respond to the problem that the EIR failed to identify and consider the incremental effects of the MAE project, individually, on the existing traffic, noise, and air quality conditions. The EIR instead evaluated any incremental change in those conditions due to the project against the already worse traffic environment of the future. The court stated that evaluation of the MAE project under those projected worse traffic conditions of the future obscured the existence and severity of adverse impacts that would be attributable solely to the project under the existing conditions without the other assumed roadway improvements. The court stated that while the city council maintained that use of the predicted traffic conditions in the year 2020 caused the project's adverse environmental impacts to be overestimated, that conclusion was not self-evident from the FEIR.

Alternatively, the city council argued that the city analyzed the traffic and related impacts of the project on the existing environment and presented that information to the city council and the public prior to EIR certification. The court stated that the appellate record showed that the internal correspondence with Skewes-Cox was not incorporated into the FEIR and was merely one of many attachments to the staff report provided to the city council for the meeting at which the project was approved. The court stated that Witthaus's response to Skewes-Cox's concerns about the chosen "baseline" included a revised table of average daily traffic volumes with columns for "existing" and "existing plus project" (not included in the FEIR), which was unaccompanied by any analysis, and his conclusory assertion that the table disclosed no significant traffic impacts even though the table showed considerable increases in traffic along Mary Avenue north of Central Expressway and along Almanor Avenue east of Mary Avenue. In addition, the court stated that the data in the table was unsubstantiated, in contrast to the draft EIR's transportation discussion, which was based on a traffic operations report completed by transportation consultants in April 2007 and attached to the document as an appendix.

The court observed that "to facilitate CEQA's informational role, the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions," citing *Laurel Heights Improvement Assn. v. Regents of University of California* [(1988) 47 Cal.3d 376, 253 Cal. Rptr. 426]. It further noted that "the public and decisionmakers,

for whom the EIR is prepared, should . . . have before them the basis for [an agency's] opinion so as to enable them to make an independent, reasoned judgment,'' citing *Santiago County Water Dist. v. County of Orange* [(1981) 118 Cal. App. 3d 818, 173 Cal. Rptr. 602]. The court stated that information introduced at the end of the environmental review process without analysis or the benefit of public scrutiny or participation does not fulfill the informational function of an EIR, citing *Save Our Peninsula*, *above*. An EIR ''must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made'' [*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova [(2007) 40 Cal.4th 412, 53 Cal. Rptr. 3d 821]. The court stated that the city council failed to demonstrate that adequate information regarding the project's traffic and related impacts on the existing environment was properly presented to the general public and decision makers in the EIR process.*

The court noted that the conventional ''harmless error'' standard has no application when an agency has failed to proceed as required by the CEQA, citing *East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.*, *above*. Thus, it stated that even if a complete analysis of the project's traffic and related impacts on the existing environment would have produced no findings of different or greater significant environmental effects than the city found based on the anticipated traffic conditions in 2020 and such analysis would not have altered the city council's decisions, such circumstances did not establish a lack of prejudice for purposes of CEQA review, citing *Fall River Wild Trout Foundation v. County of Shasta* [(1999) 70 Cal. App. 4th 482, 82 Cal. Rptr. 2d 705] and *Rural Landowners Assn. v. City Council*, *above*. The court quoted *Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection*, *above*: ''Courts are generally not in a position to assess the importance of the omitted information to determine whether it would have altered the agency decision, nor may they accept the post hoc declarations of the agencies themselves. A ''determination of whether omitted information would have affected an agency's decision'' is ''highly speculative, an inquiry that takes the court beyond the realm of its competence.'' Consequently, the court stated that the city council's repeated assertion that the EIR's assessment of traffic and related impacts using only the 2020 ''baseline'' resulted in a more conservative and realistic analysis than would the omitted assessment using a proper baseline was unavailing.

The court also rejected the city's attempt to characterize the failure to use the proper baseline as a mere ''immaterial, technical error.'' The court stated that the underlying assumptions of the traffic-related analyses, that the city's general plan was completely built out, a number of anticipated roadway improvements were in place, and traffic volumes had reached the level predicted for the year 2020, made it impossible for decision makers and the general lay public to readily grasp the traffic and related impacts of the project itself on the environment as it presently existed.

The court noted that one of the EIR's thresholds of significance stated that a transportation impact is considered significant if the project would ''cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system (i.e., result in a substantial increase in either the number of vehicle trips, the volume to capacity ratio on roads, or congestion at intersections).'' The court stated that while the EIR described the existing roadway network and the existing traffic volume on certain roadway segments and the existing LOS at certain intersections, it did not use the existing conditions as its baseline and, consequently, failed to answer how and to what extent the proposed project itself would adversely change the existing traffic conditions without those other roadway improvements assumed to be in place by the year 2020. The court stated that the EIR did not address questions such as how the project would change the delay and LOS at the various intersections under the existing conditions, and whether the project alone would substantially increase existing traffic volumes on certain roadway segments or substantially increase the existing traffic congestion and delay at certain intersections.

The court stated that the EIR described the existing noise conditions in the project vicinity and indicated that the noise subelement of the city's general plan included the noise goal of ''preserving and enhancing the quality of neighborhoods by maintaining or reducing the levels of noise generated by transportation facilities'' and the noise policy to ''refrain from increasing or reduce the noise impacts of major roadways.'' One of the thresholds of significance for noise provided that a noise impact would be considered significant if the project would result in ''a substantial permanent increase in ambient noise levels in the project vicinity above levels existing without the project.'' The court stated that the EIR set out the relationship between noise and traffic but, without an accurate assessment of the traffic impacts of the project alone on the existing environment, it did not make plain whether the project's traffic-related noise impacts on the existing environment would reach the stated thresholds of significance. The court stated that nowhere in the FEIR was the impact of the project measured against the

baseline of the existing ambient noise levels in the project vicinity.

The court stated that the FEIR also failed to describe existing air quality conditions, either quantitatively or qualitatively, in the affected local area. The EIR indicated that the project would cause traffic volumes to increase along some stretches of Mary Avenue, on Almanor Avenue east of Mary Avenue, and on Maude Avenue under future traffic conditions in 2020 and, obviously, the project would bring new vehicular traffic onto the extended portion of Mary Avenue. The EIR also reported that the project, while generally improving traffic delay at intersections, would cause delay during peak hour operations to worsen at certain intersections under future traffic conditions. Carbon monoxide was identified in the draft EIR as a local pollutant found near the source, impliedly vehicular, and the FEIR disclosed that "overall emissions are highest in idling and stop-and-go conditions." One of the EIR's thresholds of significance stated that an air quality impact is considered significant if the project would "expose sensitive receptors to substantial pollutant concentrations." The EIR described "sensitive receptors" and stated that "sensitive receptors near the project site include the residences located north of US 101 and east of Mathilda Avenue." The court stated, however, that the FEIR did not define "substantial pollutant concentrations" and did not disclose whether the adverse traffic changes resulting from the project alone would cause any adverse localized changes to the existing air quality that would meet articulated thresholds of significance.

The court stated that local changes to the existing environment resulting from the project were of utmost importance to the local area residents and should have been spelled out by the FEIR. It stated that decisionmakers and members of the public are not required to ferret out information or make their own deductions regarding whether the project would significantly affect the existing environment, citing *San Joaquin Raptor Rescue Center v. County of Merced*, *above*, and *Planning & Conservation League v. Department of Water Resources* [(2000) 83 Cal. App. 4th 892, 100 Cal. Rptr. 2d 173].

The court further stated that the EIR's discussion of cumulative traffic and related impacts seemed to have been skewed by the use of a future "baseline," which already incorporated increased future traffic, build out of the city's general plan and completion of certain anticipated roadway improvements. It stated that although the EIR acknowledged that expansion of the capacity of the area's transportation network might have an indirect growth-inducing effect and "the environmental effects of growth would generally include increased traffic, noise, air pollution, and water pollution," the EIR's cumulative impacts analysis did not discuss whether any of the project's incremental effects were cumulatively considerable when the project was considered together with other projects that caused related impacts, citing CEQA Guidelines section 15130 and 15355.

Consideration of Alternatives. Finally, the court stated that the merits of the project and each alternative, including the "no project" alternative, could not be accurately compared if the proposed project's significant effects had not been fully ascertained and disclosed in the first place. The court stated that to achieve the purposes of CEQA, the discussion of alternatives must "focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project" "because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment (Public Resources Code Section 21002.1)," citing CEQA Guidelines section 15126.6(b). The court also cited Pub. Res. Code § 21060.5 ("environment" means existing physical conditions) and CEQA Guidelines section 15360 (same). The court stated that while the city could be credited with expanding the number of alternatives, lay readers could not ascertain from the FEIR whether a comparison of the alternatives would yield different results if the impacts of the alternatives on the existing environment were considered. Thus, the court stated that the FEIR did not present the full picture.

The court speculated that the city was so focused on the future regional transportation benefits of the project that it failed to adequately evaluate the traffic and related impacts on the existing environment. It stated that while the analyses using the projected traffic conditions in 2020 added valuable information to the EIR, they were not a substitute for evaluating the project's traffic and related impacts on the existing conditions.

The court stated that the omitted information and discussions were essential to a basic understanding whether the project itself would result in any significant environmental impact in terms of traffic volume, delay, congestion, and levels of service, ambient noise, and air quality as compared to the existing conditions. It stated that without a straightforward assessment of the project's full impact on existing conditions, the EIR process does not serve its core informational purpose.

The court observed that "the failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial," citing *County of Amador v. El Dorado County Water Agency*, *above*. The court agreed with the trial court's statement that by using future traffic

conditions as its "baseline," the EIR "did not adequately explain to an engaged public how the proposed project was expected to change the present conditions in which they currently lived."

Commentary by Ron Bass

For years, many transportation specialists have been at odds with CEQA specialists over the correct baseline to use for evaluating traffic impacts in Environmental Impact Reports and Negative Declarations. The transportation people typically want to use a "future-year scenario" as the baseline because, they argue, only a comparison of a proposed project's traffic to future conditions would yield meaningful results from a transportation perspective. These specialists are guided by the norms and practices within the transportation planning profession, which may be reasonable and important for planning future transportation projects. However, CEQA specialists are guided by the State CEQA Guidelines and relevant court decisions, which provide that "existing conditions," not a future scenario, is normally supposed to be the baseline for impact analysis. These divergent views on the baseline question have frequently led to heated debates during the scoping phase of CEQA. This latest decision should provide great comfort and support to all of the CEQA practitioners who have tried to convince traffic engineers and transportation analysts that the world of transportation planning is not the same as the world of CEQA.

In this case, the city used projected conditions in the year 2020 as the baseline for evaluating the traffic impacts of the proposed project. Such future traffic levels were based on expected growth under the city's General Plan as well as projected growth in neighboring communities. Additionally, the city based its air quality and noise impact analysis on those same future traffic conditions, a common CEQA practice. Unfortunately for the city, the court held that existing conditions, not the future projected traffic levels, should have served as the baseline.

In reaching its decision, the court relied on the language of the CEQA Guidelines which provide that:

> An EIR must include a description of the physical environmental conditions in the vicinity of the project, *as they exist at the time the notice of preparation is published*, or if no notice of preparation is published *at the time environmental analysis is commenced*, from both a local and regional perspective. These environmental settings will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. [14 Cal. Code Reg. § 15125 (a) (emphasis added).]

The decision recognizes that while comparisons to future traffic scenarios may be important for transportation planning purposes they should not be used for determining significance under CEQA. The court was troubled by the fact that comparisons to hypothetical future conditions generally result in understating of the significance of impacts. This can then lead to illusory comparisons between alternatives and insufficient mitigation for project impacts. All of these problems subvert the fundamental purposes of CEQA.

The court acknowledged that the CEQA Guidelines afford lead agencies some flexibility in defining "existing conditions" and allow the use of non-normal baselines under some circumstances. Cited examples included situations where past operations of a project have been subject to business cycle fluctuations or where economic factors have caused an unusual decline in operations. The court also stated that it might be appropriate to allow the date of project approval to be the baseline, rather than strictly adhering to the date of the NOP, especially when several years might pass between the NOP and project approval. However, the court held that there was no authority in CEQA for allowing the use of a baseline that was years in the future. The city's rationales for using a future scenario as the baseline were: (1) the local transportation agency used such scenario in its regional transportation model and (2) the project was not anticipated to be built until 2020. However, the court was not convinced that either was a valid reason. Interestingly, the independent peer reviewer's viewpoints were more persuasive than the city's own staff.

The court also unequivocally declared that any deviation from existing conditions must be accompanied by a careful explanation in the CEQA document and must be based on substantial evidence in the record. Both of these factors were absent in the City of Sunnyvale's EIR. This is latest in a growing line of decisions, including the California Supreme Court's decision in *Communities for a Better Environment v. South Coast Air Quality Management Dist.* [(2010) 48 Cal.4th 310, 106 Cal. Rptr. 3d 502], in which the courts have admonished agencies for using hypothetical baselines in their CEQA analysis. Based on these cases, any lead agency that intends to use a future scenario as the baseline may be stepping into perilous territory.

Commentary by Al Herson

Mr. Bass' comment aptly describes the *Sunnyvale* case's holding and rationale. The case is likely to cause major changes in the way that transportation, air quality, and

noise impacts are often evaluated under CEQA, for land use projects as well as transportation projects. Project-specific significance determinations and mitigation obligations are to be determined using existing conditions as a baseline. Superimposing the project's incremental impacts on future transportation conditions will also provide valuable information, but this information belongs in the cumulative impact analysis.

One question that arises is how to reconcile this case with *Cherry Valley Pass Acres v. City of Beaumont (2010) 190 Cal. App. 4th 316, ____ Cal. Rptr. 3d ____], decided by a different court of appeal only a few months earlier. In that case, the court treated the baseline choice as a factual determination, and used a deferential substantial evidence standard of review to uphold the choice of a baseline for a CEQA water supply impact analysis. In contrast, Sunnyvale* used the non-deferential "failure to proceed in a manner required by law" standard of review, although in it dicta found that even if the substantial evidence standard were used, the administrative record did not contain substantial evidence supporting the lead agency's choice of a baseline other than existing conditions.

A substantive difference is that *Cherry Valley Pass Acres* upheld the lead agency's decision to use a baseline derived from adjudicated groundwater rights (1,484 acre-feet per annum (afa)) rather than the 50 afa that had been used on the project site since 2005 and at the time the NOP was released. The main basis for the court's decision was that adjudicated water rights can be a proper baseline because they constitute "real conditions on the ground," even if they are not being exercised when the EIR NOP is released. However, there were some unique facts present in *Cherry Valley Pass Acres*: Pre-2005 historical water usage was similar to the 1,484 afa water right, and the project was actually making net additional supplies available to the water supplier through transferring its 1,484 afa entitlement to the water supplier. Given the holding in *Sunnyvale*, it will be interesting to see whether future courts limit the holding in Cherry Valley Pass Acres to its facts.

Commentary by David Sandino

Because of the thoroughness of its analysis, this case instantly becomes one of the leading opinions on the vexing CEQA question of baseline. Baseline is the shorthand term for the environmental conditions from which environmental impacts caused by the proposed project are measured. If nature and regulatory conditions were static, baseline would generally be an easy thing to measure. However, neither of them necessarily is. In the case of water projects, for instance, the existing environmental conditions may depend on the hydrology of a given year or a particular season, both of which may be variable. To determine the baseline for these types of projects may require a careful analysis of these hydrological conditions. As another example, a proposed housing development may have less impacts then already permitted through existing zoning and land use plans, but if built would cause more impacts than those already on the ground.

This case illustrates the problem of determining baseline very well. The court found that the baseline to measure the traffic, noise, and air pollution impacts from a new road extension was the existing conditions on the ground (existing traffic and infrastructure), not the traffic that would exist in 2020, a standard baseline used by the regional transportation authority for traffic modeling. The court made clear that the proper baseline normally should be the existing conditions on the ground at the time of the decision unless there is "substantial evidence to support deviating from that norm." The court did not consider a statement by a city official that the project would not be built until 2020 to be substantial evidence. Instead, the court said that to justify a different baseline than existing conditions, the lead agency would need facts, assumptions supported by facts, and expert opinion. The court also noted that CEQA did nothing to prevent the use of the 2020 baseline for comparison purposes as long as the existing condition baseline was also included in the EIR.

