CALIFORNIA

# Environmental Law Reporter

MARCH 2018
VOLUME 2018 • ISSUE NO. 3



LexisNexis™
Matthew Bender®

## The 2017 Environmental Legislative Recap: Facing an Unprecedented Risk to California's Environmental Legacy

*By*

*Gary Lucks*[*]

As the legislative session began, California faced an unprecedent assault on its environmental legacy from President Trump and his controversial Environmental Protection Agency Secretary, Scott Pruitt. In his 2017 State-of-the State message, Governor Brown responded: "California is not turning back. Not now, not ever." He was joined by Speaker of the Assembly, Anthony Rendon who remarked that "California does not need healing. [It] need[s] to fight." Senate Pro Tempore Kevin de León led the fight with Senate bill (SB) 49, SB 50, and SB 51 to protect California's environmental legacy; however only one of those bills—SB 51—was signed by the Governor.

Nonetheless, the 2016-2017 legislative session was bountiful and included several significant new laws on environmental quality, land use, and natural resources. Governor Brown signed 859 new laws compared to 930 in the 2015-2016 Legislative session while vetoing 188 bills. Capping the list of achievements was a major transportation infrastructure spending bill; a comprehensive package of new laws designed to tackle California's critical housing shortage; a ten-year extension of California's signature climate

[*] Mr. Gary Lucks JD, CPEA is an environmental attorney and scientist at Beyond Compliance with over 30 years of expertise in environmental, health, and safety (EHS) law, legislative affairs, and sustainability strategy and implementation. He is a licensed attorney, a scientist, and a Certified Professional Environmental Auditor (CPEA) who advises clients on maintaining business continuity and license to operate while managing EHS risks.

Mr. Lucks has published extensively on environmental law, legislation, and policy. He co-wrote a book entitled *California Environmental Law and Policy: A Practical Guide* and wrote the Environmental Auditing chapter in the *California Environmental Law and Land Use Practice* treatise. He regularly contributes to the *California Environmental Law Reporter.*

He served on the California Lawyers Association (formerly the California State Bar) Environmental Law Section's Executive Committee and has served on the Environmental Legislation Committee for over two decades. He recently completed a four-year term as an Advisor to the Bay Area Air Quality Management District and has chaired the West Coast Institute of Internal Auditors for over a dozen years.

*continued on page 124*

## CONTENTS:



*text continued from page 123*

change law; and a major parks bond scheduled for a vote in November. Except for budget-related urgency bills that passed by a supermajority (which took effect upon approval), newly enacted laws became effective on January 1, 2018.

## Transportation

Responding to years of deferred infrastructure maintenance, the Legislature approved SB 1 (Beall) which will raise $52.4 billion over the next 10 years to rebuild California's deteriorating bridges and roadways. This long-awaited package will fund repair and improve state and local roads, bridges, freight, transit, transportation facilities, and bike paths.

This urgency measure represents a consensus among both legislative houses and the Governor and is the first gas tax increase in 23 years. According to the bill analysis, SB 1 nearly funds the estimated $59 billion price tag to address the backlog of maintenance and repairs on roadways. As of November 1, 2017, this new law increases the state excise tax from 41.7 cents/gallon to 53.7 cents/gallon on purchases of gasoline and increases the diesel fuel excise tax from 36 cents/gallon to 56 cents/gallon. These taxes will be annually adjusted to reflect the California Consumer Price Index (CPI). The sales tax increases from 9 percent to 13 percent for diesel fuel. It is interesting to note that the revenue increases on diesel fuel were supported by the trucking industry.

SB 1 provides financial protections for California truckers by allowing them to delay air pollution upgrades. This new law establishes a "useful life" period allowing truckers to enjoy a return on their investment by avoiding air pollution upgrades for 13 years or until the vehicle travels 800 thousand miles. In addition, beginning in 2020, medium and heavy-duty diesel trucks (14,000 pounds gross vehicle weight) must demonstrate full compliance with air emission requirements.

This new law also establishes an inflation-adjusted vehicle registration fee (i.e., Transportation Improvement Fee [TIF]) on vehicles ranging from $25 to $175 per vehicle. Beginning with model year 2020, SB 1 also creates a new inflation-adjusted Road Improvement Fee of $100 per zero emission vehicle (ZEV) beginning with model year 2020. Finally, SB 1 authorizes California Department of Transportation (CalTrans) to administer a newly created Advance Mitigation Program to protect natural resources.

SB 1 also provides approximately $750 million annually to fund public transportation projects including commuter and intercity passenger rail service. It also allocates an estimated $200 million annually for local transportation projects; $100 million for bicycle and pedestrian projects; $400 million for bridge and culvert repair; $25 million for freeway service patrols; and $25 million for local and regional SB 375 (Steinberg), Chapter 728, Statutes 2008 planning. SB 1 also earmarks $250 million annually to the Congested Corridors Program, to fund congestion relief projects for the key transportation corridors in the state.

Despite the consensus among the Legislature and the trucking industry, the Republican minority has promised to repeal these fuel taxes. As reported in the San Francisco

Chronicle, Gubernatorial candidate John Cox and other Republicans are gathering signatures for a November ballot initiative to defeat SB 1 and help "ensure conservative voters will turn out to the polls in the 2018 general election."

Assembly member Mullin introduced Assembly bill (AB) 1282 in response to a recommendation of the California Transportation Commission published in its 2016 annual report. That report highlighted the challenges of permitting and building critical transportation infrastructure in an efficient and timely manner and recommended creating a task force comprised of environmental and transportation agencies to accelerate deployment of transportation projects. This will allow applicants opportunities for early engagement with relevant permitting agencies to reduce permit processing time. This will offer greater certainty of permit approval requirements that govern the permitting process. This new law requires the Secretary of the California State Transportation Agency to, by April 1, 2018, create a Transportation Permitting Task Force that promotes this early engagement process.

SB 103 (Committee on Budget and Fiscal Review) establishes an Advance Mitigation Account to fund CalTrans purchase of credits from mitigation banks, conservation banks, or in-lieu fee programs to fund mitigation fees for CalTrans activities to implement natural community conservation plans. Funds for high-speed rail projects or projects associated with or interacting with the high-speed rail program are excluded from this Advance Mitigation fund.

AB 28 (Frazier) renews a CalTrans waiver of its right to sovereign immunity regarding federal lawsuits pursuant to the eleventh Amendment to the United States Constitution. This new law re-ups CalTrans authorization to function on behalf of the United States Department of Transportation (U.S. D.O.T.) for purposes of implementing the National Environmental Policy Act.

SB 810 (Committee on Transportation and Housing) is a consensus law that updates and aligns California training standards with federal law governing agricultural hazardous materials transportation. This new law updates the California Vehicle Code to align with federal regulations by updating state definitions and correcting and replacing outdated code sections and fees. This new law adjusts requirements governing vehicle license holders who haul large quantities or radioactive materials and requires drivers to possess an appropriate class driver's license to operate a vehicle and a specified certificate of training.

## Air Quality

The Governor signed several new laws that advanced his executive order to bring millions of electric vehicles to California. He also approved policies to replace dirtier, less efficient vehicles and equipment while boosting enforcement authority for air pollution control districts. Though, the most significant air quality law of the legislative session is AB 617 (Cristina Garcia). This pivotal environmental

justice law premised on the notion that lower income and minority groups experience higher levels of asthma due to their exposure to sources of air pollution. This new law is a companion measure to AB 398 focused on improving air quality exposures in disadvantaged communities. AB 617 requires the ARB to, by October 1, 2018, develop a uniform statewide methodology for annually reporting criteria air pollutants and toxic air contaminant emissions for use by certain categories of stationary sources.

By October 1, 2018, the ARB must develop a strategy to reduce toxic air contaminants (TACs) and criteria pollutants in communities experiencing high concentrations of these air pollutants. The strategy must, among other things, identify communities exposed to high cumulative air pollution; establish a methodology to identify and quantify sources of air pollution, and identify reduction measures. The strategy must also support local air districts in their efforts to develop community action plans and enforcement efforts. The strategy must also evaluate control technology to reduce emissions of criteria pollutants and TACs, including best available control technology (BACT) and Best Available Retrofit Control Technology (BARCT). The ARB must also manage an information clearinghouse for BACT and BARCT to control criteria pollutants and TACs.

This new law requires the ARB to annually identify high priority areas exposed to criteria pollutants and toxic air contaminants and deploy additional community air monitoring systems. Local air districts located in regions identified by the ARB must implement a community air emissions reduction program within one year. Air districts located in high priority areas are authorized to require stationary sources to implement fence-line monitoring systems.

By January 1, 2019, nonattainment air districts for one or more air pollutants must implement BARCT on an expedited schedule for criteria pollutants and TACs. In addition, air districts must establish an expedited schedule for BARCT for industrial sources captured by the cap-and trade program as of January 1, 2017.

The ARB must, by October 1, 2018 establish a plan to monitor the "availability and effectiveness of TAC and criteria air pollutant advanced sensing monitoring technologies and existing community air monitoring systems, as well as the need for and benefits of establishing additional community air monitoring systems."

At the local level, community emissions reduction programs must be consistent with the statewide strategy. Community-based organizations may avail themselves of technical assistance grants to support community participation in developing the community action plans. AB 617 also increases maximum civil and criminal penalties from $1,000 to $5,000 per day for stationary source air quality air violations with annual adjustments reflected in the CPI.

AB 1132 (Cristina Garcia) was inspired by an incident involving excessive lead and arsenic emissions by Exide, a lead-acid battery recycler. Although the South Coast Air Quality Management District (SCAQMD) was aware of the emissions, it was not able to enjoin the hazardous air emissions releases in a timely fashion. Prior to this new law, an air district was obligated to a lengthy hearing process before it could issue an order to abate an imminent and substantial endangerment to the public. AB 1132 aligns air pollution control district authority with the State Water Resources Control Board (SWRCB) and the Department of Toxic Substances Control (DTSC) to issue interim orders for abatement (OFA). Prior to this new law, an Air Pollution Control Officer (APCO) was authorized to issue an OFA to curtail alleged air emission violations after convening a hearing before the air district's governing board or hearing board. This new law authorizes APCOs to issue cease and desist orders to prevent imminent and substantial endangerment to public health, welfare or the environment pending a hearing from the air district hearing board.

Hospitals and health facilities regularly test their diesel generators to ensure they are fully functional in the event of an emergency. AB 1014 (Cooper) represents a consensus approach to reduce diesel particulate air emissions. This new law codifies the minimum standards governing licensed health facilities for testing and maintaining diesel backup generators and standby systems 12 times per year at specified intervals in conformance with the National Fire Protection Association's (NFPA's) Standard for Emergency and Standby Power Systems. This new law expands upon a similar law that expired in 2016 (AB 1863 [Gaines], Chapter 164, Statutes of 2010).

The Governor signed three bills to boost funding to replace dirtier, less efficient engines. Two of these new laws modify the Carl Moyer Memorial Air Quality Standards Attainment Program which funds grants to retrofit or replace diesel vehicles with cleaner engines. AB 1317 (Gray) expands equipment eligible for funding under the "Carl Moyer" program to include stationary irrigation or water conveyance engines (e.g., well pumps) used primarily for wildlife habitat. This will assist efforts to replace or upgrade highly polluting equipment and assist landowners' efforts to maintain habitat for the Pacific Flyway.

AB 1274 (O'Donnell) is an urgency law designed to help boost revenues under the Carl Moyer program. The bill analysis for AB 1274 highlights a projected shortfall that could impact efforts to attain 2023 and 2031 air quality standards. The SCAQMD estimates that this new

law will "triple the nearly $65 million generated through smog abatement fees per year." "Covered sources" under the Carl Moyer program include cleaner trucks, school and transit buses, off-road equipment, marine vessels, locomotives, agricultural equipment, light-duty vehicle scrap, and lawn mowers.

Beginning January 1, 2019, this AB 1274 defers the biennial smog check for motor vehicles that are eight or less model-years old in exchange for assessing an annual smog abatement fee of $25. The additional revenue generated will augment the Carl Moyer Memorial Air Quality Standards Attainment Program. This new law is premised on the notion that most newer model light-duty vehicles can pass a smog check after six years on the road. As a result, the smog check delay will have limited air quality impact benefit for the relatively new gasoline-powered vehicles; however, the additional revenues generated will support reduction of diesel emissions which are more toxic.

AB 1073 (Eduardo Garcia) extends until December 31, 2020 a program (SB 1204 [Lara], Chapter 524, in 2013) that requires the ARB to allocate at least 20% of funding from the California Clean Truck, Bus, and Off-Road Vehicle and Equipment Technology program. This program is designed to "develop, demonstrate, pilot, and deploy zero- and near-zero emission trucks, and off-road vehicle and equipment technologies."

The Legislature drove several new policies addressing the transportation sector which is responsible for over one-third of the greenhouse gas (GHG) emissions in California, 83% of its oxides of Nitrogen emissions, and 95% of its diesel emissions. These new laws ranged from promoting zero emissions vehicles (ZEVs) and Electric Vehicle (EV) infrastructure to replacing older, less efficient vehicles.

In 2012, Governor Brown issued an Executive Order B-16-12 targeting 1.5 million zero- or near-zero emission vehicles to be on California's roads by 2025 comprising at least 10% of state vehicle fleet purchases by 2015 and at least 25% by 2020. SB 498 (Skinner) advances this goal by requiring the Department of General Services (DGS) to achieve a 50% ZEV target for the state vehicle fleet by 2024-25. Beginning December 31, 2025, AB 739 (Chau) requires DGS to procure at least 15% heavy-duty (with a gross vehicle weight rating of 19,000 pounds or more) ZEVs and at least 30% beginning in 2030.

The Legislature approved four new laws to advance the infrastructure and convenience of driving a ZEV. SB 1275 (de León, Chapter 530, Statutes of 2014) established the Charge Ahead Initiative which set a target for one million ZEVs and near-ZEVs on California roads by January 1, 2023. Two of these new laws establish pilot programs to address the lack of charging infrastructure and install electric charging stations at state parks and beaches and schools. AB 1083 (Burke) is aimed at advancing Governor Brown's EO tackling consumer concerns over electric "range anxiety" resulting from the dearth of electric charging stations. This new law is a step in the right direction and establishes a pilot program to install electric vehicle charging stations at state parks and beaches within its service territory. Electrical corporations must identify state parks and beaches serving residents of disadvantaged communities. Similarly, AB 1082 (Burke) authorizes electrical utilities to establish another pilot program to install electric charging stations at schools (public and private) and other educational institutions. This new law prioritizes educational institutions located in disadvantaged communities for use by faculty, students, and parents.

AB 544 (Bloom) builds upon the success of prior programs promoting clean vehicles and is intended to relieve traffic congestion, conserve fuel, and reduce vehicular emissions by optimizing the use of degraded high-occupancy vehicle (HOV) lanes. AB 544 (Bloom) extends the privilege of using the HOV lanes to super ultra-low emission vehicles (SULEVs), ultra-low emission vehicles (ULEVs), advanced technology partial zero-emission vehicles (AT PZEVs), or transitional zero-emission vehicles (TZEVs).

AB 475 (Butler), Chapter 274, Statutes of 2011, helped ensure priority access to off-street parking for EVs in off-street parking facilities. AB 1452 (Muratsuchi) builds upon that law and expands accessibility for EV charging on streets. It authorizes local jurisdictions to restrict on-street parking spaces for EV charging.

California administers several programs designed to retire and replace older, high-polluting vehicles and replace them with cleaner vehicles, which includes the ARB Plus-Up program. The ARB also administers the enhanced fleet modernization program (EFMP) which is aimed at encouraging retirement of high polluting passenger vehicles and light- and medium-duty trucks that (i.e., typically vehicles that are eight years old or older and meet specified fuel economy rating) in exchange for a $1,000 voucher and $1,500 for low income car owners. This EFMP allows a lower fuel economy scale for minivans. AB 630 (Cooper) and AB 188 (Salas) are designed to accelerate retirement and replacement of older, high-polluting cars. Assembly member Salas introduced AB 188 to assist low to moderate income Californians in the agriculturally-oriented Central Valley to qualify for the EFMP and Plus-Up program. Many of these residents who use light-duty pickup trucks for work do not meet the EFMP fuel efficiency guidelines and are thus unable to replace their higher polluting light-duty vehicles. AB 188 (Salas) is designed to remedy this by allowing pickup trucks

to meet the same EFMP fuel efficiency standard in place for minivans. The Consumer Assistance Program (CAP) is another program offering incentive payments to scrap high-polluting vehicles; however, participants under this program are only eligible to scrap those vehicles that have failed their last smog test. AB 630 (Cooper) creates the Clean Cars 4 All Program that codifies existing efforts by the ARB to expand the Plus-Up program (described above). Beginning no later than July 1, 2019, the ARB must post information regarding the Clean Cars 4 All program on its website and fund these programs from the Greenhouse Gas Reduction Fund (GGRF).

SB 1275 (De León), Chapter 530, Statutes of 2014, responded to concerns that rebates to purchase cleaner vehicles are going to wealthy residents. The rebates, pursuant to the Clean Vehicle Rebate Project (CVRP), were intended for low-income applicants. SB 1275 directed ARB to adjust the rebate program which now limits rebate eligibility to income of $250,000 for single filers, $340,000 for head-of household filers, and $500,000 for joint filers. AB 615 (Cooper) is an urgency law that extends the sunset on the CVRP income eligibility to January 1, 2019.

## Climate Change

Governor Brown sprang into action when the President withdrew the United States from the United Nations Framework Convention on Climate Change Paris Agreement, leaving the United States as the lone non-participant among the world's nations. He built upon his "Under 2MOU" initiative and led an effort with governors from New York and Washington to form the United States Climate Alliance. The Alliance is aimed at galvanizing the collective support of American cities, states, and businesses to commit to achieving the objectives of the Paris Agreement by reducing GHG emissions by at least 26 percent by 2025 from 2005 levels. The Alliance is currently comprised of 15 members committed to developing Climate Action Plans to advance the objectives of the Paris Agreement. Currently, this coalition represents approximately one-third of the United States population and approximately 38% of the United States Gross Domestic Product. If the Alliance was a sovereign nation it would be the third largest economy in the world. Assembly Joint Resolution (AJR) 20 (Gonzalez Fletcher) represents another California response to the fallout from the United States' withdrawal from the Paris Agreement. This resolution encourages other states and cities to continue supporting the Agreement. The AJR additionally requests the United Nations to recognize those subnational jurisdictions whose parent countries are not signatories to the Paris Climate Agreement.

The California Global Warming Solutions Act of 2006 (AB 32) (Núñez, Pavley), Chapter 488, Statutes of 2006, authorizes the ARB to implement command-and-control rules to reduce California's collective greenhouse gas (GHG) emissions to 1990 levels by 2020. That law was set to expire in 2020. SB 32 (Pavley), Chapter 249, Statutes of 2016, reauthorized aspects of AB 32 through December 31, 2030 and boosted the statewide GHG emissions reductions to at least 40% below the 1990 levels.

AB 398 (Eduardo Garcia) is an urgency law that reauthorized the Cap-and-Trade program to continue driving down GHG emissions. This new law requires the ARB to update the GHG reduction strategy (known as the "Scoping Plan") by January 1, 2018. Significantly, this new law also extends ARB's cap-and-trade authority until December 31, 2030. This new law embraces several provisions designed to expand the availability of GHG offsets and creates a Compliance Offsets Protocol Task Force to advise the ARB on approving new offset protocols to increase offset projects that prioritize disadvantaged communities, Native American or tribal lands, and rural and agricultural regions. It also creates the Independent Emissions Market Advisory Committee. This new law additionally reduces the offset compliance credit limit to 4% between 2020 and 2025 and 6% between 2025 and 2030. At least 50% of all offset compliance projects must occur in California.

To clear the two-thirds vote margin for this urgency law, the Governor struck a deal preempting local air districts from regulating GHGs from stationary sources that are subject to the market-based compliance mechanism (i.e., the cap-and-trade program) until January 1, 2031.

This new law also extends the 3.94 percent state sales and use tax exemption, until July 1, 2030, for manufacturers and research development firms for another eight years. Specifically, the exemption applies to tangible personal property, buildings and foundations used primarily to generate, produce, store, or distribute electric power. This new law also adjusts the priorities for appropriating revenues from the GHGRF.

SB 150 (Allen) expands on SB 375 (Steinberg), Statutes of 2008, which is intended to reduce GHG emissions by promoting land use policies that reduce vehicle miles traveled (VMT). SB 375 requires metropolitan planning organizations (MPOs) to adopt sustainable community strategies to achieve targets to reduce vehicle miles traveled (VMT) automobiles and light trucks in the region. SB 150 furthers SB 375 by establishing a process governing how ARB must monitor regional progress in attaining VMT targets. Under this new law, the ARB must follow specified factors in setting regional VMT GHG emission reduction targets.

SB 563 (Lara) was introduced to reduce residential burning which, according to the bill analysis represents

one of the "easiest and most effective ways for us to curb global warming." Senator Lara states that old and inefficient wood stoves produce PM 2.5, carbon monoxide, toxic air pollutants (e.g., benzene and formaldehyde), and GHGs (e.g. methane and black carbon). He further states that wood smoke is "forecast to be the largest source of human-caused black carbon emissions." This new law establishes the Woodsmoke Reduction Program to incent voluntary replacement of uncertified, less-efficient wood stoves with cleaner more efficient stoves. This program will be funded by the GGRF.

Two measures address funding to support climate change initiatives. ACA1 (Mayes) is a proposed constitutional amendment that would place on the June 2018 ballot an initiative to establish the GGRF. This new law is designed to continue the GHG allowances generated from the market-based compliance mechanism statewide auctions and would require legislative appropriations of these funds to be approved by a two-thirds vote of the Legislature. SB 628 (Beall), Chapter 785, Statutes of 2014, was enacted in response to the financial impacts resulting from the dissolution of Redevelopment Agencies. SB 628 established Enhanced Infrastructure Financing Districts (EIFDs) as a finance vehicle to fund local infrastructure projects. AB 733 (Berman) expands the types of projects eligible for EIFD funding to include projects communities can deploy to adapt to the impacts of climate.

AB 184 (Berman) extends the sunset date for the Sea Level Rise Database (PSLRD) to January 1, 2023. This program requires the Natural Resources Agency, in collaboration with the Ocean Protection Council, to update the PSLRD and describe the statewide efforts underway to manage and adapt to sea level rise.

## Energy

California's investor-owned utilities are on track to reach the renewable energy goal of 50% by 2030. SB 618 (Bradford) requires the integrated resource plans of all load-serving entities — investor-owned utilities (IOUs), electric service providers, and community choice aggregators (CCAs) — "to contribute to a diverse and balanced portfolio of resources . . . to ensure a reliable electricity supply, that provides optimal integration of renewable energy in a cost-effective manner and meets the emissions limits for in proportion to each load-serving entity's load share. . .."

Despite California's progress advancing renewable energy, challenges remain with balancing the load on the state's electric grid. AB 2514 (Skinner), Chapter 469, Statutes of 2010, was enacted in 2014 to address the diurnal misalignment between the energy peak demand and availability of renewable energy. That law led to a PUC Decision 13-10-040 to help balance the electrical load. That decision required California's IOUs to procure in aggregate 1,325 megawatt (MW) of energy storage by December 31, 2020. Assembly member Chiu introduced AB 546 to streamline permitting of energy storage systems. Among other things, AB 546 (Chiu) requires cities and counties to allow for electronic submission of documents for "advanced energy storage installations" to increase the efficiency and cost effectiveness of the permit process. In addition, this new law requires local agencies to post documentation and forms associated with permitting advanced energy storage on their Internet Websites. Finally, this new law authorizes the Governor's Office of Planning and Research to provide guidance on energy storage permitting and streamlining, best practices. SB 338 (Skinner) is another law by Senator Skinner intended to address the misalignment with peak demand. It requires the CPUC and local POUs to evaluate, as part of the POU's integrated resource plan "the role of distributed energy resources, . . . energy efficiency, existing renewable generation, energy storage, and grid operational efficiencies."

The Legislature promoted several laws to increase renewable energy on roof tops. The Solar Water Heating and Efficiency Act of 2007 allocated $250 million to incent adoption of solar water heating systems. The IOUs have issued rebates supporting installation of 200,000 solar water heating systems. The demand for solar water heating systems did not materialize due to many reasons, including the low cost of natural gas, leaving just over $161 million in the fund. AB 797 (Irwin) extends the rebate program another two years (through August 1, 2020) and broadens the program to also include "solar thermal" systems (e.g., water and space heating, cooling systems) and industrial alternatives to natural gas (e.g., sterilizing, pasteurizing, or drying). This new law expands program eligibility to include agricultural customers, San Joaquin Valley homeowners that lack access to natural gas who use propane or wood burning and allocates $125 million and $25 million respectively to install solar thermal systems for low-income and disadvantaged communities and industrial applications.

AB 1414 (Friedman) prohibits local permitting authorities from imposing permit fees for residential rooftop solar energy systems (i.e., photovoltaic and thermal energy systems). This new law expands the fee caps to also include photovoltaic devices or technology that is integrated into a building (e.g., photovoltaic windows, siding, and roofing shingles or tiles). It further sets limits on how much a local government can charge for permit fees, which cannot exceed specified cost ceilings for residential permits and for commercial permits. AB 1414 (Friedman) extends these permitting limitations to

January 1, 2025 and lowers the maximum local permit fee for residential rooftop solar energy systems.

Although the Solar Rights Act promotes solar energy, it also allows home owners associations (HOAs) to place reasonable restrictions on solar energy system installations addressing maintenance, repair, or replacement of roofs or other building components. AB 634 (Eggman) was introduced to offer HOAs guidance to develop "'reasonable provisions'" that fairly address the rights and responsibilities of the HOA. . . . to ensure a fair allocation of usable solar space among multiple owners of separate interests. . .to avoid restrictions that may effectively prohibit or restrict installation of solar systems." Prior to this new law, the Davis-Stirling Common Interest Development Act required 67% approval of the separate CID interests for the board to grant a member exclusive use of common areas.

Proponents of AB 634 state that the home owners' association (HOA) law ". . .effectively prohibit[ed] rooftop solar installations, especially in larger HOAs." As illustrated by a situation at a senior living community (Sustainable Rossmoor), 81% of those who cast a ballot voted to approve a solar project; however, 32% of the total members did not cast a ballot. These non-votes counted as "no" votes because they were not "affirmative" votes to approve.

AB 634, among other things, prohibits HOAs from establishing a "general policy prohibiting the installation or use of a rooftop solar energy system for household purposes. . . that has been assigned to the owner for exclusive use." It also allows the board to approve such a solar energy system without a 67% vote of the separate CID member interests. This new law further establishes obligations for applicants seeking to install a solar energy system including the duty to notify other owners in the building. Finally, this new law provides that an HOA may impose reasonable restrictions on solar energy systems including an obligation for an owner (and each successive owner) disclosing to prospective buyers their responsibilities regarding the solar system, including their obligation to maintain, repair or address damage to common areas involving the solar system.

AB 1070 (Gonzalez Fletcher) was introduced in response to consumer complaints regarding commission-driven salespeople who make misrepresentations and fail to fulfill promises concerning solar energy systems. The objective of this new law is to help ensure that ". . . customers reliably receive all the information they need to make informed, responsible decisions." AB 1070 responded by requiring the Contractors State License Board (CSLB) in conjunction with the PUC to create a "solar energy system disclosure document" to be provided to solar energy customers prior to completion of a sale, financing, or lease of a solar energy system. The disclosure document and the contract must be "written in the same language as was principally used in the sales presentation and marketing material." The PUC must develop standardized inputs and assumptions used to calculate utility savings to a consumer allowing them to receive "accurate, clear, and concise information regarding the installation of a solar energy system." Similarly, the financing estimate for customers choosing to finance their solar system via the Property Assessed Clean Energy (PACE) program must provide the financing estimate.

SB 242 (Skinner) establishes several new consumer-oriented protections to the PACE programs that respond to the "complex financing structures" not envisioned when the Legislature approved PACE. . .." This new law incorporates several best management practices published by the federal Department of Energy. Among other practices, this new law requires licensing of PACE contractors and requires program administrators to record oral confirmation of the PACE contract terms with residential customers, delivered in the property owner's language or via an interpreter. It sets standards governing the first payment on a PACE contract, establishes requirements governing the advertisement of a PACE contract, and prohibits program administrators and contractors from making any representation as to the tax deductibility of a PACE contract. Finally, this new law prohibits specified payments to induce a property owner to enter into a PACE contract.

After the tragic natural gas explosion in San Bruno, the Governor signed AB 56 (Hill) [Chapter 519, Statutes of 2011] which requires California gas utilities to maintain "balancing accounts" to account for capital expenditures for utility maintenance and repair. According to Senator Bradford, notwithstanding these balancing accounts "it is still difficult to decipher when money approved by the CPUC for one project has been diverted to another project."

Sponsored by the California Energy Storage Alliance, SB 549 (Bradford) is a transparency measure designed to reveal situations where capital or expense funds earmarked for maintenance, safety or reliability were appropriated for another purpose. Specifically, this new law requires an electrical or gas corporation to annually notify the California Public Utilities Commission (CPUC), of situations where funds are redirected as described above. This new law additionally requires the CPUC to internally notify the Office of the Safety Advocate, Office of Ratepayer Advocates.

SB 19 (Hill) establishes several reforms governing the operations of the CPUC, which includes, among many other changes, codifying the responsibilities and oversight of various staff positions. This new law empowers the CPUC commissioners to appoint the chief administrative law judge

and the chief internal auditor. It also clarifies CPUC requirements to engage outside legal services. This new law additionally requires the CPUC to inform the Attorney General when engaging outside counsel. It also prohibits a public utility executive from serving as a CPUC commissioner for two years after leaving that position. This new law also requires the CPUC to establish a conflict of interest code and a statement of incompatible activities. Additionally, it calls for establishing an ethics officer. Finally, this new law requires the public advisor to entertain public complaints and comments regarding CPUC performance and to consider those comments when formulating recommendations to resolve complaints and comments.

SB 110 (Committee on Budget and Fiscal Review) is an urgency law that establishes, for the 2018–19 fiscal year, the Clean Energy Job Creation Program. This program will fund several projects serving "public schools and community colleges that create jobs in California improving energy efficiency and expanding clean energy generation." This appropriations bill allocates remaining funds from Proposition 39 (the Clean Energy Jobs Act) for energy efficiency for local educational agencies. Funding appropriations include $75 million for schools to support school bus retrofits or replacements and $100 million in loans for projects and technical assistance to improve energy efficiency and expand clean energy generation. The balance of these funds will provide school grants to improve energy efficiency and expand clean energy generation.

## Water Quality

The Legislature advanced several policies affecting drinking water safety and dam safety and providing mechanisms to deliver water to underserved communities in the state. In the wake of the tragic lead exposures in Flint, Michigan, Senator Leyva introduced SB 1398 (Leyva), Chapter 731, Statutes of 2016, which requires public water systems (PWSs) in California to identify distribution system that contain lead and establish a timeline for replacing pipes known to contain lead. SB 427 (Leyva) is a "cleanup" law designed to clarify that these provisions apply to a community water system (CWS), instead of a PWS. Under this new law, by July 1, 2020, the SWRCB and CWSs must agree on a timeline to replace piping known to contain lead.

The California Legislature continued its efforts to safeguard California children from lead in drinking water. AB 746 (Gonzales Fletcher) specifically responds to recent headlines revealing lead exposure to children at several schools including in the San Ysidro School District, Folsom Cordova Unified School District, Oakland Unified and San Francisco. In the latter two school districts, children were exposed to elevated levels of lead. AB 746 now requires CWSs to, no later than July 1, 2019, test for lead in potable water systems that serve schools built prior to January 1, 2010. The CWSs must provide its findings to the school site within 10 business days of receiving the test results. In the event the results exceed 15 ppb, the school must be notified within two business days of receiving the results. The Local Education Agency (LEA) must notify parents and guardians of the students of [the presence of] elevated levels of lead. In addition, the LEA must "take immediate steps to make inoperable and shut down . . . all fountains and faucets where the excess lead levels may exist."

California has not updated cross connection regulations (i.e., protecting potable water from exposure to non-potable water sources) protecting drinking water and backflow protection since 1987. AB 1671 (Caballero) requires the SWRCB to amend standards governing backflow protection and cross-connection control no later than January 1, 2020. This new law additionally authorizes the SWRCB to adopt a policy handbook addressing standards for backflow protection and cross-connection control.

AB 1438 (Committee on Environmental Safety and Toxic Materials) updates, revises, and recasts obsolete references to the Environmental Laboratory Accreditation Act (ELAA). This new law is designed to align the processes and procedures for appeal of actions on laboratory accreditation with the State SWRCB for petitions of administrative actions, such as revocation or suspension of laboratory accreditation. The regulations establish an appellate review process whereby the SWRCB reviews administrative actions (e.g., actions, such as application denials, issuance of citations, and revocation or suspension of accreditations). This new law additionally authorizes the SWRCB to provide state and federal accreditation (i.e., National Environmental Laboratory Accreditation Program [NELAP]) for environmental laboratories.

AB 1361 (Eduardo Garcia and Waldron) is designed to assist California tribes in accessing services from nearby water districts. The Rincon Band of Luiseno Indians sponsored AB 1361 to allow California tribes to enter into voluntary agreements for water service from neighboring water districts in a way that avoids formal annexation so as not to violate their sovereignty by subjecting the tribes to under state law (i.e., the Cortese-Knox-Hertzberg Act). This new law specifically requires local agency formation commissions (LAFCOs) to approve water district applications to extend water service to Indian lands at substantially the same terms offered to other public agencies.

AB 277 (Mathis) addresses communities that rely on groundwater but face difficulty obtaining low-interest financing and grants for infrastructure supporting drinking

and wastewater treatment. This law reauthorizes the Water and Wastewater Loan and Grant Program which empowers the SWRCB issue low-interest loans and grants to counties and nonprofit organizations to fund drinking and wastewater facilities and improvements serving households and small water systems.

AB 339 (Mathis) extends indefinitely the ability of the SWRCB to provide loans to fund urgent drinking water projects pursuant to the Cleanup and Abatement Account. These funds derive from, among other funding sources, cost recovery from the cleanup or abatement of waste, pollution or contamination.

AB 589 (Bigelow) offers rural farmers and ranchers who divert 10 acre-feet or more of water an alternative to SWRCB certification to install and maintain water supply measurement, monitoring, and reporting for water diversions. Prior to this new law, licensees seeking certification were limited to courses that were "satisfactory" to the SWRCB. This new law permits licensees to obtain certification from the University of California (UC) Cooperative Extension.

AB 355 (Chu) adjusts California's law which imposes mandatory minimum penalties of $3,000 for serious water quality violations. That law permits the SWRCB or a RWQCB to allow small publicly owned treatment works (POTWs) (defined as serving a population of 10,000 persons or fewer or a rural county, with a financial hardship) to direct funds in lieu of a penalty for a "compliance project" to upgrade treatment plants to prevent violations. The law is premised on the notion that small communities are not able to both pay penalties and support necessary facility upgrades to prevent further violations. Assemblymember Chu, introduced AB 355 to expand the eligibility for this penalty option to a broader swath of financially challenged communities, to now include POTWs with 20,000 or fewer persons. This new law additionally expands authority of the SWRCB to impose civil liability administratively for underground tank violations.

According to the bill analysis for AB 570 (Salas) approximately 700 community PWSs, serving 21 million people, are dependent on contaminated groundwater as a primary source of drinking water. AB 560 attempts to assist these largely small, rural, and low-income communities by authorizing the SWRCB to issue grants, provide principal forgiveness, and offer zero percent financing on loans, from the Safe Drinking Water State Revolving Fund (DWSRF) to severely disadvantaged communities who demonstrate and inability to repaying a DWSRF loan.

The Urban Agriculture Incentive Zones (UAIZ) promotes urban agriculture by authorizing local municipalities to authorize urban agriculture incentive zones for small-scale production of agricultural crops and animal husbandry. AB 465 (Ting) extends the UAIZ until January 1, 2029.

## Water Supply

As California braces for the possibility of another year of drought, the Legislature continues to tweak laws to sustain the state's water supply via strategies to capture storm water, replenish groundwater aquifers, and recycle water.

Pursuant to the Sustainable Groundwater Management Act (SGMA), groundwater sustainability agencies (GSAs) in critically over-drafted groundwater basins are required to develop and implement groundwater sustainability plans (GSPs) by January 31, 2020. All other groundwater basins designated as high- or medium-priority basins must be managed under a GSP or coordinated GSP by January 31, 2022. Assemblymember Mathis introduced AB 321 to invite a broader range of individuals affected by a GSA to weigh in when forming and implementing GSPs. SGMA requires GSAs to consider the interests of specified beneficial uses and users of groundwater (e.g., overlying parties with groundwater rights, including agricultural users and domestic well owners). AB 321 (Mathis) expands the scope of beneficial users underlying a groundwater basin to include farmers, ranchers, and dairy professionals." According to the author, "Too often the voices and knowledge of families and industries are ignored in efforts to streamline the formation of a groundwater plan. Rather, GSAs should draw upon the local knowledge to form a plan which benefits the basin and its residents."