This case strongly suggests that CEQA documents should generally use the existing conditions as a baseline. If not, the lead agency should carefully explain and document in the record the reasons for not using existing conditions. If a lead agency wishes to use another baseline besides the existing conditions baseline because it believes it is better or may enhance the analysis, it may but it should also include the existing conditions baseline.

➧ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 21.09[2] (Determining Whether Effects Are Significant), 22.04[6][a][i] (Contents of EIRs—Significant Environmental Effects).

WATER QUALITY CONTROL

Cases

Water Quality Control Board Properly Conducted Review of Water Quality Control Plan

City of Arcadia v. State Water Res. Control Bd.
No. G041545, 4th App. Dist., Div. 3
2010 Cal. App. LEXIS 2150
December 14, 2010

In an action by a county, cities and a nonprofit corporation representing the construction industry following the Los Angeles Regional Water Quality Control Board's periodic review of its water quality control plan, the court held that to the extent plaintiffs' action could be construed as challenging the board's pre-December 9, 2002, adoption and approval of the basin plan and amendments to it or the water quality objectives and imposition of TMDLs in the NDPES permits, their claims were barred by the three-year statute of limitations set forth in Code Civ. Proc. § 338(a). Plaintiffs were collaterally estopped from asserting claims relating to the application of Water Code § 13241 to the 2001 MS4 Permit for stormwater and urban runoff discharges and the adoption of a trash TMDL. The trial court erred in holding that the regional board had a duty to consider the factors set forth in Water Code §§ 13000 and 13241 when conducting its triennial review of the basin plan. A regional board has authority under Water Code § 13241 to include potential, as opposed to probable, beneficial uses in developing water quality objectives.

Facts and Procedure. In 1975, the Los Angeles Regional Water Quality Control Board adopted two basin plans, one covering the Santa Clarita River basin and a second covering the Los Angeles River basin. Chapter 9 of the plans, which set forth the policies and guidelines governing the formulation and adoption of a water quality control plan, stated that a plan must include "such water quality objectives as in [the regional board's] judgment will ensure reasonable protection of beneficial uses . . .," including "past, present and probable future beneficial uses, . . . environmental characteristics of the area, including quality of water supply, . . . water quality that could reasonably be achieved, . . . [and] economic considerations." In approving the basin plans, the State Water Resources Control Board issued a resolution declaring in part, "the water quality control plans include all necessary elements of a water quality control plan in accordance with Water Code §§ 13241 and 13242 . . . and federal requirements. . . ."

In 1987, Congress extended the Clean Water Act to cover storm water from "municipal storm sewers," requiring permits for these discharges to "reduce the discharge of pollutants to the maximum extent practicable, including management practices, control techniques and system, design and engineering methods, and such other provisions as the . . . State determines appropriate for the control of such pollutants" [33 U.S.C. § 1342(p)(3)(B)(iii)]. The EPA defines storm water to mean "storm water runoff, snow melt runoff, and surface runoff and drainage" [40 C.F.R. § 122.26(b)(13)].

The Regional Board issued a permit in 1990, described as an "MS4," naming the County of Los Angeles and incorporated cities located within the county as permittees. Members of plaintiff Building Industry Legal Defense Foundation (BILDF), a nonprofit corporation representing the construction industry, were also subjected to storm water and urban runoff permits related to construction activity.

In 1994, the Regional Board consolidated the two original plans into a single plan, revising it to cover stormwater and urban runoff. Although the 1994 amendment implemented a change of policy toward using a watershed-based water quality control plan, a staff report stated "most of the water quality objectives are not being changed from the existing Basin Plan." The revised plan's chapter on water quality objectives cited "California Water Code § 13241" as "specifying that each Regional Water Quality Control Board shall establish water quality objectives," which the plan defined "as 'the allowable limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.' " Concerning storm water and urban runoff, the 1994 plan identified and proposed to "implement . . . best management practices." The State Board approved the 1994 plan update.

In 1996, the Regional Board issued a renewal of the MS4 permit for Los Angeles County and the cities within the county. The permit's findings acknowledged the 1994 basin plan's shift to a watershed management approach. The permit also focused on the use of best management practices to minimize pollution from storm water and urban runoff.

On December 13, 2001, the Regional Board renewed the MS4 permit for plaintiff cities. The permit contained several pages of findings, including: (1) In 1999, the EPA "entered into a consent decree with [several environmental groups] . . . under which the Regional Board must

adopt all total maximum daily loads (TMDLs) for the Los Angeles Region within 13 years. . . .” “This permit incorporates a provision to implement and enforce approved load allocations for municipal storm water discharges and requires amending the [Stormwater Quality Management Plan] after pollutants loads have been allocated and approved”; (2) the EPA “established numeric criteria for priority toxic pollutants for the State of California (California Toxics Rule (CTR))” and thereafter, “the State Board adopted” both a policy “requiring that discharges comply with TMDL-derived load allocations as soon as possible but no later than 20 years from the [policy’s] effective date,” plus “a revised Water Quality Control Plan for Ocean Waters of California” that “contains water quality objectives which apply to all discharges to the coastal waters of California”; (3) in September 2001, “the Regional Board . . . adopted amendments to the Basin Plan, to incorporate TMDLs for trash in the Los Angeles River . . . and Ballona Creek” and stated it had “considered the requirements of [section] 13263 and [section] 13241, and applicable plans, policies, rules, and regulations in developing these waste discharge requirements.” The permit also contained provisions describing the duties of “permittees subject to the forthcoming trash TMDL.”

In 2002, the Regional Board approved an amendment to the basin plan’s water quality objectives concerning bacteria levels in water bodies designated for recreational use. The resolution approving this change found that the Federal Clean Water Act requires “the Regional Board to develop water quality objectives which are sufficient to protect beneficial uses designated for each water body . . . within its region”; “the current Basin Plan contains . . . bacteria objectives to protect waters designated for water contact recreation based on recommendations made by the U.S. EPA in 1976”; the amendment “is based on more recent epidemiological studies and research on the most appropriate bacterial indicators”; “based on these epidemiological studies, . . . the U.S. EPA revised its recommended bacteria criteria for waters designated for water contact recreation,” plus made a “commitment” “to promulgate the [revised] criteria with the goal of assuring that the . . . criteria apply” if “a State does not amend its water quality standards to include the [revised] criteria,” and “EPA’s . . . bacteria criteria [plus] the bacteria standards contained in the California Code of Regulations . . . represent the best science available.” The resolution further noted the amendment “was developed in accordance with section 13241 of the Porter-Cologne Act,” and “the Regional Board . . . considered the costs of implementing the amendment, and [found] these costs to be a reasonable burden relative to the environmental benefits.”

The Regional Board conducted a triennial review of the basin plan in 2004. Representatives of cities, public works and sanitation districts, and the construction industry responded to requests for public input. One letter, from an employee of plaintiff City of Signal Hill, commented: “The current Basin Plan has not been comprehensively updated since 1994. The Regional Board has relied upon a ‘patchwork’ of amendments, which bear no relationship to the whole document. . . . We believe that a comprehensive update of the Basin Plan under the 2004 Triennial Review is necessary since much has changed in the regulatory environment, including EPA entering into the Consent Decree in 1998 and the Amended Consent Decree in 1999. [¶] There have been significant changes to the 303(d) list, expanding the list of water bodies and constituents to be regulated. . . . Further, the regulatory framework is significantly altered with EPA’s adoption of the California Toxic Rule and the apparent decision of the Regional Board, in the Metals TMDL for the Los Angeles River, to apply these standards unreasonably to stormwater. [¶] Finally, the Basin Plan’s water quality objectives were not developed based on ‘past, present, and probable future beneficial uses,’ as required under the Water Code, but instead, appear to have been developed and based on ‘potential’ beneficial uses.”

A letter from employees of other county and city agencies and construction industry organizations requested that the 2004 review develop “protocols . . . to ensure that existing and future Basin Plan water quality standards are consistently and substantively assessed in accordance with [the] Porter-Cologne [Act] sections 13000 and . . . 13241 factors,” and stated “clear, rational criteria should be developed for creating and applying beneficial use designations, including the revision of current Basin Plan ‘potential’ use designations.”

In March 2005, after several public meetings, the Regional Board prepared a 66-page responsiveness summary to comments received from stakeholders and issued a resolution approving a list of 20 basin planning issues to be addressed during the following three years. It declined to revise or amend the basin plan or eliminate its application to potential beneficial uses of the water bodies covered by the plan.

Plaintiffs filed this action on December 9, 2005. The petition alleged eight causes of action, alternatively seeking issuance of a writ of mandate, plus declaratory and injunctive relief as to four purported defects. The first and second counts alleged that defendant Water Boards “failed to hold a public hearing for the purpose of reviewing applicable water quality standards/objectives, and where appropriate, modifying and revising such water quality standards/objectives” during the triennial review “contrary

to law. . . .” The third and fourth counts sought the same relief based on defendants’ alleged failure “to correct deficiencies, defects and improperly . . . adopted, maintained and applied . . . standards/objectives . . . based on ‘potential’ beneficial use designations, as opposed to existing uses, uses to be made of the waters, or probable future beneficial uses.” The fifth and sixth causes of action sought the same relief, alleging that the triennial review failed to comply with Water Code §§ 13000 and 13241. Finally, the seventh and eighth counts alleged the “water quality standards/objectives contain numerous beneficial ‘potential’ . . . use designations,” and thus “were developed and adopted, and are being maintained and applied without compliance with the requirements of . . . [sections] 13000 . . . and 13241. . . .”

Defendants unsuccessfully demurred and moved to strike the petition, in part arguing that the applicable statute of limitations barred plaintiffs’ claims. The trial court issued a notice of ruling that granted the writ on all causes of action “as to water quality standards and objectives of the basin plan as those standards and objectives affect storm water discharges and urban runoff.” The trial court initially rejected defendants’ claims that plaintiffs’ action was barred by the statute of limitations, res judicata or collateral estoppel. It also held that plaintiffs were not barred by their failure to file administrative challenges to the 1990 and 1996 MS4 permits issued by the Regional Board, finding it is “the adoption of the TMDLs followed by their incorporation into the NPDES permit that triggers the application of the standards.”

On the merits, the trial court held that defendants erred both by considering “ ‘potential’ future uses” and by applying “the standards . . . without appropriate consideration of the 13241/13000 factors.” The trial court stated “there is no substantial evidence showing that the boards considered the 13241/13000 factors before applying the standards to storm water in the 1975 plan adoption, the 1994 amendment, or the 2002 bacterial objectives.” Finally, the court held that “the 2004 [triennial review] was the appropriate vehicle at the appropriate time for the board to consider the factors.”

Before the court entered judgment, Natural Resources Defense Council, Santa Monica Baykeeper, and Heal the Bay successfully sought to intervene in the case. The initial judgment directed issuance of a writ of mandate that, in part, required the boards “to cease and desist, and suspend all activities relating to the implementation, application, and/or enforcement in the basin plan” to either “achieve ‘potential’ beneficial uses” or to apply water quality objectives “whether through TMDLs or other basin plan amendments or regulations, or through NPDES permits . . . until such time as [the boards] have reviewed and, where appropriate, revised the standards in light of the factors and requirements provided under sections 13241 and 13000.”

Defendants and interveners moved for a new trial and interveners also moved to vacate the judgment. The trial court denied the new trial motions but expressed “concern about [the] unintended consequences which . . . may result from immediate halting of all implementation, application and/or enforcement of the standards in the basin plan as applied . . . to stormwater.” It therefore exercised its authority under Code Civ. Proc. § 662 to vacate the original judgment and writ and entered a new judgment . . . that followed the “remand without vacatur” procedure, thereby permitting defendants to use the standards pending review.

Defendant water boards and the interveners appealed, challenging the judgment on grounds including statute of limitations and collateral estoppel, as well as the merits of the court’s decision. Plaintiff municipalities appealed, challenging only the court’s ruling that defendants could enforce the current water quality control plan pending further review proceedings. The court concluded that defendants’ and interveners’ collateral estoppel claim and their substantive arguments had merit, and reversed the judgment. Plaintiffs’ appeal therefore became moot.

Statute of Limitations. In overruling the State and the Regional Boards’ demurrer to the petition, the trial court held that “the applicable state of limitations . . . is four years,” not the three-year period set forth in Code Civ. Proc. § 338, on the basis that there was no “liability created by statute” because “petitioners are challenging what they claim to be an illegal regulation that did not impact them . . . until . . . the last of several TMDLs were adopted. . . .” In its post-trial decision the court also noted the fifth, sixth, and eighth causes of action were not barred because they challenged defendants’ 2004 triennial review approval, sought “declaratory relief regarding future basin plan amendments,” and defendants’ failure to comply with their statutory duties constituted “a continuing violation of an ongoing duty.”

Defendants and intervenors challenged the court’s ruling on the statute of limitations. The court of appeal held that the trial court clearly erred in relying on the four-year period set forth in Code Civ. Proc. § 343. The court stated that plaintiffs’ action was based on defendants’ alleged noncompliance with their statutory obligations under the Clean Water Act and the Porter-Cologne Act; Code Civ. Proc. § 338(a) provides that a three-year limitations period applies to “an action upon a liability created by statute. . . .”

The court stated, however, that the real issue was when plaintiffs' causes of action accrued, citing *Howard Jarvis Taxpayers Assn. v. City of La Habra* [(2001) 25 Cal.4th 809, 107 Cal. Rptr. 2d 369 ("A cause of action accrues 'upon the occurrence of the last element essential to the cause of action' ")]. It stated that, under Code Civ. Proc. § 338(a), to the extent plaintiffs' action could be construed as challenging the boards' pre-December 9, 2002, adoption and approval of the basin plan and amendments to it or the terms of the NDPES permits, their claims were barred, citing *Howard Jarvis Taxpayers Assn.* (a declaratory judgment action or mandate petition to enforce a statutory liability must be brought within the same three-year period after accrual of the cause of action").

The court noted that the trial court relied on *Jarvis*'s "continuing violation" exception to find that plaintiffs' action was timely. It stated that in *Jarvis*, the Supreme Court recognized an exception to the foregoing rule where taxpayers challenged a city's enactment of a utility users tax without obtaining prior voter approval as required by Proposition 62 [Gov. Code § 53720 et seq.]. *Jarvis* stated that "plaintiffs have alleged an ongoing violation of Proposition 62's commands . . . over the validity of the utility tax," and "those causes of action are not barred merely because similar claims could have been made at earlier times as to earlier violations, or because plaintiffs do not at this time also seek a refund of taxes paid. . . .Indeed, in the absence of an independent bar on equitable or writ relief, a person aggrieved by the required payment of a tax is not limited to seeking a refund, but may challenge the validity of the taxing agency's policy or continuing conduct by a claim for declaratory relief."

Defendants contended that the continuing violation exception did not apply here, because "this action was not about an application of water quality standards," but rather "was a belated, direct attack upon the . . . standards themselves." Intervenors argued that *Jarvis* was limited to tax measures. The court stated that, contrary to those assertions, the trial court did identify defendants' approval of the total maximum daily loads (TMDLs), most of which occurred within three years before this lawsuit was filed, as the application of the allegedly defective water quality objectives supporting plaintiffs' action. In addition, the court noted that the Supreme Court later relied on *Jarvis* to allow an action by a property owner who filed a facial challenge to a county ordinance within 90 days after the county issued a permit that imposed restrictions on the construction of a second dwelling, even though the ordinance had been enacted nearly 20 year earlier, citing *Travis v. County of Santa Cruz* [(2004) 33 Cal.4th 757, 16 Cal. Rptr. 3d 404].

The court stated that in any event, the trial court noted that plaintiffs' action primarily challenged the Regional Board's resolution on the 2004 Triennial Review without addressing their requests concerning the validity of the water quality objectives as well as the imposition of TMDLs under the current MS4 permit. The court stated that, insofar as plaintiffs' action was limited to those claims, it appeared to be timely.