SB 252 (Dodd) offers guidance on permitting new ground water wells during the interim period before which new GSPs are adopted in critically over-drafted groundwater basins. Specifically, until January 30, 2020, cities and counties overlying a critically over-drafted basin must request estimates of certain information from a permit applicant seeking a new well. The municipality that issues the permit must make available to the public and the GSAs information contained in the application pertaining to the new well.

AB 1328 (Limón) was introduced to assist the Central Valley RWQCB in obtaining information concerning the composition of oil and gas field waste water (i.e., "produced waters") that are treated and reinjected or disposed of in wastewater discharge ponds. Prior to this new law, the RWQCB was only able to compel chemical disclosure from the "discharger," not the chemical "supplier." This new law authorizes RWQCBs and the SWRCBs to require persons or entities or suppliers of chemicals contained in produced water discharge to disclose information regarding chemicals in the discharged wastewater. The SWRCB and the RWQCB must make this information publicly available on their websites.

SB 724 (Lara) is designed to bolster efforts by the Division of Oil, Gas, and Geothermal Resources (DOGGR) to decommission production facilities that are hazardous or deserted. This new law provides $3 million for this purpose and authorizes the supervisor or district deputy to expand its authority from ordering the plugging and abandoning of a deserted well or the decommissioning of a well. Under this new law well operators have an additional 12 months to start drilling, allowing them 24 months to begin operations before their notice of intent to commence drilling is canceled.

AB 574 (Quirk) is another step in the journey to eventually use recycled water for drinking. This new law builds upon recently adopted water recycling criteria for "indirect potable reuse" which involves recharging groundwater basins with recycled water as sources of drinking water. This new law is aimed at using recycled water mixed with raw water. It requires the SWRCB to adopt uniform recycling criteria for direct potable reuse through raw water augmentation. The criteria must be adopted no later than December 31, 2023.

AB 1343 (Chen) is intended promote to schools the availability of rebates and programs to reduce water use (e.g., rebates to install low-flow toilets). This new law additionally authorizes school districts to enter into "Go Low Flow Water Conservation" partnerships with public water systems to, among other purposes, reduce water use and storm water and dry weather runoff at schools.

SB 541 (Allen) builds upon legislation pertaining to storm water capture systems. This new law requires the SWRCB to consult with RWQCBs and the Division of the State Architect to recommend to schools the best design and use practices to capture storm water and dry weather runoff. The SWRCB must post these recommendations on their respective websites by March 1, 2019. These recommended practices will allow schools to manage water quality for projects involving new, reconstructed, or altered public school facilities as well as on school grounds.

SB 667 (Atkins) codifies the Riverine and Riparian Stewardship Program at the Department of Water Resources (DWR) to provide technical and financial assistance for watershed-based riverine and riparian stewardship improvements including coordination with the Urban Streams Restoration Program to support improvements with fish passage.

## Health and Safety

The Childhood Lead Poisoning Prevention Act of 1991 (CLPPP) establishes a standard for screening children for lead exposure and poisoning children who are deemed at high risk for lead exposure. The bill analysis for AB 1316 (Quirk and Cristina Garcia) states that many children who are not on government assistance programs may be still exposed to lead but are not being screened. AB 1316 intends to close this gap and requires the California Department of Public Health (DPH) to consult with medical and environmental experts to reevaluate the lead exposure standard for children by July 1, 2019. Beginning March 1, 2019, DPH must prominently post on its website annually its progress in identifying children with high blood lead levels along with its efforts to reduce exposures. This new law also modifies the definition of "lead poisoning" to include concentrations of lead in arterial or cord blood.

## Hazardous Waste/Materials

Noteworthy new policies addressing chemical management and waste include the first-in-the-nation law regulating chemical transparency for cleaning products. Other policies of note include a comprehensive set of new laws addressing prevention, monitoring and response to chemical risks posed by refineries to communities within their shadow. The most significant hazardous waste law of the session is AB 245 (Quirk) which almost triples the civil penalties for hazardous waste violations from $25,000 for each day of noncompliance to $70,000. This new law aligns state penalties for hazardous waste violations under the Hazardous Waste Control Act with the levels under the Federal Civil Penalties Inflation Adjustment Act of 1990. Pursuant to that Act penalties for violations of the federal Resources Conservation and Recovery Act (RCRA), Subtitle C are scheduled to increase to $70,000 for each day of noncompliance.

AB 474 (Eduardo Garcia) aligns state law with RCRA, which exempts from regulation the "extraction, beneficiation, or processing of ores and minerals" including spent brine solutions used to produce geothermal energy. This new law also exempts brine solutions that are byproducts of the treatment of groundwater if they are treated and meet California drinking water standards. The spent brine solutions must also be transferred for dewatering via a closed piping system to permitted, lined surface impoundments.

The Governor approved several laws intended to strengthen emergency preparedness and response to chemical releases. SB 54 (Hancock), Chapter 795, Statutes of 2013, was enacted after a significant chemical release and fire at the Chevron Richmond refinery in August of 2012. That law was designed to boost health and safety performance and strengthen risk management at refineries and required contractors to use highly qualified and skilled workers who have completed specified advanced safety training. AB 55 (Thurmond) was enacted to close a loophole in SB 54 which exempted refineries from these health

and safety requirements for those contracts awarded before 2014. This new law requires workers to have completed, within the prior three calendar years, at least 20 hours of approved advanced safety training to perform work at a refinery on or after July 1, 2018.

The Brown Administration formed an Interagency Working Group after the fire and explosion at the Chevron, Richmond refinery in August 2012 to "examine ways to improve public and worker safety through enhanced oversight of refineries, and to strengthen emergency preparedness in anticipation of any future refinery incident." Assemblymember Muratsuchi took a lead in legislative strategies to manage non-routine chemical releases to communities. AB 1649 (Muratsuchi) codifies this Refinery Task and provides for the California Environmental Protection Agency (CalEPA) to coordinate those state and local agency activities regarding refineries. CalEPA must convene at least two public meetings annually to share with the public current information on refinery safety. AB 1647 (Muratsuchi) is a companion law that requires refineries to install air monitoring systems by January 1, 2020. Air districts must implement and maintain refinery-related community air monitoring systems or engage a third-party contractor to do the same. Air districts and refinery owners or operators must collect real-time data from these monitoring systems and make it available in a publicly accessible format.

AB 1646 is another new law by Muratsuchi which establishes an integrated community alert system to notify communities surrounding a petroleum refinery in the event of an incident at the refinery warranting the use of the notification system. The law requires certified unified program agencies (CUPAs) to ensure the notification system is consistent with the CUPA's area plan and the California Accidental Release Prevention Program regulations. Under this new law, petroleum refineries must immediately call 9-1-1 and notify the CUPA "in the event of an incident warranting the use of the notification system."

AB 1689 (Committee on Environmental Safety and Toxic Materials) responds to recent incidents involving first responder responses to fires involving combustible metals that resulted in explosions. In one instance, fire fighters attempted to subdue fire with water which is incompatible with combustible metals. The water caused an explosion at a metal recycling facility in Maywood, California in June 2016. According to the bill analysis, the fire fighters were unaware of the presence of magnesium, a combustible metal. This new law is designed to alert first responders to the presence of combustible metals on-site. It includes combustible metals or metal alloys in those materials to be included in the chemical inventory of a hazardous materials business plan.

According to Assemblymember Gray, AB 289 is intended to incorporate into the State Emergency Plan (SEP) advances in emergency management capabilities including developments in mitigation, preparedness, response, and recovery activities. Among other things, the SEP provides recommended best practices for use by local governments and nongovernmental entities for mobilizing and evacuating disabled people during an emergency or natural disaster. Under this new law the Office of Emergency Services must update the SEP by January 1, 2019, and every 5 years thereafter.

The Lempert-Keene-Seastrand Oil Spill Prevention and Response Act requires owners or operators of marine terminals, pipelines, railroad transporters of oil to develop and implement a C-Plan (i.e., an oil spill contingency plan) to help ensure a prompt and adequate response to potential oil spills to state waters, shorelines, and inland environments. Prior to AB 1197 (Limón) C-Plans were required to identify at least one rated oil spill response organization (OSRO) for each rating level. This new law adjusts C-Plan requirements with respect to the OSRO and authorizes reliance on the owner or operator's own response equipment and personnel, if they have been rated by Office of Spill Prevention and Response.

The Act required C-Plans to identify a spill management team (SMT) to manage a spill. This new law requires the C-Plan to identify at least one certified SMT. This new law also authorizes owners or operators to rely on their own SMT if it is certified with regard to the effectiveness of its response capabilities.

AB 91 (Wood and Quirk) harmonizes state law governing radiation exposure when responding to a bomb threat with federal law. Prior to this new law, bomb squads were required to follow an elaborate procedure including installing signs warning the public of potential radiation exposures and, setting up radiation measuring instruments. This new law is premised on the notion that potential public exposure to radiation is extremely small and that time it takes to implement the protective measures conflicts with the urgency of quickly responding to the potential bomb threat. This new law aligns the procedures with those followed by the Federal Bureau of Investigation (FBI) and requires the DPH to exempt local and state (i.e., city, county, special district, or the State of California, including UC) bomb squads from the regulatory requirements for conducting field radiography under specified circumstances. These include, among others, that radiation safety officers must be certified as bomb technicians by the FBI and that the bomb squad operates pursuant to written operating procedures for a variety of radiation equipment used by the bomb squad.

Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) requires private enforcers to first provide a defendant a 60-day notice to sue which includes a certificate of merit. The certificate must state that the moving party "has consulted with one or more experts in reviewing exposure data and concludes there is cause for a lawsuit." This certificate assists the State Attorney General (AG) and local public prosecutor in deciding if they want to pursue an action on behalf of the public. In the event the Attorney believes the matter lacks merit, AB 1583 (Chau) requires the AG to provide the moving party (i.e., the noticing party) and the alleged violator with a letter indicating the same. This new law provides that the basis for the certificate of merit is discoverable and not protected by the attorney-client privilege, the attorney work product privilege, or any other legal privilege. This new law also requires the Governor's Office of Business and Economic Development (Go-Biz) to display on its website and via written materials business's obligations under Proposition 65 including where they can learn how to comply with the law.

Senator Lara introduced SB 258 to provide for more complete and full chemical disclosure for cleaning products which can cause health impacts including cancer, asthma, skin allergies, and reproductive, developmental, and hormonal changes. According to the bill analysis, "[w]hile ingredient labeling is mandatory for most components of food, cosmetics, and drugs, there are minimal requirements for cleaning products." Further, "[t]here are no clear and consistent rules in the market for companies that want to voluntarily disclose information about their products – creating confusion and an unfair playing field for businesses that want to do the right thing." This new law closes the regulatory gap to require disclosure of chemical ingredients. SB 258 (Lara) establishes the Cleaning Product Right to Know Act of 2017 which requires manufacturers of cleaning products sold in California to disclose chemical ingredients on the product label and on the product's website. This new law further prohibits the sale of products that do not meet these disclosure requirements. In addition, employers must make safety data sheets readily accessible for cleaning products in the workplace. This new law allows manufacturers to protect certain chemicals from disclosure by using their generic names.

AB 1480 (Quirk) aims to root out mounting fraud and cheating by applicants seeking pesticide applicator licenses. This new law expands the narrow enforcement authority of the Department of Pesticide Regulation (DPR) which, according to the bill analysis, is not equipped to effectively deter fraudulent conduct. This new law makes it illegal "for individuals making a false or fraudulent statement, record, or report when applying for a license or renewing a license; to subvert a licensing examination; or, to fail to follow any examination instruction related to examination security." It further expands the enforcement authority of DPR to impose civil penalties of up to $5,000 for these violations without referral to the Attorney General.

AB 643 (Huber), Chapter 407, Statutes of 2011, permits carbon monoxide (CO) to be used to control burrowing rodent pests. AB 1126 (Committee on Agriculture) extends this pest control authorization to January 1, 2023.

## Solid Waste

The Department of Resources Recycling and Recovery (CalRecycle) is leading efforts to achieve the statewide goal of diverting at least 75% of solid waste from landfills statewide by 2020. Organic materials comprise approximately one-third of the solid wastes generated in California. In light of new mandates, including CalRecycle's 50% organic waste diversion goal (Strategic Directive 6.1), AB 1572 (Aguiar-Curry) directs CalRecycle to make recommendations to the Legislature by 2022 on how to holistically revise and consolidate compliance review for all of California's waste diversion and recycling goals. This new law also extends for another two years (until January 1, 2022), the sunset on a law authorizing CalRecycle to evaluate city and county source reduction and recycling elements and household hazardous waste elements for compliance with landfill diversion requirements.

Two new laws address plastics. AB 837 (Nestande), Chapter 525, Statutes of 2012, was aimed at limiting "greenwashing" and promoting truth in claims of recycled plastic content of food and beverage containers. AB 1294 (Berman) extends indefinitely the provisions of this law. Beginning October 1, 2018, AB 906 (Bloom) adjusts requirements governing labeling of rigid plastic bottles and containers with a code reflecting the resin for purposes of sorting and recycling. Prior to the enactment of AB 906, manufacturers were required to label used bottles and containers made with polyethylene terephthalate (PET) with the resin code of "1." Recycled PET is converted into packaging and fiber (e.g., carpet and microfiber). Polyethylene terephthalate glycol-modified (PETG) is another plastic resin which is less brittle variety of PET plastic resin. Manufacturers have historically been required to label PETG with the same resin code of "1." Because PET and PETG have different melting points, they cannot be effectively processed together. AB 906 revises the definition of PET to exclude PETG to allow the materials to be segregated prior to recycling.

California's carpet stewardship program, AB 2396 (Perez), Chapter 681, Statutes of 2010, requires carpet

manufacturers to design and implement an extended producer responsibility (EPR) stewardship program. That law authorizes stewardship organizations to represent manufacturers and submit carpet stewardship plans to CalRecycle demonstrating that they have "achieved continuous meaningful improvement in the rates of recycling and diversion." AB 1158 (Chu) was enacted to address the failure of the carpet industry's stewardship organization (Carpet America Recovery Effort [CARE]) to obtain CalRecycle approval of its stewardship plan. This new law sets a revised statewide goal of achieving an annual 24% recycling rate for postconsumer carpet no later than January 1, 2020.

## CEQA

AB 246 (Santiago) extends for another two years (until January 1, 2020) the duration of the Jobs and Economic Improvement Through Environmental Leadership Act of 2011 which provides for expedited California Environmental Quality Act (CEQA) judicial review pursuant to the Environmental Leadership Act (AB 900, Buchanan), Chapter 354, Statutes of 2011. Expedited judicial review is available for projects certified by the Governor. Eligible projects include: (1) LEED (Leadership in Energy and Environmental Design) silver or better; and (2) projects that achieve a 10% greater standard for transportation efficiency. These projects must create high-wage, highly skilled jobs that pay prevailing wages and living wages. This new law increases the certification criteria for eligible projects from LEED "silver" to LEED "gold" or better and increases the transportation efficiency standard from 10% greater to 15% greater.

## Land Use and Housing

The Governor and the Legislature produced a comprehensive and thoughtful package of new laws designed to address the availability of affordable housing and the prevalence of homelessness ranging from permit streamlining to inclusionary zoning and funding. Many of these policies responded to an Assembly Housing and Community Development Committee hearing on February 22, 2017 where the Executive Director of Mutual Housing California shared her theories on the primary barriers to achieving affordable housing in California. These include lack of suitable sites (i.e., areas zoned for multifamily over single family), insufficient funding, and inadequate planning by local communities. The McKinsey Global Institute underscores the severity of California's housing crisis concluding that "at current construction rates, California will have a projected housing shortfall of 3.5 million homes by 2025."

The Councils of Government (COG) engage in a planning process (i.e., the regional housing needs assessment [RHNA]) with the Department of Housing and Community Development (HCD) to allocate a region's "fair share" housing need to accommodate population projections. Historically, if the COG's projections are within 3% of the Department of Finance's population projection then HCD relies upon the COG's number. In the event there is a discrepancy greater than 3%, HCD and the COG must reconcile the difference and agree on revised population projection. AB 1086 (Daly) adjusts the fair share allocation process by lowering the permissible discrepancy range from 3% to 1.5%. This revision is designed to address renter overcrowding in California. This new law also requires revisions to the allocation be "consistent, and not to the detriment, of the Sustainable Communities Strategies" established pursuant to SB 375.

AB 1397 closes a gap in the process of establishing inventories of residentially zoned land to accommodate its entire RHNA. This new law responds to a practice whereby cities and counties circumvent this process by establishing "default" densities and allocating sites that cannot realistically be developed for their intended use. This practice results in a dearth of land for developing affordable housing. This new law requires a more detailed analysis of whether sites are in fact suitable for residential development pursuant to the housing element law for purposes of "meeting some portion of a jurisdiction's RHNA." This new law requires local governments, when populating inventories of land available for residential development to include "vacant sites and sites that have realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level." For each site, the inventory must include "the number of units that can realistically be accommodated on that site and whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing." This new law restricts owner-occupied and rental multifamily residential use by right to developments. This restriction applies to those uses in which at least 20% of the units are affordable during the planning period. These sites must also have sufficient utilities including water and sewer.

The No Net Loss Zoning Law (Gov't Code Section 65863) prohibits local governments from approving new housing lower density housing than projected in the Housing Element without offsetting the lower density with other sites to accommodate the lost units. SB 166 (Skinner) is premised on the notion that this law does not ensure that local government will maintain available land to accommodate the remaining unmet housing need captured in its housing element. This new law amends the

No Net Loss Zoning law and requires local jurisdictions to commit to meeting the housing projection throughout the housing element planning period for lower and moderate-income households. The local jurisdiction must also issue written findings if it permits fewer units by income category than identified in the housing element for a given parcel. In that event, the jurisdiction must, within 180 days, identify and make available additional sites to compensate for the lowered density.

AB 879 (Grayson) adjusts provisions governing preparation of a local housing element annual general plan report. This new law requires that a municipality's annual report to include information about housing development applications received, approved, and disapproved along with a list of sites rezoned to accommodate a municipality's share of the regional housing need for each income level that could not be accommodated. It also modifies General Plan content addressing governmental and nongovernmental constraints impacting the maintenance, improvement, or development of housing for all income levels. This new law requires the governmental constraints analysis to also include local ordinances that directly impact the cost and supply of residential development. The nongovernmental constraints analysis must also include requests lower housing densities that would hinder the local regional housing share. This new law also requires the nongovernmental constraints analysis to demonstrate local efforts to remove nongovernmental constraints impacting plans for housing for all income levels. Finally, this new law requires that the housing element discuss efforts to remove nongovernmental constraints to the maintenance, improvement, and development of housing.

SB 330 (Berryhill) authorizes municipalities to waive building permit fees for veterans with service-related disabilities for the purpose of improving a home to accommodate that disability such as converting steps to ramps or widening door frames to be wheelchair accessible.

According to Assemblymember Bloom, AB 1505 responds to *Palmer v. City of Los Angeles*, the Second District California Court of Appeal case which limits the authority of local governments to apply inclusionary polices to rental housing. He states that "the Palmer court improperly conflated rent control [under the Costa-Hawkins Rental Housing Act], and deed-restricted affordable housing, which is creating uncertainty and confusion for local governments and housing advocates regarding the future viability of this important and well-established local land use tool." This new law overrides the Palmer decision and allows local inclusionary ordinances to require affordable rental housing. According to the bill analysis, AB 1505 preserves local government authority to optionally choose to adopt inclusionary policies which require residential development to allocate affordable units serving, moderate-income, lower income, very low income, or extremely low-income households.

AB 72 (Santiago) is premised on an HCD review of *California's Housing Future: Challenges and Opportunities* which highlights how state courts defer to local government justifications declaring developments infeasible. This new law is designed to strengthen enforcement of local governments with respect to "achieving housing goals." This new law authorizes the HCD to municipality to notify the Attorney General of alleged violations of its housing element and permits HCD to revoke a local government finding of conformity with its housing element.

AB 1515 (Daly) was introduced to provide courts clear standards to interpret the Housing Accountability Act (HAA, also known as the Anti-NIMBY Act) in favor of building housing. In HAA enforcement actions, the local government bears the burden of proving its decision conformed to the general plan, zoning standards, or other land use ordinances or requirement. Courts have historically deferred to local government determinations as to whether a project is consistent with land use plans and standards unless the court finds the local agency acted arbitrarily, capriciously, or without evidentiary basis. This new law changes the standard of judicial review and provides that a housing development project must be "deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity."

SB 167 (Skinner) makes several changes to the HAA to alleviate California's housing crisis by strengthening the burden of proof for local government approval of housing developments. This new law increases the burden from "substantial evidence" to "a preponderance of the evidence" when making findings supporting disapproval of a housing development project and its conformity with land use plans.

When a local agency denies a proposed housing development project that is, among other reasons, inconsistent, with an applicable general plan or zoning standard it must provide written documentation explaining the basis for determining that the housing development is out of compliance. This new law authorizes project applicants, those eligible to apply for residency in the development or emergency shelter, or a housing organization to enforce this law and receive reasonable attorney's fees and costs should it prevail. This new law authorizes a court to compel a local agency to act on a development project where it has disapproved an emergency shelter or specified

low/moderate-income projects without issuing sufficient findings in support of its decision. Similarly, the court can compel action where it finds a local agency conditioned approval in a manner that renders infeasible or where the agency, disapproved the project without making the required findings or without making findings supported by a preponderance of the evidence.

This new law authorizes courts to direct local agencies to approve a housing development project or emergency shelter where the court finds that the local agency acted in bad faith in disapproving or constraining a housing development project or emergency shelter. Courts are also authorized to impose a minimum fine of $10,000 per housing unit where local agencies act in bad faith or fail to carry out a court order compelling compliance. Finally, this new law adjusts procedures governing appellate review allowing a party to appeal a trial court's order or judgment to the court of appeal.

SB 540 (Roth) is intended to streamline affordable housing approvals at the local level. This new law authorizes local governments to establish "Workforce Housing Opportunity Zones" (WHOZ) to include areas identified in the local housing element. Cities must develop five- year plans identifying where to build housing and prepare an environmental impact report (EIR) under CEQA. Within 60 days of deeming an application complete, local governments must approve housing projects that comply with plan without any additional environmental review.

AB 678 (Bocanegra) modifies the HAA burden of proof supporting a local agencies decision to disapprove, condition approval in a manner rendering infeasible a housing development project for very low, low-, or moderate-income households or an emergency shelter. This new law adjusts the burden of proof for a conformity finding for housing development projects or emergency shelters with an applicable plan, program, policy, ordinance, standard, requirement, from "substantial evidence." This new law prohibits a local government from disapproving a housing development project or emergency shelter where the zoning ordinance or general plan land use designation changed after the application was deemed complete. Similarly, this prohibition applies to setting conditions of approval. This new law also amends the definition of a mixed-use development to be $^{2}/_{3}$ of the square footage be designated for residential use.

This new law authorizes a court to compel compliance with the HAA within 60 days after finding a local agency disapproved or conditioned approval in a manner that renders infeasible the project or emergency shelter or housing for very low, low-, or moderate-income households without making the required findings or without making sufficient findings. This new law also authorizes a court to compel compliance if it determines that the local agency disapproved or inappropriately conditioned a housing development project in a manner rendering it infeasible for the development without making the required findings or without making findings supported by a preponderance of the evidence. In addition, courts may direct local agencies to approve the housing development project or emergency shelter if it finds that local agency acted in bad faith by disapproving or conditionally approving housing projects or emergency shelters Courts are empowered to issue a minimum amount of $10,000 per housing unit on the date the application was deemed complete. Courts are also authorized to issue fines at five times the amount of a standard fine for local agencies that act in bad faith to carry out the court's order. Finally, this new law authorizes a court to award reasonable attorney's fees and costs to housing organizations seek to enforce the HAA and prevail.

AB 1521 (Bloom and Chiu) bolsters the Planning and Zoning Law notice obligations, which, among other things, required property owners to provide a one-year notice to tenants before converting an affordable property to market rate. This new law requires property owners of assisted housing developments to notify tenants of their intent to terminate the rental restriction. The notice must be issued within three years of a scheduled expiration of rental restrictions. This new law empowers courts to award attorney's fees and costs to a prevailing plaintiff seeking injunctive relief under this new law. This new law authorizes a tenant association at the property or any affected public entity to enforce these requirements either in law or in equity. This new law also revises the offer and acceptance process where a qualified entity elects to purchase an assisted housing development. It requires the parties to negotiate the market value for sale. Where the parties are unable to agree on that value, an appraisal process must determine the bona fide offer. Owners who receive a bona fide offer of market value are prohibited from selling the property to others and must execute a purchase agreement within 90 days of receipt of the offer.

SB 35 (Wiener) establishes a streamlined approval process under CEQA for infill residential developments (with two or more residential units) in localities that have not met their regional housing needs assessment (RHNA) target. This new law offers a streamlined, ministerial approval process under CEQA in lieu of a conditional use permit for affordable multi-family housing developments located within one-half mile of public transit. This new law limits local governments from imposing parking standards on a streamlined development. If the local government agency fails to notify the applicant of whether it meets

housing density zoning standards, the development will be deemed to comply with zoning standards.

AB 73 (Chiu) is designed to promote housing on infill sites near public transportation. This new law incents local governments to establish housing sustainability districts by rewarding them with zoning incentive payments for completing upfront zoning and environmental review for approving development projects that are consistent with the housing sustainability ordinance. This new law establishes provisions requiring replacement of affording housing units that would be displaced by a proposed development within a housing sustainability district. Under this new law, the housing sustainability district must authorize residential approvals through the ministerial issuance of a permit. Finally, this new law requires lead agencies to prepare an EIR when designating housing sustainability districts. However, housing projects undertaken in housing sustainability districts are exempt from CEQA.

Micro housing efficiency units range from 200 to 400 square feet can be folded into residential developments with conventionally sized market units. AB 352 (Santiago) responds to local permitting constraints that hinder production of micro housing unit. This new law prohibits local governments from limiting the number of efficiency units located within one-half mile of public transit or within one mile of a University of California or California State University campus.

SB 229 (Wieckowski) builds upon last year's 2016, AB 2299 (Bloom), Chapter 735, Statutes of 2016, and SB 1069 (Wieckowski), Chapter 720, Statutes of 2016 which was enacted to ease barriers constructing additional living units (ADUs or "mother-in-law" units) on single-family lots. That law required local agencies to ministerially review ADU applications within 120 days and exempts parking and fire sprinkler requirements. This new law authorizes conversion of garages, carports, and covered parking structures to an ADU. This new law prohibits a local government from approving an ordinance that prohibits the sale or other conveyance of the unit separate from the primary residence. As a result, an owner of an ADU may separately rent it; however, ADUs must be sold together with the primary residence.

AB 494 (Bloom) amends the Planning and Zoning Law to allow ADUs to be rented separately from the primary residence. This new law additionally allows garages converted to ADUs without having to meet a setback. This new law also modifies the prior parking limit for ADUs to not exceed one parking space per unit or per bedroom, whichever is less. This new law also redefines "tandem parking" to allow replacement parking spaces to be in any configuration where local agencies require ADUs to replace off-street parking spaces. This new law adds to the CEQA ministerial, nondiscretionary approval process an ADU that includes a studio, pool house, or other similar structure. Finally, this new law authorizes cities to require owner occupancy for either the primary or the ADUs.

AB 932 (Ting) expands upon the Shelter Crisis law allowing cities to declare a "shelter crisis" which limits municipal liability for providing emergency housing. The Shelter Crisis law also conditionally suspends state and local housing, health, and safety standards for public facilities. AB 932 authorizes cities in major metropolitan areas (including Berkeley, Emeryville, Los Angeles, Oakland, or San Diego, the County of Santa Clara, San Francisco) within California to adopt reasonable local standards for homeless shelters in lieu of conventional land use standards pursuant to conventional buildings. These standards allow for alternative standards for design, site development, and operation of homeless shelters.

Last year**,** SB 1263 (Wieckowski), Chapter 843, Statutes of 2016 prohibits local governments from permitting residential developments that rely upon hauled water is a water source. That law provided an exemption for rebuilding homes destroyed by natural disasters; however, homes destroyed fire due to human error did not enjoy the exemption. AB 367 (Obernolte) is declaratory of existing law and provides an exemption to rebuild due to fire.

SB 2 (Atkins) is an urgency law creating the Building Homes and Jobs Act which provides a sustainable source funding for affordable housing. This new law imposes a $75 fee on real estate transaction documents. This new law requires that 20% of these funds support affordable owner-occupied workforce housing, affordable housing, and home ownership opportunities.

SB 3 (Beall) is an urgency measure to submit to the California electorate in the November 6, 2018 general election the Veterans and Affordable Housing Bond Act of 2018 that would authorize $4 billion in General Obligation Bonds with $3 billion to finance housing programs, infill infrastructure financing and affordable housing matching grant programs. $1 billion would fund home, and mobile home purchase assistance for veterans.

AB 571 (Eduardo Garcia) is an urgency law that authorizes the use of state low income housing tax credits (Low Income Housing Tax Credit Program and to the Department of Housing and Community Development's (HCD) Office of Migrant Services]) for farmworker housing projects.

In the aftermath of dissolution of California's redevelopment agencies in 2011 successor agencies were established to help facilitate the unwinding of these agencies and their functions. Oversight boards have since been established to supervise successor agencies. These successor agencies are comprised of local agency representatives that serve the

project area. The Redevelopment Agency (RDA) dissolution process requires only one consolidated oversight board to exist in each county. Successor agencies with more than one oversight board/county were required to consolidate by July 2018; 11 counties must still complete the consolidation and require special district representation on a LAFCO. Because LAFCOs are not authorized to convene a meeting for the sole purpose of appointing an RDA board member, AB 979 (Lackey) was enacted to allow LAFCOs for the appointment of a representative oversight representative on the board. AB 979 (Lackey) specifically amends the Cortese-Knox-Hertzberg Local Government Reorganization Act to allow special districts to vote on LAFAC representation in a meeting of the county's independent special districts.

AB 1568 (Bloom) is premised on the author's belief that after dissolution of the redevelopment agencies in 2011, "Local governments have been without a reliable financing mechanism to invest in economically depressed, transit-rich areas. . .." This new law enacts the Neighborhood Infill Finance and Transit Improvements Act, which permits EIFDs to receive sales and use tax or transactions and use taxes. These revenues can be expended to support infill developments where at least 20% of the funds support affordable housing.

SB 628 (Beall), Chapter 785, Statutes of 2014, authorizes a city council or board of supervisors to establish an EIFD to generate property taxes, issue bonds, and adopt infrastructure financing plans to finance public capital facilities such as brownfield restoration and other environmental mitigation, transit priority projects, and projects implementing a sustainable community strategy.

In light of decreased funding supporting agricultural land conservation, SB 732 (Stern) was enacted to assist agricultural cities or counties in managing the costs for updating general plans. This new law is particularly focused on preserving agricultural land uses for developing agricultural land components connected to the open-space element. This new law offers them, among other assistance, priority grant funding from the California Department of Conservation and bond proceeds.

SB 407 (Wiechkowski) was prompted by an incident in Alameda County where a property manager for a homeowner's association fined a homeowner promoting state legislation regarding homeowner voting rights. This new law is designed to clarify the boundaries of first amendment protections under California law for homeowners and residents in common interest developments (CIDs). Specifically, this new law makes it unlawful for a CID to prohibit a member or resident of a common interest development from "peacefully assembling or meeting during reasonable hours and in a reasonable manner for purposes relating to common interest development living, association elections, legislation, election to public office, or the initiative, referendum, or recall processes." In addition, this new law prohibits HOAs from, among other things, imposing a fee on members of CIDs in order use the association's common area for these activities.

AB 690 (Quirk-Silva) is designed to address potential conflicts of interests with CID management companies and establishes transparency regarding HOA document production fees. This new law emerged in response to conflicts of interest with common interest development (CID) companies. It is aimed at preventing CID managers who may have recommendations to companies to which they have financial interests in other companies (e.g., a gardening or document production company. This new law amends the Davis-Stirling Common Interest Development Act and requires a CID manager or management company to disclose whether the CID manager receives referral fees and disclose this before entering into a management agreement. In addition, this new law requires CIDs to annually disclose services the CID manager contemplates providing anticipated services to the HOA.

Prior to AB 1412 (Choi) volunteer officers or directors of HOAs who manage an "exclusively residential" HOA enjoyed limited personal liability. This new law extends the protection to volunteer officers who manage mixed use HOAs.

AB 1598 (Mullin) builds on AB 2 (Alejo), Chapter 319, Statutes of 2015, which authorizes the creation of Community Revitalization and Investment Authorities (CRIAs). Under this new law local government entities are authorized to establish a CRIA to collect property taxes and issue debt. This new law is modeled after the CRIA vehicle and authorizes municipalities to create affordable housing authorities with authority to fund affordable housing.

AB 74 (Chiu) establishes the Housing for a Healthy California Program to fund supportive housing opportunities. Under this new law, the Department of Housing and Community Development is authorized to award grants to counties for capital and operating assistance, or operating reserve grants and capital loans to developers.

## Natural Resources

In his veto message for a bill that that would have banned smoking on state beaches and parks, the Governor said, "If people can't smoke even on a deserted beach, where can they? There must be some limit to the coercive power of government." He did sign a major parks bond, an endangered species law, and SB 50 (Allen) which is one of three bills introduced shortly after Scott Pruitt was confirmed to run the United State Environmental

Protection Agency. This new law authorizes the State Lands Commission (SLC), the Wildlife Conservation Board, and the California Department of Fish and Wildlife (CDFW) to implement a state policy discouraging the conveyance of federal public lands in California to third parties. This new law requires these agencies to undertake all feasible efforts to protect against future unauthorized conveyances of federal public lands or any change in federal public land designation. The SLC is authorized to petition for declaratory and injunctive relief to challenge a conveyance. These conveyances would be void ab initio unless the SLC is offered the right of first refusal or the opportunity to transfer the land to another entity.

The Legislature approved a few Assembly Joint Resolutions (AJRs) to highlight the federal government to preserve, protect and fund California's national parks. AJR 15 (Aguiar-Curry) responds to a federal Executive Order directing the U.S. Department of the Interior review specified national monuments that were designated since 1996. This includes six newly established monuments in California since 1996 including Berryessa Snow Mountain, Giant Sequoia, Carrizo Plain, San Gabriel Mountains, and, Sand to Snow and Mojave Trails. AJR 15 urges the Trump administration to "protect federal public lands and the economic, historical, cultural, and ecological values that they provide for Americans, as well as protecting the integrity of all the national monuments." AJR 23 (Bigelow) was introduced to highlight the estimated $1.7 billion in deferred maintenance at California's national parks. This measure encourages the U.S. Congress to support the National Park Service Legacy Act of 2017 (S. 751 and H.R. 2584) which is designed to provide a "reliable, predictable stream of resources" to fund deferred maintenance at the National Park System. SJR (Senate Joint Resolution) 7 (McGuire) is a similar measure focused on restoring California's salmon fisheries. This measure urges state and federal agencies to prioritize restoration of salmon fisheries statewide.

SB 5 (de León, E. Garcia) is an urgency law that enacts the California Drought, Water, Parks, Climate, Coastal Protection and Outdoor Access for All Act of 2018 which will put to the voters whether to approve $4 billion June 2018 bond measure to finance a drought, water, parks, climate, coastal protection, and outdoor access for all program. The bond would allocate $1.2 billion for parks, $550 million for flood protection, $1 billion for water programs, and $1.3 billion for climate and conservancies while reallocating $100,000,000 of the unissued bonds from Propositions 1 (the Water Quality, Supply, and Infrastructure Improvement Act of 2014), 40 (The California Clean Water, Clean Air, Safe Neighborhood Parks and Coastal Protection Act of 2002) and 84 (The Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Act of 2006) to finance projects to address drought, water, parks, climate, coastal protection, and outdoor access. This new law earmarks at least 20% of the funds for projects serving severely disadvantaged communities.

SB 159 (Allen) and 249 (Allen) are twin bills that respectively eliminate the sunset of the Off-Highway Vehicle (OHV) program and require more thorough environmental monitoring and mitigation. The Division of Off-Highway Motor Vehicle Recreation (within the Department of Parks and Recreation) is now required to, among other duties, implement a plan to manage wildlife habitat protection for state vehicular recreation areas. It must also annually monitor state vehicular recreation areas to evaluate whether soil conservation standards and wildlife habitat plans are being achieved. In addition, the agency must ensure protection of natural, cultural, and archaeological resources within vehicular recreation areas.

SB 92 (Committee on Budget and Fiscal Review) is an urgency omnibus resources trailer bill that makes several changes to effectuate the Budget Act of 2017. Among many other provisions, this new law requires the DWR to evaluate the public safety risk of specified dams in California. This new law requires high risk dams to develop and implement an emergency action plan and update it every ten years. This new law empowers DWR to issue civil fines of up to $1,000/day for noncompliance with dam safety along with operational restrictions for failure to comply. This new law provides that the investment plan for implementing the $800 million supplemental environmental penalty for Volkswagen "strive to ensure at least 35 percent of the funds benefit low-income communities disproportionately affected by air pollution."