Collateral Estoppel. Defendants cited portions of three prior judicial rulings they claimed collaterally estopped plaintiffs from arguing that the Regional Board had not considered Water Code § 13241 in adopting the 2001 NPDES MS4 permit and in subsequently approving the TMDL's for trash and metals. The trial court rejected the claims, concluding that plaintiffs' prior actions "did not challenge the legality of applying standards to storm water without the boards first appropriately considering the 13241/13000 factors."

The court held that the trial court erred in declining to find that some of plaintiffs' claims were barred by two of the prior decisions. It noted that "the doctrine of res judicata precludes the relitigation of certain matters which have been resolved in a prior proceeding under certain circumstances. . . . The doctrine has two aspects. It applies to both a previously litigated cause of action, referred to as claim preclusion, and to an issue necessarily decided in a prior action, referred to as issue preclusion. The prerequisite elements for applying the doctrine to either an entire cause of action or one or more issues are the same: (1) A claim or issue raised in the present action is identical to a claim or issue litigated in a prior proceeding; (2) the prior proceeding resulted in a final judgment on the merits; and (3) the party against whom the doctrine is being asserted was a party or in privity with a party to the prior proceeding" [*Brinton v. Bankers Pension Services, Inc.* [(1999) 76 Cal. App. 4th 550, 90 Cal. Rptr. 2d 469].

The court stated that in *City of Arcadia v. State Water Resources Control Bd.* [(2006) 135 Cal. App. 4th 1392, 38 Cal. Rptr. 3d 373], twelve of the cities involved in this action filed a petition for a writ of mandate challenging the defendants' adoption of the trash TMDL for municipal storm drains draining into the Los Angeles River, one of the alleged applications cited by the trial court in this case. The trial court in the earlier case granted the writ, finding in part that the defendants failed to consider economic factors as required by section 13241. The court of appeal reversed that portion of the ruling. On appeal, the defendants argued that section 13241 was "inapplicable because the Trash TMDL does not establish water quality objectives, but merely implements, under . . . section 13242, the existing narrative water quality objectives in the 1994

Basin Plan.'' The plaintiff cities disagreed with this claim. The appellate court declined to decide which argument was correct, finding ''even if the statute is applicable, the Water Boards sufficiently complied with it.'' The opinion then proceeded to discuss in detail the economic factors considered in the trash TMDL.

The court stated that in *County of Los Angeles v. California State Water Resources Control Bd.* [(2006) 143 Cal. App. 4th 985, 50 Cal. Rptr. 3d 619], Los Angeles County and the cities involved in this case, plus BILDF, sued the defendants challenging the adoption of the 2001 MS4 Permit. Interveners also intervened and appeared. The trial court ruled for the defendants and the court of appeal affirmed in a decision certified for partial publication. In the unpublished portion of its opinion the court rejected the plaintiffs' claim that section 13241 required ''the Regional Board . . . to consider the economic impact of issuance of the permit.'' Citing to evidence in the record, it found the plaintiffs' contention lacked merit because there was ''substantial evidence the Regional Board considered the costs and benefits of implementation of the permit.''

The court stated that the third case cited by defendants involved a February 2007 trial court statement of decision denying the petition of eight cities involved in the present case against defendants challenging the 2005 adoption of a TMDL for metals in the Los Angeles River and its tributaries. The trial court agreed that the Water Boards were required to examine the criteria in section 13241 in amending the basin plan in adopting the metals TDMLs, but found that the evidence supported the conclusion that defendants did so (along with a protest that it was unnecessary).

The court stated that the two appellate court rulings resulted in final judgments, but neither defendants nor interveners cited to the existence of a final judgment in the superior court matter. The court stated that, at best, defendants claimed the trial court's ruling had been appealed, but there was no indication the a final ruling has been rendered. It stated that while collateral estoppel can arise from a superior court judgment, the requirement of a final judgment was not satisfied as to this case.

The court stated, however, that all of the elements for collateral estoppel existed as to the two appellate court rulings. In each case, the court of appeal considered whether the boards complied with section 13241 in approving a regulation applying to plaintiffs' storm sewers and concluded they had done so. As for privity, the court observed that ''in the context of collateral estoppel, due process requires that the party to be estopped must have had an identity or community of interest with, and adequate representation by, the losing party in the first action as well as that the circumstances must have been such that the party to be estopped should reasonably have expected to be bound by the prior adjudication. Thus, in deciding whether to apply collateral estoppel, the court must balance the rights of the party to be estopped against the need for applying collateral estoppel in the particular case, in order to promote judicial economy by minimizing repetitive litigation, to prevent inconsistent judgments which undermine the integrity of the judicial system, or to protect against vexatious litigation'' [*Clemmer v. Hartford Insurance Co.* [(1978) 22 Cal.3d 865, 151 Cal. Rptr. 285]. The court stated that under this standard, not only were many of the same municipalities and BILDF parties to the prior actions, privity clearly existed between the parties to the prior lawsuits and the parties in this case.

Plaintiffs argued, and the trial court found, there was no collateral estoppel because neither decision applied the provisions of sections 13000 and 13241 to stormwater. The court stated, however, that the focus of the Clean Water Act is on setting criteria for water quality based on a water body's designated uses, not the source of discharges adversely affecting the body's water quality, citing *Pronsolino v. Nastri* [(9th Cir. 2002) 291 F.3d 1123 (''the states are required to set water quality standards for all waters within their boundaries regardless of the sources of the pollution entering the waters'')] and 33 U.S.C. § 1313(c)(2)(A) (''revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses''). Thus, the court held that the trial court erred in failing to give collateral estoppel effect to the first and second appellate court decisions concerning the application of section 13241 to the 2001 MS4 permit and the adoption of the trash TMDL.

2004 Triennial Review. The trial court found that defendants abused their discretion by declining plaintiffs' requests ''to perform the [sections] 13241/13000 analysis at the 2004 Triennial Review.'' In particular, the court found that the standards could not be applied to storm water without appropriate consideration of the 13241/13000 factors and there was no substantial evidence showing that the boards considered the factors before applying the standards to storm water in the 1975 plan adoption, the 1994 amendment, or the 2002 bacterial objectives.'' The court stated that the trial court's finding was contradicted by both the foregoing decisions as well as the record in this case. In addition, the court stated that it appeared that the trial court misunderstood the applicable legal requirements.

First, the court stated that plaintiffs' allegations that the Regional Board failed to conduct public hearings during

the 2004 triennial review were contrary to the record. It stated that the administrative record reflected that the Regional Board conducted a series of public workshops that involved discussion of a list of priorities for the basin plan.

Second, the court stated that to prevail, plaintiffs needed to show that the Regional Board had a duty to consider sections 13000 and 13241 when conducting its triennial review. It noted that "two basic requirements are essential to the issuance of the writ [of mandate]: (1) A clear, present and usually ministerial duty upon the part of the respondent; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty," citing *Shamsian v. Department of Conservation* [(2006) 136 Cal. App. 4th 621, 39 Cal. Rptr. 3d 62]. As for the first requirement, the court stated that "a statute is deemed to impose a mandatory duty on a public official only if the statute affirmatively imposes the duty and provides implementing guidelines," citing *O'Toole v. Superior Court* [(2006) 140 Cal. App. 4th 488, 44 Cal. Rptr. 3d 531]. It noted that whether a particular statute is intended to impose a mandatory duty is a question of statutory interpretation for the courts, citing *O'Toole*.

The court noted that Water Code § 13143 declares that "state policy for water quality control shall be periodically reviewed and may be revised." The Clean Water Act provides that "the State water pollution control agency . . . shall from time to time (but at least once each three-year period . . .) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards" [33 U.S.C. § 1313(c)(1)]. The court stated that the Regional Board thus was required to conduct a review of its basin plan, but the statutes do not impose a duty to revise or modify that plan.

The court held that the Regional Board was not obligated to consider the factors contained in sections 13000 and 13241 when conducting the basin plan's 2004 triennial review. The court further held that Water Code § 13000 is not a basis for mandamus relief. Section 13000 provides: "The Legislature finds and declares that the people of the state have a primary interest in the conservation, control, and utilization of the water resources of the state, and that the quality of all the waters of the state shall be protected for use and enjoyment by the people of the state[;] [¶] . . . that activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible[;] [¶] . . . that the health, safety and welfare of the people of the state requires that there be a statewide program for the control of the quality of all the waters of the state; that the state must be prepared to exercise its full power and jurisdiction to protect the quality of waters in the state from degradation originating inside or outside the boundaries of the state; that the waters of the state are increasingly influenced by interbasin water development projects and other statewide considerations; that factors of precipitation, topography, population, recreation, agriculture, industry and economic development vary from region to region within the state; and that the statewide program for water quality control can be most effectively administered regionally, within a framework of statewide coordination and policy."

The court observed that a statute containing "a general statement of legislative intent . . . does not impose any affirmative duty that would be enforceable through a writ of mandate," citing *Shamsian v. Department of Conservation*, *above*, and *Common Cause v. Board of Supervisors* [(1989) 49 Cal.3d 432, 261 Cal. Rptr. 574 (the "precatory declaration of intent expressed in the statute must be read in context" and "cannot be viewed as independently creating substantive duties . . . in addition to those imposed by the regulations")]. The court stated that this was the case for section 13000. It therefore held that the trial court erred in declaring that defendants had a duty to consider the statements of legislative intent found in section 13000 in adopting the MS4 permit and incorporating the TMDL requirements into the permit.

The court stated that section 13241 imposes obligations that can be enforced by a writ of mandate. Section 13241 provides that "each Regional Board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a the Regional Board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: [¶] (a) Past, present, and probable future beneficial uses of water. [¶] (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto. [¶] (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area. [¶] (d) Economic considerations. [¶] (e) The need for developing housing within the region. [¶] (f) The need to develop and use recycled water."

The court stated, however, that section 13241 only requires consideration of the listed factors when "establishing water quality objectives. . . ." It noted that "water

quality objectives" means "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area" [Water Code § 13050(h)]. It further noted that the objectives are only one element of a water quality control plan, which the Porter-Cologne Act defines as "a designation or establishment for the waters within a specified area of all of the following: [¶] (1) Beneficial uses to be protected. [¶] (2) Water quality objectives. [¶] (3) A program of implementation needed for achieving water quality objectives" [Water Code § 13050(j)].

The court stated that the record contained findings that the Regional Board considered the foregoing factors when adopting the 1975 basin plans for the Santa Clarita and Los Angeles Rivers and their tributaries. The court stated that when the Regional Board amended the basin plans in 1994 by combining them into one plan, a staff report expressly noted "most of the water quality objectives are not being changed. . . ." That report also discussed the potential economic impacts from some of the objectives that were revised. In addition, the court stated that the Regional Board considered the section 13241 factors when it adopted the 2001 MS4 permit and the 2002 bacteria objectives.

The court observed that it generally is presumed that official duty has been regularly performed, citing Evid. Code § 664 and *City of Sacramento v. State Water Resources Control Bd.* [(1992) 2 Cal. App. 4th 960, 3 Cal. Rptr. 2d 643 ("the relevant inquiry here is not whether the record establishes compliance but whether the record contains evidence [the board] failed to comply with the requirements of its . . . regulatory program" and, "in the absence of contrary evidence, we presume regular performance of official duty")]. The court noted that section 13241 does not specify how a water board must go about considering the specified factors, nor does it require the board to make specific findings on the factors. Furthermore, the court stated that the parties appeared to concede that the 1994 amendment to the basin plan, while it combined the two prior basin plans into one and extended the revised plan to cover storm water and urban runoff, did not change the water quality objectives.

Plaintiffs argued that the Regional Board failed to consider the section 13241 factors in relation to storm water. First, the court noted that the 1994 basin plan, which dealt with storm water, did contain an express reference to section 13241 and the staff report discussed the potential for economic impacts from some of the changes made in the plan's water quality objectives. Second, the court stated that it is clear under both the Clean Water Act and the Porter-Cologne Act that the focus of a basin plan is the water bodies and the beneficial uses of those water bodies, not the potential sources of pollution for those water bodies. The Clean Water Act declares "revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses" [33 U.S.C. §§ 1313(c)(2)(A)]. The court also cited 40 C.F.R. § 131.3(i) ("Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses" and 131.2 (a "water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses"). Similarly, the court stated that the Porter-Cologne Act requires the Regional Boards to "formulate and adopt water quality control plans for all areas within the region" [Water Code § 13240]. Section 13050(j) defines a "water quality control plan' " as applying to the "beneficial uses to be protected" "for the waters within a specified area." The court stated that merely revising a basin plan to include storm water and urban runoff from municipal storm drains discharging into water bodies already covered by that plan did not trigger the need to comply with section 13241.

The court stated that plaintiffs' reliance on *City of Burbank v. State Water Resources Control Bd.* [(2005) 35 Cal.4th 613, 26 Cal. Rptr. 3d 304] lacked merit. The court stated that in *City of Burbank*, the Regional Board issued wastewater discharge permits to wastewater treatment facilities. The permits contained daily numeric limitations for several pollutants. The cities challenged the numeric requirements, alleging that the Regional Board failed to comply with Water Code § 13263(a), which required a Regional Board to "take into consideration . . . the provisions of Section 13241" when prescribing the requirements for a "proposed" or "existing discharge . . . with relation to the conditions existing in the disposal area or receiving waters. . . ."

The court stated that *City of Burbank* concerned the validity of California's equivalent of an NPDES permit, not a basin plan or a the Regional Board's periodic review of that plan. It stated that while *City of Burbank* recognized that section 13263 imposed a requirement that waste discharge permits comply with section 13241, defendants did comply with section 13241 in issuing the MS4 permits to plaintiffs and in establishing the TMDLs for those permits.

The court further noted that *City of Burbank* also held that a failure to consider the section 13241 factors will invalidate a permit only if the Regional Board imposed

water quality requirements exceeding those imposed by federal law. *City of Burbank* explained: "Because section 13263 cannot authorize what federal law forbids, it cannot authorize a Regional Board, when issuing a wastewater discharge permit, to use compliance costs to justify pollutant restrictions that do not comply with federal clean water standards. Such a construction of section 13263 would not only be inconsistent with federal law, it would also be inconsistent with the Legislature's declaration in section 13377 that all discharged wastewater must satisfy federal standards."

The court stated that as applied here, to succeed on their petition plaintiffs had to show that the Regional Board had imposed water quality requirements exceeding those established by the Clean Water Act. The court noted that federal requirements set a minimum water quality level and, as *City of Burbank* held, a state cannot use state law limitations to impose lower water quality levels. The court stated that the record reflected that the Regional Board's actions were compelled by federal law. It held that, absent a showing that defendants sought to impose water quality objectives exceeding what federal law required, plaintiffs could not prevail.

Consideration of "Potential" Beneficial Uses. The court noted that section 13241(a) declares that the factors to be considered by a regional board in establishing water quality objectives "shall include but not necessarily be limited to . . . past, present, and probable future beneficial uses of water." The court stated that the record reflected that the Regional Board's basin plan also took into consideration "potential" beneficial uses of water in setting water quality objectives. The trial court granted plaintiffs relief as to this action, finding that "basing standards on 'potential' uses is inconsistent with the clear and specific requirement . . . that boards consider 'probable future' uses."

The court stated that this portion of the judgment was also erroneous. The court stated that, contrary to the trial court's construction, the phrase "including, but not limited to" is a term of enlargement, and signals the Legislature's intent that a statutory provision apply to items not specifically listed in the provision, citing *Major v. Silna* [(2005) 134 Cal. App. 4th 1485, 36 Cal. Rptr. 3d 875]. The court stated that, given the expansive scope of the Legislature's findings contained in section 13000, plus the findings in the 2001 MS4 permit citing water quality objectives for discharges to the state's coastal waters, allowing a Regional Board to interpret its authority under section 13241 to include the development of water quality objectives based on potential, as opposed to probable, beneficial uses would be appropriate. Therefore, the court held that the trial court erred in limiting the Regional Board's exercise of its discretion in developing water quality objectives.