AB 1530 (Gonzalez Fletcher) is intended to help sustain urban forests by improving maintenance of the urban forest canopy and protect this resource from the challenges of drought, disease, pests, and extreme weather. This new law officially recognizes the importance of maintaining an existing tree canopy and amends the California Urban Forestry Act authorizing the Department of Forestry and Fire Protection (CAL FIRE) to effectively manage urban forests and to establish local or regional targets for urban tree canopies. This new law also authorizes the CAL FIRE to provide technical assistance to urban areas to better manage urban forests, and to improve and enhance local water capture to maintain urban forests.

AB 1133 (Dahle) is designed promote the reintroduction of nonessential experimental endangered, threatened, and candidate species to native habitat for scientific or resource management. Pursuant to the California Endangered Species Act, this new law permits CDFW to authorize an incidental take of an endangered, threatened, or candidate species pursuant to the federal Endangered Species Act

that is designated as an experimental population. This new law specifies that the incidental take must further the conservation of the species, avoid and minimize the impacts of any taking of the species, and will not jeopardize the continued existence or recovery of the species.

California's coastal shorelines from time-to-time experience hazards ranging from leaking legacy oil wells to damaged piers, pilings, deteriorated electric cables, and old pipes. When resources are available, the SLC is charged with the responsibility of identifying, assessing, and remediating these hazards. SB 44 (Jackson) allocates $2 million to the SLC to administer a coastal hazard and legacy oil and gas well removal and remediation program.

AB 250 (Gonzalez Fletcher) requires the State Coastal Conservancy (SCC) to design and implement a "Lower Cost Coastal Accommodations Program." This program is intended to facilitate the generation of new, lower cost coastal accommodations on coastal public lands and coastal lands owned or operated by nonprofit organizations.

SB 161 (McGuire) requires the Fish and Game Commission (FGC) to form a tribal committee make recommendations on all tribal matters considered by the FGC.

AB 593 (Gloria) extends the sunset on the Structural Fumigation Enforcement Program from January 1, 2018, to January 1, 2023.

### Looking Ahead

As he enters his final year in office, California's longest serving Governor seems to have no less fight than he had during his first term in the 1970s. At his final State-of-the-State speech, he waxed on about big infrastructure investments including highspeed rail, fixing California's "broken water system," and defending the state gas tax. He also emphasized leading by example in the wake of the United States withdrawal from the Paris Climate Agreement. We can expect Governor Brown to advance strategies to combat climate change, including creative approaches to manage increased fire risk due to drought and warming temperatures. He is also reportedly considering linking California's cap-and trade program with the European Union's program. Other initiatives may include a continued commitment to millions of ZEVs and a more robust renewable portfolio target.

Whether his swan song will match the promise of his ambitious agenda depends in part on the fate of the Democrats' supermajority in the Legislature. Since the advent of the "#MeToo" movement, several Democratic legislators accused of sexual misconduct have either resigned or plan to retire. The Governor's rainy-day reserve may be also in jeopardy should California lose federal immigration and health care funds in a clash with the Trump Administration. Regardless of the outcome of the 2018 legislative session, it is unlikely any future Governor could top Governor's Brown's record of signing nearly 17,000 bills during his four terms at the helm.

# COMMON LAW AND ENVIRONMENTAL LITIGATION

## Cases

## Trial Court Properly Apportioned Private Attorney General Fees Based on Value of Litigation to Plaintiff

*Heron Bay Homeowners Assn. v. City of San Leandro*
No. A143985, 1st App. Dist., Div. 4
19 Cal. App. 5th 376, 2018 Cal. App. LEXIS 26
January 12, 2018

**The trial court properly apportioned the amount of attorneys' fees awarded pursuant to Code Civ. Proc. § 1021.5 to a homeowners association who challenged a wind turbine project to be built near the development, based on the project's potential impact on the value of the condominiums.**

**Facts and Procedure.** Defendant City of San Leandro is located on the San Francisco Bay. Real party in interest owned an approximately five-acre parcel in an industrial zone in the city, where it designed, manufactured, and remanufactured wind turbines used to generate electricity. Real party proposed to install a single 100-foot-tall wind turbine on its property to generate renewable energy for its business and conduct onsite research and development. To do so, it sought a variance from zoning restrictions on height.

The California Environmental Quality Act "requires that a public agency determine whether a project may have significant environmental impacts before it approves the project" [*Preserve Poway v. City of Poway* (2016) 245 Cal. App. 4th 560]. Accordingly, the city conducted a review of the proposed project. The proposed turbine would have been located within the San Francisco Bay

Estuary, a major refuge for many species of waterfowl and shorebirds, including four threatened or endangered species. Additionally, the proposed location would have been approximately 500 feet from some of the homes included in the 629-unit Heron Bay residential development.

"Under CEQA, an agency must require an [environmental impact report] for any project that 'may have a significant effect on the environment,' unless a categorical exemption applies." Alternatively, if there is substantial evidence "the project will have a significant environmental effect, but that effect may be reduced to a level of insignificance by implementing mitigation measures, the agency may adopt [a mitigated negative declaration] allowing the project to go forward subject to those measures" [*Preserve Poway, above*]. The city here circulated a notice, attaching an initial study, and advising that it proposed that the project proceed through a mitigated negative declaration (MND), with two specified mitigation measures.

Various entities and individuals submitted comments in response. The East Bay Regional Park District observed that the proposed location was "sandwiched between two marshes . . . harboring high concentrations of waterbirds, shorebirds, and numerous raptor species," and it objected that the city had not provided the data necessary to determine whether the project would result in significant environmental impacts. The Department of Fish and Wildlife recommended eight mitigation measures to minimize threats to birds. Counsel representing plaintiff Heron Bay Homeowners Association and its individual members, owners of the 629 units in the residential development, submitted comments, demanding that the city prepare an environmental impact report (EIR), and expressing concern, among other things, about the project's potential impact on views, birds and their habitats, aircraft navigational radar, noise and vibration levels, and property values. Individual homeowners also submitted comments raising various issues, including concerns about the potential impact on homeowner property values.

The city did not change course, but instead released a revised MND adding eight mitigation or monitoring levels, essentially those recommended by the Department of Fish and Wildlife. Plaintiff and its members submitted further comments in response, again insisting an EIR was required and again expressing concern, among other things, regarding an anticipated resulting decline in property values if the project were completed. The city's board of zoning adjustments ultimately approved the MND, after adding one further mitigation measure, and granted the variance. Plaintiff appealed the board's decision, but the city council affirmed it, approving the project.

Plaintiff filed a petition for a writ of mandate in the trial court seeking an order directing the city to set aside its approvals, and to comply with CEQA by preparing an EIR. The trial court granted the petition, finding that the city failed to comply with CEQA. The court observed that an agency may proceed "by way of a MND only if there is no substantial evidence before the agency that the project as revised may have a significant effect on the environment." "Whenever there is substantial evidence supporting a fair argument that a proposed project may have a significant effect on the environment, [the court noted,] an EIR normally is required. . . . 'The fair argument standard is a "low threshold" test for requiring the preparation of an EIR,'" and there is "*a preference for resolving doubts in favor of environmental review*" [quoting *Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal. App. 4th 1323].

Noting that most Heron Bay residents would not be able to see the proposed turbine, and that "obstruction of a few private views in a project's immediate vicinity [was] not generally regarded as a significant environmental impact," the trial court did "not find substantial evidence supporting a fair argument that the project as mitigated [might] have a significant effect on private aesthetics." The trial court found, however, that there was "substantial evidence supporting a fair argument that the project as mitigated [would] have a significant effect on biological resources" (specifically birds), "on noise," and "on aesthetic resources" (that is, on the public's views "from the anticipated Bay Trail"). In light of these findings, the trial court (1) directed the city to set aside its approvals, and (2) directed the city and real party not to proceed with work on the project unless and until the city approved a CEQA-compliant EIR. The court entered judgment in favor of plaintiff.

Real party and the city did not challenge the ruling or judgment on appeal. The city subsequently filed a return to the writ of mandate, advising the trial court that it had adopted a resolution setting aside its approval of the MND and the variance, and its affirmance of the board of zoning adjustment's decision. Real party did not proceed with the project.

Following entry of judgment, plaintiff moved the trial court for an award of attorneys' fees under Code Civ. Proc. § 1021.5. The fees motion advised that the Berger law firm represented plaintiff in the administrative proceedings, while the RJO law firm) represented it in the CEQA litigation before the trial court. According to the moving papers, plaintiff's members, through their membership dues, paid the Berger law firm $84,720. Additionally, under a partial contingency agreement, they paid the RJO law firm $64,638, and the firm agreed to seek reimbursement for the remainder of its fees ($166,981.50) as part of an eventual attorneys' fee award. The fees motion requested a

2.0 multiplier for the latter amount ($166,981.50), to compensate the RJO law firm for the contingency-related risk. In total, therefore, plaintiff sought a fee award of $483,321 (that is, $166,981.50 (contingency amount) x 2.0 = $333,963 + $64,638 (paid to the RJO law firm) and $84,720 (paid to the Berger law firm) = $483,321).

Real party and the city filed a joint opposition to the fees motion. They contended that plaintiff did not have legal authority to prosecute a case in the public interest; plaintiff was motivated exclusively by a desire to protect its members from the significant anticipated decline in their property values if the turbine were constructed; and this pecuniary interest clearly outweighed the fees plaintiff had paid, negating its right to recovery under Code Civ. Proc. § 1021.5.

The trial court issued an order granting the fees motion in part. The court concluded "the lawsuit conferred a significant benefit on the public." But it also found that plaintiff "had a significant financial incentive to initiate the litigation" because it feared installation of the proposed turbine would reduce members' property values. After discounting the suggestion of plaintiff's president, based on unspecified "studies," that the total reduction could be between $30 million and $150 million, the trial court acknowledged that any valuation of real estate involved uncertainty, and that the project's impact here would be distributed unevenly among plaintiff's members, "with properties closer to the turbine and with a better view of the turbine suffering larger declines in value."

Nonetheless, the trial court determined that it was possible to value the projected loss that plaintiff and its members feared. Attempting to do so, the court "*assumed* a rational fear of an average 2.5% drop in value" for all of the 629 residences (italics added by the court). Crediting evidence that each residence on average was worth $500,000, the court concluded this "*suggested*" that plaintiff and its members "sought to avoid a property loss *in the neighborhood* of $[7.8 million]" (italics added by the court). Finding that "experienced CEQA counsel would have thought there was a 75% probability of success when the litigation commenced," the trial court then discounted its $7.8 million estimate by the corresponding 25 percent risk of a loss, and concluded the "probable monetary value of the benefit of the litigation was *in the neighborhood of* $[5.8 million]" (italics added by the court) (or $9,000 per residence). In comparison, the trial court judge found, based on knowledge of the case, including the "procedural, factual, and legal complexity," and based on fee awards entered in other CEQA cases the same judge had handled, plaintiff could have reasonably estimated, "when deciding to initiate the lawsuit," that its fees would total about $240,000.

Citing the Supreme Court's decision in *Conservatorship of Whitley* [(2010) 50 Cal. 4th 1206], the trial court next considered the mechanism for paying counsel. In *Whitley*, the Supreme Court observed that Code Civ. Proc. § 1021.5 was intended to address "the problem of affordability" in public interest litigation where "litigants will be unable either to afford to pay an attorney hourly fees or to entice an attorney to accept the case with the prospect of contingency fees." In light of this statutory purpose, the trial court concluded, it was necessary to consider here "whether anticipated benefits from the litigation [could] be used to pay counsel," that is, "whether any financial benefit [was] immediately bankable." The trial court reasoned that "a plaintiff who expects a lawsuit to result in an immediate financial gain can finance the lawsuit through a contingent fee agreement because if the lawsuit is successful then the plaintiff can pay her or his lawyers from the plaintiff's immediately bankable financial recovery. In contrast, a plaintiff who expects a lawsuit to result in financial benefits that accrue over a period of years may have more difficulty financing the lawsuit through a contingent fee agreement because . . . the plaintiff may have difficulty retaining counsel who agree to be paid over that period of years. Similarly, a plaintiff who expects a lawsuit to result in avoiding a financial loss may have more difficulty financing the lawsuit because the plaintiff would still need to pay the lawyer out of his or her now undiminished assets."

Weighing these anticipated benefits and costs, the trial court concluded that it was "a very close call" whether plaintiff was entitled to a fee award. The court stated that if "required to make an all or nothing decision on fees," it would deny the motion. But the court interpreted the relevant case law as allowing it the discretion instead to apportion (or adjust) the amount of the award to account for plaintiff's "significant financial incentive" to initiate litigation. The court concluded that "where a party pursues litigation for both its private pecuniary interest and in the public interest," a court may award fees to alleviate "the financial burden of bringing the lawsuit," while deducting "an amount reflecting the fee that plaintiffs could reasonably have been expected to bear themselves" [quoting *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal. 3d 917].

Accordingly, the trial court granted plaintiff's fees motion in part. Concluding that plaintiff and its members were sufficiently motivated to retain counsel in the administrative proceedings by their concern completion of the project would reduce their property values collectively by $7.8 million, the trial court apportioned responsibility for the Berger law firm's fees ($84,720) entirely to plaintiff, denying the latter's motion insofar as it applied to those fees. The court concluded that although the same concerns

motivated plaintiff to retain the RJO law firm to initiate the CEQA litigation, , that action involved "different risks and a much larger financial commitment." The court therefore apportioned responsibility for the RJO law firm's reasonable fees ($231,619.50) equally between plaintiff and real party and the city. Finding the RJO law firm was entitled to a multiplier of 1.2 for its time, because of the risk it assumed under the partial contingency fee agreement (that is, $231,619.50 x 1.2 = $277,943.40), the court ordered real party and the city to together pay the RJO law firm (1) $138,971.70 for its work on the CEQA litigation (that is, $277,943.40 x 0.5), and (2) $42,500 for its work on the fees motion (an amount the court calculated by applying a reasonable attorney hourly rate of $425 per hour multiplied by 100 hours), or a total of $181,471.70.

Real party and the city appealed. The court affirmed the trial court's order.

**General Legal Principles.** The court noted that "the Legislature adopted section 1021.5 as a codification of the 'private attorney general' attorney fee doctrine that had been developed in numerous prior judicial decisions. . . . The fundamental objective of the private attorney general doctrine of attorney fees is 'to encourage suits effectuating a strong [public] policy by awarding substantial attorney's fees . . . to those who successfully bring such suits and thereby bring about benefits to a broad class of citizens.' The doctrine rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will *as a practical matter frequently be infeasible.*" "Because public interest litigation often yields nonpecuniary and intangible or widely diffused benefits, and because such litigation is often complex and therefore expensive, litigants will be unable either to afford to pay an attorney hourly fees or to entice an attorney to accept the case with the prospect of contingency fees, thereby often making public interest litigation 'as a practical matter . . . infeasible.' . . . . Section 1021.5 addresses this affordability problem with the inducement of attorney fees for public interest litigation when certain conditions in the statute are met" [*Whitley, above*].

Further, "eligibility for section 1021.5 attorney fees is established when '(1) [the plaintiff's] action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary has been conferred on the general public or a large class of persons," and (3) "the necessity and financial burden of private enforcement are such as to make the award appropriate"'" [*Whitley, above*]. "'[Utilizing] its traditional equitable discretion,' [the trial] court 'must realistically assess the litigation and determine, from a practical perspective' whether or not the statutory criteria have been met" [*Summit Media, LLC v. City of Los Angeles* (2015) 240 Cal. App. 4th 171].

The court noted that "'we review an attorney fee award under section 1021.5 generally for abuse of discretion. Whether the statutory requirements have been satisfied so as to justify a fee award is a question committed to the [sound] discretion of the trial court, unless the question turns on statutory construction, which we review de novo.' 'An abuse of discretion occurs if, in light of the applicable law and considering all of the relevant circumstances, the court's decision exceeds the bounds of reason and results in a miscarriage of justice. This standard of review affords considerable deference to the trial court provided that the court acted in accordance with the governing rules of law. We presume that the court properly applied the law and acted within its discretion unless the appellant affirmatively shows otherwise'" [*Espejo v. The Copley Press, Inc.* (2017) 13 Cal. App. 5th 329].

**Application of Apportionment Principles to Private Attorney General Fees.** The court stated that on appeal, and before the trial court, real party and the city did not dispute that plaintiff's action resulted in the enforcement of an important right affecting the public interest, a significant benefit was conferred on the general public or a large class of persons, and there was a necessity for private enforcement. The court's focus therefore was limited to the final element of Code Civ. Proc. § 1021.5's eligibility test, particularly, to the question of whether the "financial burden of private enforcement . . . [is] such as to make the award appropriate" [Code Civ. Proc. § 1021.5(b)]. The court noted that "in determining the financial burden on litigants, courts have quite logically focused not only on the costs of the litigation but also any offsetting financial benefits that the litigation yields or reasonably could have been expected to yield. '"An award on the 'private attorney general' theory is appropriate when the cost of the claimant's legal victory transcends his personal interest, that is, when the necessity for pursuing the lawsuit placed a burden on the plaintiff 'out of proportion to his individual stake in the matter.'"' 'This requirement focuses on the financial burdens and incentives involved in bringing the lawsuit.'" "Section 1021.5 is intended to provide an incentive for private plaintiffs to bring public interest suits when their personal stake in the outcome is insufficient to warrant incurring the costs of litigation" [*Whitley, above*].

Here, the trial court concluded that plaintiff and its members had "a significant financial incentive to initiate the litigation" because they feared installation of the proposed turbine would reduce their property values, which made plaintiff's entitlement to attorneys' fees a

"very close call.". Reasoning that the financial incentive was "mitigated by the uncertain value of the benefit sought," however, the court exercised its discretion by granting the fees motion in part, denying it in part, and then apportioning responsibility for payment of plaintiff's attorneys' fees among the parties. The resulting award was less than half the amount plaintiff originally requested.

Real party and the city asserted that the trial court erred in applying apportionment principles to grant a partial fee award. They contended that the trial court could only consider apportionment when determining the amount of the fee award, after concluding a party's financial interest in the litigation was insufficient to disqualify it from receiving any fee award. Here, real party and the city submitted that as the trial court estimated plaintiff's potential loss at about $5.8 million and the reasonable fees expenditure at $250,000, the trial court must have skipped a step, moving on to consider apportionment without properly evaluating whether plaintiff's costs transcended its members' personal interests. The court disagreed because the trial court ultimately concluded that the "value of the benefit sought" was uncertain and that conclusion was supported by substantial evidence.

The court noted that membership in plaintiff was mandatory, each member had a vote, and "properties closer to the turbine and with a better view of the turbine [would] suffer larger declines in value." In granting the writ petition, the trial court found that the proposed turbine would be visible from only a few Heron Bay residences. Although the potential loss of property value for some residents might have been significant, it was reasonable to question whether the majority of plaintiff's members would have had sufficient incentive to retain counsel for the CEQA litigation having previously incurred litigation fees to no avail in the administrative proceedings, if there had not been the possibility of securing an award under Code Civ. Proc. § 1021.5. The uncertainty was underscored by the fact that plaintiff actually secured representation for the CEQA litigation "on a 'partially contingent basis,'" which apparently allowed it, at least initially, to pay the RJO law firm less than a third of the amount the firm actually billed. This indicated that plaintiff and its members did not actually value the "benefit" here sufficiently to undertake the litigation absent the incentive of a potential fee award under Code Civ. Proc. § 1021.5.

**Benefit Sought By Plaintiff Would Not Result in Immediate Financial Gain.** The court further stated that it was relevant that the benefit plaintiff and its members sought through the litigation could not be used to pay counsel and was not "immediately bankable." The trial court observed that unlike a "plaintiff who expects a lawsuit to result in an immediate financial gain [and] can finance the lawsuit through a contingent fee agreement," a "plaintiff who expects a lawsuit to result in avoiding a financial loss may have more difficulty financing the lawsuit because the plaintiff would still need to pay the lawyer out of his or her now undiminished assets." CEQA litigation costs could be "significant," and represented a "much larger financial commitment" than the previous administrative proceeding. These factors were pertinent in evaluating whether the personal interests of plaintiff's members transcended the litigation costs [*see, e.g., Woodland Hills, above*].

**Record Supported Implied Finding That Plaintiff Had Sufficient Financial Interests to Incur Some Costs.** The court stated that although the trial court did not expressly state a finding on the financial burden element before discussing apportionment, the record supported an implied finding that plaintiff had a sufficient financial incentive to incur some, but not all, of the costs of the litigation [*see, e.g., Ketchum v. Moses* (2001) 24 Cal. 4th 1122]. The trial court's apportionment discussion reflected this implied finding. The trial court stated that it would "apportion fees between those that [plaintiff] would have reasonably incurred to further its own interests and those of its members and those that [plaintiff] would not have incurred, or could not have retained counsel to incur, without the prospect of a fee award under [section] 1021.5." The court noted that in *Woodland Hills*, the California Supreme Court confirmed apportionment was appropriate in such circumstances: "If the trial court finds that plaintiffs' potential benefit was such that individuals in their position could reasonably have been expected to incur attorney fees if the amount of the fee bore a more reasonable relation to such benefit, the trial court, in awarding fees under section 1021.5, may deduct from the total reasonable attorney fee an amount reflecting the fee that plaintiffs could reasonably have been expected to bear themselves" [*see also Collins v. City of Los Angeles* (2012) 205 Cal. App. 4th 140; *cf. Whitley, above*]. The court stated that the trial court therefore acted within its discretion in apportioning to plaintiff (1) full responsibility for paying the Berger law firm's fees (for representation in the administrative proceedings) and (2) 50 percent responsibility for paying the RJO law firm's reasonable fees (for representation in the CEQA litigation), while apportioning to real party and the city the remaining 50 percent responsibility for the RJO law firm's reasonable fees.

**No Showing That Plaintiff Solely Motivated by Self Interest.** Real party and the city suggested, in the alternative, that plaintiff was ineligible to seek attorneys' fees because it acted purely out of self-interest or, if it acted for altruistic purposes, that it lacked authority to do so, because its governing documents did not permit it to pursue public interest or environmental litigation. However, the court noted that "a pecuniary interest in the

outcome of the litigation is not disqualifying. 'If the party claiming fees has a pecuniary interest in the outcome of the lawsuit, the issue is whether the financial burden placed on the party is out of proportion to its personal stake in the lawsuit'" [*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal. App. 4th 1331; *see also Whitley, above*]. The trial court implicitly answered the threshold question in the affirmative here, although it concluded apportionment was appropriate. The court stated that even if this were not the case, the argument of real party and the city that plaintiff lacked authority to pursue public interest or environment litigation failed because they did not cite any specific provision of the 48-page governing document that they contended effected this restriction, and the court's review of the document also uncovered no such proscription.

The court stated that the trial court did not find, and the record did not support the conclusion, that plaintiff and its members were motivated in initiating this litigation solely by a desire to avoid a loss in property values. Although the public comments that plaintiff and its individual members submitted during the administrative process raised concerns about the project's potential impact on property values, they also expressed worries about the potential impact on wildlife, aesthetics, health, and noise levels. Plaintiff additionally submitted a consultant's report suggesting that the project would "have a potentially significant impact on aesthetics, biological resources, and noise." The fact that a party has a pecuniary interest in initiating litigation does not automatically signify more altruistic concerns played no role in the decision.

**Uncertain Value of Benefit Sought.** Real party and the city additionally contended that the trial court's conclusion that plaintiff's "financial incentive" here was "mitigated by the uncertain value of the benefit sought" contradicted its earlier estimate assigning a value to plaintiff's avoided property value loss. However, the court stated that it did not discern a contradiction; rather, it viewed the trial court's statement as confirmation that it did not ultimately value the projected property loss at $5.8 million. The court arrived at that figure by assuming that plaintiff and its members subjectively feared "an average 2.5% drop in [the] value" of all 629 residences, and then plugging that number into the test described in *Whitley* for weighing costs and benefits [*see Whitley, above*]. Under that test, "the successful litigant's reasonably expected financial benefits are determined by discounting the monetary value of the benefits that the successful litigant reasonably expected at the time the vital litigation decisions were made by the probability of success at that time. The resulting value must be compared with the plaintiff's litigation costs actually incurred, including attorney fees, expert witness fees, deposition costs and other expenses" [*Espejo, above*].

The court stated that it is questionable whether a trial court may rely on an arbitrary estimate in evaluating the extent of a party's personal stake in litigation under Code Civ. Proc. § 1021.5 [*see Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal. App. 4th 714]. But the trial court undoubtedly erred in concluding that a subjective standard applies when evaluating a party's personal stake in the outcome of litigation under Code Civ. Proc. § 1021.5. "Although objective financial incentives and subjective motives may overlap, and indeed sometimes may be indistinguishable," *Whitley* confirmed that "only the former is the proper subject of the court's inquiry when assessing the financial burden of litigation under section 1021.5."

However, the court stated that the error was not fatal to the trial court's decision because it did not actually rely on its own arbitrary assessment in deciding the fees motion. Instead, after concluding that plaintiff "had a significant financial incentive to initiate the litigation," the trial court observed that the value of the benefit remained "uncertain" and could be addressed through apportionment. Real party and the city did not dispute that plaintiff had a significant financial incentive to initiate litigation, and plaintiff did not appeal the trial court's conclusion on this point. The only question, therefore, was whether the incentive was so large and the benefit so certain that it precluded any award.

Real party and the city asserted that "abundant evidence" confirmed the answer was yes. Aside from the trial court's arbitrary valuation of plaintiff's feared loss, however, the only specific valuation real party and the city cited was a broad estimate of the total loss for all 629 residences that plaintiff's president (Lee) asserted, without citing any evidence or authority, in one sentence of a multipage public comment he submitted during the administrative process. In the one sentence, Lee asserted that (1) *unspecified* "*studie*s . . . *suggested*" the values of properties within a mile of a turbine dropped between 10 percent and 30 percent, and (2) applied here, this would represent a total reduction of "between $15,000 to $150,000 per home or $30 million to $150 million for the community" (italics added by the court). The court noted that although property owners may offer opinions regarding the value of their property [Evid. Code § 813], a trier of fact is not obligated to accept the opinion [*see, e.g., City of Perris v. Stamper* (2016) 1 Cal. 5th 576] and there was no claim that the court erred here in rejecting the president's unsupported assertion regarding the potential value of the loss for all homeowners. As real party and the city cited no other evidence suggesting a specific valuation of the projected loss, the court could not agree that the evidence here required a finding that plaintiff's stake in the litigation made it ineligible for a fee award of any size.

**Preservation of Property Values as Disqualifying Interest.** Real party and the city contended that it is well established that "preservation of property values *can* be a disqualifying pecuniary interest" under Code Civ. Proc. § 1021.5 (italics added by the court), and "need not be quantified with absolute mathematical precision." As support for this proposition, real party and the city relied on *Beach Colony II v. California Coastal Com.* [(1985) 166 Cal. App. 3d 106]. There, a real estate development partnership, which planned to construct 10 condominium units in a coastal area, sought to void a permit condition that would have increased its costs by $300,000. The partnership ultimately prevailed, obtaining a published opinion, and was awarded attorneys' fees. The court of appeal reversed the award, however, because the partnership made "no attempt to compare its litigation costs to the immediate economic benefit" that it received through the litigation—apparently offering no evidence at all regarding the amount of attorneys' fee it incurred—contending instead simply "that the general public got something for nothing at [its] expense." As support for its decision to reverse the award, the court relied on the following facts: the partnership's sole motive in initiating litigation was "economic self-interest;" "the benefits it obtained [were] immediately and directly translated into monetary terms" in that its victory allowed the partnership to save $300,000 in improvement expenses; and the partnership did not produce "*any* evidence to support an inferred finding that its legal costs transcended its personal interest in [the litigation]" (italics added by the court).

The court stated that the decision was easily distinguishable as none of those key facts existed here. To the contrary, the record here contained evidence that plaintiff and its members were motivated to initiate the CEQA litigation in part by nonpecuniary interests, including concerns about the proposed turbine's potential impact on wildlife, aesthetics, health and noise levels. The trial court agreed that the monetary value of the benefit they sought was uncertain. And plaintiff submitted detailed evidence demonstrating the financial costs of its litigation, including attorneys' fees.

The court observed that while *Beach Colony II* was not instructive, other cases were on point. It cited *Citizens Against Rent Control v. City of Berkeley* (1986) 181 Cal. App. 3d 213] as one example. There, a group of Berkeley landlords successfully challenged the constitutionality of a city ordinance that would have limited the funds they could contribute to defeating a proposed rent-control ordinance. When the landlords subsequently sought a fee award under Code Civ. Proc. § 1021.5, the city opposed the request, contending that the plaintiffs were sufficiently motivated to pursue the litigation by their private pecuniary interests because they feared enactment of rent control would decrease rental property values. The court of appeal rejected this argument, however, affirming the trial court's fees award. It reasoned that the plaintiffs had received no direct pecuniary benefit from their litigation, and that "any benefit in the form of preventing erosion of property values was at least once removed from the results of the litigation" because "freedom from the contribution limit" did not guarantee defeat of the initiative measure. "The amount of any monetary advantage was speculative," therefore, the court concluded. Further, after noting the plaintiffs' motivations "clearly extended beyond preventing rent control," because the plaintiffs continued to defend their judgment after rent control became a reality in the city, the court remarked: "On these facts, [the] argument of financial motivation disintegrates into a claim that property owners are cut off from the benefits of section 1021.5 whenever they pursue litigation that might someday help them further or secure their property interests. The claim is untenable."

The court stated that the same conclusions applied here, for reasons summarized in a second case, *Keep Our Mountains Quiet, above*, which involved key facts almost identical to those at issue in this case. In *Keep Our Mountains Quiet*, as here, an association of local residents filed a CEQA challenge, seeking to require preparation of an EIR, after the county adopted an MND that would have allowed a neighboring landowner to commence a project—securing a use permit to host numerous special events per year—despite noise and traffic concerns. After granting the association's request, the court awarded attorneys' fees, and the landowner appealed. As real party and the city did here, the landowner contended that the association and its members were disqualified from receiving a fees award because many members submitted written comments confirming that they had a financial incentive to initiate the litigation, namely, a desire to avoid property value losses. The court of appeal rejected this argument, based on reasoning that was equally applicable here.

The court in that case began by observing that "no evidence was submitted attempting to quantify any potential property value reductions." Although the landowner's attorney had posited a figure, assuming each members' residence would sustain a $20,000 reduction in value, the court rejected the figure because it was "based on conjecture." Quoting *Citizens Against Rent Control, above*, the court then ruled that any benefit in the form of an avoided loss in property values was indirect as the trial court's ruling did not guarantee changes to the challenged project, the amount of any resulting monetary advantage was speculative, and neighboring property owners were not disqualified from seeking an award under Code Civ. Proc. § 1021.5 simply because they pursued litigation "that might someday help them further or secure their property

interests." "Because 'any potential financial incentive for [the Association] and its members [was] indirect and largely speculative,'" the court determined that the "trial court did not abuse its discretion in concluding the financial burden criterion was satisfied" [quoting *Plumbers & Steamfitters, Local 290 v. Duncan* (2007) 157 Cal. App. 4th 1083; *see also Galante Vineyards v. Monterey Peninsula Water Management Dist.* (1997) 60 Cal. App. 4th 1109].

The court stated that it reached the same conclusions for the same reasons here. As in *Citizens Against Rent Control* and *Keep Our Mountains Quiet*, plaintiff and its members neither expected nor received any direct pecuniary benefit from their litigation. Any benefit they received in the form of avoiding a loss in property values was at least once removed from the results of the litigation because the trial court's ruling did not guarantee that the city would refuse the requested variance or require real party to make changes to the project following adoption of an EIR, or that real party would abandon the project. The amount of any monetary advantage, therefore, was speculative. On these facts, the court rejected the suggestion that plaintiff and its members were cut off from the benefits of Code Civ. Proc. § 1021.5 because they pursued litigation that "might someday help them . . . secure their property interests" [*Keep Our Mountains Quiet, above*, quoting *Citizens Against Rent Control, above*].

The court stated that although real party and the city devoted considerable effort to distinguishing the facts, discrediting the analysis, and minimizing the importance of the *Keep Our Mountains Quiet* decision, it was unconvinced. Real party and the city attempted to distinguish the facts, for example, by contending that, unlike in *Keep Our Mountains Quiet*, here there was evidence quantifying the amount of the reduction in property value that plaintiff initiated litigation to prevent. Real party and the city presumably referred to the unsupported suggestion of plaintiff's president, which the court previously quoted that all members might see the value of their homes reduced by "between $50,000 to $150,000." But, again, the trial court rejected this estimate, giving it no weight, in a ruling that was not challenged on appeal. Real party and the city cited no other evidence except "the trial court's . . . *analysis*," but the latter did not fill the gap as it was the trial court's duty "to weigh and interpret evidence" [*National Football League v. Fireman's Fund Ins. Co.* (2013) 216 Cal. App. 4th 902], not to create it.

Real party and the city also attempted to differentiate this case by observing that, while *Keep Our Mountains Quiet* concluded any financial benefit was indirect and speculative—because the trial court's ruling granting a writ of mandate did not guarantee changes to the proposed project—here the trial court found that the financial benefit was "direct" and "non-speculative," and real party ultimately did abandon the project. Real party and the city cited the pages of the trial court's order in which it initially assigned a value of $5.8 million to the loss that plaintiff and its members subjectively feared. However, the court noted that the trial court did not ultimately rely on this tentative estimate, concluding instead the value of the benefit that plaintiff and its members sought remained "uncertain." Further, the argument of real party and the city did not address the fact that the trial court's ruling here—as in *Keep Our Mountains Quiet*—did not directly produce any financial "benefit." The trial court did not, and could not, for example, order the city to withhold approval for the project. Thus, "any benefit in the form of preventing erosion of property values was at least once removed from the results of the litigation" [*Keep Our Mountains Quiet, above*].

Real party and the city suggested that it would "write the 'financial burden' element entirely out of Section 1021.5" if the value of the asserted financial benefit in the form of loss of property value must be quantified with objective evidence before it is considered, particularly in CEQA cases. Real party and the city pointed to three cases in which courts applied the financial burden element to conclude plaintiffs were ineligible for fee awards without requiring "'empirically-derived' economic data." But in two of those cases, the courts had a basis for assigning a value, while in the third case the court affirmed denial of an award relying primarily on other grounds [*see Norberg v. California Coastal Commission* (2013) 221 Cal. App. 4th 535; *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal. App. 4th 1312; *Christward Ministry v. County of San Diego* (1993) 13 Cal. App. 4th 31].

**Burden of Proof.** Finally, real party and the city contended that the trial court erred in concluding that it should give plaintiff "the benefit of the doubt" in light of the "uncertainties regarding the pre-litigation cost/benefit analysis." Citing *Norberg*, they noted that plaintiff had the burden of proving its litigation costs transcended the private interests it sought to benefit. The court stated that while real party and the city were correct about the burden of proof, the court was not persuaded that the trial court misunderstood this point. Rather, the court's review of the entire record confirmed that the trial court held plaintiff to its burden—denying its fees motion in part, and declining to award even half of its reasonable attorneys' fees—based on its conclusion that plaintiff had a significant financial incentive to initiate litigation, even though evidence confirming the existence and value of the benefit sought was minimal at best.

To the extent real party and the city contended that plaintiff failed to meet its burden of proof, for example, by failing

to adequately and objectively quantify the potential reduction in property values that it avoided through this litigation, the court disagreed. As an initial matter, the court noted that the contention appeared to contradict the assertions of real party and the city, in support of other arguments, that it was not necessary to precisely quantify the value of the benefit that plaintiff sought. Leaving this point aside, however, the court concluded that plaintiff did meet its burden of proving the financial burden of the litigation transcended the value of its private pecuniary interests, making a partial award appropriate. Plaintiff's fees motion provided detailed information regarding its litigation costs, and correctly pointed out that plaintiff and its members received no "reasonably certain financial benefit" by securing an order directing the city to prepare an EIR [*see Citizens Against Rent Control, above*; *Keep Our Mountains Quiet, above*]. On appeal, real party and the city had the burden of proving that the trial court abused its discretion in granting the partial fee award [*In re Marriage of Minkin* (2017) 11 Cal. App. 5th 939], for example, by ignoring evidence, if such existed, that plaintiff and its members received a financial benefit disqualifying them from receiving any award. The court stated that they had not met this burden.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 13.10 (Entitlement to Court-awarded Fees Under Code Civ. Proc. § 1021.5).

# THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

## Cases

### Exhaustion Requirements Did Not Apply to Attorney General, Who Intervened in Petition to Set Aside Certification of Final Environmental Impact Report

*City of Long Beach v. City of Los Angeles*
No. A148993, 1st App. Dist., Div. 3
19 Cal. App. 5th 465, 2018 Cal. App. LEXIS 30
January 12, 2018 (cert. for part. pub.)