➧ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 31.22[2] (Formulation of Water Quality Control Plans—Designation of Beneficial Uses and Water Quality Objectives).

Regulatory Activity

Oil Spill Response—Certificate of Financial Responsibility. The Office of Spill Prevention and Response is proposing to amend 14 Cal. Code. Reg. §§ 791, 791.7, 792, 794, 795, and 796, pertaining to the Certificate of Financial Responsibility requirements for oil spill response. No hearing has been scheduled, but one may be requested in writing no later than 15 days before the end of the public comment period. *Written comments* by 5:00 p.m., February 14, 2011, to Department of Fish and Game, Office of Spill Prevention and Response, P.O. Box 944209, Sacramento, CA 94244-2090, Attention: Joy D. Lavin-Jones. Comments may also be submitted by fax to (916) 324-5662 or by e-mail to jlavinj@ospr.dfg.ca.gov. *Copies* of the proposed text and statement of reasons are available on the OSPR website at www.dfg.ca.gov/ospr/Law/regs_under_review.asp. *Inquiries*: Joy Lavin-Jones. (916) 327-0910, or Alexia Retallack, (916) 322-1683.

AIR QUALITY CONTROL

Regulatory Activity

Carbon Intensity Lookup Tables—Low Carbon Fuel Standard. The Executive officer of the California Air Resources Board will conduct a public hearing at 2:00 p.m., February 24, 2011, Cal EPA, Air Resources Board, Byron Sher Auditorium, Second Floor, 1001 I St., Sacramento, CA, to consider amendments to the Carbon Intensity (CI) Lookup Tables in the Low Carbon Fuel Standard (LCFS) regulation. Amendments are proposed to 17 Cal. Code. Reg. § 95486 and incorporated supporting pathway documents.

Section 95486 sets forth the methodology for determination of carbon intensity values of various fuel pathways. There are three types of proposed CI amendments: (1) ARB initiated pathways, (2) Method 2A submittals,

and (3) Method 2B submittals. Staff has developed carbon intensities for six additional fuel pathways: Used Cooking Oil Biodiesel (with and without cooking), Canola Biodiesel, Corn Oil Biodiesel, and Sorghum Ethanol (Dry and Wet DGS). In addition, staff has evaluated a number of Method 2A/2B customized CI pathway applications submitted by regulated parties or entities on behalf of regulated parties. The customized CI pathways under consideration include: corn ethanol, mixed-feedstock ethanol (e.g., corn-sorghum), sugarcane ethanol processed pursuant to the Caribbean Basin Initiative, and liquefied natural gas. The various corn and mixed-feedstock ethanol pathways differ by process energy input, energy efficiency, production process technology, and co-product mix. Staff will be presenting these new and modified fuel pathways for Executive Officer approval and incorporation into the Lookup Tables.

Written comments by 12:00 noon, February 23, 2011, to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically to www.arb.ca.gov/lispub/comm/bclist.php. *Copies* of the proposed text and statement of reasons: Public Information Office, Air Resources Board, 1001 I St., Sacramento, CA 95814, (916) 322-2990. The documents are also available on the ARB website at www.arb.ca.gov/regact/2011/lcfs11/lcfs11.htm. *Substantive inquiries*: John Courtis, Manager, Alternative Fuels Section, (916) 323-2661, or Was Ingram, Air Resources Engineer, (916) 327-2965. *Procedural inquiries*: Lori Andreoni, Manager, Board Administration & Regulatory Coordination Unit, (916) 322-4011.

LAND USE AND ENVIRONMENTAL PLANNING

Cases

Mobilehome Park Owners Failed to State Facial Takings Claim Based on Adoption of Rent Control Ordinance

Guggenheim v. City of Goleta
No. 06-56306, 9th Cir. (en banc)
2010 U.S. App. LEXIS 25981
December 22, 2010

In this decision on rehearing en banc, the Ninth Circuit held that a mobilehome rent control ordinance that was originally enacted by the county and subsequently adopted by a newly incorporated city in which plaintiffs' mobilehome park was located did not effect a taking of the park owners' property. The government action at issue was the continuation of the old ordinance, and there was no interference with plaintiffs' investment-backed expectations because the mobilehome park had been subject to rent control under the county ordinance when plaintiffs bought the park.

Facts and Procedure. In 1979, Santa Barbara County adopted a rent control ordinance for mobile homes. The rent control ordinance was amended in 1987.

Mobile homes have the peculiar characteristic of separating ownership of homes that are, as a practical matter, affixed to the land, from the land itself. Because the owner of the mobile home cannot readily move it to get a lower rent, the owner of the land has the owner of the mobile home over a barrel. The Santa Barbara County rent control ordinance for mobile homes had as its stated purpose relieving "exorbitant rents exploiting" a shortage of housing and the high cost of moving mobile homes.

Eighteen years after the original rent control ordinance went into effect, and ten years after the amendment, plaintiffs bought a mobile home park (Ranch Mobile Estates) burdened by the ordinance. At the time of purchase, the park was in "unincorporated territory" in Santa Barbara County. Five years later, in 2002, the City of Goleta incorporated territory including plaintiffs' land. California law requires a newly incorporated city comprising previously unincorporated territory to adopt, as its first official act, an ordinance keeping all the county ordinances in effect for

120 days or until the new municipality changes them, whichever happens first [Gov. Code § 57376(a)]. The county rent control ordinance for mobile home parks thus became the city rent control ordinance on the first day of the city's existence, on February 1, 2002, as the city's first official act. On April 22, 2002, within the 120-day sunset period, the City of Goleta adopted the county code including the mobilehome ordinance. The parties stipulated that there was a legal gap when the ordinance was not in effect, apparently referring to the hours between the city's coming into legal existence and the performance of the city's first official act on its first day. Those hours on the first day of Goleta's existence were the only time between 1979 and the present day, and the only time during plaintiffs' ownership, when no rent control ordinance burdened plaintiffs' mobile home park.

In 2002, plaintiffs sued the city claiming that the rent control ordinance was a taking of their property without compensation, and asserting numerous other claims. They limited their takings claim to a facial challenge rather than an "as applied" challenge. They claimed that it was the rent control ordinance itself, not its particularized application to their mobile home park or the regulatory process applied to their park, that denied them their constitutional rights. Plaintiffs' theory was that by locking in a rent below market rents, and allowing tenants to sell their mobile homes to buyers who would still enjoy the benefits of the controlled rent (albeit subject to upward adjustment under the ordinance), the ordinance shifted much of the value of ownership of the land from the landlord to the tenant. Plaintiffs submitted an expert's report with the summary judgment papers explaining that rents for sites in their mobile home park would average about $13,000 a year without rent control, but average less than $3,300 with rent control, and that the tenants could sell their mobile homes for around an average of $14,000 without rent control, but because of rent control, the average mobile home in the park sold for roughly $120,000. Because plaintiffs lost on summary judgment, the court of appeals assumed for purposes of decision that this was correct.

The federal court case was stayed pursuant to *Pullman* abstention while plaintiffs pursued claims in state court. They settled the state case with the city. Plaintiffs then won summary judgment in the federal court, and the city appealed. While the appeal was pending, the Supreme Court decided *Lingle v. Chevron U.S.A. Inc.* [(2005) 544 U.S. 528]. Plaintiffs and the city agreed that *Lingle* undermined the district court judgment. Accordingly, they stipulated to dismiss the appeal and reopened the litigation in district court. The city won summary judgment, and plaintiffs appealed. The district court observed that plaintiffs "got exactly what they bargained for when they purchased the Park—a mobile-home park subject to a detailed rent-control ordinance." The Ninth Circuit reversed, but decided to rehear the case en banc. The en banc court vacated the earlier decision and affirmed the district court. Circuit Judge Bea wrote a dissent, joined by Chief Judge Kozinski and Circuit Judge Ikuta.

Standing and Ripeness. The court noted that although the city did not dispute jurisdiction, the circuit court raised the issues of standing and ripeness sua sponte in its panel decision. The court stated that plaintiffs claimed an injury in fact to themselves (deprivation of much of the value of their land), which was fairly traceable to Goleta's rent control ordinance, and was redressable by a decision in their favor, so they did have standing to maintain their challenge to the 2002 ordinances. Plaintiffs owned the land in 2002 when the City of Goleta promulgated the 2002 ordinances.

The Court stated that ripeness was more complicated, because of *Williamson County Regional Planning Commission v. Hamilton Bank* [(1985) 473 U.S. 172]. The court noted that *Williamson* imposed two ripeness requirements on federal takings claims. First, a regulatory takings claim is not ripe until the appropriate administrative agency has made a final decision on how the regulation will be applied to the property at issue. The court observed, however, that this requirement has no application to a facial challenge, citing *Hacienda Valley Mobile Estates v. City of Morgan Hill* [(9th Cir. 2003) 353 F.3d 651 ("facial challenges are exempt from the first prong of the *Williamson* ripeness analysis because a facial challenge by its nature does not involve a decision applying the statute or regulation")]. Second, a property owner who sues for inverse condemnation, claiming that his or her property was taken without just compensation, generally must seek that compensation through the procedures provided by the state before bringing a federal suit.

The court noted that in *Yee v. City of Escondido* [(1992) 503 U.S. 519], a California mobile home rent control case, the Supreme Court held that although an "as applied" challenge would have been unripe because the park owner had not sought permission to increase rents from the administrative body established by the ordinance, the facial challenge by the park owners was ripe because it did not depend on the extent to which they were deprived of the economic use of their property or the extent to which they were compensated. Subsequently, in *Suitum v. Tahoe Regional Planning Agency* [(1997) 520 U.S. 725], the Supreme Court described the *Williamson* ripeness requirements as "prudential" rather than jurisdictional in the context of regulatory takings case. In *Adam Brothers Farming, Inc. v. County of Santa Barbara* [(9th Cir. 2010) 604 F.3d 1142], the circuit court held that it had

discretion to waive the *Williamson* exhaustion requirement where the case raised only prudential ripeness concerns, and did so, assuming without deciding that the takings claim was ripe. *Adams Brothers* applied *McClung v. City of Sumner* [(9th Cir. 2008) 548 F.3d 1219], which also interpreted *Suitum* as describing *Williamson* ripeness as prudential rather than jurisdictional, and concluded that "we need not determine the exact contours of when takings claim ripeness is merely prudential and not jurisdictional."

The court stated that this did not mean that *Williamson* is dead. It noted that in *Ventura Mobilehome Communities Owners Association v. City of San Buenaventura* [(9th Cir. 2004) 371 F.3d 1046], the only cognizable claim raised was an as applied challenge, and therefore the court held that it was properly dismissed as unripe. The court further noted that *Sinclair Oil Corp. v. County of Santa Barbara* [(9th Cir. 1996) 96 F.3d 401] held that while as applied challenges required *Williamson* exhaustion, facial challenges sometimes did and sometimes did not.

The court stated that it was especially difficult to determine the continuing viability of the ripeness precedents because many involved "substantially advances legitimate state interests" claims under *Agins v. City of Tiburon* [(1980) 447 U.S. 255], and *Agins* was overruled by *Lingle*, *above*. The court observed that *Agins* was the law during state proceedings in this case, and *Lingle* did not come down until the first appeal was pending in federal court. The court stated that it might be that a claim (even a facial claim), alleging a regulatory taking based on the theory that an ordinance takes property without just compensation is unripe until that property owner has sought compensation through such state proceedings as may be available, but that under *Suitum*, this ripeness requirement now appears to be prudential rather than jurisdictional.

The court assumed without deciding that the claim was ripe in this case, and exercised its discretion not to impose the prudential requirement of exhaustion in state court. The court stated that two factors persuaded it to follow this course. First, because it rejected plaintiffs' claim on the merits, it would be a waste of the parties' and the courts' resources to bounce the case through more rounds of litigation. Second, the court observed that plaintiffs did indeed litigate in state court, and they and the City of Goleta settled that litigation. The court stated that unfortunately, the law changed after their trip to state court, so they might well have proceeded differently there had they been there after *Lingle* came down, but that it was hard to see any value in forcing a second trip on the parties.

Penn Central** and **Palazzolo.The court noted that plaintiffs challenged only the 2002 City of Goleta ordinance, not the 1979 or 1987 County of Santa Barbara ordinances. The court stated that there was a big problem with challenging as a taking the government's failure to repeal a long existing law. It observed that the county ordinances were both promulgated long before plaintiffs bought their land, and the rent control regime created by the county ordinances limited the value of the land when plaintiffs bought it. Plaintiffs asserted no claim against the county, just the City of Goleta. They framed their challenge narrowly, solely as a facial challenge to the city ordinance promulgated in 2002. They argued that their facial challenge should be evaluated under *Penn Central Transportation Co. v. New York City* [(1977) 438 U.S. 104]. The court assumed, without deciding, that a facial challenge can be made under *Penn Central*.

The court stated that *Palazzolo v. Rhode Island* [(2001) 533 U.S. 606] was of no help to plaintiffs, because they did not have the problem addressed in *Palazzolo*. The court stated that the taking in *Palazzolo* was from the first owner and the "as applied" lawsuit was by the second. The transfer of the property was by operation of law during the period when the owner was ripening the claim by exhausting state remedies. The court stated that one reason why these distinctions mattered was that even though in *Palazzolo* title passed to the plaintiff after the land use restriction was enacted, he acquired his economic interest as a 100 percent shareholder in the corporation owning the land before the land use restriction was enacted, and title shifted to him because his corporation was dissolved, not because he bought the property for a low price reflecting the economic effect of the regulation.

The court stated that *Palazzolo* held that an owner who acquires title to property during the period required for an as applied regulatory taking to ripen (in that case during proceedings on applications to build on wetlands) is not necessarily barred from bringing the action when it ripens even though he did not own the property when the regulation first started to be applied to the property. The court stated that this difference mattered because an as applied challenge necessarily addresses the period during which the administrative or judicial proceedings for relief occur, so justice may require that title transfers during the ripening period not bar the action. The court observed that there is no such extended period applicable to a facial challenge, because the only time that matters is the time the ordinance was adopted.

The court stated that, unlike the owner in *Palazzolo*, plaintiffs owned the mobile home park at all relevant times. Plaintiffs owned the park during, before, and after adoption of the two City of Goleta ordinances they challenged, both upon incorporation and within the 120-day period. The court stated that *Palazzolo* did not revive a

challenge to the 1979 and 1987 county ordinances, citing *Daniel v. County of Santa Barbara* [(9th Cir. 2002) 288 F.3d 375]. Thus, whatever wrongs the 1979 and 1987 county ordinances might have done to whoever owned the mobile home park then, those wrongs were not before the court.

The court stated that plaintiffs carefully brought only a facial challenge in order to reserve the possibility of an as applied challenge if the City of Goleta's arbitrator should deny them a fair rent increase at some point. The court observed that if the rent control scheme effects an unconstitutional taking when applied, the challenge will be to that application, not to the ordinance on its face, and the time for the challenge will run from when the administrative action became final as opposed to when the ordinance was enacted. The court stated that it thus is not as though an unconstitutional law becomes immunized from all challenges once limitations bar facial challenges to its enactment.

The court quoted *Levald, Inc. v. City of Palm Desert* [(9th Cir. 1993) 998 F.2d 680]: "In the takings context, the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a single harm, measurable and compensable when the statute is passed." The court stated that it did not matter that a challenge might not have been worth making in 1979 or 1987 when property values were lower, but became worth making when the housing bubble inflated many prices. The court noted that "while the rising property values may be relevant to an as-applied challenge, they are not relevant to a claim that the very enactment of the statute effected a taking," citing *Levald*.

The court cautioned that this did not mean that passage of the county ordinances in 1979 and 1987 could be ignored. It noted that *Yee v. City of Escondido* held that a takings challenge to mobile home rent control ordinance materially similar to Goleta's should be analyzed as a regulatory taking under *Penn Central*, not a physical occupation amounting to a per se taking as in *Loretto v. Teleprompter Manhattan CATV Corp.* [(1982) 458 U.S. 419]. It stated that *Lingle* explained *Penn Central* as identifying several factors, not a set formula, to determine whether a regulatory action is "functionally equivalent to the classic taking." *Lingle* stated that "primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." The court noted that *Lingle* also pointed out that the character of the government action may be relevant, but it stated that this cut against plaintiffs because the government action here was a continuation of an old ordinance. Thus, the court stated that this case turned on the "primary" factor of *Penn Central*.

No Distinct Investment-backed Expectations. The court concluded that the "primary factor"—the extent to which the regulation has interfered with distinct investment-backed expectations—was fatal to plaintiffs' claim. It assumed for purposes of discussion that the rent control ordinance, unchanged since 1987, did indeed transfer about $10,000 a year in rent for the average mobile home owner from the landlord to the tenant, and that this has had the effect of raising the price of the average mobile home from $14,000 to $120,000. The court stated that this had happened before plaintiffs bought the mobile home park; since the ordinance was a matter of public record, the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer.

The court stated that plaintiffs could have no "distinct investment-backed expectations" that they would obtain illegal amounts of rent. It stated that to "expect" can mean to anticipate or look forward to, but it can also mean "to consider probable or certain," and "distinct" means capable of being easily perceived, or characterized by individualizing qualities. The court stated that "distinct investment-backed expectations" implies reasonable probability, like expecting rent to be paid, not starry eyed hope of winning the jackpot if the law changes.

The court stated that a landlord buys land burdened by leaseholds in order to acquire a stream of income from rents and the possibility of increased rents or resale value in the future. It stated that the income stream had already suffered a reduced flow when plaintiffs bought the park, so what they paid reflected the flow that the law allowed. The court stated that plaintiffs might conceivably have paid a slight speculative premium over the value that the legal stream of rent income would yield, on the theory that rent control might someday end, either because of a change of mind by the municipality or court action. It stated, however, that such a premium could be no more than a speculative possibility, not an "expectation." It stated that speculative possibilities of windfalls do not amount to "distinct investment-backed expectations," unless they are shown to be probable enough materially to affect the price. The court stated that the idea, after all, of the constitutional protection we enjoy in the security of our property against confiscation is to protect the property we have, not the property we dream of getting. It state that plaintiffs bought a trailer park burdened by rent control, and had no concrete reason to believe they would get something much more valuable, because of hoped-for legal changes, than what they had.

In a footnote, the court noted that the dissent suggested that any speculative possibility, including the speculative possibility that a long existing law might change, should be enough to give rise to a takings claim if that speculative possibility is cut off. Thus, the court stated that under the dissent's approach, if a statute prohibiting some land use was converted into a state constitutional amendment, the identical language in the constitutional amendment would amount to a taking, because it would reduce the speculative possibility that the law might be repealed. The court stated that it is one thing to speculate that the value of your land might change based on market demand; it is another to gamble that a stable law may be repealed or nullified. The court concluded that while there is always some possibility that the law may change—and the dissent suggested that this possibility might be especially great in California—that possibility ought generally to be deemed too slight to give rise to a takings claim when the law is reenacted rather than repealed.

The court noted that plaintiffs and the city stipulated that there was a period of time when their mobile home park was free of rent control. That was the period of hours after "organization" of the City of Goleta and, "prior to performing any other official act." The court stated that this period could not have given rise to a reasonable investment-backed expectation, because plaintiffs had already made their investment years before, and even if they had bought the mobile home park during those few hours, they would have known that Goleta's first official act would, under controlling law, have to be adoption of the county's rent control ordinance.

Plaintiffs also argued that the 120-day period when the rent control ordinance would be terminated unless readopted gave them a reasonable expectation that it would not be readopted. The court stated that this argument failed to account for the fact that their investment had already been made years before. The court stated that even if the investment had been made during the 120 days, it was not as though the ordinance was in limbo during that period. The rent control ordinance was the law. The court stated that although the city might choose to let the ordinance lapse instead of readopting it, that possibility was as speculative as the possibility that the city might end rent control after the 120-day period. The court stated that such speculation is less than an expectation.

Character of Government Action. The court noted that *Lingle* held that *Penn Central*, while not establishing a set formula, identifies significant factors, "the economic effect on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action—for instance whether it amounts to a physical invasion or instead merely affects property interests through some public program adjusting the benefits and burdens of economic life to promote the common good—may be relevant in discerning whether a taking has occurred." The court stated that he character of the government action did not help plaintiffs—the city did not adjust the benefits and burdens of economic life, it left them as they had been for many years.

The court stated that whatever unfairness to the mobile home park owner might have been imposed by rent control, it was imposed long ago, on someone earlier in plaintiffs' chain of title. It stated that plaintiffs doubtless paid a lot less for the stream of income mostly blocked by the rent control law than they would have for an unblocked stream. The court concluded that the 2002 City of Goleta adoption by reference of the Santa Barbara County ordinance did not transfer wealth from plaintiffs to their tenants—that transfer occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants.

The court observed that the people who really do have investment-backed expectations that might be upset by changes in the rent control system are tenants who bought their mobile homes after rent control went into effect. The court stated that ending rent control would be a windfall to plaintiffs and a disaster for tenants who bought their mobile homes after rent control was imposed in the 70s and 80s. The court stated that tenants come and go, and even though rent control transfers wealth to "the tenants," after a while, it is likely to affect different tenants from those who benefitted from the transfer. The court stated that the present tenants lost nothing on account of the city's reinstitution of the county ordinance, but they would lose, on average, over $100,000 each if the rent control ordinance were repealed. The court stated that tenants who purchased during the rent control regime had invested an average of over $100,000 each in reliance on the stability of government policy. The court stated that leaving the ordinance in place would impair no investment-backed expectations of plaintiffs, but nullifying it would destroy the value those tenants thought they were buying.

Equal Protection and Due Process Claims Plaintiffs argued that the ordinance denied them substantive due process because it did not assure them a fair return on their investment, and that it denied them equal protection of the law because it treated mobile home park owners differently from other landlords.

The court noted that due process claims can succeed when a rent control ordinance fails to substantially further a legitimate government interest, citing *Richardson v. City and County of Honolulu* [(9th Cir. 1997) 124 F.3d 1150]. It further noted that the dissent argued that this

ordinance did not achieve its purpose because it failed to control the price of sublets. The court stated that it was true that the rent control ordinance at issue here did not control the rental price of a mobile home for occupants such as subletters—it controlled the rental price of the land on which the mobile home is situated. The court stated that this was in keeping with the purpose of the ordinance, which was not just to lower rents, but to "alleviate the hardship" to mobile home owners caused by "the high cost of moving mobilehomes, the potential for damage resulting therefrom, requirements relating to the installation of mobilehomes, including permits, landscaping and site preparation, the lack of alternative homesites for mobilehome residents and the substantial investment of mobilehome owners in such homes." The court stated that such a purpose does not protect mobile home renters from all market increases in the value of occupancy—it protects owners of mobile homes from the leverage owners of the pads have, to collect a premium reflecting the cost of moving the mobile home on top of the market value of use of the land. The court concluded that the was a legitimate government purpose, related to but distinct from lowering housing prices for all renters.

The court stated that whether the City of Goleta's economic theory for rent control was sound or not, and whether rent control would serve the purposes stated in the ordinance of protecting tenants from housing shortages and abusively high rents or would undermine those purposes, was not for it to decide. The court stated that it was bound by precedent establishing that such laws do have a rational basis, citing *Pennell v. City of San Jose* [(1988) 485 U.S. 1 ("we have long recognized that a legitimate and rational goal of price or rate regulation is the protection of consumer welfare")]; *Equity Lifestyle Props., Inc. v. County of San Luis Obispo* [(9th Cir. 2008) 548 F.3d 1184 ("The Supreme Court and this Circuit have upheld rent control laws as rationally related to a legitimate public purpose")]; and *Carson Harbor Village Ltd. v. City of Carson* [(9th Cir. 1994) 37 F.3d 468, overruled on other grounds by *WMX Techs. Inc. v. Miller* [(9th Cir. 1997) 104 F.3d 1133 ("A generally applicable rent-control ordinance will survive a substantive due process challenge if it is 'designed to accomplish an objective within the government's police power, and if a rational relationship existed between the provisions and the purpose of the ordinances' ")]. The court observed that students in Economics 101 have for many decades learned that rent control causes the higher rents and scarcity it is meant to alleviate, but stated that the Due Process Clause does not empower courts to impose sound economic principles on political bodies.

The court stated that plaintiffs' equal protection theory was also foreclosed by precedent, citing *Equity Lifestyle Props., Inc. v. County of San Luis Obispo* [(9th Cir. 2008) 548 F.3d 1184 ("This equal protection challenge must be considered under rational basis review because mobile-home park owners are not a suspect class")]. The court stated that the theory would have no force even if it were not foreclosed by precedent, because only a rational basis was needed for the ordinance, and mobile parks differ from most other property in the separation of ownership of the land from the improvements affixed to the land. The court stated that it was possible that application of the ordinance by the arbitrator would violate substantive or procedural due process requirements, but that remained to be seen, if at all, in an as applied challenge.

Dissent. The dissent was of the view that the majority misapplied the Supreme Court's analysis of regulatory takings claims because it ignored two essential elements of that analysis, and failed to follow the Court's instructions on the one element it used to disqualify the facial takings claim. The dissent stated that the majority impermissibly picked out only one of the three factors to be considered in determining whether a regulation effects a taking under the *Penn Central test* whether the claimant had "distinct investment-backed expectations"—and ignored the other two. The dissent stated that this converted a three-factor balancing test into a "one-strike-you're-out" checklist. The dissent also stated that the majority ignored the holding in *Palazzolo* that an investor can validly expect that a land control measure, in place when he or she invests, is not necessarily eternal and therefore does not disqualify his claim of regulatory taking.

The dissent also was of the view that the majority incorrectly decided the substantive due process and equal protection claims by citing rent control cases. The dissent opined that the Goleta ordinance was not a rent control law because it was not designed to, nor did it, control rents. The dissent concluded that the very structure of the ordinance was designed and intended not to provide housing rent control, but to transfer wealth from mobile home park owners to one group of lucky tenants. The dissent would have found that the measure was a wealth transfer, pure and simple, with none of the features of rent control that have been held to constitute legitimate governmental interests. As such, the dissent would have held that its enforcement violated due process and equal protection.

Commentary by Andrew Schwartz Shute, Mihaly & Weinberger LLP

The City of Goleta retained our firm, Shute, Mihaly & Weinberger LLP, to represent the city in the appeal in *Guggenheim v. City of Goleta* after the Ninth Circuit

granted the city's petition for rehearing en banc. The city prevailed on rehearing. The Ninth Circuit's en banc decision in *Guggenheim* is significant on two levels. In an immediate sense, it preserves the homes and life savings of thousands of residents of California mobile home parks. Mobile home owners tend to be low- or moderate-income individuals and families, elderly, or disabled who have struggled to become homeowners. Rent control protects their investment. The court's decision affirms the important role rent control regulations play in providing stability for this vulnerable population, particularly in California's expensive real estate market.

Mobile home owners have a unique relationship with park owners; while the mobile home owner can invest in improvements to her property and surrounding landscaping, she does not own the land itself. Without limits on rent increases, many mobile home owners would be forced out of their homes, in part because mobile homes are, in fact, not mobile. Those forced to sell due to unaffordable rent would be unable to recoup their investment in the property upon the sale because most bought and invested in improvements to their homes when the rent for their pads was capped. The higher the cost of the rent for the pad on which a mobile home sits, the lower the value of the mobile home itself. Once the rent cap is lifted, a buyer will pay only a fraction of the value of the home if it were still under rent control. While mobile home owners would lose their investment, the park owners who bought with the price regulation in place would gain a windfall with the elimination of that regulation.

The decision has implications far beyond mobile home rent control, however: It is a major victory for government's ability to make land use decisions in furtherance of the public good. A victory for the plaintiffs could have opened the door to significant challenges to other types of land use and environmental regulations, upending long-standing Supreme Court case law that protects such regulatory activity.

The regulatory takings doctrine originated with the United States Supreme Court's decision in *Pennsylvania Coal Co. v. Mahon* [(1922) 260 U.S. 393, 415], where the Court first declared that government regulation that deprives the property owner of virtually all value of the property—tantamount to a direct condemnation—could be compensable. The Supreme Court did not revisit the regulatory takings doctrine until *Penn Central Transp. Co. v. New York City* [(1978) 438 U.S. 104], where the Court established a three-factor test for a taking: (1) the economic impact of the regulation; (2) the extent to which the regulation interferes with investment backed expectations; and (3) the character of the governmental action [438 U.S. at 124].

In the 25-year period after *Penn Central*, the Court found taking liability in several cases involving physical occupations of property or regulatory deprivation of all value, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* [(1983) 458 U.S. 419, 426–27 (physical taking)]; *Nollan v. California Coastal Comm'n* [(1987) 483 U.S. 825, 841–42 (physical taking)]; *Lucas v. South Carolina Coastal Council* [(1992) 505 U.S. 1003, 1019 (destruction of all value)]. The Supreme Court also found that takings liability could be imposed under the three *Penn Central* factors where the regulation effected less than a total deprivation of value or a physical invasion [Lucas, 505 U.S. at 1019 n.8].

Because regulatory takings cases are usually resolved in favor of the public agency based on the procedural defenses of ripeness, standing, or the statute of limitations, courts have had few opportunities to apply the three-factor *Penn Central* test. Indeed, *Guggenheim* is the first case in which the Ninth Circuit has applied the *Penn Central* test. [The Ninth Circuit was able to reach the merits because, unfortunately, the city waived its procedural defenses before the city retained our firm.] While the three-factor test of *Penn Central* has been applied in a handful of cases in the lower federal and state courts, the United States Supreme Court has had only two occasions to apply *Penn Central* since it decided that case in 1978. In *Ruckelshaus v. Monsanto Co.* [(1984) 467 U.S. 986], the EPA required the submission of trade secrets concerning chemicals marketed by chemical companies as a condition of permission to market their products. During a period where the law did not prevent the EPA from publicly disclosing Monsanto's trade secrets, the Supreme Court held that Monsanto had no reasonable investment-backed expectation that the data would be kept secret [467 U.S. at 1006]. After the law was amended to require the EPA to maintain confidentiality of the trade secrets, the Court ruled that Monsanto could state a valid takings claim [467 U.S. at 1008, 1011, 1013].

In *Palazzolo v. Rhode Island* [(2001) 533 U.S. 606], the Rhode Island Supreme Court had adopted a blanket rule that one who acquires title after the challenged regulation had been imposed was barred from asserting a taking under the investment-backed expectation factor of *Penn Central* [746 A.2d 707, 717]. The United States Supreme Court reversed, finding that the claimant's acquisition of property after the regulation had been adopted did not automatically bar a regulatory takings claim [533 U.S. at 630]. In neither *Monsanto* nor *Palazzolo*, however, did the Supreme Court provide any clear standards for the application of the investment-backed expectation factor. Indeed, the paucity of Supreme Court precedent applying the *Penn Central* factors has resulted in non-uniformity of decisions in lower courts. Compare, e.g., *Guggenheim v.*

City of Goleta [No. 06-56306, 2010 U.S. App. LEXIS 25981, *27-*28 (9th Cir. Dec. 22, 2010) (rejecting facial *Penn Central* challenge to rent control)] and *District Intown Properties Limited Partnership v. District of Columbia* [(D.C. Cir. 1999) 198 F.3d 874, 884 (denying *Penn Central* claim against historic preservation law) with *Loveladies Harbor, Inc. v. United States* [(Fed. Cir. 1994) 28 F.3d 1171, 1176 (finding restriction on filling wetlands under Clean Water Act a *Penn Central* taking)] and *Action Apartment Ass'n v. Santa Monica Rent Control Bd.* [(2001) 94 Cal. App. 4th 587, 605–07, 114 Cal. Rptr. 2d 412 (applying *Penn Central* factors to hold ordinance requiring landlords to pay interest on tenant security deposits effected a taking)].