**Pursuant to Pub. Res. Code § 21177(d), the exhaustion requirements that generally apply to parties contesting the adequacy of an environmental impact report did not apply to the Attorney General, who intervened in a petition to set aside certification of the final environmental impact report (FEIR) relating to the proposed construction of a new railyard. Further, the FEIR failed to adequately consider air quality impacts of the project, particularly impacts to ambient air pollutant concentrations and cumulative impacts of such pollutant concentrations. With respect to all other claimed deficiencies, the analysis in the FEIR satisfied the requirements of the California Environmental Quality Act.**

**Facts and Procedure.** Together, the Ports of Long Beach and Los Angeles handle up to 64 percent of all oceanic shipping on the West Coast and about 35 percent of such shipping in the United States. The final environmental impact report (FEIR) relating to the proposed construction by real party in interest (BNSF) of a new railyard approximately four miles from the Port of Los Angeles described: "The majority of goods coming into the ports arrive in shipping containers transported on container ships. Once the containers have been off-loaded from ships onto a marine terminal, they are sorted based on destination and transported out of the terminal by truck or train. Containers may be placed on trains inside the terminal (on-dock rail), they may be loaded onto truck chassis (trailers designed to hold containers) to be hauled to their final destination, or they may be loaded onto truck chassis to be drayed to a railyard outside the terminal (near-dock or off-dock rail)."

As of 2008, there were nine operating "on-dock railyards" at the ports. "Typically, trains built on-dock consist of railcars all bound for the same destination, although exceptions do occur. Most cargo that cannot fill a single-destination train on-dock is drayed to an off-dock or near-dock railyard to be combined with cargo from other marine terminals headed for the same destination because those railyard facilities can provide space to hold containers from multiple terminals and assemble them into blocks for common destinations." "Containers handled at the on-dock railyards leave the port area via the Alameda Corridor, a 20-mile long, multiple-track rail system with no at-grade (i.e. street level) crossings that links the rail facilities of the ports with the transcontinental rail network . . . near downtown Los Angeles."

Union Pacific operates the only "near-dock railyard" presently servicing the ports. Union Pacific's near-dock facility is approximately five miles north of the ports. Containers from the ports are transported to the near-dock railyard via trucks on local roads. Trains departing the near-dock railyard utilize the "Alameda Corridor" to connect with the transcontinental rail network.

Currently, two "off-dock railyards" handle the majority of containers from the ports: BNSF's Hobart yard and

Union Pacific's East Los Angeles yard. Both railyards are located near downtown Los Angeles, approximately 24 miles north of the ports. Containers are transported by truck, generally via the I-710 freeway, from the ports to the off-dock railyards.

The City of Los Angeles Harbor Department released a notice of preparation and initial study for BNSF's proposed construction. The proposed project was referred to as the Southern California International Gateway Project or "SCIG." A supplemental notice of preparation was issued.

Nearly six years later, the harbor department released a draft environmental impact report (DEIR) for the project. Based on comments received during the public comment period, the harbor department revised major portions of the DEIR and it released a recirculated DEIR (RDEIR) for a 45-day public review period.

The harbor department issued the FEIR. The FEIR described the proposed project as consisting of "the construction and operation of a new near-dock intermodal rail facility by BNSF that would handle containerized cargo transported through the ports." The project would have the capacity to handle an estimated 1.5 million intermodal containers per year at full operation and would generate approximately 2 million truck trips between the facility and port terminals per year. "The primary objective and fundamental purpose of the proposed project is to provide an additional near-dock intermodal rail facility serving the San Pedro Bay Port marine terminals that would meet current and anticipated containerized cargo demands, provide shippers with comparable intermodal options, incorporate advanced environmental controls, and help convert existing and future truck transport into rail transport, thereby providing air quality and transportation benefits." The FEIR explained that "the need for additional rail facilities to support current and expected cargo volumes, particularly intermodal container cargo was identified in several recent studies . . . . As discussed in those studies, even after maximizing the potential on-dock rail yards, the demand for intermodal rail service creates a shortfall in railyard capacity . . . . Those studies specifically identified a need for additional near-dock intermodal capacity to complement and supplement existing, planned, and potential on-dock facilities."

At present, BNSF processes intermodal, transloaded and domestic cargo at the Hobart yard. The FEIR indicated that upon completion of the new railyard, BNSF intended to transfer 95 percent of its intermodal business at Hobart to SCIG. "The proposed project would eliminate a portion . . . of existing and future intermodal truck trips between the ports and [Hobart] . . . by diverting them to the proposed SCIG facility." Stated differently, the estimated 2 million truck trips between the port and the proposed new railyard "would replace truck trips that would otherwise go to the [Hobart] yard in East Los Angeles, a journey of 24 miles each way."

BNSF's domestic and transloaded cargo business would remain at the Hobart yard. The FEIR did not analyze the level of activity that would remain at Hobart upon construction of the new railyard or the impact of additional traffic that might then be handled at Hobart. The document explained that "whether or not SCIG is built, domestic traffic (i.e., traffic from non-Port sources) and transloaded cargos to Hobart will likely continue to grow at a rate related to market demand in the United States economy. . . . Because that growth is not dependent on SCIG being built, it is not appropriate to evaluate that growth as part of SCIG, or any truck trips not going to SCIG."

The FEIR concluded that the project would have significant unavoidable environmental impacts on, among other things, air quality, noise, greenhouse gas emissions, and traffic.

The board of harbor commissioners certified the FEIR, adopted a statement of overriding considerations, and approved the project. The resolution was appealed to the Los Angeles City Council, which affirmed the certification and approval.

In June 2013, seven petitions for writs of mandate were filed in the Los Angeles County Superior Court, challenging the certification and approval. The petitions were consolidated for all purposes and later transferred to the Contra Costa County Superior Court. In May 2014, pursuant to a stipulation, the Attorney General intervened in the action filed by the City of Long Beach, one of the plaintiffs.

The trial court issued its opinion and order on the consolidated petitions. It found the FEIR's project description and analysis of indirect impacts and growth-inducing impacts to be deficient because they failed to discuss the reasonably foreseeable indirect impacts from freeing capacity at the existing Hobart yard. The court also held that the FEIR's analysis of noise, traffic, air quality, greenhouse gases, and cumulative environmental impacts and of mitigation measures were inadequate. Thereafter, the court issued a peremptory writ of mandate directing the City of Los Angeles to set aside its certification of the FEIR and approval of the project and to comply with the California Environmental Quality Act.

The City of Los Angeles and BNSF appealed. The court of appeal affirmed in part and reversed in part.

**Exhaustion of Administrative Remedies.** In *State Water Resources Control Bd. Cases* [(2006) 136 Cal.

App. 4th 674], the court noted that "'exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action.' Subdivision (a) of CEQA section 21177 sets forth the exhaustion requirement . . . here. That requirement is satisfied if 'the alleged grounds for noncompliance with [CEQA] were presented . . . by any person during the public comment period provided by [CEQA] or prior to the close of the public hearing on the project before the issuance of the notice of determination.'"

In *Sierra Club v. City of Orange* [(2008) 163 Cal. App. 4th 523], the court noted that "'The rationale for exhaustion is that the agency "is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief . . . the [agency] will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so."' To advance the exhaustion doctrine's purpose 'the "exact issue" must have been presented to the administrative agency . . . .' While '"less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding" . . . 'generalized environmental comments at public hearings,' 'relatively . . . bland and general references to environmental matters,' or 'isolated and unelaborated comments' will not suffice. The same is true for 'general objections to project approval . . . .' 'The objections must be sufficiently specific so that the agency has the opportunity to evaluate and respond to them.'" "An appellate court employs a de novo standard of review when determining whether the exhaustion of administrative remedies doctrine applies."

Defendants—the City of Los Angeles, its council, the Port of Los Angeles, and the harbor department—contended that the court lacked jurisdiction to consider certain objections to the sufficiency of the FEIR asserted by the Attorney General because those objections were not made by any party in the administrative proceedings. The Attorney General argued that he was exempt from the exhaustion requirement under Pub. Res. Code § 21177(d) [*Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal. App. 4th 430]. Appellants argued that the exemption in Pub. Res. Code § 21177(d) applies only to identity exhaustion under Pub. Res. Code § 21177(b) and not to issue exhaustion under Pub. Res. Code § 21177(a); that is, that the Attorney General could assert objections that were raised by someone during the administrative proceedings, even if not by the Attorney General, but could not assert objections that no party raised during those proceedings.

The court stated that excusing the Attorney General from the issue exhaustion requirement would create the possibility that an environmental impact report may be held inadequate for a deficiency that was never brought to the agency's attention and which the agency had no opportunity to correct. Nevertheless, the court agreed with the Attorney General and the court in *Maintain Our Desert Environment, above*, that the plain language of Pub. Res. Code § 21177(d) exempts the Attorney General from all statutory exhaustion requirements.

The court stated that contrary to defendants' argument, the legislative history did not create any ambiguity in the statutory language, let alone establish with certainty that the Legislature intended Pub. Res. Code § 21177(d) to exempt the Attorney General only from identity exhaustion under Pub. Res. Code § 21177(b). To the contrary, the court stated that the unqualified exemption is consistent with other statutory provisions that recognize the Attorney General's unique authority to protect the environment of the State of California [*see* Gov. Code §§ 12600(b), 12606; Pub. Res. Code § 21167.7].

**Project Description.** In *San Joaquin Raptor Rescue Center v. County of Merced* [(2007) 149 Cal. App. 4th 645], the court noted that "under CEQA, a 'project' means '*the whole of an action*, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . .' It refers to the underlying 'activity' for which approval is being sought. The entirety of the project must be described, and not some smaller portion of it. The Guidelines specify that every EIR must set forth a project description that is sufficient to allow an adequate evaluation and review of the environmental impact."

In *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* [(2014) 227 Cal. App. 4th 1036], the court noted that "a project description that gives conflicting signals to decision makers and the public about the nature and scope of the project is fundamentally inadequate and misleading. 'Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the 'no project' alternative), and weigh other alternatives in the balance.'"

The trial court found that the project description was deficient here because it failed to include "a discussion of the reasonably foreseeable indirect changes at Hobart." Defendants contended that the trial court's holding was based on a misunderstanding of what must be included in a project description and confused the project's description with the analysis of the project's environmental impacts [*see El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.

App. 4th 1591]. Defendants argued, "the activity subject to governmental approval is 'the construction and operation of a new near-dock intermodal rail facility by BNSF that would handle containerized cargo transported through the ports of Los Angeles and Long Beach . . . .' *That* activity 'required discretionary approval from [the harbor department] and, therefore, it is subject to the requirements of CEQA.'"

The court stated that the project description here accurately described the pertinent features of the construction and operation of SCIG. With respect to the project's cargo handling capacity, the FEIR "takes a conservative approach: it analyzes the capacity the project applicant (BNSF) has applied for (a maximum of 2.8 million TEUs, or 1.5 million lifts at full operation), and assumes that market factors would determine the actual demand that it serves." Plaintiffs argued that the description of the project was misleading and inaccurate because it "defines the project as replacing—rather than increasing—existing BNSF capacity." They argued that "rather than accurately characterizing the project as increasing BNSF's cargo-handling capacity by an *additional* 1.5 million cargo containers per year, the EIR states that SCIG will 'replace' or 'eliminate' operations from BNSF's Hobart yard." They suggested that by defining the project "not as creating *additional* capacity to handle *increased* cargo volumes, but as 'eliminating' existing activities at Hobart," the EIR "profoundly skews the environmental analysis."

The court stated that plaintiffs improperly characterized the project description. The FEIR accurately stated that the project would permit BNSF to divert a portion of its operations from Hobart to SCIG and also acknowledged that the volume of cargo serviced at Hobart would continue to grow. Neither the project description nor any part of the FEIR suggested that BNSF's total capacity would remain unchanged as a result of the project. The court concluded that there was nothing misleading or inaccurate about the project description [*see El Dorado County Taxpayers for Quality Growth, above*].

The court stated that *San Joaquin Raptor Rescue Center, above*, cited by plaintiffs, was distinguishable. That case involved an environmental impact report in connection with the issuance of a conditional use permit for the proposed expansion of an aggregate mining operation. The EIR described the project as an expansion that included the mining of additional acreage "*but is not proposed to substantially increase daily or annual production.*" However, the court found that "despite assurances to the contrary, the Project includes a substantial increase in mine production. . . . By giving such conflicting signals to decision makers and the public about the nature and scope of the activity being proposed, the Project description was fundamentally inadequate and misleading." The "curtailed and inadequate characterizations of the Project were enough to mislead the public and thwart the EIR process." "The public hearings reflect similar confusion about the level of production allowed under the Project."

The court stated that neither the project description nor any portion of the FEIR in this case indicated that BNSF's overall capacity would not be significantly increased as a result of the construction of the new railyard. The FEIR was required to evaluate any indirect environmental impact that could be caused by the project arising from increased availability of capacity at Hobart, but there was no deficiency in the manner in which the FEIR described the SCIG project.

**Indirect Impacts on Hobart Yard.** The court noted that "in evaluating the significance of the environmental effect of a project, the lead agency shall consider . . . reasonably foreseeable indirect physical changes in the environment which may be caused by the project" [CEQA Guidelines § 15064(d)]. "An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project" [CEQA Guidelines § 15064(d)(2)]. "An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable" [CEQA Guidelines § 15064(d)(3)]. Indirect impacts "may include growth-inducing effects and other effects related to induced changes in the pattern of land use, population density, or growth rate, and related effects on air and water and other natural systems, including ecosystems" [CEQA Guidelines § 15358(a)(2)].

The trial court found that the FEIR's analysis of indirect impacts was deficient because it omitted any discussion of the reasonably foreseeable impacts that would be caused by freeing capacity at the Hobart yard. The court observed that by constructing SCIG, BNSF would "nearly double" its capacity and the FEIR failed to analyze how "BNSF is going to utilize Hobart once additional capacity is created."

The court noted that master response 3 of the FEIR was issued in response to the large number of comments raising concerns about the project's indirect impacts at the Hobart yard. The response provided in relevant part, "a number of commenters have criticized the RDEIR for not evaluating regional changes in goods movement that they posit might occur with implementation of SCIG. Their reasoning is that if SCIG absorbs the international cargo currently going to Hobart, then domestic and transload cargo will backfill the freed-up capacity . . . . Other commenters have

criticized the RDEIR for not including future operations at Hobart (i.e., truck and train trips) in the analyses. These assertions are speculative, and not supported by facts or evidence. In fact, . . . the suggestion that cargo would materialize to backfill the freed-up capacity [is] wholly unsupported by the facts."

The court stated that the record reflected that at present there was no unmet demand for rail service at the Hobart yard that would give rise to additional traffic when intermodal traffic was diverted to the new railyard. As BNSF explained in its memorandum to the harbor department, "BNSF is not aware of any currently unmet demand for cargo transportation that would be generated as a result of moving direct intermodal international cargo from Hobart to SCIG. All Southern California domestic cargo requiring rail transport is already being transported by rail. There is no latent demand for rail transport that is not being served."

The court stated that master response 3 further explained that "there is no reason to believe that cargo would somehow materialize to fill the freed-up capacity. Hobart and other intermodal facilities already accept all cargo in the region that demands rail transport and are not yet operating at capacity, meaning that there is no unserved cargo that would appear to fill freed-up capacity. This conclusion is reinforced by the results of analyses showing that existing railyards, while busy, are not operating at their maximum practicable capacity (MPC); for example, Hobart's current MPC is approximately 1.7 million lifts, whereas, as described above and in Appendix G4, in 2010 it handled only about one million lifts, approximately one-half of them direct international containers. BNSF has already expanded Hobart, but cargo volumes, rather than suddenly increasing, actually decreased between 2007, when the expansion was completed, and 2010 (BNSF, 2012a; BNSF, 2012b). Those volumes were driven by regional and national economic factors (i.e., the 2008 recession), not by the availability of capacity at Hobart."

The court stated that domestic and transload cargo volumes were anticipated to increase in the future, but the freed-up capacity at Hobart would not give rise to indirect environmental impacts for at least two reasons. First, as shown in the FEIR, cited in the master response, "domestic and transload cargo volumes would increase whether or not SCIG is built, and . . . the increases would be the same under either scenario. This is true because demand is independent of capacity—the region's economy would grow at a rate unrelated to capacity at Hobart. . . . Hobart will continue to accept transload and domestic cargo with or without SCIG." The intermodal rail analysis, prepared by the harbor department, appendix G4 of the FEIR, explained that "the market demand for pure domestic cargo and transload cargo is independent of a project's capacity. In the case of the SCIG project, the region's economy drives the demand for domestic and transload cargo which would grow at a rate unrelated to capacity at Hobart. A facility's capacity does not create growth in demand."

The court stated that second, substantial evidence supported the finding that BNSF had capacity at Hobart to meet all projected growth until at least 2035. Contrary to the finding of the trial court, substantial evidence supported the growth predictions used in FEIR. The FEIR predicted that by 2030 the ports would be processing 34.6 million TEUs annually. This prediction was based on a long-term forecast prepared by the Global Insight and Tioga Group in 2009. The "IHS Global Insight/Tioga" forecast is "a demand-based (i.e., unconstrained) forecast, that assumed transportation and infrastructure capacity would be available to meet the demand." The trial court acknowledged the "considerable studies done by and for the Port about the amount of [intermodal] business that will be generated by the world economy over various periods of time."

The court stated that the FEIR assumed that domestic cargo volumes would "continue to grow at a rate of 2% per year with or without SCIG being built." As the trial court noted, other studies also utilized an estimated growth in domestic cargo of 2 to 3 percent annually. The 2 percent annual growth figure appeared to be based on a "IHS Global Insight database" known as "TRANSEARCH" that "shows projections of cargo tonnage for domestic and international goods movement through 2040." According to this database, the domestic cargo sector in the applicable region was projected to grow at rates between 2.1 percent and 3 percent annually from 2012 to 2035. The court stated that contrary to plaintiffs' arguments, these growth rates were not unsupported assumptions. They were reasoned predictions by experts on which the city was entitled to rely [*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal. App. 4th 1437].

The court quoted the FEIR: "BNSF has already undertaken physical modifications and operational changes that have expanded the capacity of the Hobart Yard. To accommodate future increased cargo volumes at Hobart, BNSF would undertake additional operational and physical changes. . . . BNSF would implement additional physical changes to the Hobart and Commerce facilities that would increase their capacity; BNSF represents that those changes could be implemented without discretionary permits. . . .The operational changes and the approved expansions would allow Hobart/Commerce to handle approximately 3 million lifts . . . per year by 2035, which

is approximately 1 million lifts more than its existing capacity. The Port independently undertook engineering analyses of the Hobart/Commerce Yard that confirmed BNSF's representations of the potential to expand capacity at these facilities."

The court stated that in the with-SCIG (proposed project) scenario, BNSF would not have to make changes to its Hobart operations other than to add capacity at some point in the future when demand exceeded capacity (projected by independent analysts to occur as soon as 2023). Since BNSF already had the right to expand its Hobart facilities, the freeing of capacity at Hobart by transferring intermodal traffic to the new railyard could at most delay the point at which BNSF elected to expand the Hobart facilities. The expansion would not be the consequence of constructing the new railyard.

The court stated that because there was a sufficient evidentiary basis for the city's conclusion that a predicted amount of economic growth would occur with or without this project and that the project was not necessary to enable BNSF to service the projected growth at Hobart, any such growth was not an indirect impact of the SCIG project that the FEIR was required to study.

**Air Quality.** The court noted that impact AQ-3 assessed whether the proposed project would result in significant emission of criteria pollutants. In making this analysis, the FEIR measured and modeled in pounds per day (lbs/d) the mass of pollutants to be emitted by operation of the project. The FEIR included data tables that presented both the unmitigated average daily criteria pollutant emissions from operation of the proposed project in the benchmark years 2016, 2023, 2035, 2046, and 2066 and estimated peak daily unmitigated emissions for the same benchmark years. Applying this data to applicable standards of significance, the FEIR concluded that emissions "are below the significance thresholds for [oxides of nitrogen ($NO_x$), particulate matter less than 10 microns in diameter ($PM_{10}$) and particulate matter less than 2.5 microns in diameter ($PM_{2.5}$)] for all analysis years. Therefore the unmitigated project would have less than significant impacts." Similar analysis of the no project alternative concluded that emissions under the no project alternative also would not be significant. Moreover, daily emissions of $NO_x$, $PM_{10}$ and $PM_{2.5}$ under the project would be consistently lower than under the no project alternative in each of the benchmark years.

Impact AQ-4 assessed whether project operations would result in significant "offsite ambient air pollutant concentrations" in the geographic area surrounding the project site. Under this analysis, the FEIR measured and modeled the concentration of pollutants in micrograms per cubic meter ($\mu g/m^3$) that would occur at different geographic locations within the designated area as a result of operations at SCIG. The FEIR used "dispersion modeling of onsite and offsite project operational emissions . . . to assess the impact of the project on local offsite air concentrations."

The air dispersion model used was "designed for use with emission sources situated in terrain where ground elevations can exceed the stack heights of the emission sources. The . . . model requires hourly meteorological data consisting of wind direction, wind speed, temperature, stability class, and mixing height. The . . . model allows input of multiple sources and source groupings, eliminating the need for multiple model runs." "Rather than modeling each analysis year to identify the maximum pollutant concentrations, a single composite emissions scenario was modeled as a conservative approach. The composite emissions scenario is a combination of the peak year (for the annual $NO_2$ and $PM_{10}$ concentration thresholds), peak day (for the 24-hour . . . $PM_{10}$, and $PM_{2.5}$ concentration thresholds), or peak hour (for the 1-hour $NO_2$ . . .) emissions within the modeling domain by source category. Note that the peak year or day emissions for a particular source category may not necessarily occur in the same year or day as the other categories." The FEIR stated that this methodology, characterized by defendants and the trial court as a "worst case" analysis, "results in conservative predictions of concentrations from project operational emissions."

Applying this methodology, the FEIR concluded that project operations would have a significant impact on air quality because ambient air pollutant concentrations "would exceed the SCAQMD [South Coast Air Quality Management District] thresholds for 1-hour and annual $NO_2$, 24-hour and annual $PM_{10}$, and 24-hour $PM_{2.5}$." The FEIR also concluded that the no project alternative would result in similar significant impacts. Specifically, "the No Project Alternative would exceed the SCAQMD thresholds for 1-hour and annual $NO_2$ and 24-hour and annual $PM_{10}$." Ground-level concentration of $PM_{2.5}$ was not projected to exceed standards of significance under the no project alternative.

The court stated that although the FEIR did not contain a table comparing the results of the modeling for the project and no project alternative, comparing table 3.2-28 (maximum offsite $NO_2$ concentrations associated with operations of the project) and table 5-7 (maximum offsite $NO_2$ concentrations associated with operations of the no project alternative) showed that the total ground level concentration of $NO_2$ under the no project alternative would exceed that of the project. But the opposite was true for the concentration of particulate matters. A comparison of table 3.2-29 (maximum offsite $PM_{10}$ and $PM_{2.5}$

concentrations associated with operation of the project) with table 5-8 (maximum offsite $PM_{10}$ and $PM_{2.5}$ concentrations associated with operation of the no project alternative) showed that over a 24-hour period ground level concentration of $PM_{10}$ for project operations would be more than three times greater than the concentration under the no project alternative (9.1 $\mu g/m^3$ to 2.9 $\mu g/m^3$) and that ground level concentration of $PM_{2.5}$ for project operations would be five times greater than the concentration under the no project alternative (4.5 $\mu g/m^3$ to 0.9 $\mu g/m^3$).

The court noted that figures included in section 3.2 and appendix C2 of the FEIR showed the geographic areas in which the ground-level concentration of various particulates were projected to exceed standards of significance. While the geographic area impacted by significant concentration of $NO_2$ remained the same, the area impacted by significant annual and 24-hour concentrations of $PM_{10}$ varied considerably. The significant concentration of $PM_{10}$ under the no project alternative occurred just to the east of Interstate 710, while the significant concentration of $PM_{10}$ under the project was centered over and adjacent to the project site. Figure 3.2-9 showed that the impact of significant ground-level concentration of $PM_{2.5}$ was restricted to small areas directly over the project site.

The trial court found that the composite emissions scenario was misleading and provided insufficient information to permit meaningful comparison of the project and the no project alternative.

The court explained that "had the screening analysis shown that there would never be an exceedance of a concentration standard of significance the analysis could have ended there. But that is not what the screening analysis showed. . . . . Having screened—and having found potential exceedances from SCIG—the EIR stopped its analysis. It left the public and decision-makers in the dark about whether there would be exceedances of $NO_2$, $PM_{2.5}$ and $PM_{10}$ standards in any given year at a given place. By combining concentrations from different years (for screening purposes) the EIR never examined the impact of SCIG in any given year. It showed that there could be an impact, but it did not examine what that impact might be, who might be affected, and for how long." The trial court emphasized that this "is not a small point. The SCIG has been presented as a project that will improve air quality significantly. . . . Those commenting on the EIR, as it was being developed, expressed considerable concern about the impact of air pollution on those who live near the proposed project."

Defendants argued that the composite emissions scenario methodology was a "common industry-accepted protocol" that was amply supported by substantial evidence, including expert opinion. They argued that contrary to the trial court's conclusion, this methodology was not misleading nor did it result in the omission of any necessary information from the FEIR.

The court acknowledged that the FEIR analysis was conducted in accordance with the harbor department's protocol for criteria pollutant dispersion modeling. The "Methodology for Criteria Pollutant Dispersion Modeling in Port of Los Angeles CEQA Documents" cited by defendants recommended using "screening-level dispersion modeling with conservative emissions" to screen out pollutants followed by modeling of maximum pollutant concentrations each project analysis year. The protocol recognized, however, that for "large CEQA projects . . . it is often not practical to perform criteria pollutant dispersion modeling separately for each project analysis year because of the sheer number of model runs (pollutants x averaging periods x alternatives x mitigated & unmitigated x coarse & fine grids). To further complicate matters, the spatial and physical diversity of the source types often make it impossible to determine which analysis year would yield maximum concentrations. For example, cargo handling equipment emissions often peak in the early years of a project, while ocean-going vessel (OGV) emissions often peak in the latter years; the concentrations associated with combined emissions could peak in either year or sometime in between. As a conservative solution, the air quality analyst may choose to limit the number of modeling runs by modeling a single composite emissions scenario for each combination of pollutant, averaging period, and project alternative. . . . The composite emissions scenario would include the highest emissions by source category over the appropriate range of analysis years. The highest emissions for a particular source category may not necessarily occur in the same year as the other categories. For example, project emissions could be grouped into the following source categories: trucks, cargo handling equipment, OGVs, harbor craft, locomotives, and construction. The maximum emissions over the range of applicable analysis years are determined separately for each source category. These maximum emissions are then modeled together to conservatively predict maximum ground-level criteria pollutant concentrations for the pollutant and averaging period of interest. This screening method would result in conservative (i.e., over-predicted) concentrations from project emissions."

In *Save Panoche Valley v. San Benito County* [(2013) 217 Cal. App. 4th 503], the court stated that "under CEQA, an agency is not required to conduct all possible tests or exhaust all research methodologies to evaluate impacts. Simply because an additional test may be helpful does not mean an agency must complete the test to comply with the requirements of CEQA. An agency may exercise

its discretion and decline to undertake additional tests." It is the objector's burden to establish that the methodology used was misleading or that "relevant, crucial information" was omitted that rendered the analysis legally inadequate [*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal. App. 4th 713; *see North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal. App. 4th 614].

**Analysis of Air Pollution Concentration Impacts Was Incomplete.** The court stated that while it did not agree that the composite emissions, or worst case, methodology was misleading, it did agree with the trial court that the analysis of air pollution concentration impacts was nonetheless incomplete. "When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. 'The EIR must contain facts and analysis, not just the bare conclusions of the agency.' 'An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' Analysis of environmental effects need not be exhaustive, but will be judged in light of what was reasonably feasible" [*Association of Irritated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383].

The trial court concluded that the analysis of air pollution concentrations was inadequate because a reader could not compare the ambient air pollutant concentrations under the project and no project scenarios at any given point in time. Defendants contended that CEQA imposed no such specific requirement. They argued that the FEIR disclosed that the project would result in significant air quality concentration impacts and thereby adequately informed the public of the project's impacts. They suggested that "an EIR that performs a 'worst-case-scenario' analysis of 'the greatest potential impacts' of a project properly 'promotes informed decision making, and evidences a good faith effort at forecasting' the project's impacts, consistent with the goals of CEQA."

The court agreed with the trial court that crucial information was omitted from the FEIR. Project neighbors reading the FEIR would learn that for benchmark years, peak and average daily emissions of $PM_{10}$ would be lower under the project than under the no project alternative. The composite analysis showed, however, that the concentration of $PM_{10}$ in the area immediately surrounding the project would in the worst case be three times greater under the project than under the no project alternative. In addition, from what can be gleaned from data spread throughout the FEIR but never explicitly analyzed or discussed, the concentration of $PM_{10}$ that currently existed over the lengthy stretch of highway over a mile away from the project site would, under the project, be concentrated in the area immediately surrounding the project, which included both homes and schools. Thus, it was particularly important to understand, and the FEIR did not disclose or estimate, how frequently and for what length of time the level of particulate air pollution in the area surrounding the proposed rail yard would exceed the standard of significance. The composite analysis did not disclose the frequency of occasions or the estimated length of time during which ambient pollutants would remain at heightened levels—whether the worst case would be the situation for only a day or for as long as the railyard was in operation. The court stated that without such an understanding, the public and decision makers could not fairly consider alternatives or mitigation measures or intelligently balance competing considerations before adopting a statement of overriding considerations [*see* CEQA Guidelines § 15093].

The court stated that defendants' reliance on cases approving "worst-case scenario" analyses in CEQA cases was misplaced. For example, in *Sierra Club v. Tahoe Regional Planning Agency* [(E.D.Cal. 2013) 916 F.Supp.2d 1098], the EIR examined "the noise impacts of the project's construction activity based on the 'worst-case scenario' in which the three loudest pieces of equipment would be operating at the same time." The court concluded that the analysis was sufficient because the analysis was "thorough and carefully detailed the level of noise that will result from the project" at "all times of day." Here, the court stated that while a project neighbor in that case could predict what noise levels would be at any given time of day under the worst case scenario, the same could not be said for a project neighbor in the present case. In this case, a neighbor would have no idea how bad air quality would be, if the railyard was constructed, at any point or for how long in the future.

The court stated that finally, defendants cited no evidence to support their contention that the inclusion of additional information regarding air pollutant concentrations would be impractical. Citing the protocol quoted above, they argued, "were CEQA to require an EIR to analyze every potential impact for every year of a project's lifespan, or even for a series of benchmark years, agencies would be required to run thousands of complex dispersion models—effectively grinding the CEQA process to a halt." The protocol, however, did not excuse CEQA compliance. It provided general guidelines and required the air quality analyst to determine whether it was appropriate to "limit the number of modeling runs" and to select the "appropriate range of analysis years." The court stated that a reasonable selection of benchmark years, as in other analyses, could be acceptable. In this instance, the decision

to perform only a single modeling run with a 50-year analysis range did not comply with CEQA.

Accordingly, the court agreed with the trial court that with respect to impact AQ-4, the harbor department "failed to proceed in the manner required by CEQA, and the [FEIR] fails to set forth sufficient information to foster informed public participation and reasoned decision making."

**Cumulative Impacts on Air Quality.** The court noted that CEQA requires that an EIR discuss the significant cumulative impacts to which a proposed project would contribute, taking into account past, present, and probable future projects causing similar impacts [CEQA Guidelines § 15130]. "Cumulative impacts" are defined as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts" [CEQA Guidelines § 15355]. Such impacts are "significant" when a project's incremental effect on other projects' effects is "cumulatively considerable" [CEQA Guidelines § 15130(a)].

The court stated that the FEIR identified Union Pacific's proposal to modernize and expand its existing intermodal container transfer facility (ICTF), located adjacent to SCIG's northern boundary, as one of 170 present or reasonably foreseeable future projects that could contribute to cumulative environmental impacts. The FEIR concluded, under cumulative impact AQ-4, that operation of "past, present, and reasonably foreseeable future projects," including the proposed project and the proposed expansion of ICTF, would result in a significant cumulative air quality impact related to exceedances of the significance thresholds for $NO_x$, $PM_{10}$, and $PM_{2.5.}$ The FEIR explained that, "Although there is no way to be certain if a cumulative exceedance of the thresholds would happen for any pollutant without performing dispersion modeling of the other projects, previous experience . . . indicates that cumulative air quality impacts would be likely to exceed the thresholds for $NO_x$, could exceed the thresholds for $PM_{10}$ and $PM_{2.5}$, and would be unlikely to exceed the thresholds for CO." The FEIR added that because "operation of the proposed project would cause exceedances of the SCAQMD thresholds for 1-hour and annual $NO_2$, 24-hour and annual $PM_{10}$, and 24-hour $PM_{2.5}$ . . ., the project would result in a cumulatively considerable contribution to a significant cumulative impact." The FEIR also concluded, under cumulative impact AQ-7, that the "past, present, and reasonably foreseeable future projects" and the proposed project did not have a significant cumulative impact on non-cancer risk.

The trial court acknowledged that the "ICTF facility and the ICTF expansion Project are mentioned throughout" the cumulative impacts chapter and that "in many respects, these mentions are brief but sufficient." The trial court found, however, that the analyses under cumulative impact AQ-4 (ambient air pollutant concentrations) and cumulative impact AQ-7 (noncancer health risks) were inadequate.

With respect to the cumulative impacts analysis under impact AQ-4, the trial court explained that the analysis "disclaims an ability to know 'if cumulative exceedances of thresholds would happen for any pollutant without performing dispersion modeling of the other projects'" but concluded that "operations of the past, present and reasonably foreseeable future projects, including the proposed project, would result in a significant cumulative air quality impact." The trial court observed that the analysis relied on the "seriously deficient" screening methodology discussed above without any discussion of how the expansion at ICTF would affect pollutant concentrations. "This is important, since an increase in air pollution from the ICTF will be emitted 'next-door' to SCIG, and presumably have a significant impact on those living in the vicinity of both facilities."

Defendants contended that CEQA did not require quantification of any air quality impacts of the ICTF because quantification in this instance was impractical and unreasonable. The court stated that defendants were likely correct that conducting dispersion modeling for the ICTF expansion project would be unreasonably time consuming and impractical, if not already completed for the applicable project EIR, and that it was within the harbor department's discretion to evaluate whether the original emissions data had become unreliable with the passage of time. Nonetheless, as the trial court observed, the fact that "CEQA does not require quantified analyses does not mean that all meaningful information on a subject can be omitted from an EIR's cumulative impacts analysis." The court agreed with the trial court that the analysis identified the potential cumulative impacts of the ICTF expansion project "in such general terms that the 'big picture'—two large railyard expansions located next to one [another]—is missing from the analysis" and that "when the combined analysis was removed from the DEIR, so too was the acknowledgment that the ICTF expansion project was not just another land use project in the area." Accordingly, the harbor department had to make a "good faith and reasonable disclosure" of the cumulative impacts before the FEIR could be approved.

With respect to cumulative impact AQ-7, the trial court found that there was no substantial evidence to support the conclusion that "the past, present, and reasonably foreseeable future projects and the proposed project do not have a significant cumulative impact on non-cancer risk." The court disagreed.

The court noted that under cumulative impact AQ-7, the FEIR explained that "emissions of TACs would increase

chronic and acute noncancer effects . . . compared to baseline levels . . . [, but] the increases would all be well below the 1.0 hazard index significance criterion at all receptors near the project site." Defendants elaborated further: "table 3.2-35 of the EIR shows various hazard indices for non-cancer health risks, breaking out the portion attributable to baseline conditions ('CEQA 2010 Baseline') and the portion attributable to SCIG ('CEQA 2010 Increment') to reach a total hazard index under the project scenario. The EIR forecasts that maximum non-cancer risks will occur at occupational and recreational receptors, where acute hazard indices under the project scenario measure 0.5 (comprised of a 0.3 baseline and a 0.2 increase attributable to SCIG). . . . Even assuming the ICTF expansion project were next door to SCIG and had the same incremental impact on non-cancer hazard indices as SCIG (0.2), the maximum hazard index would still be only 0.7—that is, a 0.3 baseline, a 0.2 increase attributable to SCIG, and another 0.2 increase attributable to ICTF expansion. This would still be well below the 1.0 significance threshold." The court stated that the data in table 3.2-35 amply supported the conclusion reached under cumulative impact AQ-7.

**Greenhouse Gas Emissions.** Chapter 3.6 contained the FEIR's discussion of greenhouse gas (GHG) emissions. The chapter analyzed two potential impacts. First, under impact GHG-1, the FEIR considered whether the project "would result in an increase in construction-related and operation-related GHG emissions." The FEIR quantified GHG emissions and concluded that significant impacts would occur under the proposed project because the new railyard "would produce GHG operational emissions that would exceed the CEQA baseline levels when the project reaches its full capacity in 2035 and beyond."