A notable exception to the Supreme Court's murky pronouncements with regard to the *Penn Central* test is Justice O'Connor's concurring opinion in *Palazzolo*. Joining the majority, Justice O'Connor forcefully declared that while the claimant's acquisition of title after the government adopted the challenged regulation was not absolutely dispositive, it could be sufficient to negate a taking under the investment-backed expectations factor of *Penn Central* [*see Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring)]. Notions of fairness, Justice O'Connor wrote, require that a property owner cannot complain of regulatory limits on use of the property that the owner knew about or should have known about at the time of purchase [533 U.S. at 636]. The owner's purchase price presumably took into account those regulatory limitations [533 U.S. at 636].

The en banc panel in *Guggenheim* rejected the property owner's contention that *Palazzolo* demands that courts, in analyzing reasonable investment backed expectations, disregard whether the challenged regulation was in place when the claimant acquired the property [2010 U.S. App. LEXIS 25981, *18-*19]. *Guggenheim* is now the leading case applying Justice O'Connor's reasoning to dismiss a regulatory takings claim. This precedent could result in a judgment for the government in a broad class of cases where the takings claimant acquired the property after the regulation in question had been enacted.

Also of importance in the *Guggenheim* en banc opinion is the majority's rejection of the mobile home park owner's due process claim [2010 U.S. App. LEXIS 25981, *29-*31]. In *Agins v. City of Tiburon* [(1980) 447 U.S. 255, 260], the Supreme Court held that a regulation that does not substantially advance a legitimate state interest could be deemed a taking. In *Lingle v. Chevron U.S.A., Inc.* [(2005) 544 U.S. 528], the Court overruled *Agins*, finding that the takings clause was concerned only with regulation that is "functionally equivalent" to a direct condemnation [544 U.S. at 543]. The *Lingle* Court held that a searching assessment of the wisdom or efficacy of social and economic regulation is not a proper function of the courts [544 U.S. at 544]. To the contrary, the formulation of such policies is the province of legislatures and executives [544 U.S. at 544]. Judicial review of police power regulation, the Court held, should be conducted under the deferential rational basis test of due process, rather than as a takings [[544 U.S. at 542].

After *Lingle*, several commentators and litigants, including the mobile home park owner in *Guggenheim*, contended that *Lingle* should be interpreted to allow application of a heightened scrutiny test to regulation under due process. The *Guggenheim* court disagreed, holding that the due process rational basis test requires deference to legislative judgments [2010 U.S. App. LEXIS 25981, *31-*32]. The court correctly defined its role narrowly: "We are a court, not a tenure committee, and are bound by precedent establishing that [rent control] laws do have a rational basis" [2010 U.S. App. LEXIS 25981, *31]. The court's due process holding is a compelling affirmation of separation of powers and the legislative prerogative to impose government economic and social regulation in furtherance of community interests.

Commentary by David Sandino

The case in the newest addition to significant body of law concerning rent control and takings challenges. [*See, e.g.*, *Birkenfeld v. City of Berkeley* [(1976) 17 Cal. 3d 129, 130 Cal. Rptr. 465, (cities and counties may enact rent control ordinance as long as opportunity for reasonable rent increases exist)]; *Pennell v. City of San Jose* [(1988) 485 U.S. 1 (San Jose rent control ordinance on its face does not constitute a taking)]. That there is no lack of case authority on the subject should not be a complete surprise. One California tenant organization lists over forty California cities, including Goleta, with some form of rent control at last count.

This case is an important addition to this growing body of law. In an en banc decision, the majority applies the *Penn Central* regulatory takings approach, not the *Loretto v. Teleprompter Manhattan CATV Corp.* physical taking analysis, and gets no objection from the dissent that it is the proper analysis to use. Although the proper test to use—regulatory taking or physical taking—for some takings challenges may be unsettled, its application by the majority in this context was not questioned in the dissent.

However, there was significant disagreement on the application of the *Penn Central* test itself. In *Penn Central*, the Supreme Court set forth three factors to be considered in determining whether there has been a

physical taking: (1) the economic impact of the regulation on claimant: (2) the nature of the government's action; and (3) the extent to which the regulation interferes with the claimant's investment-back expectations. Based on *Penn Central* and *Lingle v. Chevron U.S.A. Inc.* [(2005) 544 U.S. 528], the Guggenheim court majority determined that among the factors, investment-backed expectations are to be consider primary. To the strong objection of the dissent, the majority did not give the other two factors extensive treatment in its analysis.

In another significant construct, the majority also determined that "investment-backed expectation" means not only to look forward, but to factor in "reasonable probability." This requires that the level of the return on investment must be considered in the context of the likelihood of change to the regulatory environment. In this case, the court concluded that there was not a reasonable probability to expect that Goleta would alter the rent control ordinance in a manner to the Guggenheims' liking in the foreseeable future.

This case will have significant influence on how future regulatory takings cases relating to rent control and other types of government regulation are to be tried and argued. The evidentiary emphasis will now be on the investment-backed expectations and not on the nature of government's action or on economic impact to the regulated party. The new definition of investment-backed expectations may also make it easier for rent control communities to prevail in these types of cases, especially if they have a long history of supporting rent control.

➧ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 65.23[3] (Regulatory Takings—Rent Control).

NATIONAL ENVIRONMENTAL POLICY ACT

Regulatory Activity

CEQ Guidance on Mitigation of Environmental Impacts. On February 18, 2010, the White House Council on Environmental Quality (CEQ) proposed four steps to modernize and reinvigorate the National Environmental Policy Act. CEQ issued draft guidance for public comment on when and how federal agencies must consider greenhouse gas emissions and climate change in their proposed actions; clarifying appropriateness of "Findings of No Significant Impact" and specifying when there is a need to monitor environmental mitigation commitments; clarifying use of categorical exclusions; and enhanced public tools for reporting on NEPA activities.

CEQ has now released final guidance on the "Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact" and on "Establishing, Applying and Revising Categorical Exclusions under the NEPA." The guidance clarifies that the environmental impacts of a proposed action may be mitigated to the point when the agency may make a FONSI determination. When the FONSI depends on successful mitigation, however, such mitigation requirements should be made public and be accompanied by monitoring and reporting. The guidance also emphasizes that when agencies base their environmental analysis on a commitment to mitigate the environmental impacts of a proposed action, they should adhere to those commitments, monitor how they are implemented, and monitor the effectiveness of the mitigation.

Specifically, the guidance affirms that agencies should:

- Commit to mitigation in decision documents when they have based environmental analysis upon such mitigation (by including appropriate conditions on grants, permits, or other agency approvals, and making funding or approvals for implementing the proposed action contingent on implementation of the mitigation commitments);
- Monitor the implementation and effectiveness of mitigation commitments;
- Make information on mitigation monitoring available to the public, preferably through agency web sites; and
- Remedy ineffective mitigation when the Federal action is not yet complete.

The CEQ announcement on release of the final guidance, with links to the guidance documents, is available at www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.

FORESTRY DEVELOPMENT

USFS Supplemental EIS Adequately Addressed Project Effects on Old Growth Trees

Lands Council v. McNair
No. 09-36026, 9th Cir.
2010 U.S. App. LEXIS 26274
December 28, 2010

The Ninth Circuit rejected challenges raised under the National Forest Management Act and NEPA to the Forest Service's decision to thin 277 acres of old-growth forest in the Mission Brush Project area, located in the Idaho Panhandle National Forest. The Forest Service could rely on its updated database, which had been found to be inadequate in a previous decision. The Forest Service properly used the "proxy-on-proxy" methodology for analyzing wildlife viability.

Facts and Procedure. In May 2004, the U.S. Forest Service issued the Mission Brush Final Environmental Impact Statement (FEIS) and Record of Decision (ROD). Lands Council administratively appealed the ROD. The Ninth Circuit held that the Timber Stand Management Record System (TSMRS) database on which the Forest Service relied was inaccurate and unreliable [*Lands Council v. Powell* [(9th Cir. 2005) 395 F.3d 1019]. In response to the *Powell* decision, the Forest Service updated the TSMRS database and prepared a supplemental EIS.

The Forest Service issued the SFEIS and ROD on April 20, 2006. In response to *Powell*, the SFEIS contained additional information on cumulative effects and the methodologies for analyzing forest conditions, including wildlife analysis and stands of old-growth trees. The SFEIS also evaluated three alternative actions and one no-action alternative. The Forest Service chose Alternative 2, which included harvesting smaller trees within the 277 acres of old growth in the project.

Lands Council's administrative appeal of the ROD was denied. In October 2006, plaintiffs Lands Council and Wild West Institute filed suit against the Forest Service alleging violations of the Idaho Panhandle National Forest (IPNF) Plan, the National Forest Management Act, and NEPA. They also sought a temporary restraining order and a preliminary injunction to halt the project. A county, cities, and logging companies (intervenors) intervened on behalf of the Forest Service.

The district court denied Lands Council's motion for a temporary restraining order as moot, and also denied its motion for a preliminary injunction. Lands Council appealed, and the Ninth Circuit reversed the district court's decision in *Lands Council v. McNair* [(9th Cir. 2007) 494 F.3d 771]. However, the Ninth Circuit subsequently reheard the case en banc [*Lands Council v. McNair* [(9th Cir. 2008) (en banc) 537 F.3d 981] (*Lands Council*)] and unanimously affirmed the district court's denial of injunctive relief. The parties then filed cross-motions for summary judgment in the district court. The district court granted the Forest Service's motion for summary judgment, and denied plaintiffs' motion for summary judgment. Lands Council appealed, and the court of appeals affirmed the district court decisions.

Standard of Review. The court noted that review under the applicable arbitrary and capricious standard "is narrow and we do not substitute our judgment for that of the agency." A decision is arbitrary and capricious "only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise" [*Lands Council*, *above*]. Agency action is valid if the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made" [*Arrington v. Daniels* [(9th Cir. 2008) 516 F.3d 1106].

The court stated that it generally must be at its "most deferential" when reviewing scientific judgments and technical analyses within the agency's expertise, citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.* [(1983) 462 U.S. 87]. The court stated that may not "act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain every possible scientific uncertainty," citing *Lands Council*. It observed that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive," citing *Lands Council*.

Exhaustion of Administrative Remedies. Section 10(b) of the IPNF Plan provide that "approximately 10 percent of the Forest will be maintained in old growth as needed to provide for viable populations of old-growth dependent and management indicator species." The IPNF Plan also required the Forest Service to "manage the habitat of species listed in the Regional Sensitive Species List to prevent further declines in populations which could lead to federal listing under the Endangered Species Act." The Mission Brush Project

was required to comply with the standards and goals of the IPNF Plan [16 U.S.C. § 1604(g)(1)].

Lands Council made three claims on appeal in its challenge to the Mission Brush Project. It asserted that: (1) the "proxy-on-proxy" methodology utilized by the Forest Service had failed and that, as a result, the IPNF Plan's 10(b) provision requiring 10 percent old-growth forest was insufficient; (2) the Forest Service could not demonstrate that it was in compliance with the IPNF Plan's 10 percent-old-growth standard because the databases consulted by the Forest Service were flawed; and (3) the Forest Service applied flawed habit suitability models. The court rejected the contentions.

The court rejected the Forest Service's contention that Lands Council failed to exhaust its challenge to the 10 percent-old-growth standard. The court noted that a party forfeits arguments that are not raised during the administrative process. It further noted, however, that a claimant need not raise an issue using precise legal formulations, as long as enough clarity is provided that the decision maker understands the issue raised. Accordingly, the court stated that alerting the agency in general terms will be enough if the agency has been given "a chance to bring its expertise to bear to resolve [the] claim," citing *Native Ecosystems Council v. Dombeck* [(9th Cir. 2002) 304 F.3d 886].

The court stated that Lands Council raised a study (Lesica study) in its administrative challenge, arguing that the Forest Service did not scientifically justify why 10 percent old-growth habitat was sufficient to maintain viability for old-growth-dependent species. In addition, before the district court, Lands Council argued that the proxy-on-proxy methodology was unreliable because it failed to provide enough habitat for 40 percent of a species-maximum population potential. The court stated that Lands Council combined those two arguments in its appeal. The court stated that while the arguments were now more fully developed than in prior proceedings, Lands Council clearly put the Forest Service on notice that it challenged the 10 percent-old-growth standard, claiming that it was insufficient to ensure enough habitat for old-growth-dependent species. The court therefore found that Lands Council exhausted its general argument that the 10 percent-old-growth standard was insufficient.

Forest Service Reasonably Relied on 10 Percent-Old-Growth Standard. The court noted that the IPNF Plan required that "approximately 10 percent of the Forest will be maintained in old growth as needed to provide for viable populations of old-growth dependent and management indicator species." Lands Council argued that because the Forest Service utilized the proxy-on-proxy methodology, the minimum old-growth habitat should be 14 percent of the forest. Lands Council arrived at this figure by asserting that, historically, the old-growth acreage average was at 35 percent. It then multiplied that figure by the 40 percent-maximum-population-potential figure for indicator species identified in the IPNF Plan. Lands Council also relied on the "Lesica" paper to argue that the 10 percent-old-growth standard was flawed.

Citing *Lands Council*, the court stated that it does not "act as a panel of scientists that instructs the Forest Service how to validate its hypotheses regarding wildlife viability, chooses among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan, and orders the agency to explain every possible scientific uncertainty. . . . This is not a proper role for a federal appellate court." Rather, the court stated that it defers to the agency's technical expertise where the record demonstrates that the agency reasonably relied on data in concluding the project meets the standards imposed by the NFMA.

The court concluded that the Forest Service reasonably relied on the 10 percent-old-growth standard as set forth in the IPNF Plan. First, it noted that the IPNF Plan's goal of maintaining a 40 percent population potential was an objective, not a requirement, unlike the 10 percent-minimum-old-growth standard, citing *Norton v. S. Utah Wilderness Alliance* [(2004) 542 U.S. 55]. The court further noted that many species use a variety of habitats and do not rely exclusively on old-growth forest. For example, it stated that the pileated woodpecker thrives in different forest types and the northern goshawk lives in a mix of landscape stages. Thus, the court stated that simply applying a flat standard of 40 percent population viability within old-growth forest does not account for the reality that wildlife use a variety of habitats. The court also noted that while the Forest Service was not required to meet the 14 percent level old-growth standard advocated by Lands Council, the area where the project was located actually met a 14 percent threshold.

Second, the court stated that it had already rejected the Lesica study in a similar challenge based on the Kootenai National Forest Plan, citing *Ecology Ctr. v. Castaneda* [(9th Cir. 2009) 574 F.3d 652]. In that case, the court determined that "Lesica's conclusion does not bear directly on the 'viable population' standard. The fact that levels of old-growth forest were significantly higher prior to European settlement in no way disproves the conclusion that ten percent is enough to support 'viable populations.' "The court stated that because the Lesica study did not directly challenge the Forest Service's conclusion that 10 percent was sufficient to sustain viable populations of old-growth species, the agency was not required to respond to it.

Compliance With 10 Percent-Old-Growth Standard. Lands Council contended that the Forest Service could not demonstrate that it was in compliance with the IPNF Plan's 10 percent requirement because the Forestry Inventory Analysis (FIA) and TSMRS databases were unreliable. The court rejected the argument.

The court noted that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive," citing *Lands Council*. The court stated that it was within the Forest Service's discretion to rely on its own data and to discount the alternative evidence proffered by Lands Council. The court stated that the Forest Service reasonably relied on the FIA database and, after updating, the TSMRS database to conclude that more than 10 percent of the IPNF is old-growth. It further stated that because the project did not contemplate the removal of old-growth trees, it did not affect the amount of old-growth forest in the IPNF.

Forest Inventory and Analysis Database. The court stated that the FIA database's design and methodology were scientific, publicly disclosed, and repeatable with stringent quality control standards and procedures, citing *Lands Council*. Based on the FIA database, the Forest Service estimated that in 2004 the percentage of old-growth forest in the IPNF was 12.85 percent with a 90 percent degree of certainty. The court observed that this exceeded the 10 percent-minimum-old-growth forest requirement under the IPNF Plan. The court stated that, even though Lands Council disagreed with this conclusion, the Forest Service was entitled to reasonably rely on its own scientific data and analysis.