Under impact GHG-2, the FEIR considered whether the proposed project would "conflict with state and local plans and policies adopted for the purpose of reducing GHG emissions." The FEIR concluded that the proposed project "is consistent with state and local policies and plans for GHG emissions and climate change. Accordingly, there are no significant impacts resulting from inconsistencies with existing plans and policies." The FEIR explained that "the proposed project would result in more efficient use of fossil fuels to move goods as a result of increased use of rail versus trucking between the Ports and the SCIG facility. The project is consistent with key legislation, regulations, plans and policies described in section 3.6.3, applicable regulations. The ratio of locomotive fuel efficiency to truck fuel efficiency on a per-ton-mile basis ranges from 1.9 to 5.5 (Federal Railroad Administration, 2009). Increased fuel efficiency reduces GHG emissions on a per-ton-mile basis. The project, by shifting the drayage truck trips from Hobart yard to the SCIG facility, would increase the fuel efficiency of regional cargo movement and decrease GHG emissions. This fundamental feature of the Project is consistent with the California Air Resources Board's [CARB] scoping plan for reducing GHG emissions from the Goods Movement sector which calls for efficiency-based GHG reductions in activities such as port-related trucks, cargo handling equipment, and freight transport."

The court noted that in contrast, the FEIR concluded that the no project alternative would conflict with state and local plans and policies adopted for the purpose of reducing the emissions of GHGs. The FEIR explained that "the no project alternative would not increase use of more efficient modes of goods movement by continuing to move cargo by truck to the Hobart yard. Therefore no additional efficiency in cargo movement is realized in the no project alternative, which is inconsistent with the goals of the AB32 scoping plan, the Western Regional Climate Action Initiative, the Mayor of Los Angeles' Executive Directive No. 10, and the Port of Los Angeles Climate Action Plan."

**Discussion of GHG Impacts Not Inadequate.** The trial court found that the discussion of impacts under GHG-2 was inadequate because it "does not inform the public or decision makers of the reasons it believes the project is consistent with . . . 'key legislation, regulations, plans and policies.'" The trial court also concluded that the analysis was "misleading" because "a project that will increase GHG emissions cannot be in harmony with state and local plans and policies that require a decrease in GHG emissions." The court disagreed.

In *Center for Biological Diversity v. Department of Fish & Wildlife* [(2015) 62 Cal. 4th 204], the court acknowledged that a comparison of the project's expected emissions to a hypothetical business-as-usual scenario is an appropriate "tool for evaluating efficiency and conservation efforts" and may be used "to show the project incorporates efficiency and conservation measures sufficient to make it consistent with achievement of Assembly Bill 32's reduction goal, not to show the project will not increase greenhouse gas emissions over those in the existing environment." The court stated that GHG-2 properly used such a comparative tool to show that shifting the drayage truck trips from the Hobart yard to the SCIG facility would increase the fuel efficiency of regional cargo movement and decrease GHG emissions, consistent with the goals of the scoping plan.

In *Center for Biological Diversity, above*, the court ultimately concluded that there was no substantial evidence for the finding that the project's emissions would not

conflict with statewide emission reduction goals. Unlike in the present case, the lead agency in that case attempted to establish "consistency" with state plans and policies by showing that the "*project-level* reduction of 31 percent in comparison to business as usual is consistent with achieving Assembly Bill 32's *statewide* goal of a 29 percent reduction from business as usual." The court explained why this was inadequate as follows: "At bottom, the EIR's deficiency stems from taking a quantitative comparison method developed by the Scoping Plan as a measure of the greenhouse gas emissions reduction effort required by the state as a whole, and attempting to use that method, without consideration of any changes or adjustments, for a purpose very different from its original design: to measure the efficiency and conservation measures incorporated in a specific land use development proposed for a specific location. The EIR simply assumes that the level of effort required in one context, a 29 percent reduction from business as usual statewide, will suffice in the other, a specific land use development. From the information in the administrative record, we cannot say that conclusion is wrong, but neither can we discern the contours of a logical argument that it is right. The analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a quantitative equivalence between the Scoping Plan's statewide comparison and the EIR's own project-level comparison deprived the EIR of its 'sufficiency as an informative document.'"

The court here stated the harbor department did not purport to measure "consistency" with a specific quantitative reduction goal. The harbor department separated its quantitative analysis (GHG-1) from its qualitative analysis (GHG-2), informing the reader that emissions would exceed baseline levels, resulting in a significant impact, but that the project was consistent with state and local plans and policies that encouraged adoption of more efficient use of fossil fuels to move goods. This analysis was particularly apt in this instance where the no project alternative also resulted in significant impacts and was not consistent with conservation goals. The court stated that accordingly, there was no inadequacy in the FEIR's analysis of GHG emissions.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 11.06 (Preliminary Litigation Issues—Exhaustion of Administrative Remedies), 22.04[4] (Contents of EIRs – Project Description), 22.04[6] (c) (Environmental Impact Reports—Contents of EIRs—Environmental Impacts—Cumulative Impacts), [k] (Environmental Impact Reports—Contents of EIRs—Environmental Impacts—Greenhouse Gas Emissions and Climate Change).

# Landowners Failed to Exhaust Administrative Remedies By Failing to Appeal to City Council

*Clews Land & Livestock, LLC v. City of San Diego*
No. D071145, 4th App. Dist., Div. 1
19 Cal. App. 5th 161, 2017 Cal. App. LEXIS 1166
December 20, 2017, cert. for pub. January 8, 2018

**Plaintiffs appealed a judgment in favor of defendant city. Plaintiffs challenged the city's approval of a project to build a private secondary school on land neighboring their commercial horse ranch and equestrian facility and the city's adoption of a mitigated negative declaration for the project. The court of appeal held that plaintiffs' challenge to the MND was barred because they did not exhaust their administrative remedies in proceedings before the city. The court rejected plaintiffs' argument that the city's process for administrative appeals violated CEQA by improperly splitting the adoption of an environmental document (e.g., the MND) from the project approvals. The court further concluded that plaintiffs' challenge to the MND failed on the merits, even assuming plaintiffs exhausted administrative remedies. Finally, the court concluded that the city complied with all applicable requirements of the city municipal code regarding historical resources and that the city's approval of the project did not conflict with the open space designation because the project would be located on already-developed land.**

**Facts and Procedure.** The project proposed by real parties in interest consisted of a proposed 5,340-square-foot private school, divided into three classroom buildings under a single roof, on an approximately one-acre site. The school would have a maximum enrollment of 75 students, with 18 staff members. Along with the school, the project proposed construction of a 24-stall parking lot, landscaping, and removal of certain existing features on the site, including a concrete-filled swimming pool.

A farmhouse at the site was built around 1900 and was a designated historical resource, part of the larger Mount Carmel Ranch (Historical Resources Board No. 391). Real parties used the farmhouse as an administrative office, and they would continue to do so following project completion. Several older outbuildings existed at the site as well. The project would not affect the farmhouse or outbuildings, and the school's design incorporated features intended to ensure compatibility with the historic nature of the site.

The site was adjacent to plaintiffs' equestrian facility, the Clews Horse Ranch. The ranch consisted of a 45-stall parking lot, corrals, stables, riding areas, a barn, a clubhouse, and two or three single-family homes. A riding ring abutted the project site. The ranch had facilities for over 100 horses and a dozen cattle. Individuals came to the

ranch to ride or participate in other equestrian activities. The ranch also held a popular rodeo.

The project site was situated at the end of Clews Ranch Road, a 1,650-foot private driveway that also provided access to the ranch. It was approximately 20 feet wide and had a posted speed limit of 10 miles per hour. Clews Ranch Road ran east-to-west and connected with Carmel Country Road. At that intersection, a public parking lot served recreational bicycle and hiking trails in the area. Clews Ranch Road was the sole vehicular accessway for both the project site and the ranch, although a dirt road ran westward from the site and connected with Carmel Creek Road. The project site sat on a bluff above State Route 56, a busy divided highway. Across the highway was a developed suburban area.

The site lay within the "Neighborhood 8" portion of Carmel Valley, a designated community plan area within defendant City of San Diego. The site was designated as open space under the Carmel Valley Neighborhood 8 precise plan. The site was zoned residential MF-1, which allowed construction of multifamily dwellings up to a density of seven to 15 units per acre. MF-1 zoning allowed "by right" construction of primary and secondary schools. The site was also within the coastal zone. When the neighboring ranch was permitted in 2007, the city changed its zoning from multifamily residential to agricultural. The ranch was also designated open space.

Real parties applied to the city for the approvals necessary to develop the project. In an initial study, the city staff determined that the project would not have a significant impact on any environmental factors, with the exception of "cultural resources," that is, archaeological and paleontological resources. Such resources might exist in the project area. However, the city staff concluded that the environmental impact would be less than significant if mitigation measures were adopted, including on-site monitoring during grading activities.

The initial study also assessed the project's potential impacts on historical resources, fire hazards, land use and planning, noise, recreation, and transportation and traffic. The initial study identified the farmhouse as a historical resource, but it determined that the project's effects on the farmhouse would be less than significant because the farmhouse and outbuilding structures would be maintained and because the school's design was consistent with the city's historical resource regulations.

As to fire hazards, the initial study noted that the project site was adjacent to native or naturalized vegetation in the Carmel Valley River Enhancement Program (CVREP) area along State Route 56. Based on its location, the project would be subject to brush management regulations. In addition, the project's design incorporated fire-resistant materials and tempered glass windows. Based on these factors, the initial study concluded that the project would not "expose people or structures to a significant risk of loss, injury or death involving wildland fires."

As to land use, the initial study determined that the project was compatible with the community plan and permitted by the underlying multifamily residential zoning. As to noise, it found no environmental impact. The initial study noted that the project would not be a "permanent noise generating source" and "would not expose people to a substantial increase in temporary or periodic ambient noise levels." As to recreation, the initial study concluded that the project would have no impact on recreational resources. And as to traffic and transportation, the initial study likewise found no impact. It determined that the project was consistent with the community plan and underlying zoning, would not cause any permanent increase in traffic, and would not result in inadequate emergency access.

Based on the initial study, the city staff prepared a draft mitigated negative declaration (MND) for the project. The draft MND described the proposed project (albeit as "three modular buildings" rather than a single building), identified the potential impact on cultural resources, and described the mitigation measures that real parties would adopt to lessen any such impact. The city's initial study was attached to the draft MND.

Several interested parties submitted comments in response to the draft MND. Two Native American tribes wrote regarding cultural resources. The city staff responded by pointing out the mitigation measures in the draft MND. The San Diego County Archaeological Society wrote to clarify the qualifications of any archaeological monitor. A consultant engaged by real parties requested certain technical corrections, including changing the description of the project from "three modular buildings" to "a new single-story building."

Plaintiffs submitted comments criticizing the use of an MND for the project. They contended that the city was required to prepare an environmental impact report. Among other things, plaintiffs argued that potential impacts on historical resources, fire hazards, noise, and transportation and traffic should be studied in an EIR. They believed that the draft MND's treatment of historical resources was inadequate without a comprehensive survey of the project site. They further believed that the draft MND did not adequately consider the hazards to students and teachers from wildfires, especially given the limited access to the project site. They contended that the draft MND ignored the impact of noise on the Clews Horse Ranch and alleged that the project created a real threat to

the viability of the ranch as a place to board and train horses. A ranch creditor also wrote to complain that approval of the project would impair the ability of Clews Ranch to realize its economic potential and therefore impaired the security of his loan. Finally, plaintiffs argued that the project's use of Clews Ranch Road would overburden the easement held by the project site over the road.

A ranch client submitted comments that echoed plaintiffs' concerns regarding noise. He noted that the ranch's riding area was very close to the project site. He alleged that construction activities at the project site had caused "loud, unanticipated noise, or blowing plastic sheets" that caused him and other riders to be thrown from their horses. He further alleged that Clews Ranch Road could not handle additional traffic and had numerous blind spots. He believed additional traffic would endanger horses and riders that used the road. As to the latter concerns, the city staff responded that the dimensions, alignment, and surfacing of the road had been reviewed by the city engineering, transportation, and fire personnel, who determined that it was adequate to serve both the school and the ranch. The city staff noted that real parties had proposed to use a shuttle bus service to transport students to the school from the public parking lot at the intersection of Clews Ranch Road and Carmel Country Road, thereby reducing traffic on Clews Ranch Road.

Plaintiffs engaged a fire safety consultant (Collingsworth) to submit additional comments regarding fire hazards related to the project. Collingsworth concluded that the project had significant adverse fire safety impacts that required preparation of an EIR. He noted that the project site was within a very high fire hazard severity zone and a flood plain. Collingsworth identified a large number of questions regarding fire safety that he alleged went unanswered in the draft MND. These questions revolved around topics such as the project's design and construction standards, the evacuation plan for the school, first responder response times and capabilities, and brush management guidelines. Collingsworth also provided general information regarding the vulnerability of structures and people to wildfires, the strength and intensity of expected wildfires, the impact of drought conditions on fire behavior, and the safety of firefighters and other emergency personnel. He expressed concern that Clews Ranch Road would be inadequate to evacuate the school in addition to the animals and people at the ranch. Finally, he asserted without citation that traffic was already constrained and gridlocked during commuter hours on and offsite under current conditions.

The city staff reviewed Collingsworth's comments and did not believe that he had raised any significant environmental impacts. The fire marshal had reviewed the project and found that it complied with the city fire codes. Similarly, an outside consultant engaged by real parties had prepared a wildfire analysis in response to Collingsworth's comments. The consultant identified no significant impacts regarding fire safety. Real parties also submitted a brush management plan and a fire protection and emergency evacuation plan, which described two evacuation routes (one eastward and one westward) in the event of an emergency.

The city staff identified several project design features that reduced the potential for fire hazard impacts, including fire-resistant building materials, brush removal, a new water line and fire hydrant serving the project site, and an annually reviewed evacuation plan. They described the contents of the school's evacuation plan, including exit routes east along Clews Ranch Road to Carmel Country Road and west along a dirt road to Carmel Creek Road. The city staff noted that the school intended to close on red flag warning days out of an abundance of caution. For fires that might originate at the school, the city staff noted among other things that the project would incorporate interior sprinklers that successfully suppressed 98 percent of fires.

Real parties engaged a consultant to prepare an analysis of potential noise impacts caused by the project. The consultant reported that school would be in session from 8:30 a.m. until 2:00 p.m., with morning and lunch breaks. No physical education classes would be on site, and the school would not use bells or other alarms (except for fire alarms). Given the proximity of State Route 56, approximately 200 feet from the project site, the consultant found that the average ambient noise level at the site was approximately 60 decibels. The consultant identified the loudest likely noise generated by students and faculty at the school as laughter, which had a level of approximately 88 decibels. It modeled a worst-case scenario, where the laughter was continuous over a one-hour period, and the weighted average noise levels ranged between 38 and 49 decibels at the receivers in the model. Because these levels were less than the observed noise level at the site, the consultant concluded that the project's noise impact would not exceed levels that would disturb sensitive wildlife under the city's noise significance determination thresholds.

The city staff prepared a final MND for the project. The final MND incorporated real parties' requested change to the project description, as well as new information from the reports and analyses prepared by real parties. For example, the city staff changed their conclusion regarding emergency access to the project from "no impact" to "less than significant impact" and added detail regarding the city's review of emergency access to the school. After

review by the San Diego Fire Department, the city staff determined that the school met its emergency access requirements. This determination was supported by real parties' fire consultant, who concluded that the project would not expose people or structures to a significant risk of loss, injury, or death from wildland fires. The final MND confirmed, however, that the physical scope of the project, project impacts, proposed mitigation measures and conclusions of the MND were not affected by the revisions.

After the city staff prepared the final MND, the Carmel Valley Community Planning Board (CVCPB) considered the project. Several board members expressed concern about the multifamily residential zoning of the project site and expressed their desire to have open space there. The project was put to a vote by the board. The vote failed, with five in favor, four opposed, and two abstentions. Nine votes were required to support the project.

The board chair subsequently wrote to the city to describe the "unusual dilemma" the project posed to the board. He wrote that the site's multifamily residential zoning seemed incompatible with the community plan, which designated the site as open space. The chair stated that he personally did not object to a school at the site because it appeared to be an acceptable use of the protected area. But other board members expressed concern that the school's use of the site would not be compatible with the horse ranch next door. The chair believed further study of the issue was needed. Other board objections included concerns over the impact of noise and traffic on the horse ranch, the impact of the school's operation on the public parking lot that would be used by the school's shuttle buses, the impact of development on the rural setting and nearby recreational trails, the severity of fire hazards and the adequacy of evacuation routes, and the general sense that "many issues still could use more detailed and guaranteed solutions."

Plaintiffs submitted additional comments objecting to allegedly significant changes to the project and demanding recirculation of the MND. They also argued that the city had not complied with its historical resource regulations. Collingsworth submitted additional comments as well that criticized the project's brush management and evacuation plans. He also rebutted the city's responses to comments on the draft MND.

The city scheduled a public hearing on the project before a city hearing officer. In a report to the hearing officer, the city staff recommended that the project be approved in full, that is, the final MND be adopted and permits for coastal development and site development be issued. The report described the current site conditions, the proposed project, and the governing community plan. It noted that the site was within an area of designated open space, but it concluded that the project was consistent with the community plan's open space policies because the new development did not extend beyond previously developed and disturbed areas. The hearing officer approved the project and adopted the MND.

The public hearing notice stated, "the decision of the Hearing Officer is final unless appealed to the Planning Commission," and "the decision made by the Planning Commission is the final decision by the City." It then advised, "the adoption of [an MND] may be appealed to the City Council after all other appeal rights have been exhausted. All such appeals must be filed by 5:00 PM within ten (10) business days from the date of the Planning Commission's certification/adoption of the environmental document."

At the time of the hearing, the city published information bulletin 505, a guide to the city's appeal procedure under the San Diego Municipal Code. The city divided its procedures for approving development applications into different numbered processes [SDMC § 112.0501]. The city handled the project at issue here under process three. The bulletin stated, "Process Two and Three permit decisions are appealable to the Planning Commission. Process Four permit decisions are appealable to the City Council. Appeals of Environmental Determinations may be made after all project appeal rights have been exhausted." It further stated, "All appeals must be made in accordance with the procedures listed in Chapter 11, Article 2, Division 5. All appeals must be made no later than close of business, within ten (10) business days of the original decision date (Process Three and Four)." The bulletin specified the filing location for "Process Two and Three Decisions Appealable to the Planning Commission" as the city's development services department, and the filing location for "Process Four Decisions and Environmental Determinations Appealable to the City Council" as the city clerk's office.

Plaintiffs appealed the hearing officer's decision to the planning commission on a city form, DS-3031. They selected "Process Three Decision—Appeal to the Planning Commission" as the "Type of Appeal." They filed the form with the city's development services department. They did not select "Environmental Determination—Appeal to City Council" or file the form with the city clerk's office.

Plaintiffs identified numerous grounds for appeal. They contended that the hearing officer's findings under the California Environmental Quality Act and in the final MND were not supported, including in the areas of traffic and transportation, noise, hazards, and cultural resources. They also contended that the project's approval conflicted with the city's historical resource regulations and the Carmel Valley Neighborhood 8 Precise Plan.

In a report to the planning commission, the city staff recommended that plaintiffs' appeal be denied. After recounting the conditions at the site and the description of the project, the report addressed the issues identified by plaintiffs' appeal. The report noted that an MND had been adopted by the hearing officer, but no appeal had been filed challenging that environmental determination. The report stated that the time to appeal had expired 10 business days after the hearing officer's decision, so any issues based on CEQA or the MND had been waived. The report rejected plaintiffs' contention that the city failed to comply with its historical resources regulations. The project would maintain the existing historic farmhouse, and the new construction was consistent with the farmhouse's aesthetics. Based on these facts, the project was consistent with federal standards for historical resource preservation and did not require a site development permit under the city's historical resource regulations. A site development permit was required, however, based on its location in the Carmel Valley community plan area. The report further rejected plaintiffs' contention that the project conflicted with the community plan's open space designation for reasons previously discussed.

Plaintiffs objected to the report's characterization of their appeal. In correspondence with the city staff, plaintiffs argued that they had appealed the hearing officer's environmental determination, as evidenced by their statement of the grounds of appeal. Plaintiffs claimed that they were not required to appeal the environmental determination to the city council until their other appeals had been exhausted, that is, after the planning commission rendered its decision. The city staff responded that plaintiffs were welcome to present their argument to the planning commission.

At the planning commission's first hearing on the project, a commissioner asked the deputy city attorney present about the scope of plaintiffs' appeal. The attorney responded that plaintiffs had not properly appealed the hearing officer's environmental determination because they had not indicated on their appeal form that they were pursuing an appeal of that determination. She explained, "Had [the appropriate box] been checked, this appeal would be set before the City Council and would not be heard before this body." Later in the hearing, a commissioner expressed sympathy with plaintiffs' position, finding it clear that plaintiffs attempted to appeal both the permit approvals and the environmental determination. She requested that the appeal be returned to the city staff and calendared before the city council. The deputy city attorney responded that the appeal procedures were laid out in the SDMC, and it would be impossible to transfer the appeal to the city council. The commissioner further requested that the city's appeal form and information bulletin be revised to reflect the correct procedures. The attorney stated that they would follow up on the commissioner's request. After hearing numerous speakers for and against the project, including both fire experts, the planning commission trailed consideration of the project to its next meeting.

At the next meeting, the commissioners questioned real parties, plaintiffs, and their representatives. However, the planning commission was unable to reach the four-vote threshold to act on the project. The vote on a motion to approve the project and deny plaintiffs' appeal was three in favor and two opposed, with two not voting. Consideration of the project was trailed again to a future meeting.

When the planning commission considered the project a third time, a motion to approve the project and deny plaintiffs' appeal prevailed on a vote of four in favor, two opposed, and one not voting. The planning commission's decision was memorialized in a resolution granting a coastal development permit and site development permit for the project. The resolution and permits included extensive findings regarding the project and its compliance with the city's land use policies.

Plaintiffs attempted to file an appeal of the planning commission's decision to the city council. Plaintiffs used a redesigned form DS-3031 that identified the "Type of Appeal" as either "Appeal of the Project" or "Appeal of the Environmental Determination." The various city processes, and the body to which the appeal was made, were no longer identified on the form. Plaintiffs indicated that they were appealing both the project and the environmental determination. As grounds for their appeal, they identified various environmental impacts they believed required preparation of an EIR, including transportation and traffic, fire hazards, land use and planning, noise, and historical resources. They also contended, among other things, that the MND should have been recirculated because the final MND contained significant revisions to the project and additional mitigation measures. To justify their appeal, plaintiffs referenced language in the public hearing notice and information bulletin that purported to authorize an appeal of an environmental determination after all other appeal rights had been exhausted.

The city rejected plaintiffs' appeal and stated that plaintiffs' appeal challenging the environmental determination was untimely under the SDMC. The planning commission's approval of permitting for the project was final and not appealable.

Plaintiffs then appealed to the California Coastal Commission. They argued that the project was inconsistent with the city's local coastal program (LCP). To support their argument, plaintiffs pointed to the community

plan's designation of the area as open space and the historic status of the farmhouse at the site. They claimed that the city failed to analyze the effect of the project on the functions of the open space, including the benefits of the CVREP recreation areas, and failed to follow its historical resource regulations. Plaintiffs also claimed that the project would expose their horse ranch and users of nearby trails to increased fire hazards because of inadequate evacuation routes.

Coastal Commission staff assessed plaintiffs' appeal and found that they raised no substantial issue. The staff's report concluded that the project was consistent with the LCP. The report rejected plaintiffs' open space argument because the site had already been developed and disturbed, and it found that the city had complied with its historical resource regulations. It further noted, "Fire safety and evacuation is not an LCP issue; however, the development complies with all fire-related requirements including brush management and building design." The report referenced a number of project elements that would address fire hazards and fire safety.

The Coastal Commission's staff report concluded, "there is strong and legal support for the City's determination that the proposed development is consistent with the certified LCP. . . . The extent and scope of the development is minor." The commission agreed with the report and found no substantial issue.

Plaintiffs then filed a petition for writ of mandate and complaint for declaratory and injunctive relief, violation of procedural due process and equitable estoppel. The operative first amended petition and complaint alleged that the MND was improperly adopted because the project would have significant environmental impacts in the areas and because the final MND had significant new material that required recirculation. The petition and complaint repeated plaintiffs' contentions that the community plan's open space designation prohibited the project and that the city failed to follow its historical resource regulations. The petition and complaint also challenged the city's appeal procedures. It alleged that the procedures did not comply with CEQA because they segregated environmental determinations from project approvals. It further alleged that the city did not provide adequate notice of the appellate procedures, thereby violating state law, the SDMC, and plaintiffs' constitutional right to procedural due process. Finally, it alleged that the city should be equitably estopped from claiming that plaintiffs had not adequately appealed adoption of the MND because the public hearing notice and other documents inaccurately described the appeal procedures.

The trial court denied the petition and rejected plaintiffs' claims. The court concluded plaintiffs failed to exhaust their administrative remedies in the city proceedings by failing to properly appeal the hearing officer's environmental determination. It found that the city was not estopped from asserting a defense based on administrative exhaustion and that the city's appeal procedure did not violate CEQA. Even if the defense did not apply, the court was unpersuaded that adoption of the MND was unjustified. The court explained, "the court agrees with the City and [real parties] that much of what motivated petitioners' objection to the building of the school next door has nothing to do with environmental concerns. Petitioners just do not want the academy as a neighbor because they feel it will affect them adversely from an economic perspective." The court did not believe that there was a fair argument that the project would significantly impact the environment. It stated, "the dominant neighbor of the proposed academy is [State Route] 56, hardly an environmentally sensitive area. The building proposed is small (5340 sq. ft. in a single story), and it will be unoccupied more days and hours than not. It strikes the court that requiring an expensive, time-consuming, and likely to be challenged EIR for this modest project, which is about the size of a large home, would be overkill." The court found plaintiffs' remaining arguments unpersuasive and entered judgment accordingly. Plaintiffs appealed.

The court of appeal affirmed the trial court's judgment. The court concluded that plaintiffs' challenge to the MND was barred because they did not exhaust their administrative remedies in proceedings before the city. In doing so, the court rejected plaintiffs' argument that the city's process for administrative appeals—at least as implicated by the project—violated CEQA by improperly splitting the adoption of an environmental document (e.g., the MND) from the project approvals. The court further concluded that plaintiffs' challenge to the MND failed on its merits, even assuming that plaintiffs had exhausted their administrative remedies. Finally, the court concluded that the city complied with all applicable requirements of the SDMC regarding historical resources and the city's approval of the project did not conflict with the open space designation because the project would be located on already-developed land.

**Exhaustion of Administrative Remedies.** The court noted that "the exhaustion of administrative remedies doctrine 'bars the pursuit of a judicial remedy by a person to whom administrative action was available for the purpose of enforcing the right he seeks to assert in court, but who has failed to commence such action and is attempting to obtain judicial redress where no administrative proceeding has occurred at all; it also operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have

failed to "exhaust" the remedy available to them in the course of the proceeding itself.' As [the California] Supreme Court has stated it: 'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.' The rule is a jurisdictional prerequisite in the sense that it 'is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts'" [*Citizens for Open Government v. City of Lodi* (2006) 144 Cal. App. 4th 865].

The court explained for example, if the administrative proceeding includes a right to appeal an allegedly improper action, a plaintiff must generally pursue that administrative appeal in order to exhaust his or her administrative remedies. "'If some reasonable administrative remedy, such as the right to appeal the action of a planning commission, were afforded to challenge such improper action the doctrine of administrative remedies would bar suit by litigants who failed to employ it'" [*Tahoe Vista Concerned Citizens v. County of Placer* (2000) 81 Cal. App. 4th 577; *see Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal. 3d 412].

The court observed that "'consideration of whether such exhaustion has occurred in a given case will depend upon the procedures applicable to the public agency in question'" [*Tahoe Vista, above*]. It noted that the city had established five "decision processes" to handle applications for permits, maps, and other planning decisions [SDMC § 112.0501]. The city applied its "Process Three" to real parties' application. Under process three, an application may be approved, conditionally approved, or denied by a hearing officer at a public hearing [SDMC § 112.0505]. The hearing officer must comply with CEQA's environmental review and certify or adopt the appropriate environmental document (e.g., negative declaration, MND, or EIR) [SDMC § 128.0311(a)]. The hearing officer's decision may be appealed to the planning commission within 10 business days by filing an application with the city manager [SDMC § 112.0506]. The planning commission may affirm, reverse, or modify the decision being appealed [SDMC § 112.0506(f)].

The SDMC contains a separate section describing the procedure for environmental determination appeals [SDMC § 112.0520]. The SDMC defines an "environmental determination" as "a decision by any non-elected City decision maker, to certify an environmental impact report, adopt a negative declaration or mitigated negative declaration, or to determine that a project is exempt from [CEQA]" [SDMC § 113.0103]. The procedure for environmental determination appeals applies regardless of the decision process adopted by the city: "Notwithstanding other provisions of this Code, any person may appeal an environmental determination not made by the City Council" [SDMC § 112.0520(a)]. An environmental determination appeal must be filed with the city clerk within 10 business days of either "the date of the posting of the Notice of Right to Appeal Environmental Determination" or "the date of a decision by a Hearing Officer or the Planning Commission to adopt or certify an environmental document" [SDMC § 112.0520(b)].

The city council may grant or deny the appeal [SDMC § 112.0520(e)]. If the city council denies the appeal, it will "approve the environmental determination and adopt the CEQA findings and statement of overriding considerations of the previous decision-maker, where appropriate" [SDMC § 112.0520(e)(1)]. If the city council grants the appeal, it will set aside the environmental determination and return it to the city staff for reconsideration [SDMC § 112.0520(e)(2), (f)(2)]. "The Planning Director shall reconsider the environmental determination ... and prepare a revised environmental document as appropriate, in consideration of any direction from the City Council" [SDMC § 112.0520(f)(2)]. During this time, "the lower decision-maker's decision to approve the project shall be held in abeyance. The City Council shall retain jurisdiction to act on the revised environmental document and associated project at a subsequent public hearing" [SDMC § 112.0520(f)(1)].

At the subsequent hearing, the city council has the power to consider the revised environmental document and the associated project: "At a subsequent hearing, the City Council shall again consider the environmental determination and associated projects, and may take action as follows: (A) Certify or adopt the environmental document; adopt CEQA findings and statement of overriding considerations as appropriate; and affirm the previous decision to approve the associated project; (B) Certify or adopt the environmental document; adopt CEQA findings and statement of overriding considerations as appropriate; condition and approve the associated project as modified; or (C) Find that the environmental document is insufficient, in which case the document shall not be certified. The associated project shall be denied and the decision shall be deemed the final administrative action" [SDMC § 112.0520(f)(3)].

**Bifurcated Appeals Procedure.** The court concluded that these provisions establish a bifurcated appeals procedure for process three decisions made by a hearing officer. While a hearing officer's "decision" may be appealed to the planning commission within 10 business days [SDMC § 112.0506(b)], any environmental determination by the hearing officer must simultaneously be appealed to the city

council within the same period [SDMC § 112.0520(b)(2)]. As a result of this bifurcation, an appeal to the planning commission covers only the nonenvironmental project approvals (e.g., permits), while an appeal to the city council covers the environmental determination. If the city council grants the appeal, however, it may consider the nonenvironmental project approvals as well.

The court stated that although the sequencing and interaction of these two appeals was unclear, it did not delve further into the city procedure in order to resolve the dispute. The court stated that plaintiffs filed only an appeal of the hearing officer's decision to the planning commission. They did not file an appeal of the hearing officer's environmental determination. They therefore did not avail itself of the city's administrative appeals procedure that was available to address their objections to the hearing officer's adoption of the MND. Plaintiffs did not exhaust their administrative remedies regarding the MND, and they could not bring a judicial action challenging it [*see Tahoe Vista, above*].

Plaintiffs argued that their failure to appeal the hearing officer's environmental determination was excused because the city's bifurcated appeal procedures were invalid under CEQA. The court noted that CEQA requires the person or persons responsible for approving a project (the "decisionmaking body" in CEQA parlance) also be responsible for complying with CEQA's environmental review (e.g., by certifying an EIR, adopting a negative declaration or MND, or determining that the project is exempt) [*see* Guidelines §§ 15025(b) and 15356]. The court noted that assuming authority is properly delegated within the public agency, the decisionmaking body may be an unelected official or commission [*California Clean Energy Committee v. City of San Jose* (2013) 220 Cal. App. 4th 1325]. If the decisionmaking body is unelected, however, the decisionmaking body's compliance with CEQA must be appealable to the agency's elected decisionmaking body, if any [Pub. Res. Code § 21151(c); Guidelines §§ 15061(e), 15074(f), 15090(b)].

The court stated that the city's procedure complied with these requirements. Under process three, the hearing officer has the authority to approve the project and comply with CEQA's environmental review [SDMC §§ 112.0505 and 128.0311(a)]. The hearing officer is therefore the city's decisionmaking body under the Guidelines. Further, because the hearing officer is unelected, the city's procedures allow an appeal of the hearing officer's environmental determination to the city's elected the city council [SDMC § 112.0520]. The court stated that plaintiffs did not avail itself of that procedure.

The court stated that *California Clean Energy* was inapposite. In that case, the local agency had delegated the authority to comply with CEQA's environmental review to its planning commission. This delegation was improper because the planning commission did not have the authority to approve the project at issue. The planning commission's purported certification of a final EIR for the project was therefore unauthorized by CEQA, and the plaintiff's challenge to that certification was not barred by its failure to appeal the planning commission's environmental decision. Here, the court stated that the hearing officer's adoption of an MND for the project was procedurally proper, since the hearing officer also had the authority to approve the project. *California Clean Energy* did not apply.

The court stated that the other authorities that plaintiffs cited confirmed that the hearing officer's adoption of the MND was procedurally proper because he was the city's decisionmaking body for the project [*see POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681; *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770]. The court stated that the city's procedure establishing an appeal to the city council to challenge the hearing officer's adoption of the MND was likewise proper [*see Vedanta Society of So. California v. California Quartet, Ltd.* (2000) 84 Cal. App. 4th 517]. Plaintiffs were required to pursue this appeal in order to exhaust their administrative remedies.

Plaintiffs argued that the city's appeal procedures were inadequate because the planning commission had authority over project approvals but not the environmental determination. However, the court stated that this alleged inadequacy did not affect the validity of the hearing officer's environmental determination, so it provided no excuse for plaintiffs' failure to appeal that determination. In addition, the court stated that it was unclear on the current record which procedure would have applied had plaintiffs properly appealed the environmental determination. During the first planning commission meeting, a deputy city attorney told the commissioners, "Had [the appropriate box] been checked, this appeal would be set before the City Council and would not be heard before this body."

Plaintiffs also argued that the city council was not a "decisionmaking body" because project approval under process three progressed from the hearing officer to the planning commission. No independent appeal to the city council, separate from an environmental determination, was authorized [SDMC § 112.0506]. The planning commission's decision was final. Plaintiffs asserted that the city council was therefore not a "person or group of people within a public agency permitted by law to approve or disapprove the project at issue" [Guidelines § 15356]. If the city grants the environmental determination appeal,

however, it has such authority [SDMC § 112.0520(f)]. The court noted that neither CEQA nor the Guidelines require that a local agency's elected decisionmaking body accept appeals regarding every project approval, separate and apart from environmental review. They require only that the environmental determination be appealable [Pub. Res. Code § 21151(c); Guidelines §§ 15061(e), 15074(f), 15090(b)]. The court stated that the city's procedures allowed exactly the same.

**Error In Public Hearing Notice.** Plaintiffs further claimed that their failure to appeal should be excused based on inaccurate descriptions of the city's appeal process in the public hearing notice for real parties' project and the city's information bulletin 505. The court stated that the public hearing notice misstated the procedure for an environmental determination appeal by implying that the appeal should occur after the planning commission considered the project: "The adoption of [an MND] may be appealed to the City Council after all other appeal rights have been exhausted. All such appeals must be filed by 5:00 PM within ten (10) business days from the date of the Planning Commission's certification/adoption of the environmental document."

The court noted that under the SDMC, the appeal to the city council for a process three project does not occur "after all other appeal rights have been exhausted"; it occurs simultaneously with the appeal to the planning commission. And, while the notice's reference to an appeal "within ten (10) business days of the Planning Commission's certification/adoption of the environmental document" may be applicable to other projects (see, e.g., SDMC, § 112.0507 [describing the city's process four]), it was not accurate under the process three procedures that the city applied to this project because the time to appeal ran from the hearing officer's adoption of the environmental document. The city's information bulletin, which was referenced in the public hearing notice, stated that appeals had to be made in accordance with the SDMC and did not describe the specific procedures, except to state, "Appeals of Environmental Determinations may be made after all project appeal rights have been exhausted." The court stated that this statement incorrectly described the sequencing of the project and environmental determination appeals under process three, which had to be pursued simultaneously.

The court stated that plaintiffs primarily framed their argument based on these inaccuracies as one of improper notice under CEQA. However, it stated that this framing did not fit the facts here. The authorities cited by plaintiffs discussed the failure to comply with CEQA's requirement that an "alleged grounds for noncompliance" with CEQA be presented to a public agency under Pub. Res. Code § 21177(a) [*see Temecula Band of Luiseno Mission Indians v. Rancho Cal. Water Dist.* (1996) 43 Cal. App. 4th 425; *McQueen v. Board of Directors* (1988) 202 Cal. App. 3d 1136]. This requirement "does not apply to any alleged grounds for noncompliance with this division for which there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law" [Pub. Res. Code § 21177(e)].

The court noted that in *McQueen*, the court held that an inaccurate and misleading project description is "tantamount to a lack of notice" under CEQA, thus excusing the plaintiff's failure to raise a noncompliance issue early in the public agency's consideration of the project. *Temecula Band* agreed with *McQueen*'s interpretation of the statute, but it distinguished *McQueen* on the facts. While the project description was inaccurate and misleading, as in *McQueen*, the project was clarified at a subsequent public hearing. The *McQueen* plaintiff failed to object after that clarification, despite an opportunity to do so, and therefore its failure to raise a noncompliance issue was not excused.

The court stated that plaintiffs' failure to appeal was not a failure to raise a noncompliance issue under Pub. Res. Code § 21177. *McQueen* and *Temecula Band* therefore had little relevance to the administrative exhaustion issue here. Further, even taken on their own terms, these authorities stood only for the proposition that a plaintiff should be excused from failing to raise a noncompliance issue where a misleading project description—or complete lack of notice—has misled a plaintiff into believing there is no noncompliance issue at all [Pub. Res. Code § 21177(e); *Temecula Band, above*]. It does not apply where the public agency has accurately provided notice of a public hearing, but it misstates the applicable procedures to appeal the decision made at that hearing.

Instead, a plaintiff's remedy in this situation is to prevent the public agency from invoking an administrative exhaustion defense through equitable estoppel [*see Shuer v. County of San Diego* (2004) 117 Cal. App. 4th 476; *see also Feduniak v. California Coastal Com.* (2007) 148 Cal. App. 4th 1346; *J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal. App. 4th 978; *but see Park Area Neighbors v. Town of Fairfax* (1994) 29 Cal. App. 4th 1442]. The court stated that plaintiffs pursued a claim for equitable estoppel in the trial court, but they were unsuccessful. They had not raised any claim of error regarding equitable estoppel in this court. The court stated that their failure to exhaust administrative remedies therefore could not be excused on that basis.

**Adoption of MND.** Plaintiffs primarily argued that the hearing officer should not have adopted the MND because the record demonstrated a fair argument that the project could have a significant effect on the environment that would not be mitigated. Plaintiffs contended that the city was therefore required to prepare an EIR for the project.

The court noted that an EIR must be prepared "if there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment" [Pub. Res. Code § 21080(d)]. "'May' means a reasonable possibility" [*Pocket Protectors v. City of Sacramento* (2004) 124 Cal. App. 4th 903].

The court noted that "an economic or social change by itself shall not be considered a significant effect on the environment. A social or economic change related to a physical change may be considered in determining whether the physical change is significant" [Guidelines § 15382; *see* Pub. Res. Code § 21082.2(c)].

The court further noted that "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" [Pub. Res. Code § 21080(e)(1)]. "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment" [Pub. Res. Code § 21080(e)(2)]. "The existence of public controversy over the environmental effects of a project shall not require preparation of an environmental impact report if there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment" [Pub. Res. Code § 21082.2(b)]. "Relevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence . . . . So may expert opinion if supported by facts, even if not based on specific observations as to the site under review" [*Pocket Protectors, above*].

The court stated that the agency does not weigh the potential effect on the environment if substantial evidence supports both the preparation of an EIR and the opposite. "If a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect" [Guidelines § 15064(f)(1); *see No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal. 3d 68]. For example, "if there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR" [Guidelines § 15064(g)]. "The fair argument standard creates a 'low threshold' for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review" [*Preserve Poway v. City of Poway* (2016) 245 Cal. App. 4th 560].

The court stated that the hearing officer's "decision to issue a negative declaration in connection with [the project] is reviewed for 'prejudicial abuse of discretion,' which 'is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence'" [*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal. 4th 155, quoting Pub. Res. Code § 21168.5]. "'In reviewing the adoption of [a negative declaration], our task is to determine whether there is substantial evidence in the record supporting a fair argument that the Project will significantly impact the environment; if there is, it was an abuse of discretion not to require an EIR. "'Whether a fair argument can be made is to be determined by examining the entire record.'"' 'Although our review is de novo and nondeferential, we must give the lead agency the benefit of the doubt on any legitimate, disputed issues of credibility'" [*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal. App. 5th 677].

The court stated that plaintiffs bore the burden of identifying in the record substantial evidence of a fair argument that the project could have a significant effect on the environment that would not be mitigated [*see Citizens for Responsible & Open Government v. City of Grand Terrace* (2008) 160 Cal. App. 4th 1323]. Plaintiffs contended that the project could have significant effects in the areas of fire hazards, traffic and transportation, noise, recreation, and historical resources.

The court stated that plaintiffs had not made a sufficient showing here. The project was relatively modest and located on already-developed land. The record did not reflect any fair argument that the project could have a significant effect on the environment that would not be mitigated. The court addressed each of the areas plaintiffs identified in turn.

**Fire Hazards.** The court noted that a project may have a significant effect on the environment by increasing the risk of fire hazards, including wildfires. Here, however, the court stated that plaintiffs had not shown that the project would have any significant effect on fire hazards in the area. The project met all applicable fire codes, the project site was already developed, and plaintiffs' large commercial horse ranch already operated on the neighboring parcel. The area already saw vehicular and pedestrian traffic. Plaintiffs had not shown any of the project's activities had a reasonable possibility of significantly increasing the risk of fire hazards. By incorporating a new water line and fire hydrant, the project appeared to increase fire safety in the area.

The court observed that plaintiffs focused on the location of the project in a very high fire hazard severity zone [*see* Gov. Code § 51178] and the risk to persons and property from potential wildfires in the area. The court stated that plaintiffs' focus was misplaced. As the California Supreme Court explained, "[the courts] must distinguish between requirements that consider the *environment's* effects on a project and those that contemplate the *project's* impacts on the existing environment." Only the latter impacts are valid under CEQA. It is proper to evaluate "a project's potentially significant *exacerbating* effects on existing environmental hazards—effects that arise because the project brings 'development and people into the area affected.'" But considering existing environmental hazards, unchanged by the project, are not proper under CEQA. "CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users or residents" [*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal. 4th 369].

Plaintiffs argued that the project would inhibit the ability of people and, at the ranch, animals to evacuate in the event of a wildfire. Plaintiffs pointed to the alleged inability to timely and safely evacuate 95 school personnel and students in conjunction with their 135 horses and 15 cattle, ranch personnel, clients and trailers through the narrow Clews Ranch Road. However, the court stated that Clews Ranch Road was 20 feet wide and only 1,650 feet long. Complaints about its inadequacy were speculative. The project would also have an alternate evacuation route westward along a dirt road, and it intended to operate only part of the year and would close on red flag warning days. The inherent difficulty in evacuating "135 horses and 15 cattle, ranch personnel, clients and trailers" already existed and would not be significantly affected by the project. Thus, the court stated that there was no fair argument that the project would materially affect evacuation routes in the area.

Plaintiffs relied on the comments submitted by Collingsworth. His comments consisted largely of general observations regarding fire hazards not tied to the project, questions about the project, and topics allegedly unaddressed or inadequately addressed in the MND and project materials. His general observations could not, in and of themselves, create a fair argument without some nexus with the project itself. His questions about the project and the topics allegedly unaddressed or inadequately addressed also could not create a fair argument without some showing that those questions and topics referred to a potentially significant effect on the environment that the project could create. Collingsworth also focused on the effect of the environment on the project (students and faculty at the school), rather than the effect of the project on the environment, which was incorrect for the reasons the court had already discussed. The court stated that Collingsworth's remaining comments were conclusory, speculative, or otherwise unsupported. They were likewise insufficient.

The court stated that plaintiffs had not shown that there was a fair argument that the project's effect on the fire hazards in the environment, including as a consequence of bringing additional people into the area, could be significant. The city therefore was not required to prepare an EIR on this basis.

**Traffic and Transportation.** The court noted that a project may have a significant effect on the environment by increasing traffic or impeding transportation. Various comments from the public argued that the project here would create an unreasonable traffic situation on Clews Ranch Road. They claimed that the road could not support the estimated 117 additional daily trips caused by the project because the road was narrow, might create conflicts for two-way traffic, and was used by pedestrians and horses as well. Clews, one of the plaintiffs, and others contended that there were also "blind corners" on the road. The court stated that as to the last comment, it appeared contradicted by the actual condition of the road, which was only 1,650 feet long and largely straight. On direct issues of credibility, the court had to defer to the hearing officer [*see Joshua Tree, above*]. The remaining comments were insufficient to create a fair argument that the project could have a significant impact on traffic and transportation. Clews Ranch Road was 20 feet wide and allowed two-way traffic. It had supported traffic to and from plaintiffs' large commercial horse ranch and the project site, including during special events, without incident.

The court stated that the factual situation here was far different from the situation in *Keep Our Mountains Quiet v. County of Santa Clara* [(2015) 236 Cal. App. 4th 714] that plaintiffs cited. In that case, an initial report by the Department of Transportation found that there would be "'significant impacts to the operations and traffic movements to the site entrances' and 'might impede [Summit Road] in both directions because of numerous vehicles making right and left-turns into the site.'" The road leading to the project site was winding and very narrow (under 10 feet at one point), with 39 blind curves. The accident rate was twice the statewide average. The court stated that no such facts were developed here.

The court stated that the commenters' predictions of significant impacts alone were insufficient absent specific facts in the record supporting a fair argument. "In the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence" [*Joshua*

*Tree, above*]. The court stated that plaintiffs had not shown that there was a fair argument that the project's effect on traffic and transportation could be significant. The city was not required to prepare an EIR on this basis.

**Noise.** The court noted that a project may have a significant effect on the environment through the noise it generates [*see Oro Fino Gold Mining Corp. v. County of El Dorado* (1990) 225 Cal. App. 3d 872]. Several commenters associated with plaintiffs' horse ranch predicted significant noise impacts because noises from school activities could disrupt ranch operations. For example, one commenter described incidents in which construction noise at the project site had frightened horses and caused them to throw their riders. However, the court stated that the possibility that noise would impact the horse ranch's operations was insufficient. The court noted that "under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons" [*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal. App. 4th 477]. The court stated that the noise likely generated by the school (children laughing and playing, cars driving, doors closing, etc.) was insignificant in the context of the environment as a whole, especially given the project's location near a busy highway, State Route 56, and plaintiffs' large ranch.

The court stated that even if the noise generated by the school adversely impacted the ability of the ranch to continue operation as a viable business, the impact on the ranch alone would be insufficient to support preparation of an EIR. The court noted that the fact that a project may affect another business's economic viability is not an effect covered by CEQA unless it results in a change in the physical environment (e.g., urban decay) [*Joshua Tree, above*]. The court stated that plaintiffs had not shown that there was a fair argument that the project's effect on noise in the environment could be significant. The city was not required to prepare an EIR on this basis.

**Recreation.** The court noted that a project may have a significant effect on the environment if it reduces available recreation activities. The court observed that the project here would use a public parking lot serving nearby trails as a pick-up and drop-off point for its shuttles. Commenters believed that the school's use of the parking lot would leave little room for other users. For example, the CVCPB expressed concern that "unresolved operational issues such as the drop-off and pickup location may impact traffic flow on Carmel Country Road and [the location] may be inadequate for the added use beyond much needed parking for the heavily used CVREP public trails." The court stated that speculation by commenters such as the CVCPB was not substantial evidence, and it was insufficient to support a fair argument that the project could have a significant impact on recreation [*Joshua Tree, above*]. Plaintiffs had not shown that the city was required to prepare an EIR on this basis.

**Historical Resources.** The court noted that a project may have a significant effect on the environment if it affects historical resources. The court stated that the project here would not alter the historic farmhouse on the site or its outbuildings, and the architecture of the new school on the property was consistent with the farmhouse's aesthetic. Plaintiffs claimed that the city should have undertaken additional study of the project's impact on the broader Mount Carmel Ranch historical resource, but such criticism was mere rhetoric without facts supporting such an impact. The court stated that plaintiffs had not shown that there was a fair argument that the project's effect on historical resources might be significant. The city was not required to prepare an EIR on this basis.

**Recirculation of MND.** The court noted that to achieve the public notice purposes of CEQA, an MND must be recirculated if it is substantially revised after its release but prior to adoption [Guidelines § 15073.5(a)]. A substantial revision includes the circumstances where "a new, avoidable significant effect is identified and mitigation measures or project revisions must be added in order to reduce the effect to insignificance," or "the lead agency determines that the proposed mitigation measures or project revisions will not reduce potential effects to less than significance and new measures or revisions must be required" [Guidelines § 15073.5(b)(1)–(2)]. The court noted that recirculation is not required where "new project revisions are added in response to written or verbal comments on the project's effects identified in the proposed negative declaration which are not new avoidable significant effects"; "measures or conditions of project approval are added after circulation of the negative declaration which are not required by CEQA, which do not create new significant environmental effects and are not necessary to mitigate an avoidable significant effect"; or "new information is added to the negative declaration which merely clarifies, amplifies, or makes insignificant modifications to the negative declaration" [Guidelines § 15073.5(c)(2)–(4)].

Plaintiffs contended that the school's shuttle bus plan and its intent to close on red flag warning days, which were added to the project after the MND was circulated, constituted new mitigation measures that required recirculation. The court disagreed. The court stated that these plans were purely voluntary, so they could not constitute mitigation measures [Guidelines § 15126.4(a)(2)]. And plaintiffs had not shown they were added to the project to reduce significant effects on the environment for the reasons already discussed. In addition, additional information about the

project's design and layout, its evacuation plan, and its brush management plan, which were also added after circulation, were clarifying and amplifying in nature and did not make substantial revisions to the project [*see* Guidelines § 15126.4(c)(4)]. The court stated that recirculation was not required.

**Historical Resource Regulations.** Plaintiffs contended that the city failed to follow its historical resource regulations [SDMC § 143.0201 et seq.] and the historical resources guidelines of the city's Land Development Manual (HRG). The court stated that to succeed, plaintiffs had to establish a prejudicial abuse of discretion, that is, they had to show that the city's actions were "arbitrary, capricious, in excess of its jurisdiction, entirely lacking in evidentiary support, or without reasonable or rational basis as a matter of law" [*Sierra Club v. County of Napa* (2004) 121 Cal. App. 4th 1490]. The court noted that "a prejudicial abuse of discretion is established if the agency has not proceeded in a manner required by law, if its decision is not supported by findings, or if its findings are not supported by substantial evidence in the record" [*Sierra Club, above*; *see* Pub. Res. Code § 21168.5].

Plaintiffs advanced two interrelated arguments in an attempt to show that the city did not proceed as required by law: (1) the historical resource regulations required the city to apply its "Process Four" to the project, which would involve review by the city's Historical Resources Board, and (2) the regulations required the city to analyze the effect of the project on Mount Carmel Ranch, the broader historical resource of which the project site's historic farmhouse was a part.

The court noted that the city's historical resource regulations apply whenever historical resources, including designated historical resources, are present at a project site [SDMC § 143.0210(a)(1)]. The city must proceed under process four for certain types of development when a designated historical resource is present. The types of development that require process four are subdivisions, single- or multiple-unit residential developments, commercial or industrial developments, public works projects, and any developments that deviate from the historical resources regulations [SDMC § 126.0502(d)(1)]. The historical resources regulations similarly require process four for subdivisions, single- or multiple-unit residential developments, commercial or industrial developments, public works projects (other than capital improvement program projects), land use plans, and any developments that deviate from the historical resources regulations (other than capital improvement program projects) [SDMC § 143.0210(e)(2)].

The court noted that even if these requirements apply, the historical resource regulations contain certain exemptions [SDMC § 143.0220; *see* SDMC §§ 126.0502(d)(1) and 143.0210(e)]. One of these exemptions covers "any development that proposes minor alterations or improvements consistent with [SDMC] Section 143.0250(a), to a designated historical resource, or any historical building or historical structure located within a historical district, or any new construction within a historical district that will enhance, restore, maintain, repair, or allow adaptive reuse of the resource and which will not adversely affect the special character or special historical, architectural, archaeological, or cultural value of the resource when all feasible measures to protect and preserve the historical resource are included in the development proposal consistent with the Secretary of Interior's Standards and Guidelines" [SDMC § 143.0220(a)].

The court observed that in the report to the planning commission for the project, the city staff explained that the project fell within this exemption because it was new construction that was consistent with the secretary of the interior's standards and guidelines, the HRG, and the historical resource regulations. The court stated that in arguing that process four applied, plaintiffs did not address the substance of this exemption. It merely criticized the city's reliance on the exemption as a post hoc rationalization. Such criticism was insufficient without a showing that process four should have been applied, citing *Sierra Club*: "The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination."

Plaintiffs also criticized the city for not complying with the requirements of the historical resource regulations and the HRG, particularly the absence of any detailed analysis of the project's effect on the Mount Carmel Ranch, the broader historical resource of which the project site's historic farmhouse was a part, or of the project's area of potential effect. Again, the court stated that plaintiffs' criticism was insufficient. Inadequate explanation regarding compliance is not the same as noncompliance [*see Sierra Club, above*].

The court stated that plaintiffs' further contention that a recommendation of the Historical Resources Board was required was incorrect; such a recommendation was only required under process four [SDMC § 126.0504(b)(2)]. Further, plaintiffs' contention that approval of real parties' project should have been handled under the same procedures as the prior approval of their commercial horse ranch was unpersuasive. The court stated that the mere fact that plaintiffs complied with different procedures did not show that real parties should be held to those procedures. Plaintiffs had not shown that the city erred.

**Consistency with Carmel Valley Neighborhood 8 Precise Plan.** Plaintiffs argued that the project conflicted with the Carmel Valley Neighborhood 8 Precise Plan adopted by the city. The Precise Plan "provides development guidelines for the Neighborhood 8 portion of Carmel Valley, a designated community plan area within the City." "The Neighborhood 8 Precise Plan also functions as a component in the development implementation process . . . . The precise plan constitutes one of a series of steps in the City approval of development projects in Neighborhood 8. The Carmel Valley Community Plan provides guidelines, proposals and concepts for the future development of the entire Carmel Valley community. The precise plan is used by the individual neighborhoods, within the larger Carmel Valley Plan context, to determine how the specific development unit will take shape. It is the precise plan's role to address issues such as development density, road alignments and community facility sites. The adopted precise plans then become the basis for reviewing subsequent development plans, subdivisions, and other permits within their respective development units." The court stated that while subordinate to the city's general plan and the Carmel Valley Community Plan, the Precise Plan guided development in the same way for projects within its area of concern.

The court stated that the most recent Precise Plan, issued in 2012, designated the project site as open space. In their report to the hearing officer, the city staff identified the site as designated natural open space. The report explained, however, that development on the site was consistent with the Precise Plan because the area had already been disturbed: "The project site has been previously disturbed by the prior construction of several concrete pads void of any structures, several accessory buildings, a swimming pool and the historic residential structure. These improvements are or were dispersed throughout the property. The proposed school building is located in an area on the site which was previously developed with a swimming pool which has since been capped and covered with a concrete pad. New drive aisles and parking areas would be located in areas of previous disturbance and are either covered in concrete/asphalt/gravel or are existing unpaved driveways and/or parking areas. The project design limits new development to previously developed and disturbed areas in conformance with the Precise Plan's Open Space policies." In the report to the planning commission following plaintiffs' appeal, the city staff reiterated their analysis and found no inconsistency between the project and the Precise Plan.

The court stated that the site development permit issued by the planning commission confirmed that the project site was designated Open Space by the Precise Plan. But it explained, "The proposed Project will be developed on previously disturbed land and will not impact or develop on existing undisturbed open space and [the Multi-Habitat Planning Area] land." The court stated that it therefore found that the project would not "adversely affect the applicable land use plan."

The court noted that any local land use or development decision, including approval of the project at issue here, must be consistent with the applicable general plan and its constituent elements. The court reviewed the city's finding that the project was consistent with the Precise Plan for abuse of discretion. "A city's determination that a development approval is consistent with its general plan has been described by some courts as 'adjudicatory' and by others as 'quasi-legislative.' Where a consistency determination involves the application of a general plan's established land use designation to a particular development, it is fundamentally adjudicatory. In such circumstances, a consistency determination is entitled to deference as an extension of a planning agency's '"unique competence to interpret [its] policies when applying them in its adjudicatory capacity."' Reviewing courts must defer to a procedurally proper consistency finding unless no reasonable person could have reached the same conclusion" [*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal. 5th 141]. "The party challenging a city's determination of general plan consistency has the burden to show why, based on all of the evidence in the record, the determination was unreasonable" [*San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal. App. 4th 1].

Plaintiffs focused on the project's site's multifamily residential (MF-1) zoning and contended that zoning was inconsistent with an open space designation. The court stated that while "a zoning ordinance that conflicts with a general plan is invalid at the time it is passed" [*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal. 3d 531], the city's zoning decision was not at issue here. The multifamily residential zoning was implemented prior to the latest Precise Plan's open space designation. The Precise Plan contemplated a change in the site's zoning from multifamily residential to open space, but it appeared that this change had not occurred.

The court stated that the issue here was whether the project was consistent with the Precise Plan's open space designation. Plaintiffs did not persuasively address the reasoning behind the city's consistency determination, which was based on previous development at the site. Plaintiffs referenced the general concern for open space, natural vistas, and recreation described in the Precise Plan and similar documents, but they did not explain how the city abused its discretion in finding that the development of the school at issue here would be consistent with the objectives of the open space designation. Plaintiffs' claim that

the CVREP trails would be affected by the project's use of the trailhead parking lot had been addressed and rejected above.

The court stated that the city could reasonably conclude that the project was consistent with the Precise Plan and its open space designation because the proposed school would be built on already-developed land, next to a large commercial horse ranch, and would be consistent with the historic nature of the site [*see Orange Citizens, above*]. Plaintiffs' bare assertion that further evaluation was needed was insufficient.

**Site Development Permit Findings.** Plaintiffs contended that the city's findings in the site development permit were not supported by the evidence. The court found that contention unpersuasive for the reasons already discussed with respect to plaintiffs' specific arguments above.

### *Commentary by Al Herson*

This comment focuses on the court's alternative holding that even if the petitioner exhausted its administrative remedies, an EIR was not required for the proposed school project. The court held that a Mitigated Negative Declaration (MND) was an appropriate CEQA document because there was no substantial evidence in the record supporting a fair argument that the proposed project might create a significant impact.

Of particular interest was the court's analysis of fire hazard impacts. The court applied the Supreme Court's holding in *CBIA v. BAAQMD* [(2015) 62 Cal. 4th 369] that CEQA is generally not concerned with the impacts of pre-existing environmental conditions on a project, unless the project exacerbates those impacts. The Clews Land and Livestock case is one of the very few cases to date applying the Supreme Court's holding.

Petitioner's argument focused on the location of the project in a very high fire hazard severity zone, and the risk to persons and property from potential wildfires in the area. However, the court held that the appropriate inquiry was not general exposure to existing wildfire risk, but rather whether the proposed project would increase that risk. Petitioner had not produced substantial evidence that the project would increase wildfire risk. The holding might have been different if petitioner had produced substantial evidence that construction or operation of the school would increase wildfire hazards through, for example, vehicle accidents or improperly disposed smoking materials.

Also of interest was the court's rejection of petitioner's argument that significant noise impacts from the school could disrupt the ranch's operations. For example, it was alleged that construction noise could cause horses to throw their riders. The court initially rejected this argument by citing CEQA case law indicating that CEQA is concerned with whether a project will affect the environment of persons in general, not whether a project will affect particular persons. This principle has in the past been applied primarily to aesthetic impacts; its application to noise impacts is a bit problematic, as noise impact analysis often considers whether particular sensitive receptors near a project are exposed to excessive noise levels [*see, generally,* CEQA Guidelines Appendix G, Section XII]. The court seemed to exclude adjacent business patrons (i.e., horse riders) from the class of sensitive receptors that CEQA noise impact analysis should consider.

At any rate, the court went on to observe that the noise likely generated by the school would be insignificant given the project's location near a busy highway and large ranch. The court went on to observe that even if the noise generated by the school adversely impacted the ability of the ranch to continue operation as a viable business, an EIR would not be triggered unless loss of economic viability resulted in a change in the physical environment (e.g., urban decay).

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 11.06 (Exhaustion of Administrative Remedies), 21.09[5] (Judicial Review of Negative Declaration Decision).

## Plaintiff Failed to Present Substantial Evidence to Support Fair Argument of Physical Urban Decay

*Visalia Retail, LP v. City of Visalia*
No. F074118
2018 Cal. App. LEXIS 84
January 4, 2018

**Plaintiff challenged an EIR for the update of the city's general plan that included a land use policy affecting areas designated "Neighborhood Commercial." Under the policy, no tenant in a Neighborhood Commercial area could be larger than 40,000 square feet in size. Plaintiff contended that the city violated CEQA by failing to analyze the potential for the policy to cause urban decay. Plaintiff's expert was of the opinion that the land use policy would cause anchor vacancies and/or lower-traffic anchors, which would reduce rental income landlords use for maintenance and improvements, which would "create a downward spiral of physical deterioration." The court of appeal affirmed judgment for the city. Plaintiff's expert supported his opinion largely with conjecture as to**

**whether the land use policy would cause urban decay. Further, even if the land use policy would undoubtedly cause some adverse economic consequences, plaintiff's expert offered little to show that "the magnitude of this effect" may lead to a substantial impact on the environment. That is, even if a handful of properties were to remain permanently vacant, the result would not necessarily be the kind of change the physical environment that implicates CEQA.**

**Facts and Procedure.** The City of Visalia filed a "Notice of Preparation" [*see* CEQA Guidelines § 15082] indicating that it was preparing to update its general plan, and that an EIR was required. Though specific proposals on how to update the general plan had "not yet been determined," the general plan update would "likely address" various topics, including land use and city design.

The notice identified a "next step" in the process, which would involve a group called the General Plan Update Review Committee (GPURC). The GPURC would participate in the development of potential "land use and transportation alternatives" and prepare a "preferred plan." The preferred plan would be presented to the city's "decision-makers," and the general plan update would be drafted based on the preferred plan.

On January 22, 2013, the city council met with the planning commission to review the progress made by the GPURC. City council members and planning commissioners "provided preliminary feedback to staff for additional analysis." Staff prepared "white papers" addressing various decision points raised by the councilmembers' feedback.

One of the white papers concerned the land use policy applicable to properties classified as "Neighborhood Commercial." The white paper referenced a draft land use policy called LU-P-66, which read in pertinent part: "Shopping centers in Neighborhood Commercial areas should have the following:

- Anchored by a grocery store or similar business offering fresh produce, poultry, fish and meat;
- Include smaller in-line stores of less than 10,000 square feet; Total size of 5 to 12 acres as shown on the Land Use Diagram; and
- Integrated with surrounding neighborhood uses in terms of design, with negative impacts minimized.

"Standards for Neighborhood Commercial development also should require design measures that create a walkable environment and require local street and pedestrian connections. Alterations and additions in existing nonconforming centers may be permitted, subject to design review and conditions of approval to minimize neighborhood impacts.""

The staff white paper identified concerns raised with respect to the draft of LU-P-66. Residents of the Stonebridge neighborhood expressed that there should be "a size limit for anchor stores (i.e., maximum of 35,000 SF)." The residents argued that "grocery stores over 50,000 SF are not truly serving just the surrounding neighborhood, but will target shoppers from outlying areas, thereby creating additional traffic, noise, and other impacts and inviting persons from outside the immediate neighborhood."

The white paper indicated that the GPURC "considered" a size limit on grocery stores, but rejected the idea, concluding that "the free market will dictate the size of grocery store that will work for a given site and neighborhood. Further, placing a limit on building size could work against continually evolving changes in industry trends and store prototypes."

The city staff also provided their own commentary on the size cap issue. They observed that maximum size limits for anchor stores "are somewhat arbitrary." "A typical Savemart grocery store is about 55,000 square feet," but a "new Walmart neighborhood grocery store being constructed at Houston and Demaree is about 38,000 square feet." The city staff further observed that store sizes "are dependent on market dynamics" and setting a limit "may create difficulties for grocery stores to locate in Visalia or for [Neighborhood Commercial] sites to attract an anchor tenant."

The white paper recommended that the city council adopt LU-P-66 in its current form. The white paper offered two alternatives to the current draft, one of which was to "establish a maximum (and/or minimum) square footage size requirement for anchor tenants."

The city council held a work session on February 25, 2013. Councilmembers discussed various issues. It was the city staff's "understanding from the discussion among the Councilmembers" that they wanted to "set a maximum anchor tenant size of 40,000 sq. ft." Consequently, the staff recommended the following pertinent changes to LU-P-66: "Shopping centers in Neighborhood Commercial areas should shall have the following:

- Anchored by a grocery store or similar business offering fresh produce, poultry, fish and meat;
- Include smaller in-line stores of less than 10,000 square feet;
- Total size of 5 to 12 acres as shown on the Land Use Diagram;
- Integrated with surrounding neighborhood uses in terms of design, with negative impacts minimized;
- Located no closer than one mile from other General Plan-designated Neighborhood Commercial or Community Commercial locations, or from existing grocery stores;

- No individual tenant shall be larger than 40,000 square feet in size.

"Standards for Neighborhood Commercial development also shall require design measures that create a walkable environment and require local street and pedestrian connections. Alterations and additions in existing nonconforming centers may be permitted, subject to design review and conditions of approval to minimize neighborhood impacts."

The city council adopted the recommended language on April 1, 2013.

The city had urban and regional planning consultants prepare a "public review draft" of the general plan update, and a draft EIR, both dated March 2014. The draft general plan update referred to the land use policy at issue in this case as "LU-P-67," rather than LU-P-66. The policy included the 40,000-square-foot cap on tenants.

The draft EIR was circulated for review and comment from March 31 through May 14, 2014. A "final" EIR was prepared on June 26, 2014.

Plaintiff's counsel sent a letter dated October 6, 2014, to the mayor and city council. The letter was sent on behalf of his clients, "Thomason Development Company/Visalia Retail, LP." The letter expressed objection "to the proposed certification of the Final Environmental Impact Report ('FEIR'), the proposed re-designation of nearly seven acres of Thomason's property as Medium Density Residential along with the proposed overly-restrictive Land Use Policy, LU-P-67, found in the 2030 General Plan Update that will not only limit economic activity in the City of Visalia, but will lead to the urban decay and other physical effects in Visalia."

Enclosed with plaintiff's counsel's October 6, 2014, letter was a report written by a real estate broker. The report first described broker's experience and qualifications, which included: (1) cofounding a real estate brokerage firm in 1981; (2) having been "involved in retail shopping center leasing and development since 1978"; (3) having "been instrumental in the construction of over 65 shopping centers . . . comprising over 6,000,000 square feet"; (4) having been "involved in 45 grocery store transactions"; (5) having "completed 25 drug store deals with Payless Drug, CVS Pharmacy, Thrifty and Save On."

The report indicated that the 40,000-square-foot cap "creates the strong likelihood that [neighborhood commercial] centers will never develop in Visalia." It also noted that even with his extensive experience with grocery store anchors, he was "unaware of any grocers willing to build new stores under 40,000 sq. ft. in size." The report asserted that a "typical Save Mart, Safeway/Vons, Albertsons, or Lucky supermarket demands at least 50,000 square feet for a new store to 'pencil out' financially."

The report also cited news articles indicating that the 2009 launch of 10,000 to 20,000-square-foot "Fresh & Easy" stores by "UK mega-grocer Tesco" failed and left some landlords "high and dry."

The report indicated that neighborhood supermarket anchors smaller than 40,000 square feet were unable to maintain long-term, successful operations in the city. It cited three examples of stores in the area that were no longer in operation. In contrast, the report identified two Save Marts exceeding 50,000 square feet that "are serving the neighborhoods with close and convenient shopping as planned."

The report also cited the Urban Land Institute as saying, "The neighborhood shopping center provides merchandise for daily living needs—convenience goods like food, drugs, hardware, and personal services. A supermarket is the principal tenant in this type of shopping center." The report then opined: "The reason for the inclusion of supermarkets in these centers is not difficult to fathom: Supermarkets are the primary draw for the center, and the visitation that they generate is essential for the success of all the tenants. If supermarkets are replaced by low volume tenants such as discount furniture operations that draw few patrons to the center, great harm may accrue to the other tenants, with downward pressure on sales volumes, occupancy and tenant quality."

The report indicated that the size cap would not encourage grocers to build small stores but would instead cause them to decline to enter the city market entirely. The report acknowledged that it was possible to attract one of a limited number of 40,000-square-foot Walmart neighborhood market anchors, but said that Walmart was unique, and "the more likely scenario will be the absence of any development of new neighborhood retail."

The report also indicated that physical effects could result from urban decay.

"In the context of a neighborhood center, there are few acceptable alternatives to [the] presence of the supermarket anchor. Therefore, even if some space can be re-tenanted by other (weaker) tenants, the center may be subject to physical deterioration, urban decay, and blight.

"In addition to physical impacts resulting from failing to provide neighborhood retail needs, these vacancies also, in several situations, would lead to or exacerbate physical blight and 'urban decay' deterioration of the centers resulting from anchor vacancies or by backfilling vacant anchor space with less-utilized commercial uses such as gyms, furniture stores, or '99 cent' stores. Sometimes

anchor grocery stores would continue to operate but would seek rent reductions from their landlords. Such reduced revenue stream, in turn, reduced the landlords' available capital [to] maintain and improve these properties, creating a downward spiral of physical deterioration."

The report also briefly described the "downzoning" of 6.2 acres of the broker property, leaving only 9.3 acres zoned as Neighborhood Commercial. It indicated that even without the tenant size cap, 9.3 acres was too "compact" of a site to attract anchor tenants.

Finally, the report indicated that the tenant type and size requirements were inconsistent with another part of the proposed general plan update called LU-P-45, which provided:

"Promote development of vacant, underdeveloped, and/or redevelopable land within the City limits where urban services are available and adopt a bonus/incentive program to promote and facilitate infill development in order to reduce the need for annexation and conversion of primary agricultural land and achieve the objectives of compact development established in this General Plan.

"Techniques to be used include designation of infill opportunity zones as part of the implementation process and provision of incentives, such as reduced parking and streamlined review, and residential density bonuses, and floor area bonuses for mixed use and/or higher-density development, subject to design criteria and findings of community benefit."

The report asserted that the tenant type and size requirements would discourage infill and were therefore inconsistent with LU-P-45.

On October 14, 2014, the city council certified a final EIR for the general plan update. At the same meeting, the city council adopted the general plan update subject to a few amendments passed at the meeting. The final, adopted general plan update retained the 40,000-square-foot cap on tenants.

On November 14, 2014, plaintiff filed a petition for writ of mandate in the superior court seeking to invalidate the city's certification of the final EIR and adoption of the general plan update. The petition asserted that the city failed to comply with CEQA, that the general plan update was inconsistent, and that the city failed to properly notice its October 14, 2014, meeting. The superior court rejected each claim, and entered judgment denying plaintiff's petition on May 9, 2016.

The court of appeal affirmed and held that the EIR sufficiently addressed the significant effects and the evidence did not constitute substantial evidence to support a fair argument of urban decay.

**No Substantial Evidence from Which Fair Argument Could Be Made That There Was Possibility Physical Urban Decay Would Result.** The court noted that "with certain limited exceptions, a public agency must prepare an EIR whenever substantial evidence supports a fair argument that a proposed project 'may have a significant effect on the environment'" [*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th 1112].

The court noted that "An [EIR] is an informational document which . . . shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project" [Pub. Res. Code § 21061].

The court also noted that "The function CEQA assigns to an EIR, in fact, epitomizes the statute's focus on informed decisionmaking and self-government. The statute does not necessarily call for disapproval of a project having a significant environmental impact, nor does it require selection of the alternative 'most protective of the environmental status quo.' Instead, when 'economic, social, or other conditions' make alternatives and mitigation measures 'infeasible,' a project may be approved despite its significant environmental effects if the lead agency adopts a statement of overriding considerations and finds the benefits of the project outweigh the potential environmental damage" [*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal. 4th 369].

Further, an EIR must set forth in detail "all significant effects on the environment of the proposed project" [Pub. Res. Code § 21100(b)]. "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in any of the *physical* conditions within the area affected by the project" [CEQA Guidelines § 15382, italics added by the court]. Because of the physicality requirement, "an economic or social change *by itself* shall not be considered a significant effect on the environment" [CEQA Guidelines § 15382, italics added by the court]. As a result, "evidence of economic and social impacts that do not contribute to . . . physical changes in the environment is not substantial evidence that the project may have a significant effect on the environment" [CEQA Guidelines § 15064(f)(6)]. But "where a *physical* change is caused by economic or social effects of a project, the *physical* change may be regarded as a significant effect in the same manner as any other physical change resulting from the project" [CEQA Guidelines § 15064(e), italics added by the court].