Lands Council contended that the FIA database overestimated old-growth habitat due to the fact that actual stands were not examined. Lands Council asserted that the FIA database was based on surveys of sample plots that are one-sixth of an acre in size and, therefore, did not accurately represent the fragmented IPNF or meet the IPNF Plan's minimum 25-acre old-growth size requirement. Lands Council further contended that the FIA's 90 percent confidence level is undermined because the 2006 Monitoring Report had a 10 percent reduction in two years in old-growth estimates, and that the Forest Service could not meet the 10 percent-minimum-old-growth standard because the 2006 Monitoring Report had a confidence interval range of 9.5 percent to 14 percent. Lands Council contended that these alleged flaws meant that the FIA database could not validate the TSMRS database's old-growth estimates.

The court concluded that the Forest Service reasonably relied on the FIA database as a scientifically valid measure of old-growth forest. First, it stated that the IPNF Plan did not require a 25-acre stand in order to count towards the 10 percent minimum. Section 10(f) of the IPNF Plan provided that "one or more old-growth stand per old-growth unit should be 300 acres or larger. . . . The remaining old-growth management stands should be at least 25 acres in size. Preferred size is 80 acres." The court stated that this Plan objective was to be used as a guide for planning purposes, but did not prohibit counting stands less than 25-acres as old growth. Additionally, the court stated that even if only 25-acre or larger stands were counted, there was still enough old growth to meet the requirement for old growth management units.

The court further stated that the Forest Service was not mandated to follow a particular methodology in determining whether or not the project was in compliance with the 10 percent required old-growth forest, citing *Lands Council*. The court stated that it is within the Forest Service's discretion to choose its methodology, as long as it explains why it is reliable.

The court stated that a 10 percent reduction from the 2004 to the 2006 Monitoring Report did not undermine the Forest Service's reliance on the FIA's 90 percent confidence level. The 2006 Report (variance from 9.5 percent to 14 percent) was only at slight variance with the 2004 Report (variance from 10.55 percent to 15.27 percent). It is reasonable to expect some variance over the years as the forest is dynamic, not static. Furthermore, the FIA estimated in 2006 that the old growth was 11.8 percent, which met the 10 percent requirement. The court stated that because this calculation was provided with a 90 percent confidence measure, there was a very small chance that the old growth forest was actually less than 10 percent, at 9.5 percent. The court stated that the measure of confidence served to suggest the level of accuracy in determining the 11.8 percent number. It stated that just because the outer possible, though unlikely, range was just under 10 percent does not mean that it was unreasonable for the Forest Service to rely on the more probable calculation of 11.8 percent in determining plan compliance.

The court further stated that Lands Council did not administratively exhaust, either in its administrative appeal or before the district court, its argument that the FIA database was unreliable because the Forest Service examined only 8.3 acres of old-growth forest. In addition, the court stated that Lands Council did not provide any scientific or reasoned analysis of why the FIA database was unreliable because only eight acres of old-growth forest had actually been examined.

The court stated that the Forest Service reasonably concluded that the FIA database was statistically sound and scientifically valid for measuring forests at large and

medium scales. The court further stated that expert opinion supported this conclusion. It noted, for example, that a senior research mathematical statistician for the Forest Service Rocky Mountain Research Station concluded that the FIA database "can produce a scientifically defensible estimate of the proportion of forest within a National Forest that meets the Northern Region's definition of old-growth." The court stated that the Forest Service's determination that the FIA database was reliable—based on independent, public, and scientifically verifiable information—was entitled to substantial deference. Accordingly, the court held that it was not arbitrary and capricious for the Forest Service to rely on the FIA database in reaching the conclusion that the project was in compliance with the IPNF Plan requirement of 10 percent old growth.

Timber Stand Management Record System Database. The court noted that in *Powell*, *above*, it held that the TSMRS database was unreliable for estimating old growth in the IPNF. In response, the Forest Service updated the database and issued a supplemental FEIS. The court stated that to the extent that the Forest Service ensured that its conclusions were based on updated and reliable evidence, its reasonable reliance on the TSMRS database was entitled to deference.

Lands Council argued that the Forest Service's update was insufficient because there was no documentation of field verification on a statistically significant number of stands. Lands Council also argued that the database did not provide information about snags or canopy closure and thus did not confirm the quality of the old growth.

The court concluded that because the TSMRS database was updated and verified by the FIA database, and the Forest Service obtained snag and canopy data in other ways, the Forest Service reasonably relied on the TSMRS database to determine that the project was in compliance with the 10 percent-old-growth standard.

First, the court noted that the Forest Service specifically updated the TSMRS database in response to the *Powell* decision. This included spending $320,000 for updates, stand reviews, and field verification of old-growth stand information in the project area. The forest-wide verification was conducted on a sample basis, which was a method approved by *Lands Council*. 537 F.3d at 991–92. Furthermore, the Forest Service conducted field verification of the old-growth stands in the project area.

The court stated that on having conducted its update with new data, the TSMRS database indicated that 12.1 percent of the IPNF forested areas were allocated as old growth, with 98.5 percent of those stands being field verified. Based on those conclusions, the SFEIS determined that the IPNF old-growth requirements were met.

The court noted that the TSMRS was an independent database from the FIA, using different design samples and developed by a different group. It stated that both the FIA and TSMRS found that old-growth inventory was approximately 12 percent, which was sufficient to meet the IPNF Plan 10(b) standard of 10 percent. The court stated that, having updated and field verified the TSMRS database, the Forest Service reasonably relied on conclusions that the quantity of old growth met the 10 percent IPNF Plan requirement, particularly when such results were consistent with the independent conclusions under the FIA database.

The court further stated that the fact that the TSMRS database did not calculate snags or canopy closure did not mean that the Forest Service ignored the quality of the habitat. The court stated that the TSMRS did not use snags or canopy closure data because those characteristics are not recognized as minimum criteria for determining whether a stand is old growth. It further stated that the Forest Service relies on widely accepted standards for determining whether a stand is old growth, citing P. Green, et al., "Old-Growth Forest Types of the Northern Region," R-1 SES 4/92 U.S. Forest Service, Northern Region (April 1992, errata corrected Feb. 2005). The court observed that the Forest Service is not mandated to follow a particular methodology, as long as it explains why its methodology is reliable, citing *Lands Council.*

The court also noted that the FIA database, which was also used to calculated old-growth inventory for the project SEIS, provided forest-wide snag data. The court observed that canopy cover is stand-specific criteria based on the habitat needs of particular species. It stated that the Forest Service therefore reviewed the canopy cover for the project when examining the habitat suitability for species.

The court concluded that, based on the TSMRS database updates, which were verified by the FIA database, the Forest Service reasonably relied on the TSMRS database to conclude that the project was in compliance with the 10 percent-old-growth standard. The court stated that the Forest Service further accounted for snag data through the FIA database and reviewed habitat needs for particular species, even though such indicators are not characteristics of minimum old-growth forest. Thus, the court held that the Forest Service did not arbitrarily and capriciously rely on the TSMRS database in determining that the IPNF met the 10 percent-old-growth standard.

Project Did Not Remove Old-growth Forest. The court stated that it was also significant that the project did not allow for the removal of any old-growth trees—only smaller-diameter trees would be removed to facilitate the growth of older trees. The court noted that Lands Council did not dispute this. The court stated that it

decided this issue when it held en banc that "because no old growth forest is to be harvested under the Project, . . . it cannot be said that the Project itself violates the IPNF Plan's requirement to maintain ten percent of the forest acreage as old growth forest." Therefore, the court stated that the record supported the Forest Service's conclusion that the project was in compliance with the IPNF Plan's 10 percent-old-growth requirement.

Habitat Suitability Models. Lands Council argued that the Forest Service applied flawed habitat suitability models based on the TSMRS. In particular, Lands Council contended that the Forest Service could not document the presence of a single flammulated owl, an indicator species, during a ten-year period. Lands Council further alleged that other old-growth-dependent species such as the northern goshawk, fisher, marten, pileated woodpecker, and black-backed woodpecker could also suffer from the project.

The court observed that forest plans must "provide for diversity of plant and animal communities . . . in order to meet overall multiple-use objectives" [16 U.S.C. § 1604(g)(3)(B)]. The IPNF Plan required that the Forest Service manage the habitat of regional sensitive species and prevent a decline in their populations that could lead to a federal listing under the Endangered Species Act. The Plan also required the monitoring of population trends of management indicator species and evaluating each project alternative for impacts on both indicator species habitat and population.

The court noted that "neither the NFMA and its regulations nor the IPNF Forest Plan specify precisely how the Forest Service must demonstrate that its site-specific plan adequately provide for wildlife viability. . . . Thus, we defer to the Forest Service as to what evidence is, or is not, necessary to support wildlife viability analyses," citing *Lands Council*. The court stated, for example, that the Forest Service may use "the amount of suitable habitat for a particular species as a proxy for the viability of that species" (habit-as-proxy approach) and may also use "habitat as a proxy to measure a species' population, and then to use that species' population as a proxy for the population of other species" (proxy-on-proxy approach), citing *Lands Council*. Additionally, the court noted that viability analysis that uses all currently available scientific data is considered sound, citing *Inland Empire Pub. Lands v. U.S. Forest Serv.* [(9th Cir. 1996) 88 F.3d 754]. The court stated that while the Forest Service may rely on reliable proxies for species' viability, it "nevertheless must both describe the quantity and quality of habitat that is necessary to sustain the viability of the species in question and explain its methodology for measuring this habitat," citing *Lands Council*.

The court stated that the Forest Service considered the wildlife that could be affected by the proposed activities under this project. It stated that the Forest Service assessed both capable and suitable habitat, as well as the quality and quantity of habitat necessary to support each species. The court stated that in reaching its conclusions, the Forest Service relied on "scientific literature, wildlife databases, professional judgment, recent field surveys, and habitat evaluations." It stated that the Forest Service's methodology was validated as reliable and accurate through site visits of representative capable habitat, with an emphasis on stands considered "currently suitable." Indirect and cumulative impacts on the species were investigated and assessed. After this analysis, the Forest Service concluded that the project would likely not contribute to federal listing under the Endangered Species Act or cause a loss of viability.

Lands Council challenged the Forest Service's habitat suitability analysis on the ground it was based on the TSMRS database. However, the court repeated that the Forest Service reasonably relied on the TSMRS and FIA database estimates for old-growth habitat, and that in addition to utilizing the databases, the Forest Service also conducted site-specific examinations to confirm the database models.

Lands Council further contended that because the Forest Service had not documented the presence of a single flammulated owl, an indicator species, over the course of ten years, the habitat suitability analysis was flawed. The court noted that *Native Ecosystems Council v. Tidwell* [(9th Cir. 2010) 599 F.3d 926] held that the proxy-on-proxy approach was unreliable where the management indicator species (there the sage grouse) had not been seen in the project area for fifteen years, and the Forest Service had not cited any "monitoring difficulties." However, the court stated that *Tidwell* was distinguishable from the circumstances here.

The court noted that it previously considered flammulated owl detection in the project area and held that the viability analysis was not unreliable where the species was difficult to detect, citing *Lands Council* ("monitoring difficulties do not render a habitat-based analysis unreasonable, so long as the analysis uses all the scientific data currently available"). The court stated that the Forest Service used available scientific data that flammulated owls prefer open old-growth stands and examined how the project would support a more viable habitat for the owls. The Forest Service further relied on other surveys that detected flammulated owls in post-treatment areas, and determined that fire suppression has been a negative influence on flammulated-owl habitat. Thus, the court stated that even though there were no owls detected in

the area, the proxy-on-proxy method did not fail in this case where the flammulated owls were difficult to detect, and the Forest Service used available scientific data to reach its conclusions.

The court stated that the record indicated that northern goshawks were using suitable habitat in the project area and other active territories. It stated that the SFEIS evaluated the environmental consequences of the project on the goshawks, and the Forest Service based its conclusions regarding goshawk habitat on published scientific literature.

The court stated that similarly, the SFEIS discussed the scientific material and basis for concluding that fishers, while currently rare, should see improved habitat overall with the implementation of the project, even if there was some degrading of fisher habitat. The court stated that this conclusion was based on existing scientific literature and an evaluation of the project's potential impact on the fishers.

The court stated that the Forest Service also considered available scientific literature and the potential impact of the project on the pileated woodpecker and black-backed woodpecker. The analysis concluded that the project would likely result in some effect on the pileated woodpecker (which lives in a variety of forest habitat beyond old growth), but that adjacent locations would provide suitable feeding habitat. With regard to the black-backed woodpecker, the Forest Service considered that while the project would create a reduction in snags by removing unhealthy trees, a sufficient quantity of snags would remain to meet the guidelines' recommended levels. Thus, the Forest Service concluded that the black-backed woodpecker would remain viable.

MINERAL DEVELOPMENT

Cases

Expansion of Phosphate Mine Did not Violate CWA or NEPA

Greater Yellowstone Coalition v. Lewis
No. 09-35279, 9th Cir.
2010 U.S. App. LEXIS 26112
December 23, 2010

Approval by BLM and the Forest Service of a project to expand a phosphate mine did not violate the Clean Water Act, the National Forest Management Act, or NEPA.

Facts and Procedure. Since 1984, Simplot has operated the Smoky Canyon Mine in parts of the Caribou National Forest to acquire phosphate ore. Current mining operations encompass five panels, labeled A to E, occupying around 5,000 acres of land. Overburden from these panels contains waste rock with a high selenium concentration. Although essential to animal health in small amounts, selenium is toxic at elevated levels. Highly toxic selenium concentrations have been found in area streams. Because of the high selenium levels produced at the site, the existing mining operations are subject to an ongoing site investigation and response action under CERCLA. To extend the life of the Smoky Canyon Mine, Simplot proposed to extract resources from two federal mineral leases adjacent to the mine, designated as panels F and G. Simplot sought approval from the Bureau of Land Management, which has jurisdiction over all phosphate mining leases on public land [30 U.S.C. § 211] and the U.S. Forest Service, which has the authority to provide a special use permit in furtherance of mining operations where such activities occur on forest system lands, such as the Caribou National Forest [36 C.F.R. § 251].

The agencies released a Draft Environmental Impact Statement ("DEIS") for public comment in 2005. The agencies held three public meetings in January 2006 and received 38,616 letters, emails, and comment forms in response to the DEIS. In October 2007, the agencies published a Final Environmental Impact Statement ("FEIS"). In the FEIS, the agencies concluded that the mine expansion would not contribute to violations of water quality standards. The agencies based this conclusion

on the combined effects of (1) Simplot's efforts to reduce the selenium pollution seeping from Smoky Canyon's existing pits, and (2) Simplot's proposed store and release cover system.

The agencies acknowledged the necessity of remediating the current mining areas in order to avoid exacerbating current water quality violations. The agencies determined that two areas (Pole Canyon and Panel E) were the major sources of existing selenium pollution in Sage Creek. The agencies noted in the FEIS that determining all sources of existing pollution would require additional investigation. The FEIS evaluated the remediation efforts at Pole Canyon and Panel E, and concluded that the remediation efforts would significantly reduce existing selenium levels.

In combination with remediating existing pollution, Simplot sought to limit future selenium pollution from the mine expansion by reducing the amount of water that would flow through the newly extracted waste rock. Simplot conducted scientific modeling and analysis to predict the rate at which water would filter through the overburden and into surface water, and the amount of selenium such water would carry. Based on that information, Simplot designed a cover that would be placed throughout panels F and G to limit the percolation of water. However, when Simplot tested this cover using a HELP3 water balance model, the agencies determined the amount of precipitation entering the overburden needed to be reduced further.

To achieve the required reductions in percolation, Simplot developed the "Deep Dinwoody Cover System," which consists of layers of one to two feet of topsoil, three feet of material from a geological stratum known as the Dinwoody Formation, and two feet of chert, a coarse material that encourages moisture storage and subsequent removal of moisture by evapotranspiration. The agencies eventually adopted this design in the FEIS.