The court stated that as these aspects of the law demonstrate, "CEQA is not a weapon to be deployed against all possible development ills" [*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal. App. 5th 677]. The fact that a project "may drive smaller retailers out of business is not an effect covered by CEQA. Only if the loss of business affects the physical environment—for example, by causing or increasing urban decay—will CEQA be engaged" [*Joshua Tree, above*].

The court noted that "In preparing an EIR, the agency must consider and resolve *every fair argument* that can be made about the possible significant environmental effects of a project" [*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099, italics added by the court]. An EIR is required "'not only when a proposed project *will* have a significant environmental effect, but also when it "may"'" [*Perley v. Board of Supervisors* (1982) 137 Cal. App. 3d 424]. "The word 'may' in this context connotes a reasonable possibility" [*Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal. App. 3d 748].

The court stated that while plaintiff need only present a "fair" argument, the argument must nonetheless be based on substantial evidence. "Substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" [Pub. Res. Code § 21080(e)(1)]. Speculation, argument, unsubstantiated opinion or narrative and evidence of economic impacts are not substantial evidence [Pub. Res. Code § 21080(e)(2)]. "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence" [*Joshua Tree, above*].

Plaintiff argued that evidence in the administrative record established that the tenant type restriction and size cap would cause significant physical impacts and, therefore, the EIR was inadequate for failing to address those impacts. The city responded that the broker report "fails to show how LU-P-67" would cause urban decay.

Synthesizing the parties' contentions and the applicable law summarized above, the court distilled the issue before it to the following: can it be fairly argued from substantial evidence that there was a reasonable possibility LU-P-67 would cause urban decay in the form of significant, physical effect(s) on the environment?

The court stated that the estate broker's urban decay argument could be roughly summarized as follows: the 40,000-square-foot cap would cause grocers to refuse to locate in neighborhood commercial centers, which would cause vacancies, which in turn would result in urban decay. The city countered that the estate broker did not offer legally sufficient evidence that LU-P-67 would cause anchor tenants to refuse to locate in neighborhood commercial centers.

The court concluded that while the estate broker report presented an earnest policy case against LU-P-67, it failed to provide substantial evidence from which a fair argument could be made that LU-P-67 could cause significant effects on the environment.

**Estate Broker Report Did Not Provide Requisite Basis for Plaintiff's Challenge.** The court stated that the estate broker report offered four bases for the argument that grocers would refuse to locate in neighborhood commercial centers as a result of LU-P-67: (1) the estate broker was personally unaware of any grocers willing to build new stores under 40,000 square feet; (2) a "typical" SaveMart, Safeway/Vons, Albertsons or Lucky store required at least 50,000 square feet to be profitable; (3) Tesco launched multiple 10,000–20,000-square-foot grocery stores and they were unsuccessful; and (4) three Visalia grocery stores under 40,000 square feet were no longer in business.

The court explained that none of these constitute "substantial evidence" [Pub. Res. Code § 21080(e)(2)] on which a fair argument of urban decay could be predicated.

The court stated that the estate broker's assertion that he was personally unaware of any grocery stores willing to build new stores under 40,000 square feet did not support an argument that no grocers were willing to build such stores. It was clear that at least some grocers in some circumstances were willing to build stores under 40,000 square feet. For one, the estate broker acknowledged that Walmart built a sub-40,000-square-foot supermarket (though he argued that Walmart would likely build larger stores in the future). Additionally, the report indicated that some community members were advocating the 40,000-square-foot cap in the hopes of attracting a Trader Joe's or Whole Foods market.

The court stated that the report also identified four grocers whose business model required their "typical" stores to be at least 50,000 square feet. But this observation pertained to four grocers, which did not suggest that other grocers were similarly unwilling to build stores under 40,000 square feet. Nor did it establish that even the four identified grocers could not build "atypical" stores to achieve profitability at smaller sizes.

In sum, the court concluded that the report's evidence that some grocers would not locate in the city was not enough to support a fair argument "that urban decay would result." "Even if a handful of properties were to remain permanently vacant, the result would not necessarily be the kind of change to the physical environment that

implicates CEQA" [*Joshua Tree, above*]. Inferring that urban decay would result from the incompatibility between LU-P-67 and the business model of four grocers would be speculation.

The court stated that the report also pointed to one grocer's failed attempts to build stores 10,000 to 20,000 square feet in size across the United States. But these stores were one-quarter to one-half the size permitted under LU-P-67. Even if this case study indisputably showed that grocery stores under 20,000 square feet were not viable, it would not raise a fair argument that a size cap twice as large would produce similar results.

Finally, the court stated that the report identified three "sub-40,000 sq. ft. neighborhood supermarket anchors" that were "unable to maintain long-term successful operations" in the city. But there was no analysis provided as to why those stores closed. Absent such evidence, it was speculation to conclude that they closed because of their size.

In sum, the court concluded that the report did not provide the requisite basis for plaintiff's challenge because (1) its analysis of causation was speculative, and (2) the potential economic consequences it identified did not "mean that urban decay would result. Common sense alone tells us nothing about the *magnitude* of the effect" (original italics). While the report suggested that some grocers would refuse to locate in the city under LU-P-67, it failed to support the implication that such vacancies and lower quality tenants would be so rampant as to cause urban decay. That omission was important, because "even if a handful of properties were to remain permanently vacant, the result would not necessarily be the kind of change to the physical environment that implicates CEQA" [*Joshua Tree, above*].

**Project Challenger's Responsibility to Adduce Substantial Evidence Supporting Fair Argument That Project May Cause Urban Decay.** Plaintiffs pointed to the decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* [(2004) 124 Cal. App. 4th 1184] (*BCLC*). That case involved the development of two shopping centers totaling 1.1 million square feet of space. The two centers were 3.6 miles apart and each center was to have "a Wal-Mart Supercenter . . . plus a mix of large anchor stores, smaller retailers, and a gas station" [*BCLC, above*]. In contrast, the present case involved a land use policy within an amended general plan.

The court noted that *BCLC* held that the EIR was fatally defective for failing to analyze "the projects' individual and cumulative potential to indirectly cause urban/suburban decay." The court observed that case law "has established that in appropriate circumstances CEQA required urban decay or deterioration to be considered as an indirect environmental effect of a proposed project." The court held that while the proposal of a new shopping center did not trigger "a conclusive presumption of urban decay," analysis of urban decay was required "*when there is evidence* suggesting that the economic and social effects caused by the proposed shopping center ultimately could result in urban decay or deterioration" (italics added by the court). The court acknowledged cases like *City of Pasadena v. State of California* [(1993) 14 Cal. App. 4th 810], disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* [(1995) 9 Cal. 4th 559], wherein the court "agreed that social and economic effects must be considered if they will cause physical changes," but nonetheless rejected CEQA challenge presented therein because the plaintiff did not make a sufficient showing that the project would cause physical deterioration [*BCLC, above*]. The court found the present record closer to *City of Pasadena* than *BCLC* because plaintiff did not make a sufficient showing LU-P-67 could cause physical deterioration.

In dictum in *BCLC*, the court rejected the plaintiff's argument that study of urban decay was "not required because the record does not contain substantial evidence proving that the shopping centers will cause urban decay." The court stated that the plaintiff articulated the "wrong standard of review" and that the true issue was "whether the lead agency failed to proceed as required by law."

The court concluded that *BCLC* was correct that the plaintiff in that case had identified the wrong standard of review. It was not a project challenger's responsibility to adduce substantial evidence proving that the project would cause urban decay. But it was the project challenger's responsibility to adduce substantial evidence supporting a fair argument that the project could cause urban decay [*e.g.*, *Joshua Tree, above*; *cf.* Pub. Res. Code § 21082.2].

**General Plan Not Internally Inconsistent.** Plaintiff contended that the general plan was internally inconsistent. The court noted that general plans "must be internally consistent" [*Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal. 5th 141]. Similarly, amendments to the general plan must be internally consistent and cannot cause the general plan to become internally inconsistent [*DeVita v. County of Napa* (1995) 9 Cal. 4th 763].

The court noted that "The . . . amendment of a general plan is a legislative act. A legislative act is presumed valid, and a city need not make explicit findings to support its action. A court cannot inquire into the wisdom of a legislative act or review the merits of a local government's policy decisions." "A court therefore cannot disturb a general plan based on violation of the internal consistency and correlation requirements unless, based on the evidence

before the city council, a reasonable person could not conclude that the plan is internally consistent or correlative." The plaintiff bore the burden of proof on this issue [*South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal. App. 4th 1604].

The court noted that plaintiff pointed to several policies and goals enunciated in the general plan, including: (1) maintaining the city's role as a regional commercial and industrial center for surrounding counties; (2) enhancing the city's retail base; (3) preserving and enhancing qualities that make the city an ideal place to do business; (4) fostering a good working relationship between the city and business community; (5) striving for a balanced mix of local, regional, and national retailers; (6) attracting new retail development; (7) supporting infill development which in turn offers various fiscal, social, economic, and environmental benefits; (8) promoting pedestrian-oriented retail. With respect to infill, the general plan contained policies concerning the minimization of urban sprawl, and the encouragement of compact, concentric, and contiguous development. Plaintiff argued that LU-P-67 conflicted with these goals and policies because it would prohibit development in neighborhood commercial sites, some of which were surrounded by urbanized development. Plaintiff pointed to the estate broker report and city staff analysis as evidence that the rigidity of LU-P-67's tenant size cap was unwise.

The court stated that plaintiff's argument failed to appreciate the standard of review that the court had to apply, and, more broadly, the court's role in this process. Determining the proper means of encouraging infill development or market flexibility was a policy question for political bodies, not a legal question for the courts. The court's role was to determine whether any reasonable person could conclude that LU-P-67 was consistent with the stated goals of the general plan (e.g., infill development, market flexibility). The court concluded that a reasonable person could find the plan internally consistent on several rationales.

The court stated that first, the city could have concluded that the tenant size cap would not impede infill development. The general plan proposed 14 undeveloped neighborhood commercial centers. The general plan also utilized a commercial mixed use designation at which larger tenants were permitted. The general plan observed that the "new commercial mixed use designation, applied to much of South Mooney Boulevard north of Caldwell, as well as along other major arterials and community shopping nodes, provides needed flexibility in retail and service formats and clustering." Plaintiff could have reasonably concluded that LU-P-67 would not likely impede infill development because larger tenants could utilize areas designated commercial mixed use, while smaller tenants could fill the 14 anticipated neighborhood commercial sites. The court concluded that because that determination was reasonable, it was immaterial that the estate broker report supported a different view.

The court stated that second, promoting infill development in whatever form it may take was not the general plan's goal. The general plan sought specific kinds of development (e.g., pedestrian-friendly retail). Once the general plan declared of goal of encouraging infill development, it was not prohibited from seeking to restrict the nature of that development, even if those restrictions could preclude some infill development. Here, LU-P-67 capped tenants in neighborhood commercial zones at 40,000 square feet. Even assuming for the sake of argument that plaintiff was indisputably correct that this policy would discourage some infill development, the city could reasonably decide to accept that consequence as the cost of pursuing other goals (e.g., helping smaller businesses, promoting pedestrian-oriented retail, etc.). In sum, just because the general plan declared a goal of promoting infill development does not mean all of its policies had to encourage all types of infill development. General plans must balance various interests, and the fact that one stated goal had to yield to another did not mean the general plan was fatally inconsistent. Few, if any, general plans would survive such a standard.

The court stated, as demonstrated by the two rationales described above, a reasonable person could conclude that LU-P-67 was not inconsistent with the stated goals and policies of the general plan. As a result, the court rejected plaintiff's internal inconsistency challenge [*see Dana Point, above*].

**City Did Not Violate Planning and Zoning Law.** The court noted that on August 27, 2014, the city gave notice in a newspaper of general circulation that it would hold a public hearing on the certification of the EIR and adoption of the amended general plan on September 8, 2014. At the end of the September 8 meeting, the city adjourned its meeting to October 6.

On October 6, 2014, the city council held a special meeting "to continue the Public Hearing [from September 8] and take additional public comment." Plaintiff's counsel offered public comments at the meeting, wherein he expressed concerns with LU-P-67 (and the rezoning of a portion of the estate broker property). Councilmember was absent from the meeting.

The court noted that near the end of the meeting, the following discussion occurred:

"MAYOR NELSON: Anybody else like to address the Council at this time? Seeing none, I'm going to close the

public comment session. And rest assured again, all of the comments made tonight are public record, Council member Link will be apprised of all the comments made tonight so he will be informed of this session. I will—

"MR. PELTZER: Just to clarify, we want to formally close the public hearing and indicate it won't be reopened at the next hearing.

"MAYOR NELSON: Right we're formally closing the public hearing portion, it will not be reopened at our future meeting."

The court noted that at the close of the meeting, a councilmember made a motion "that we continue this item sans public comment because that public hearing was closed, and to a future date to be determined and with notice being more than 24 as is usual with a special meeting." The motion passed.

The court noted that on October 10, 2014, plaintiff's counsel engaged an economics professor with a Ph.D. from Cornell University to "prepare an expert analysis of the economic and physical effects likely to result from Visalia's proposal to regulate neighborhood retail center development via General Plan policy LU-P-67." Plaintiff's counsel later informed the expert that on October 10, 2014, the city posted notice of the continued hearing on the general plan for October 14, 2014. Plaintiff's counsel said he believed that the city "erred by not providing 10-days' notice" and would request the city reschedule the hearing to provide 10 days' notice.

The court stated, nonetheless, that the city council held its special meeting on October 14, 2014. The council invited and heard public comment at the October 14, 2014, meeting. Plaintiff's counsel offered comments, and referenced a letter he had previously sent to the council raising "noticing issues" with the meeting. Plaintiff's counsel also provided the city council with specific changes it could make to the wording of LU-P-67. After discussion, the city council voted to retain the existing language of LU-P-67, effectively rejecting plaintiff's counsel's suggestions.

The court stated that despite the adoption of the general plan update at the October 14 meeting, the expert proceeded to prepare a draft of his expert report in November 2014. The draft report was included in the appellate record. The expert described the draft report in a declaration as "essentially the report I would have submitted to the Council had the Council provided 10-days' notice of the final hearing." In the draft report, the expert said that it was his "professional opinion that [the city's] urban decay would increase markedly" as a result of the general plan update.

The court noted that the Planning and Zoning Law [Gov. Code § 65000 et seq.) governs the adoption and contents of general and specific plans, among other things [8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law § 1010]. Among its requirements is Gov. Code § 65355's directive that "prior to adopting or amending a general plan, the legislative body shall hold at least one public hearing. Notice of the hearing shall be given pursuant to Section 65090" [Gov. Code § 65355]. Gov. Code § 65090(a) requires 10 days' notice.

The court disagreed with plaintiff's argument that the city violated the Planning and Zoning Law by failing to provide at least 10 days' notice for the October 14, 2014, meeting.

The court noted that the Planning and Zoning Law only requires "one public hearing" before amending a general plan [Gov. Code § 65355]. The city held a public hearing on September 8, 2014, with notice given on August 27. The public hearing was continued to October 6 and then closed at the end of that meeting. The city satisfied the Planning and Zoning Law's requirement of holding "at least one public hearing" with 10 days' notice [Gov. Code §§ 65355, 65090(a)].

The court stated it was true that the city also held a special meeting on October 14, 2014, and did not provide 10 days' notice for that meeting. But the city already satisfied the Planning and Zoning Law's requirement of "at least one" public hearing with 10 days' notice. That the city could have held additional meetings on the general plan amendment was inapposite.

The court stated that plaintiff insisted that while the city council indicated it was ending the public hearing on October 6, 2014, it in fact invited and heard public comment at the October 14 meeting. This observation did not alter the court's conclusion. The Planning and Zoning Law required the city to hold "at least one public hearing" and to notice "the hearing" pursuant to Gov. Code § 65090. The city complied by holding a public hearing on September 8, with notice published on August 27. Consequently, even though public comment was permitted at the October 14 special meeting, nothing in Gov. Code § 65355 required 10 days' notice of that meeting. Importantly, Gov. Code § 65355 does not require notice under Gov. Code § 65090 for "all hearings" or for "any such hearings." Instead, it requires notice be given pursuant to Gov. Code § 65090 for "*the* hearing"—meaning the *singular* "public hearing" required by the statute [Gov. Code § 65355, italics added by the court]. Consequently, when a local agency holds one public hearing, properly noticed under Gov. Code § 65090, its obligation under Gov. Code § 65355 is satisfied. When

the local agency holds additional meetings where public comment is permitted, those meetings are not subject to the notice requirements of Gov. Code § 65090.

Thus, the court concluded that plaintiff failed to show that the city violated the Planning and Zoning Law's notice requirements.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 22.04[6][c] (Contents of EIR – Socioeconomic Effects).

## Regulatory Activity

**CEQA Guidelines.** The Natural Resources Agency is proposing to adopt new CEQA Guidelines and amend other CEQA Guidelines [14 Cal. Code Reg. §§ 15004, 15051, 15061, 15062, 15063, 15064, 15064.4, 15064.7, 15072, 15075, 15082, 15086, 15087, 15088, 15094, 15107, 15124, 15125, 15126.2, 15126.4, 15152, 15155, 15168, 15182, 15222, 15269, 15301, 15357, 15370, Appendix C, Appendix D, Appendix E, Appendix G, and Appendix M] to reflect recent legislative changes to CEQA, clarify certain portions of the existing CEQA Guidelines, and update the CEQA Guidelines consistent with recent court decisions. Pub. Res. Code § 21083 requires regular updates to the CEQA Guidelines to explain and implement CEQA. This package also makes changes in the CEQA Guidelines required by Pub. Res. Code §§ 21083.01 (add wildfire considerations to the environmental checklist), 21083.05 (update the CEQA Guidelines section related to greenhouse gas emissions), 21083.09 (separate the consideration of paleontological resources from tribal cultural resources in the environmental checklist), and 21099 (update the CEQA Guidelines to include criteria for determining the significance of projects' transportation impacts). Two hearings will be held: 1:30 - 4:30 p.m., March 14, 2018, California Science Center, Annenberg Building, Muses Room, 700 Exposition Park Dr., Los Angeles, CA; and 1:30 - 4:30 p.m., March 15, 2018, California Energy Commission, Rosenfeld Hearing Room, 1516 9th St., Sacramento, CA. Written comments by 5:00 p.m., March 15, 2018. Comments may be submitted by mail or delivery but electronic submission of comments is preferred: Christopher Calfee, Deputy Secretary and General Counsel, California Natural Resources Agency 1416 Ninth Street, Suite 1311, Sacramento, CA 95814, fax: 916-653-8102; email: CEQA.Guidelines@resources.ca.gov. Copies of the proposed text and statement of reasons: Christopher Calfee, above. The documents are also available at http://resources.ca.gov/ceqa/.

# WATER QUALITY CONTROL

## Cases

### Challenges to WOTUS Rule Must Be Filed in Federal District Courts

*Nat'l Ass'n of Mfrs. v. DOD*
No. 16-299, U.S. S. Ct.
199 L. Ed. 2d 501, 2018 U.S. LEXIS 761
January 22, 2018

**The Waters of the United States Rule (WOTUS Rule) is not a limitation promulgated or approved under 33 U.S.C. § 1311 and does not fall within 33 U.S.C. § 1369(b)(1)(F), which covers actions issuing or denying a permit under the National Pollutant Discharge Elimination System program. Thus, 33 U.S.C. § 1369(b)(1)(E), (F) do not confer original and exclusive jurisdiction on courts of appeals to review the WOTUS Rule. In addition, Congress has made clear that rules like the WOTUS Rule must be reviewed first in federal district courts.**

**Facts and Procedure.** Congress enacted the Clean Water Act in 1972 "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters" [33 U.S.C. § 1251(a)]. One of the Act's principal tools in achieving that objective is 33 U.S.C. § 1311(a), which prohibits "the discharge of any pollutant by any person," except in express circumstances. A "discharge of a pollutant" is defined broadly to include "any addition of any pollutant to navigable waters from any point source," such as a pipe, ditch, or other "discernible, confined and discrete conveyance" [33 U.S.C. § 1362(12), (14)]. And "navigable waters," in turn, means "the waters of the United States, including the territorial seas" [33 U.S.C. § 1362(7)]. Because many of the Act's substantive provisions apply to "navigable waters," the statutory phrase "waters of the United States" circumscribes the geographic scope of the Act in certain respects.

33 U.S.C. § 1311(a) contains important exceptions to the prohibition on discharge of pollutants. Among them are two permitting schemes that authorize certain entities to discharge pollutants into navigable waters [*see Rapanos v. United States* (2006) 547 U.S. 715]. The first is the National Pollutant Discharge Elimination System (NPDES) program, which was administered by the Environmental Protection Agency (EPA) under 33 U.S.C. § 1342. Under that program, the EPA issues permits

allowing persons to discharge pollutants that can wash downstream "upon [the] condition that such discharge will meet . . . all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343" [33 U.S.C. § 1342(a)(1)]. "NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation's waters" [*Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.* (2000) 528 U.S. 167]. One such limitation was an "effluent limitation," defined in the Act as a "restriction . . . on quantities, rates, and concentrations" of specified pollutants "discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance" [33 U.S.C. § 1362(11)].

The second permitting program, administered by the Army Corps of Engineers under 33 U.S.C. § 1344, authorizes discharges of "dredged or fill material," which "are solids that do not readily wash downstream" [*Rapanos*, *above*]. Although the Corps bears primary responsibility in determining whether to issue a 33 U.S.C. § 1344 permit, the EPA retains authority to veto the specification of a site for discharge of fill material [*see* 33 U.S.C. § 1344(c)].

The statutory term "waters of the United States" delineates the geographic reach of many of the Act's substantive provisions, including the two permitting programs outlined above. In decades past, the EPA and the Corps (collectively, the agencies) have struggled to define and apply that statutory term [*see, e.g.*, 42 Fed. Reg. 37124, 37127; 51 Fed. Reg. 41216-41217]. And the Supreme Court, in turn, had considered those regulatory efforts on several occasions, upholding one such effort as a permissible interpretation of the statute but striking down two others as overbroad [*compare United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, *with Solid Waste Agency v. United States Army Corps of Eng'rs* (2001) 531 U.S. 159; and *Rapanos*, *above*].

In 2015, responding to repeated calls for a more precise definition of "waters of the United States," the agencies jointly promulgated the Waters of the United States Rule (WOTUS Rule) [80 Fed. Reg. 37054]. The WOTUS Rule was intended to "provide simpler, clearer, and more consistent approaches for identifying the geographic scope of the [Act]" [80 Fed. Reg. at 37057]. To that end, the rule separates waters into three jurisdictional groups—waters that are categorically jurisdictional (*e.g.*, interstate waters); those that require a case-specific showing of their significant nexus to traditionally covered waters (*e.g.*, waters lying in the flood plain of interstate waters); and those that are categorically excluded from jurisdiction (*e.g.,* swimming pools and puddles) [*see* 33 C.F.R. § 328.3 (2017); 80 Fed. Reg. 37057]. Although the revised regulatory definition "applies broadly to [the Act's] programs," the WOTUS Rule itself states that it "imposes no enforceable duty on any state, local, or tribal governments, or the private sector" [80 Fed. Reg. 37102]. The rule's preamble states that it "does not establish any regulatory requirements" and is instead "a definitional rule that clarifies the scope of" the statutory term "waters of the United States" [80 Fed. Reg. at 37054].

The Act contemplated two primary avenues for judicial review of EPA actions, each with its own unique set of procedural provisions and statutes of limitations. For "certain suits challenging some agency actions," the Act grants the federal courts of appeals original and "exclusive" jurisdiction [*Decker v. Northwest Environmental Defense Center* (2013) 568 U.S. 597]. Seven categories of EPA actions fall within that jurisdictional provision; they include actions of the EPA Administrator—

> "(A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(*l*) of this title" [33 U.S.C. § 1369(b)(1)].

To challenge those types of actions, a party must file a petition for review in the court of appeals for the "judicial district in which [the party] resides or transacts business which is directly affected by" the challenged action. Any such petition must be filed within 120 days after the date of the challenged action [33 U.S.C. § 1369(b)(1)]. If there are multiple petitions challenging the same EPA action, those petitions are consolidated in one circuit, chosen randomly from among the circuits in which the petitions were filed [*see* 28 U.S.C. § 2112(a)(3)]. 33 U.S.C. § 1369(b) also contains a preclusion-of-review provision, which mandates that any agency action reviewable under 33 U.S.C. § 1369(b)(1) "shall not be subject to judicial review in any civil or criminal proceeding for enforcement" [33 U.S.C. § 1369(b)(2].

The second avenue for judicial review covers final EPA actions falling outside the scope of 33 U.S.C. § 1369(b)(1). Those actions are typically governed by the Administrative Procedure Act (APA). Under the APA, an aggrieved party may file suit in a federal district court to obtain review of any "final agency action for which there is no other adequate remedy in a court" [*see* 5 U.S.C. § 704]. Those

suits generally must be filed within six years after the claim accrues [28 U.S.C. § 2401(a)].

Soon after the agencies promulgated the WOTUS rule, several parties, including petitioner, challenged the rule in the district courts across the country. The Judicial Panel on Multidistrict Litigation (JPML) denied the government's request to consolidate and transfer those actions to a single district court.

Uncertainty surrounding the scope of the Act's judicial-review provision had also prompted many parties—but not petitioner—to file "protective" petitions for review in various courts of appeals to preserve their challenges in the event that their district court lawsuits were dismissed for lack of jurisdiction under 33 U.S.C. § 1369(b). The JPML consolidated these appellate-court actions and transferred them to the U.S. Court of Appeals for the Sixth Circuit. The court of appeals thereafter issued a nationwide stay of the WOTUS Rule pending further proceedings [*see In re EPA and Dept. of Defense Final Rule* (CA6 2015) 803 F.3d 804].

Meanwhile, parallel litigation continued in the district courts. Some district courts dismissed the pending lawsuits, concluding that the courts of appeals had exclusive jurisdiction over challenges to the rule [*see Murray Energy Corp. v. EPA* (ND W. Va., Aug. 26, 2015) 2015 U.S. Dist. LEXIS 112944; *Georgia v. McCarthy* (SD Ga., Aug. 27, 2015) 2015 U.S. Dist. LEXIS 114040]. One district court, by contrast, held that it had jurisdiction to review the WOTUS Rule [*see North Dakota v. EPA* (ND 2015) 127 F. Supp. 3d 1047].

Petitioner intentionally did not file a protective petition in any court of appeals to ensure that it could challenge the Sixth Circuit's jurisdiction. Instead, petitioner intervened as a respondent in the Sixth Circuit and, along with several other parties, moved to dismiss for lack of jurisdiction. The government opposed those motions, arguing that challenges to the WOTUS Rule had to be brought first in the court of appeals because the rule fell within 33 U.S.C. § 1369(b)(1) (E), (F). The court of appeals denied the motions to dismiss in a fractured decision that resulted in three separate opinions [*In re Dept. of Defense* (2016) 817 F.3d 261]. The court of appeals denied rehearing en banc. The U.S. Supreme Court granted certiorari and reversed the judgment, in a unanimous opinion written by Justice Sotomayor.

**WOTUS Rule Not an "Effluent Limitation."** The Court noted that 33 U.S.C. § 1369(b)(1) enumerates seven categories of EPA actions that must be challenged directly in the federal courts of appeals. Of those seven, only two were at issue in this case: Subsection (E) of 33 U.S.C. § 1369(b)(1), which encompasses actions "approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345," and subsection (F) of 33 U.S.C. § 1369(b)(1)(F), which covers actions "issuing or denying any [NPDES] permit."

The Court noted that 33 U.S.C. § 1369(b)(1)(E) grants courts of appeals exclusive jurisdiction to review any EPA action "in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345." The government contended that EPA's action in issuing the WOTUS rule qualified as an action promulgating or approving an "other limitation" under 33 U.S.C. § 1311 because the rule established the geographic scope of limitations promulgated under 33 U.S.C. § 1311. The Court disagreed.

The Court stated that the WOTUS rule is not an "effluent limitation"—a conclusion that the government did not meaningfully dispute. The Court noted that an "effluent limitation" is "any restriction . . . on quantities, rates, and concentrations" of certain pollutants "which are discharged from point sources into navigable waters" [33 U.S.C. § 1362(11)]. The WOTUS Rule imposes no such restriction. Rather, the rule announces a regulatory definition for a statutory term and "imposes no enforceable duty" on the "private sector" [*see* 80 Fed. Reg. 37102].

The government instead maintained that the WOTUS Rule was an "other limitation" under subparagraph (E). The Court stated that although the Act provides no express definition of that residual phrase, the text and structure of subparagraph (E) convey what that language means. And it is not as broad as the government insisted.

The Court observed that Congress' use of the phrase "effluent limitation or other limitation" in subparagraph (E) suggests that an "other limitation" must be similar in kind to an "effluent limitation": that is, a limitation related to the discharge of pollutants. An "other limitation," for instance, could be a non-numerical operational practice or an equipment specification that, like an "effluent limitation," restricts the discharge of pollutants, even though such a limitation would not fall within the precise statutory definition of "effluent limitation." That subparagraph (E) cross-references 33 U.S.C. §§ 1311, 1312, 1316, and 1345 reinforces this natural reading. The unifying feature among those cross-referenced sections is that they impose restrictions on the discharge of certain pollutants. The Court acknowledged that some of those sections provide concrete examples of the type of "other limitation" that Congress had in mind. 33 U.S.C. § 1311(b)(1)(C) allows the EPA to issue "any more stringent limitations" if technology-based effluent limitations cannot "meet water quality standards, treatment standards, or schedules of compliance." And 33 U.S.C. § 1345(d)(3) provides that, if "it is not feasible to

prescribe or enforce a numerical limitation" on pollutants in sewage sludge, the EPA may "promulgate a design, equipment, management practice, or operational standard." All of this demonstrates that an "other limitation," at a minimum, must also be some type of restriction on the discharge of pollutants. The Court stated that because the WOTUS Rule did no such thing, it did not fit within the "other limitation" language of subparagraph (E).

The Court observed that the government tried to escape this conclusion by arguing that subparagraph (E) expressly covers "*any* effluent limitation or other limitation" [33 U.S.C. § 1369(b)(1)(E) (emphasis added by the court)], and that the use of the word "any" made clear that Congress intended subparagraph (E) to sweep broadly and encompass all EPA actions imposing limitations of any sort under the cross-referenced sections. The Court acknowledged that use of the word "any" will sometimes indicate that Congress intended particular statutory text to sweep broadly [*see, e.g.*, *Ali v. Federal Bureau of Prisons* (2008) 552 U.S. 214]. But whether it does so necessarily depends on the statutory context, and the word "any" in this context does not bear the heavy weight that the government had put upon it. The Court stated that contrary to the government's assertion, the word "any" could not expand the phrase "other limitation" beyond those limitations that, like effluent limitations, restricts the discharge of pollutants. In urging otherwise, the government read the words "effluent limitation and other" completely out of the statute and insisted that what Congress really meant to say was "any limitation" under the cross-referenced sections. The Court stated that those were not the words that Congress wrote, and the Court was not free to "rewrite the statute" to the government's liking [*Puerto Rico v. Franklin Cal. Tax-Free Trust* (2016) 136 S. Ct. 1938].

The Court stated that even if it accepted the government's reading of "effluent limitation or other limitation," the rule still did not fall within subparagraph (E) because it was not a limitation promulgated or approved "under section 1311" [33 U.S.C. § 1369(b)(1)(E)]. The Court stated that it has acknowledged that the word "under" is a "chameleon" that "must draw its meaning from its context" [*Kucana v. Holder* (2010) 558 U.S. 233]. With respect to subparagraph (E), the statutory context made clear that the prepositional phrase—"under section 1311"—was most naturally read to mean that the effluent limitation or other limitation must be approved or promulgated "pursuant to" or "by reason of the authority of" 33 U.S.C. § 1311 [*see St. Louis Fuel and Supply Co., Inc. v. FERC* (CADC 1989) 890 F.2d 446]. Here, the Court stated that the EPA did not promulgate or approve the WOTUS Rule under 33 U.S.C. § 1311. The Court noted that 33 U.S.C. § 1311 generally bans the discharge of pollutants into navigable waters absent a permit. Nowhere does that provision direct or authorize the EPA to define a statutory phrase appearing elsewhere in the Act. The Court acknowledged that the phrase "waters of the United States" did not appear in 33 U.S.C. § 1311 at all. Rather, the WOTUS Rule was promulgated or approved under 33 U.S.C. § 1361(a), which grants the EPA general rulemaking authority "to prescribe such regulations as are necessary to carry out [its] functions under" the Act. Proving the point, the government's own brief cited 33 U.S.C. § 1361(a) as the statutory provision that "authorized the [EPA] to issue the [WOTUS] Rule."

The government nonetheless insisted that the language "under section 1311" posed no barrier to its reading of subparagraph (E) because the WOTUS Rule's legal and practical effect was to make effluent and other limitations under 33 U.S.C. § 1311 applicable to the waters that the Rule covered. However, the Court stated that the government's "practical-effects" test was not grounded in the statutory text. Subparagraph (E) encompasses EPA actions that "approve or promulgate any effluent limitation or other limitation under section 1311," not EPA actions that have the "legal or practical effect" of making such limitations applicable to certain waters. Further, the government offered no textual basis to read its "practical-effects" test into subparagraph (E).

The Court stated that beyond disregarding the statutory text, the government's construction also rendered other statutory language superfluous. For instance, subparagraph (E)'s cross-references to 33 U.S.C. §§ 1312 and 1316 [*see* 33 U.S.C. § 1369(b)(1)(E)]. 33 U.S.C. § 1311(a) authorizes discharges that comply with those two cross-referenced sections [*see* 33 U.S.C. § 1311(a)]. Thus, EPA actions under 33 U.S.C. §§ 1312 and 1316 also would have a "legal and practical effect" on the scope of 33 U.S.C. § 1311's general prohibition of discharges, as the government contended was the case with the WOTUS Rule. The Court stated that if, on the government's reading, EPA actions under 33 U.S.C. §§ 1312 and 1316 would count as actions "under section 1311" sufficient to trigger subparagraph (E), Congress would not have needed to cross-reference 33 U.S.C. §§ 1312 and 1316 again in subparagraph (E). That Congress did so undercut the government's proposed "practical-effects" test.

Similarly, the Court stated that the government's "practical-effects" test ignored Congress' decision to grant appellate courts exclusive jurisdiction only over seven enumerated types of EPA actions set forth in 33 U.S.C. § 1369(b)(1). 33 U.S.C. § 1313, which governs the EPA's approval and promulgation of state water-quality

standards, was a prime example. Approving or promulgating state water-quality standards under 33 U.S.C. § 1313 also has the "legal and practical effect" of requiring that effluent limitations be tailored to meet those standards. Under the government's reading, subparagraph (E) would encompass EPA actions taken under 33 U.S.C. § 1313, even though such actions were nowhere listed in 33 U.S.C. § 1369(b)(1). The Court noted that courts are required to give effect to Congress' express inclusions and exclusions, not disregard them [*see Russello v. United States* (1983) 464 U.S. 16].

Accordingly, the Court stated that subparagraph (E) did not confer original and exclusive jurisdiction on courts of appeals to review the WOTUS Rule.

**Government's Interpretation of Subparagraph (F).** The Court observed that government fared no better under subparagraph (F). That provision grants courts of appeals exclusive and original jurisdiction to review any EPA action "in issuing or denying any permit under section 1342" [33 U.S.C. § 1369(b)(1)(F)]. The Court explained that NPDES permits issued under under 33 U.S.C. § 1342 "authorize the discharge of pollutants" into certain waters "in accordance with specified conditions" [*Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.* (1987) 484 U.S. 49]. The Court stated that the WOTUS Rule neither issues nor denies a permit under the NPDES permitting program. Because the plain language of subparagraph (F) is "unambiguous," "[the Court's] inquiry begins with the statutory text, and ends there as well" [*BedRoc Limited, LLC v. United States* (2004) 541 U.S. 176, 183].

The Court stated that rather than confronting that statutory text, the government asked it to ignore the text altogether. To that end, the government urged the Court to apply the "functional interpretive approach" that it purported the Court employed in *Crown Simpson Pulp Co. v. Costle* [(1980) 445 U.S. 193] (per curiam). The government asserted that *Crown Simpson* broadened the statutory inquiry under subparagraph (F) by directing courts to ask whether agency actions were "functionally similar" to permit issuances or denials. The government asserted that the WOTUS Rule was "functionally similar" to issuing or denying a permit because it established the geographical bounds of EPA's permitting authority and thereby dictated whether permits might or might not be issued. The Court rejected this approach because it misconstrued *Crown Simpson* and ignored the statutory text.