To test the Dinwoody Cover, Simplot hired an independent environmental consultant (O'Kane) that performed two sets of studies using conservative estimates of the Dinwoody Cover elements. O'Kane first used 100 years of daily climate data to run a one-dimensional model study that estimated annual water infiltration based on evaporation, transpiration, runoff, and vertical percolation. Because the one-dimensional model did not account for horizontal movement of water, O'Kane then performed two two-dimensional studies. The first two-dimensional study took into account the full size of the mine, and was run across twenty years, including the five wettest years. The second two-dimensional study was run across the full 100 years, but used a shortened slope length instead of the full size of the mine. The two studies were conducted using this methodology because a full two-dimensional model would have taken at least three months to complete.

During the environmental review process, the agencies convened a twenty-four person interdisciplinary group of experts, six of whom were tasked with reviewing water quality issues. These six experts (the "technical review team") reviewed the results of the O'Kane studies to evaluate the models and results. One of the experts—the Forest Service's National Ground Water Program Leader (Carlson)—expressed concern with the modeling. Carlson was of the view that it failed to account for the seasonal surge of snowmelt and precipitation that occurred in the area. To address this concern, the technical review team asked a separate consulting firm (Knight Piesold) whether the studies accounted for seasonal variations. Knight Piesold concluded that the studies did account for seasonal variations by including in the inputs the peak flows, even though the output (the total water percolating through the cover) was reported annually. Because the studies showed that the total annual output was no more than 0.7 inches of water, the annual output would remain the same even if that entire 0.7 inches seeped through during the peak flow months. After analyzing the O'Kane studies, the technical review team noted that the lack of monthly outputs "led to uncertainty within the technical review team about the short-term accuracy" of the results. However, the technical review team concluded that additional modeling was not necessary because the team members were confident in the long-term results and because Simplot agreed to testing of the cover to confirm it operated as the model predicted.

Throughout the review process, the agencies collaborated with the Idaho Department of Environmental Quality ("IDEQ"), charged with enforcing water quality standards in Idaho. The IDEQ appointed members to the technical review team, assisted with sampling and interpreting results, and participated in the modeling review. It concluded that the mine expansion would not result in violation of either surface or groundwater quality standards, and concurred with the agencies' approval of the project.

The project was approved by the agencies, despite objections raised by the plaintiffs in this case. After exhausting the administrative remedies, plaintiffs filed suit in district court alleging the agencies' approval violated the CWA, the NFMA, and NEPA. Plaintiffs sought a preliminary injunction against the mine expansion. The district court granted intervenor status to Simplot, various Idaho and Wyoming cities and counties, United Steelworkers Local 632, and the Idaho Farm Bureau Federation. The district court denied the motion

for a preliminary injunction and granted summary judgment for the agencies. Plaintiffs appealed, contending that the agencies (1) acted arbitrarily and capriciously in violation of NEPA, the Clean Water Act, and the National Forest Management Act; (2) violated NEPA's hard look and public disclosure requirements; and (3) failed to acquire a section 401 certification as required under the CWA. The court of appeal affirmed the judgment in a 2-1 decision (Circuit Judge Fletcher dissenting).

Standard of Review. The court noted that a district court's grant of summary judgment is subject to de novo review. The appellate court may set aside agency action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" [5 U.S.C. § 706(2)(A)]. It quoted *Lands Council v. McNair* [(9th Cir. 2008) (en banc) 537 F.3d 981, overruled on other grounds by *Winter v. NRDC, Inc.* [(2008) 555 U.S. 7]]: "We will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

The court stated that agencies have discretion to rely on their own experts' reasonable opinions to resolve a conflict between or among specialists, even if the court finds contrary views more persuasive, citing *Marsh v. Or. Natural Res. Council* [(1989) 490 U.S. 360]. Thus, the "inquiry must 'be searching and careful,' but 'the ultimate standard of review is a narrow one' " [*Marsh v. Or. Natural Res. Council*].

No Clean Water Act Violation. The court noted that the CWA requires federal agencies to determine that approved actions do not result in pollution in violation of state water quality standards [33 U.S.C. § 1323(a)]. IDEQ regulations establish the maximum acceptable level of selenium at .00005 milligrams per liter. The NFMA requires the Forest Service to develop comprehensive management plans for each unit of the National Forest System [16 U.S.C. § 1604(a)] and all subsequent agency action must be consistent with the governing forest plan [16 U.S.C. § 1604(i)]. The Caribou National Forest Plan provides that in phosphate mine areas, "overburden and soil materials shall be managed according to state-of-the-art protocols to help prevent the release of hazardous substances in excess of state and/or federal regulatory standards" [U.S. Dep't of Agriculture, Forest Service, Revised Forest Plan for the Caribou National Forest 4-83 (Feb. 2003)].

The court stated that although selenium pollution was currently a serious problem at the site, the agencies concluded in their FEIS that Simplot's mine expansion would not result in increased selenium pollution in violation of Idaho law or the Caribou National Forest Plan, as prohibited by the CWA and NFMA. This determination rested on the agencies' conclusion that existing selenium pollution could be reduced and future selenium pollution could be limited. The court noted that in reviewing agency decisions, it is required to determine whether the agencies' decision is "founded on a rational conclusion between the facts found and the choices made," citing *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife* [(9th Cir. 2001) 273 F.3d 1229].

Plaintiffs argued that the agencies failed adequately to examine other sources of existing selenium pollution when concluding that remediation at two of the known sources—Pole Canyon and Panel E—would be sufficient to offset future pollution from the mine expansion. The court stated that the agencies acknowledged that without decreasing existing pollution, the mine expansion would exacerbate the current selenium exceedences. It stated that the agencies then examined the available evidence, which indicated that Pole Canyon and Panel E were the major contributors of the existing selenium contamination. After evaluating the data, the agencies determined that remediation efforts at Pole Canyon and Panel E alone would be sufficient to offset selenium from the expansion. The court held that because this was a rational conclusion from the facts found, neither the CWA or the NFMA required the agencies to identify further any other possible source of pollution.

Plaintiffs argued that the agencies' reliance on the O'Kane studies was arbitrary and capricious because the studies failed to account for seasonal variations. The court stated that although plaintiffs pointed to Carlson's concerns about whether the studies adequately modeled peak flows, the record demonstrated that the agencies fully evaluated Carlson's concerns. It stated that not only did O'Kane assure the agencies that the models addressed seasonal variations, the technical review team specifically asked a separate consultant whether the studies accounted for such changes in precipitation. All of the experts agreed that the model effectively accounted for seasonal variation in the long-term. The court stated that while the team admitted to uncertainty about the short-term accuracy of the model, this limited qualification of the team's conclusions fell far short of plaintiffs's assertion that it "failed to consider an important aspect of the problem" [*Motor Vehicle Mfrs. Ass'n v. State Farm Auto Ins. Co.* [(1983) 463 U.S. 29]. The court concluded that because the record demonstrated that the agencies fully considered Carlson's concerns, examined the relevant evidence, and made a reasonable conclusion, their actions were not arbitrary or capricious.

No NEPA Violation. The court next held that the district court properly concluded that the agencies did not violate NEPA. The court observed that NEPA requires that an agency "consider every significant aspect of the environmental impact of a proposed action," and that it "inform the public that it has indeed considered environmental concerns in its decisionmaking process," citing *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council* [(1983) 462 U.S. 87]. It noted that unlike the CWA, NEPA does not require particular environmental standards or mandate that agencies achieve substantive environmental results, citing *Bering Strait Citizens for Responsible Res. Dev. v. United States Army Corps of Eng'rs* [(9th Cir. 2008) 524 F.3d 938].

Plaintiffs asserted that the agencies violated NEPA by failing to take the requisite "hard look" and by failing fully to disclose internal uncertainties about the studies. Plaintiffs contended that the agencies should have conducted a more searching review in two ways. First, they argued that the agencies should have ordered additional two-dimensional modeling to respond to Carlson's claim that the models did not account for seasonal variations. The court stated, however, that failure to order additional studies did not equate to a failure to evaluate the environmental impact of the proposal. It stated that the agencies' technical review team conducted a thorough review of the extensive modeling studies, and specifically asked an outside consultant to evaluate Carlson's concerns. The court stated that although plaintiffs might disagree with the conclusion that the model fully accounted for seasonal variations, reliance on the model did not constitute a NEPA violation because the agencies conducted the requisite investigation. The court cited *Marsh*, *above* ("when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"). The court stated that the record here supported the conclusion that the proposed cover design could handle such seasonal fluctuations.

The court further stated that the fact that the agencies relied on future testing to verify the model's predictions did not invalidate the previous, rigorous evaluation. The court stated that because the agencies had already satisfied NEPA's hard look requirement, the decision to require future testing should not be construed as undermining their evaluation of the environmental impacts of the mine expansion. The court stated that due to that testing, the agencies were in a unique position to monitor the effectiveness of the cover system. Furthermore, the requirement of future testing was a condition of the permit issued to Simplot, and thus the agencies could enforce that condition. The court stated that if testing revealed significant inadequacies or miscalculations in the modeling, the agencies presumably were authorized to and would require Simplot to take corrective action.

The court stated that plaintiffs's reliance on *Western Watersheds Project v. Kraayenbrink* [(9th Cir. 2010) 620 F.3d 1187], which held that the BLM's failure to address concerns raised by experts violated NEPA's hard look requirement, was misplaced. The court stated that in *Western Watersheds*, the BLM offered "no reasoned analysis whatsoever" in support of its conclusion and "never seriously considered" a "deluge of concerns." It stated that, in contrast, the agencies here not only fully recognized and evaluated the impact of future selenium pollution, they specifically asked an outside consultant about the one concern plaintiffs claimed was ignored, justifiably relied on the vast majority of experts who said the model accounted for seasonal variations, and further implemented testing and monitoring to ensure compliance. The court stated that this was all that NEPA required.

Plaintiffs also contended that the agencies should have conducted a more searching review by identifying other existing sources of pollution in addition to Pole Canyon and Panel E. Plaintiffs argued that by failing to evaluate other potential sources, the agencies did not give the environmental impact of the mine expansion the requisite "hard look." The court disagreed. It stated that NEPA only mandates an evaluation of a proposed plan's future environmental impact. The court stated that because the agencies reasonably concluded that remediation efforts at Pole Canyon and Panel E alone would sufficiently offset future pollution, any other investigation of existing pollution was not required.

Plaintiffs argued that the agencies also violated NEPA by failing to disclose the internal uncertainty as to the model's short term accuracy and by publicly denying any uncertainty. The court held that the district court properly determined that the agencies appropriately disclosed all relevant uncertainties. It noted that an agency "must acknowledge and respond to comments by outside parties that raise significant uncertainties and reasonably support that such uncertainties exist," citing *McNair*, *above*. However, *McNair* explained that "to the extent our case law suggests that a NEPA violation occurs every time [an agency] does not affirmatively address an uncertainty in the EIS, we have erred. After all, to require the [agency] to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the [agency] from acting due to the burden it would impose." The court stated that it could not hold here that one statement indicating uncertainty within the technical review team represented a significant

uncertainty as to the model's ability to predict future pollution levels. The court stated that this conclusion was supported by the voluminous evidence in the record manifesting confidence in the modeling results and the ultimate determination by the technical review team supporting the models' predictions.

Plaintiffs relied on *Lands Council v. Powell* [(9th Cir. 2005) 395 F.3d 1019], which held that the Forest Service violated NEPA when it relied upon a flawed model and failed to disclose the limitations of that model in the EIS. The court stated that in *Powell*, however, the government conceded that the model did not include relevant variables. In contrast, the agencies argued here that the relevant variables reflecting seasonal variations were included and that Carlson's objections went to the time scale of the model output rather than the input variables.

The court held that because the one sentence in the record indicating some uncertainty within the team did not rise to the level of "significant uncertainty" contemplated by *McNair*, the agencies did not violate NEPA's disclosure requirements.

Section 401 Certification Not Required. The court held that the district court correctly concluded that Simplot did not fail to acquire a section 401 certification as required under the CWA. The court observed that the section 401 certification requirement applies only to discharges from point sources, citing *Or. Natural Desert Ass'n v. Dombeck* [(9th Cir. 1998) 172 F.3d 1092]. The court held that Simplot was not required to obtain a section 401 certification because the mining pits protected by the cover did not qualify as a point source.

The court noted that under section 401 of the CWA, "any applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates" [33 U.S.C. § 1341(a)(1)]. The CWA defines "discharge" as including "any addition of any pollutant to navigable waters from any point source" [33 U.S.C. § 1362(12)(A)]. A point source is defined by the CWA as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged" [33 U.S.C. § 1362(14)].

The court stated that the text of section 401 and the case law are clear that some type of collection or channeling is required to classify an activity as a point source, citing *Trustees for Alaska v. EPA* [(9th Cir. 1984) 749 F.2d 549 ("point and nonpoint sources are not distinguished by the kind of pollution they create or by the activity causing the pollution, but rather by whether the pollution reaches the water through a confined, discrete conveyance")]. It stated that when evaluating what constitutes a point source in the mining context specifically, we have noted that Congress intended "runoff caused primarily by rainfall around activities that employ or create pollutants" to be a nonpoint source, citing *Trustees*.

The court stated that in the proposed mine expansion, there were two potential discharges where polluted water would enter the ground and, eventually, surface water. First, water would run off the top of the cover and enter a type of stormwater drain system before it was released. The court stated that this stormwater system was exactly the type of collection or channeling contemplated by the CWA, and Simplot had obtained the requisite section 401 certification for that system.

The court stated that the second potential source of discharge would occur when some water seeped through the cover and into the pits containing waste rock. The court stated that this was nonpoint source pollution because there was no confinement or containment of the water; the cover was designed to divert water away from the pits. As such, the water would filter into the pits at a rate less than water filtered into surrounding ground that was not protected by the cover. The court stated that the small amount of precipitation (around 0.7 inches a year) that would make it through the cover would not be collected or channeled, but instead would filter through 200 feet of overburden and 250 to 750 feet of undisturbed material beneath the overburden, eventually entering the surface water. The court cited *Northwest Envtl. Def. Ctr. v. Brown* [(9th Cir. 2010) 617 F.3d 1176 ("stormwater that is not collected or channeled and then discharged, but rather runs off and dissipates in a natural and unimpeded manner, is not a discharge from a point source")]. The court thus concluded that the pits that collected the waste rock did not constitute point sources within the meaning of the CWA, and Simplot was not required to obtain a permit under section 401.

Dissent. Circuit Judge Fletcher concurred in the majority ruling that a section 401 permit was not required for the expansion, but disagreed with the majority that the federal agencies acted neither arbitrarily nor capriciously when approving the expansion project. Judge Fletcher noted that the EPA and Simplot had entered into a consent decree under CERCLA the required Simplot to undertake a set of "removal response actions" to clean up selenium pollution the company's mining activities had caused in and around the Smoky Canyon Mine. However, there was no evidence that Simplot had complied with its obligation to develop and implement a comprehensive clean-up plan for pollution stemming from existing mine panels A, B, C, and D. Rather, Judge Fletcher stated that Simplot had only identified some of

the sources of extant selenium pollution caused by its mining activities in Smoky Canyon. Judge Fletcher also noted that significant economic interests opposed the halting of the mine expansion.

Judge Fletcher observed that, against this backdrop, Simplot applied to the agencies for permission to expand the mine into two new panels. The expansion would extend the life of the mine, and of a processing plant, by fourteen to sixteen years. On the record, Judge Fletcher could not agree with the majority that the agencies did not act arbitrarily or capriciously in approving the mine expansion project. Rather, Judge Fletcher would have held that the agencies violated the CWA, the NFMA and NEPA in three distinct ways: (1) by authorizing the expansion project on the basis of admittedly incomplete information regarding sources of extant selenium pollution, without any indication that the missing information could not reasonably be obtained; (2) by relying on the results of concededly inadequate modeling to predict the water quality impacts of the expansion project; and (3) by adopting what amounted to a "test while mining" scheme, relying on post-decisional modeling rather than additional modeling prior to project approval to evaluate the expanded mine's environmental impacts.

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION
As Required by 39 U.S.C. Sec. 3685

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