First, the Court observed that *Crown Simpson* provided scant support for the government's atextual construction of subparagraph (F). In that case, the Court held that subparagraph (F) conferred jurisdiction over the EPA's veto of a state-issued permit The Court explained that "when [the] EPA . . . objects to effluent limitations contained in a state-issued permit, the precise effect of its action is to 'deny' a permit within the meaning of [subparagraph F]." The Court stated that contrary to the government's suggestion, the WOTUS Rule in no way resembled the EPA's veto of a state-issued permit addressed in *Crown Simpson.* Although the WOTUS Rule may define a jurisdictional prerequisite of the EPA's authority to issue or deny a permit, the rule itself makes no decision whatsoever on individual permit applications. *Crown Simpson* was therefore inapposite.

In addition, the Court stated that the government's proposed "functional interpretive approach" was completely unmoored from the statutory text. The Court explained that subparagraph (F) applied only to EPA actions "issuing or denying" a permit "under section 1342." The government invited the Court to broaden that narrow language to cover any agency action that dictated whether a permit was issued or denied. Congress easily could have drafted subparagraph (F) in that broad manner. Congress could have said that subparagraph (F) covers EPA actions "relating to whether a permit is issued or denied," or, alternatively, EPA actions "establishing the boundaries of EPA's permitting authority." But Congress chose not to do so. The Court declined the Government's invitation to override Congress' considered choice by rewriting the words of the statute [*see Franklin Cal. Tax-Free Trust*, *above*].

Finally, the Court stated that the government's interpretation of subparagraph (F) would create surplusage in other parts of 33 U.S.C. § 1369(b)(1). Subparagraph (D) is one example. That provision gives federal appellate courts original jurisdiction to review EPA actions "making any determination as to a State permit program submitted under section 1342(b)." In other words, subparagraph (D) establishes the boundaries of EPA's permitting authority vis-Ã-vis the states. Under the government's functional interpretive approach, however, subparagraph (F) would already reach actions delineating the boundaries of EPA's permitting authority, thus rendering subparagraph (D) unnecessary. Absent clear evidence that Congress intended this surplusage, the Court rejected an interpretation of the statute that would render an entire subparagraph meaningless. The Court noted that it is "obliged to give effect, if possible, to every word Congress used" [*Reiter v. Sonotone Corp.* (1979) 442 U.S. 330].

Therefore, the Court stated that subparagraph (F) did not grant courts of appeals exclusive jurisdiction to review the WOTUS Rule in the first instance.

**WOTUS Rule to be Reviewed First in Federal District Courts.** The Court stated that, unable to anchor its preferred reading in the statutory text, the government sought refuge in a litany of extratextual considerations that it believed supported direct circuit court review of the WOTUS rule. The Court stated that those considerations—alone and in combination—provided no basis to depart from the statute's plain language.

First, the government contended that initial circuit court review of the WOTUS rule would avoid an irrational bifurcated judicial-review scheme under which federal courts of appeals would review individual actions issuing or denying permits, whereas district courts would review broader regulations governing those actions. In *E.I. du Pont de Nemours & Co. v. Train* [(1977) 430 U.S. 112], the Court described such a bifurcated regime as a "truly perverse situation." And a few years later, in *Crown Simpson*, the Court declared that "absent a far clearer expression of congressional intent, [the Court] [was] unwilling to read the Act as creating such a seemingly irrational bifurcated system." However, unlike in *Crown Simpson*, the Court here perceived such a "clear expression of congressional intent." Even if the Court could draft the statute differently, Congress made clear that rules like the WOTUS rule must be reviewed first in federal district courts. In addition, the bifurcation that the government bemoaned was no more irrational than Congress' choice to assign challenges to NPDES permits to circuit courts, and challenges to 33 U.S.C. § 1344 permits to district courts [*see* 33 U.S.C. §1369(b)(1)(E)]. And notably, many of the court's recent decisions regarding the agencies' application and definition of the term "waters of the United States" have originated in district courts, not the courts of appeals [*see*, e.g., *Army Corps of Engineers v. Hawkes Co.* (2016) 136 S. Ct. 1807; *Sackett v. EPA* (2012) 566 U.S. 120; *Rapanos*, *above*].

Second, the government argued that immediate court of appeals review would facilitate quick and orderly resolution of disputes about the WOTUS rule. The Court acknowledged that routing WOTUS rule challenges directly to the courts of appeals might improve judicial efficiency [*see Crown Simpson*, *above*; *see also Harrison v. PPG Industries, Inc.* (1980) 446 U.S. 578]. But efficiency was not Congress' only consideration. Had Congress wanted to prioritize efficiency, it could have authorized direct circuit court review of all nationally applicable regulations, as it did under the Clean Air Act [*see* 42 U.S.C. § 7607(b)(1)]. That Congress structured judicial review under the Act differently confirmed what the text made clear—that 33 U.S.C. § 1369(b)(1) did not grant courts of appeals original jurisdiction to review many types of EPA action, including the WOTUS rule.

Third, the government contended that "initial review in a court of appeals" promoted "national uniformity, an important goal in dealing with broad regulations." [*quoting* National Resources Defense Council v. EPA (D.C. Cir. 1982) 673 F.2d 400]. The Court stated that argument carried some logical force. After all, the numerous challenges to the WOTUS rule in this very case were consolidated in one court of appeals, avoiding any risk of conflict among other courts of appeals, whereas the same was not true for the challenges filed in district courts, leading to some conflicting outcomes. But even if Congress sought to ensure national uniformity, it did not pursue that end at all costs. Although 33 U.S.C. § 1369(b)(1) does not authorize immediate circuit-court review of all national rules under the Act, it does permit federal appellate courts to review directly certain effluent and other limitations and individual permit decisions [*See, e.g.*, 33 U.S.C. § 1369(b)(1)(E), (F)]. It was true that Congress could have funneled all challenges to national rules to the courts of appeals, but it chose a different track here: It carefully enumerated the seven categories of EPA action for which it wanted immediate circuit court review and relegated the rest to the jurisdiction of the federal district courts.

The Court stated that the government's policy arguments did not obscure what the statutory language made clear: Subparagraphs (E) and (F) do not grant courts of appeals exclusive jurisdiction to review the WOTUS Rule.

In a final effort to bolster its preferred reading of the Act, the government invoked the presumption favoring court-of-appeals review of administrative action. The government asserted that when a direct-review provision like 33 U.S.C. § 1369(b)(1) exists, this Court "will not presume that Congress intended to depart from the sound policy of placing initial . . . review in the courts of appeals" "absent a firm indication that Congress intended to locate initial APA review of agency action in the district courts" [*Florida Power & Light Co. v. Lorion* (1985) 470 U.S. 729]. However, the Court stated that the government's reliance on *Florida Power* was misplaced. Unlike the "ambiguous" judicial review provisions at issue in *Florida Power*, the scope of subparagraphs (E) and (F) was set forth clearly in the statute. As the Court recognized in *Florida Power*, jurisdiction was "governed by the intent of Congress and not by any views [the Court] may have about sound policy." Here, the Court stated that Congress' intent was clear from the statutory text.

# AIR QUALITY CONTROL

## Cases

### Modifications to Truck and Bus Regulation violated California Environmental Quality Act and California's Administrative Procedures Act

*John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.*
No. F074003, 5th App. Dist.
2018 Cal. App. LEXIS 85
January 31, 2018

**The State Air Resources Board adopted proposed modifications to the truck and bus regulation, extending certain deadlines for small fleet operators to comply with the regulations. A fleet operator, along with a related interest group, (collectively plaintiffs), filed a writ petition against the board and its Executive Officer alleging that the modifications were improper under both the California Environmental Quality Act and California's Administrative Procedures Act (APA). The trial court ruled in plaintiffs' favor on both claims. The court of appeal held that the board's issuance of the public regulatory advisory constituted the approval of a project under CEQA and the board violated CEQA's timing requirement because the required environmental review was incomplete at the time of the CEQA project approval. Further, the board failed to abide by its obligations under the APA in either form or substance because it failed to properly respond to the comments regarding intra-state competition issues.**

**Facts and Procedure.** In January 2010, a regulatory scheme called the truck and bus regulation, first passed in late 2008, became effective [*see* 13 Cal. Code Reg. § 2025]. The regulations are designed to reduce emissions of diesel particulate matter (PM), oxides from nitrogen (NOx), and greenhouse gases from large diesel vehicles. It does so, in part, by requiring vehicle owners to retrofit and upgrade existing vehicles to the equivalent of 2010 or newer model year engines.

Shortly before the regulations became effective, staff notified the State Air Resources Board that the ongoing global recession had substantially reduced overall trucking activity since the regulations were first envisioned, potentially warranting modifications to the expected regulations. The board responded by delaying some reporting deadlines and requesting proposals for modifications to the regulations. The subsequent proposal resulted in certain modifications to the original regulations that would delay the initial compliance dates by a year and further defer engine replacements by two or more years for most fleets. These changes also eliminated a requirement that certain light trucks utilize a particulate matter filter and provided a 10-year window where only engines 20 years old, or older, would require modernization. The board noted in its briefing that no legal challenges were filed against these modifications.

In October 2013, the board received a status update on the truck and bus regulation. In this update, the board was informed that staff had been working with regulated fleets to meet compliance deadlines. Staff reported that, while "the vast majority of the 260,000 trucks registered in California [that] must comply with the requirements of the regulation [were] already compliant," 20,000 trucks still needed a filter, of which nearly 15,000 were in small fleets of three or fewer. Staff identified January 1, 2014, as a critical upcoming milestone "because it's the first time at least one vehicle for each of these fleets needs to become compliant," while noting that "small fleets typically have least access to capital, creating additional challenges" toward compliance.

As part of this update, staff identified "what [the board] is doing to assist fleets in transitioning into compliance as we approach the upcoming compliance date." Staff pointed to several funding programs available to assist fleets with required modifications and noted that "staff is also proposing some new regulatory flexibility to be added to the regulation." As part of this regulatory flexibility, staff indicated it was "proposing to issue a regulatory advisory that would provide fleets that order a [particulate matter] filter or a replacement truck or that are eligible and apply for a grant or a loan to have until July 1, 2014, to complete the steps necessary to come into compliance" and stated "because we are planning to make regulatory changes to provide relief, we believe it is appropriate to provide access to these provisions while staff finalizes them to present to the Board by April 2014." All these proposals were part of what staff described as "a comprehensive strategy which will help many of [the currently noncompliant] fleets transition into compliant trucks." Staff explained that, moving forward, "staff will assess the emission and economic impacts of proposed regulatory changes," and "return to the Board by April 2014 with proposed amendments." In the meantime, staff noted they would issue a regulatory advisory to allow fleet operators to take advantage of the planned flexibility. Based on this presentation, the Board indicated its staff should examine these changes while some members expressed thanks that flexibility was being built into the regulations.

In November 2013, the board issued the expected regulatory advisory concerning its plans to modify the current regulations. The regulatory advisory described steps the board "is taking to assist vehicle owners with the transition to the upcoming January 1, 2014, particulate matter . . . filter compliance deadline under the Truck and Bus Regulation" and expressed its overall goal as providing "additional time for owners to complete their good faith compliance efforts" and "additional flexibility for many lower use vehicles and vehicles that operate solely in certain areas of the State." The advisory explained the board "will recognize good faith efforts of vehicle owners to comply with the deadline" then in place by ensuring those meeting relevant criteria "will not be subject to enforcement action during the period through July 1, 2014."

Truck owners were also allowed "to take advantage of the following anticipated regulatory changes for all vehicles" prior to the expected April 2014 hearing at which the matter would be again discussed. Staff outlined these anticipated changes as: (1) reopening the period for vehicles to opt-in to the existing low mileage agricultural vehicle extension; (2) reopening the period for vehicles to opt-in to the existing low mileage construction truck extension; (3) reopening the period for vehicles to opt-in to the existing particulate matter phase-in requirements; (4) increasing the thresholds for low-use exemptions; and (5) expanding the definition of "NOx exempt" areas. Staff also explained that the "PM filter requirements for vehicles operated exclusively in the existing and newly proposed 'NOx exempt' areas . . . will be delayed one year until January 1, 2015." The advisory further explained that "while . . . staff anticipates proposing amendments similar to these administrative changes at the Board's regularly scheduled April 2014 meeting, the changes will not be finalized until approved by the Board." However, "in the event that the proposed amendments differ from those identified above and impact a fleet's ability to comply with the regulation, . . . staff will provide fleets that have reported their intent to use these options additional time beyond the Board's April 2014 meeting to come into compliance."

On March 5, 2014, the board released a staff report, which included its proposed amendments to the truck and bus regulation and its initial statement of reasons for proposed rulemaking. The initial statement provided recommendations for modifications in line with those discussed at the October 2013 meeting and, relevant to this appeal, included distinct subsections discussing air quality, the environmental impacts analysis, and the economic impacts analysis and assessment. With respect to the disputed modifications, the initial statement sought to provide relief in areas with cleaner air by delaying the compliance schedule for all vehicles operating solely within certain exempt areas by one year for initial compliance and four years for final compliance. For small fleets outside of these areas, staff proposed "to defer the compliance requirements for the second and third truck in a small fleet by one year and two years, respectively. . . ." No changes were recommended regarding the first truck "because the January 1, 2014, compliance date has passed and many small fleet owners have already complied."

For fleets that had already complied with the prior particulate matter regulations, staff recommended extending the time they could use existing particulate matter retrofits, extending the use of credits with respect to the use of particulate matter filters, and allowing operators to continue operating if retrofitted particulate matter filters were recalled, all of which generally extended relevant deadlines for complying fleets. The credit program generally allowed trucks fitted with compliant particulate matter filters prior to 2012 to count against other trucks in the fleet that would otherwise need to be upgraded until the new deadlines were reached. The changes would also delay the point at which trucks outfitted with a particulate matter filter prior to 2014 would have to upgrade their engine to a 2010 model level.

The air quality section of the initial statement identified several reasons why reducing diesel particulate matter and black carbon—"a major constituent of diesel [particulate matter]"—was important nationally and locally, particularly in the South Coast and San Joaquin Valley regions. This section also included updated information about the types of trucks subject to regulation and their use in California. In conjunction with Appendix F to the initial statement, the air quality section explained that current pollution estimates now included "up-to-date (2013) fuel sales and use data," the "latest nationwide truck sales projected in the Annual Energy Outlook," improved matching of engine and truck model years from prior estimates, and updated information "on how truck owners are actually complying" with the previously passed regulations. The air quality section then provided several charts showing how oxides of nitrogen and particulate matter emissions would decrease from the current levels estimated under the updated methodology and compared those reductions to the estimated reductions if the current regulations were left in place.

The environmental impact analysis section disclosed the staff's opinion "that implementing the proposed amendments to the regulation would not result in an adverse impact on the environment" and explained the staff's process for making this determination. In discussing air quality benefits under this section, the initial statement

noted that "staff projects a temporary delay in some emission benefits in the near term (until 2020) compared to emission benefits that may have been achieved absent the proposed amendments," but found that impact "minimized by the fact that overall emissions continue to be lower than originally expected due to the continued effects of the economic downturn." The initial statement then referred to the air quality section for further details. Reaching the heart of its conclusion, the initial statement then explained that "the amendments only change the mid-term timing of clean-up of the truck fleet and, therefore, do not result in any increase in emissions compared to existing environmental conditions. Also, despite the projected near-term delay in some emissions benefits . . . emissions . . . will continue to drop from today's levels as a result of the regulation with the proposed amendments and it will ultimately result in the same projected air quality benefits." In similar language, when discussing "'NOx exempt areas,'" the initial report stated that "although emissions would not decline as rapidly, in these regions, trucks that travel in these areas would continue to meet the full requirements of the regulation and both NOx and PM emissions will continue to decline. Since there is no longer a need to substantially decrease NOx emissions in these attainment areas, no adverse impacts to air quality would occur." Ultimately, the section concluded that because "no significant adverse environmental impacts were identified, this environmental analysis does not include a discussion of mitigation measures or environmental alternatives."

Finally, the economic impacts analysis and assessment section claimed to discuss "the effect of the proposed amendments on individual fleet owners and businesses affected by the regulation." It generally concluded that the amendments "would reduce compliance costs for many fleet owners" by allowing "fleet owners more time to make the required upgrades, thereby providing time for used compliant truck prices to naturally decline." The section then discussed numerous expected costs, including vehicle price and replacement costs, retrofitting particulate matter filter costs, and other similar matters associated with the regulations. Within these analyses, staff considered things such as differences in impact between in-state and out-of-state fleets, differences in impact on high-mileage fleets, and annual operational, maintenance, and reporting costs. The section further considered the specific impact the modifications had on small businesses within California, noting "the proposed amendments would not impose any additional costs on small businesses, and should result in small businesses, many of them small fleets, being able to spread out" their compliance costs. At the same time, the section explained that "the [amendments] could have a negative economic impact on retrofit manufacturers and installers," among others.

As part of the economic analysis, staff completed a standardized regulatory impacts assessment (SRIA), which was ultimately submitted to the department of finance for review and approval. Included within this assessment was a discussion of costs and cost savings arising from the proposed amendments. In its discussion on the costs and cost savings for businesses, staff concluded that "the businesses required to comply are throughout the state of California, while all regulated businesses can benefit from the compliance delays, the businesses that have already complied would not be affected." The report did not identify any analysis supporting this conclusion. In a later section on macroeconomic impacts, the assessment looked at competitiveness and job impacts in California, among other factors. Here, when discussing competiveness, the assessment focused on "competitive advantages of businesses outside of California to those in California" and found "no direct impact on competitiveness." The report noted that, while some businesses "have indicated that the compliance requirements would negatively impact their ability to achieve the necessary profits to stay in business," the amendments were designed "to provide the flexibility necessary to ensure these businesses are not eliminated" and the "strategy will be beneficial for California due to a favorable change in the trade balance between California and the rest of the world." With respect to job impacts, the assessment found that there would "be no net loss in jobs over the life of the proposed Amendments," while noting there may be an immediate lower demand for trucks and exhaust retrofit devices, resulting in some job losses for those service providers.

Following release of the initial statement, the board solicited and received public comments on its proposals. These comments included several from a fleet operator, which raised the issues litigated in this matter.

The board held another public meeting, at which time it was updated on the status of its proposed modifications. In that presentation, staff recommended adopting the proposed modifications with several non-substantive changes requiring a 15-day public comment period under the California's Administrative Procedures Act (APA). The board adopted this recommendation and initially approved the modified regulations by way of resolution 14-3, on April 25, 2014. As part of this approval, the board approved and released written responses to comments on the environmental impacts analysis related to the modified regulations, rejecting all public criticisms of the document.

When providing the 15-day comment period, and a second 15-day comment period required after additional changes were made that increased compliance times for the second truck in a small fleet, among other matters, the

board noted that staff "has determined that these modifications do not change implementation of the regulation in any way that alters any of the conclusions of the environmental analysis . . . included in the Staff Report released on March 5, 2014," and that the "modifications do not cause any changes that alter the air quality emissions assessment or otherwise result in any other significant adverse environmental impacts."

Following these comment periods, the board held another public meeting and received another update on the modifications. The staff update noted the original environmental analysis found no adverse environmental impacts and the 15-day changes did not alter that conclusion. Staff noted additional environmental comments had been received and responded to and recommended reaffirming the board's finding of no adverse environmental impact and adopting the final regulation order.

The board issued resolution 14-41, adopting the final regulation order for the modified regulations and the written responses to the environmental and economic comments previously discussed. In line with this action, the board issued its final statement of reasons for rulemaking, which incorporated the initial statement and provided written responses to all the comments received from the public. Included in these comments were dozens of assertions that the proposed modifications were harmful to fleets that had already complied with the prior regulations. In response to these comments, the board wrote it "was concerned with small fleets, lower mileage fleets, and fleets in rural areas with cleaner air, all which arguably continue to be impacted by the recession and are challenged in complying with the regulation. In considering changes, the Board carefully considered various options to find the best balance in providing additional flexibility for such fleets while minimizing the impacts to compliant fleets and retaining the air quality benefits of the regulation. [The board] recognizes that to those fleets that have already made investments to comply, providing additional flexibility can be viewed as unfair. However, most of the amendments were structured in a manner that would minimize the impact on such fleet owners that compete in the same markets. The amendments also included changes that reward fleets that have acted early and have already complied." The board then pointed to responses to multiple related comments to support this claim. These additional responses included statements suggesting that the board considered the alleged impacts, such as, "The Board determined the amended regulation achieves the appropriate balance in addressing concerns about competitive disadvantage and protecting public health while still meeting air quality obligations." The board also suggested that it did not make certain changes to avoid significant competitive disadvantage concerns, writing "The Board determined that it was not appropriate to expand the definition [of certain work trucks] to include tractor-trailers because the amendments would no longer meet air quality objectives, and would create competitive disadvantage concerns among most for-hire fleets."

Plaintiffs, the fleet operator and a related interest group, filed their initial petition for a writ of mandate and complaint for declaratory and injunctive relief based on the board's conduct to that point. The petition and complaint was amended in July 2014 and faced a quick demurrer on the grounds that the regulatory proceedings were not complete. After the board issued its final approval, plaintiffs filed a second amended petition and complaint, which remained the operative pleading in this case.

The trial court first concluded that the board engaged in post hoc environmental review by approving amendments before the environmental review process was complete. The court reasoned that the board began carrying out and implementing the proposed amendments as early as November 2013, and the board's April 25, 2014, approval was also premature given that additional environmental review remained. The court next found that the board should have prepared the functional equivalent of an environmental impact report (EIR), rather than adopt the proposed equivalent of a negative declaration, because a fair argument existed in the record that the amendments would have a significant effect on the environment. The court found substantial evidence showed potential increases in oxides of nitrogen, particulate matter, and greenhouse gases. In addition to these findings, the court also concluded that the board adopted an incorrect baseline for determining impacts on the environment because it did not utilize as a baseline measurement, "what would obtain under the unmodified 2010 Amendments" and instead used "the current conditions obtaining due to lack of enforcement of the 2010 Amendments." The court rejected the notion that a negative declaration could be utilized in the future in light of the fact "the criteria pollutant emissions caused by the Amendments vastly exceeded the thresholds of significance" for oxides of nitrogen and particulate matter. Finally, the court found that the board had also violated the APA by utilizing a materially deficient economic impact analysis. The court found that, despite numerous comments on the issue of competitive impacts on compliant fleets, "there is no analysis in either the SRIA or the Fiscal Statement of the impacts to compliant trucking companies being undercut in the market by non-compliant trucking companies due to the Amendments."

Based on these findings, the trial court granted plaintiffs' writ petition, voided the board's approval of the 2014 amendments to the truck and bus regulation and certification of the environmental documents related to the 2014

amendments, and issued a peremptory writ of mandamus to the Board ordering it "to comply with [the California Environmental Quality Act] and the APA before taking any further action to approve, implement or enforce the 2014 Amendments." The court denied plaintiffs' request for declaratory relief and awarded respondents their fees and costs.

Defendants, the board and its Executive Officer, appealed. The court of appeal affirmed the trial court's judgment.

**CEQA and Board's Regulatory Program.** The court noted that the board is not subject to the full scope of CEQA. Rather, it utilizes its own regulatory program when adopting or amending standards for the protection of ambient air quality. This process is permitted under the law as a certified regulatory program [*see* Pub. Res. Code § 21080.5; 14 Cal. Code Reg. §§ 15250–15252]. Such programs are exempt from certain procedural aspects of CEQA because "they involve 'the same consideration of environmental issues as is provided by use of EIRs and negative declarations'" [*POET, LLC v. State Air Resources Bd.* (2013) 218 Cal. App. 4th 681 (*POET I*)]. Certification of a program is effectively a determination that the agency's regulatory program includes procedures for environmental review that are the functional equivalent of CEQA [*Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal. App. 4th 1049]. "The practical effect of this exemption is that a state agency acting under a certified regulatory program need not comply with the requirements for preparing initial studies, negative declarations or EIR's. The agency's actions, however, remain subject to other provisions of CEQA" [*POET I, above*].

The court noted that the board's "regulatory program is contained in sections 60005, 60006 and 60007 of title 17 of the California Code of Regulations. These provisions require the preparation of a staff report at least 45 days before the public hearing on a proposed regulation, which report is required to be available for public review and comment. (Cal. Code Regs., tit. 17, § 60005, subd. (a).) It is [the Board's] policy 'to prepare staff reports in a manner consistent with the environmental protection purposes of [the board's] regulatory program and with the goals and policies of [CEQA].' (Cal. Code Regs., tit. 17, § 60005, subd. (b).) The provisions of the regulatory program also address environmental alternatives and responses to comments to the environmental assessment. (Cal. Code Regs., tit. 17, §§ 60006, 60007)" [*POET I, above*].

Although the board follows slightly different procedures, the court analyzes the board's conduct for compliance with CEQA's policies and legal mandates [*POET I, above*].

**Board's Approval of Modifications.** The court noted that although the board is not subject to the full extent of CEQA regulations when utilizing its certified regulatory program, it is subject to various CEQA principles relevant to its regulatory actions. One of these principles is the expectation that CEQA documents, and by extension CEQA compliant documents like the board's staff report, "be considered *before project approval*" [*POET I, above*]. As explained in the CEQA Guidelines, "public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance" [CEQA Guidelines, § 15004(b); *see Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal. 3d 376]. The board is subject to this same timing requirement [*POET I, above*].

The parties disputed whether the board satisfied this timing requirement. According to plaintiffs, the board took two distinct steps that committed it to a definite course of action with respect to the proposed modifications. Firstly, plaintiffs contended that the board violated CEQA when its staff issued regulatory advisory 13-28 in November 2013. Plaintiffs argued that the board necessarily limited its choice of alternatives or mitigation measures and committed itself to a definite course of action on the modifications when it issued an advisory telling fleet owners they could "'report and take advantage of applicable anticipated regulatory changes.'" Secondly, plaintiffs saw a CEQA violation at the time the board first approved the amendments at the April 25, 2014, meeting. Plaintiffs posited that the board's CEQA review was not complete, according to regulatory rules, until the board filed a notice of decision, which did not occur until November 2014, and that the approval in April 2014 included language demonstrating the environmental review was ongoing.

The board disagreed. With respect to its conduct in issuing the regulatory advisory, the board argued that the advisory itself was not a project and did not bind the board to adopting the proposed amendments or preclude consideration of alternatives. Rather, the board stated that it "was simply allowing vehicle owners an opportunity to report their intent to use amended provisions if they became available and be eligible for some delay in enforcement, if they reported that intent," conduct the board contended was perfectly acceptable given its inherent discretion "to determine where, when, and how to utilize its enforcement resources." It further suggested that any error at this stage was "moot and irrelevant because by the time the writ petition was filed, [the board] did in fact conduct the full CEQA review of the proposed regulatory modifications." On the matter of its April 2014 approval, the board's

position was that it met all CEQA requirements prior to the April 2014 approval and that plaintiffs were mistaking routine boilerplate language in its notice of approval for an admission that further environmental review was applicable. The board asserted that no further CEQA analysis was required after that point and further meetings were held only to comply with certain requirements of the APA.

**Board Violated CEQA by Approving Project Too Early.** The court began with analyzing the board's conduct when issuing the regulatory advisory. The court ultimately found that this action constituted the approval of a project under CEQA. Contrary to the framework of the board's arguments, the project in this instance was not the advisory, but the proposed regulatory modifications. The board's issuance of a public regulatory advisory stating that fleet operators could take advantage of the proposed regulatory modifications before they were enacted, and would not be subject to enforcement actions or penalties if those modifications were not enacted, was sufficient conduct to constitute approval of those regulations under CEQA. As the required environmental review was incomplete at the time of the CEQA project approval, the board violated CEQA's timing requirement.

The court noted that a project is a broad concept under CEQA that asks whether certain entities' activities "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." Analogous to this case, "this means that agency action approving or opening the way for a future development can be part of a project and can trigger CEQA even if the action takes place prior to planning or approval of all the specific features of the planned development" [*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal. App. 4th 643]. This "opening the way" can trigger CEQA where it constitutes an approval.

Although the court agreed with the board that issuing the regulatory advisory itself did not constitute a project, this did not end the court's inquiry. The court noted that the modification of current regulations may constitute a project [*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal. App. 5th 52 (*POET II*)].

The court noted that prior to issuing the regulatory advisory, staff identified proposed modifications to the current framework of the truck and bus regulation, modifications it called a comprehensive compliance strategy. The board and its staff then indicated their intent not to prosecute those that failed to comply with the current controlling regulations if they identified their intent to comply with the expected proposal. The potential modifications were sufficiently detailed to allow staff to indicate they would quickly present modifications based on their presented outline to the board and could rely on that outline as a basis for choosing not to enforce the present regulations. Such a plan was certainly detailed enough to constitute a project which could not be approved without CEQA compliance [*see Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116]. Thus, under CEQA's timing requirement, the court had to consider whether the board improperly approved this project prior to the completion of the required environmental analysis.

The court stated that while the board contended that no project approval could exist prior to the formal approval from the board, this was not correct. An approval under CEQA is "the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person" [CEQA Guidelines § 15352(a)]. "Generally speaking, an agency acts to approve a proposed course of action when it makes its earliest firm commitment to it, not when the final or last discretionary approval is made" [*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal. App. 4th 832, italics omitted]. Approvals under CEQA, therefore, are not dependent on "final" action by the lead agency, but by conduct detrimental to further fair environmental analysis.

The California Supreme Court provided an extensive analysis of this principle with respect to public/private development agreements in *Save Tara.* In that case, the city council for West Hollywood entered into a development agreement that was contingent on later CEQA review and other regulatory approvals. The Court found that this agreement violated CEQA's timing requirement, noting in its analysis that the agreement included a loan not conditioned on CEQA compliance, that the city had made several statements suggesting that it was committed to the project, and that the "city [had] proceeded with tenant relocation on the assumption the property would be redeveloped as in the proposed project."

In its discussion regarding the general principles of CEQA's timing requirement, the Supreme Court explicitly rejected the city's argument that approval could not occur until the relevant agency entered into an unconditional agreement irrevocably vesting development rights. In language pertinent to this case, the Court noted it previously found approval "even though further discretionary governmental decisions would be needed before any environmental change could occur" and explained that limiting approval to unconditional agreements would ignore situations where bureaucratic and financial momentum had built irresistibly behind a proposed project, creating a strong incentive to ignore environmental concerns. Notably, however, the Court also rejected the idea that any agreement, conditional

or not, would constitute approval, stating specifically that approval "cannot be equated with the agency's mere interest in, or inclination to support, a project, no matter how well defined." Balancing these positions, the Court concluded that the proper test for determining whether a project had been prematurely approved was whether the agency had taken any action that significantly furthered a project "in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project," including "the alternative of not going forward with the project." The Court instructed reviewing courts to look "not only to the terms of the agreement but to the surrounding circumstances" when making this determination.

The court stated that the core principles set forth in *Save Tara* equally applied to public regulatory action, such as the proposed amendments at issue here [*POET I, above*]. While the facts shedding light on the agency's rule-making process will be different from those arising when an agency approves a development agreement, such differences are immaterial to the core issue whether the agency has taken any steps foreclosing alternatives, including that of not going forward, or has otherwise created bureaucratic or financial momentum sufficient to incentivize ignoring environmental concerns.

Under that standard, the court concluded that the board did take action that significantly furthered the proposed regulations in a manner that foreclosed the alternative of not modifying the regulations. As the board noted in its briefing, it was updated on issues regarding full implementation of the existing regulations in October 2013. At that time, it was informed compliance was required by January 1, 2014, and that many small fleets were facing economic challenges in meeting this deadline. In response to this information, the board directed its staff to propose modifications to the regulations. While such conduct certainly built momentum behind a change to the regulations, such momentum was well in line with *Save Tara*'s reminder that agencies may express interest in or even inclination toward proposed projects.

The court stated that shortly after providing those instructions, staff responded, in November 2013, with draft modifications and an advisory to the public regarding the proposal. While the advisory informed the public that further action by the board was necessary to implement any changes, and warned that the board and staff may propose amendments, it expressly stated that, should modifications occur that "impact a fleet's ability to comply with the regulation, [the board's] staff will provide fleets that have reported their intent to use these options additional time beyond the Board's April 2014 meeting to come into compliance." Thus, at the point of the November 2013 advisory, the board, through its staff's statements, had confirmed it intended to change the current regulations and that it would not prosecute any fleet operator that failed to comply with those 2014 regulations between January 1, 2014, and the April 2014 board meeting. In related public comments, members of the board were already expressing their gratitude for the forthcoming "flexibility" to the regulations.

The court concluded that such conduct qualified as approval of the modified regulations under CEQA. While the board previously expressed an inclination to modify the regulations, its advisory made clear that, at some level, changes were coming. It thus put substantial momentum behind supporting the changes offered by staff, as written, even if it retained a stated authority to modify those recommendations. This momentum was further buttressed by an express and public confirmation that the regulations as currently drafted would not be enforced. This expression of intent wholly precluded any potential "not going forward" option, as even if the board found a reason not to make changes it would have already delayed implementation of the regulations as written by at least four months, thereby ensuring that at least some reduction in environmental impact under the pending regulations would not occur.

The board argued that such a conclusion could not stand because the board was merely exercising its well-settled powers of prosecutorial discretion with respect to regulatory enforcement. Noting there was no case law on record suggesting that the board's "exercise of its prosecutorial discretion is constrained by CEQA," the board argued that there "is no evidence in the record that this temporary forbearance was likely to have any impact on the environment or otherwise constituted a project under CEQA." The court stated that this argument was fundamentally flawed. The court's conclusion in this matter did not add new limits to the board's exercise of prosecutorial discretion; rather it enforced the limits CEQA placed on all board actions that approved projects under that overarching law. The court observed that this was no different than occurred in *Save Tara*, where the agency was utilizing its uncontested authority to enter into contracts but did so in a manner that improperly approved a project under CEQA. It was, likewise, no different from how the board prematurely approved the Low Carbon Fuel Standard in *POET I* even though the board-approved modifications were subject to further comment and potential change. In all such cases, there was no curtailment to the agency's ability to use a power generally. The court stated that rather, the law requires the agency to consider when it can properly use that power such that it does not purposefully or inadvertently sidestep the mandatory provisions of CEQA.

The court stated that as the board cited in its own briefing, "a decision to devote available facilities and personnel to selected areas and to abstain from active pursuit of others is a policy or planning decision at a relatively high internal level" [*Roseville Community Hosp. v. State of California* (1977) 74 Cal. App. 3d 583]. To ignore the impact of such a high level policy decision in analyzing approval under CEQA would directly contradict the California Supreme Court's guidance in *Save Tara* to review not only the specific actions taken but also the surrounding circumstances when considering approval of a project. Whether such additional circumstances have any independent impact on the environment or otherwise constitute a project is a true red herring. The sole question under the law is whether some action constituted approval of a CEQA project. The court stated that the project here was the ultimate modification of the truck and bus regulation. Thus, the only relevant question was whether the board took meaningful steps in support of that project, thereby foreclosing alternatives. In this case, the court concluded that such steps were taken prior to the board conducting its environmental analysis, violating CEQA.

**Remedy for Early Approval.** The court noted that "directing an agency to void its approval of the project is a typical remedy ... for a CEQA violation" [*POET I, above*]. This is what the mandate issued by the trial court ordered, along with a direction that the board "comply with CEQA and the APA before taking any further action to approve, implement or enforce the 2014 Amendments." The parties did not dispute that affirming the trial court supported voiding the approval of the modifications under CEQA. However, the board raised as an issue whether it would be required to prepare the functional equivalent of an EIR under the trial court's final statement of decision.

The court concluded that, to the extent the trial court intended to specifically order the preparation of the functional equivalent of an EIR, it erred. The court noted, however, that the court's actual judgment imposed no direct requirement to do so. The court considered this issue based on the parties' competing interpretations.

The court noted that Pub. Res. Code § 21168.9 controls the court's authority when crafting a remedy for CEQA violations. Under this statute, upon finding a CEQA violation, "a court should enter an order that includes (1) a mandate that the decision be voided in whole or in part, and/or (2) a mandate that the agency 'take specific action as may be necessary to bring the ... decision into compliance with' CEQA." However, "subdivision (c) of [Public Resources Code] section 21168.9 provides in part that 'nothing in this section authorizes a court to direct any public agency to exercise its discretion in any particular way'" [*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal. 4th 1086]. Thus, where no discretion remains for the agency, courts have properly instructed them to prepare an EIR when required [*Berkeley Hillside Preservation, above*; *see Save Tara, above*]. However, where the agency retains discretion on how to proceed under CEQA despite its previous violations, it may exercise that discretion on remand. Thus, courts can order an EIR only where, under the circumstances of that case, the agency lacks discretion to proceed in a different fashion [*Berkeley Hillside Preservation, above*].

In this case, the court did not believe that the board lacked discretion to act in compliance with CEQA without generating the functional equivalent of an EIR. As the board noted, it could choose to revert to the prior regulatory scheme, effectively choosing the no project option. In addition, in light of its analysis of the errors identified below, it remained possible that the board could issue something similar to a mitigated negative declaration or could modify the regulations in a manner that avoided the environmental impacts identified by plaintiffs. The trial court's judgment accounted for this possibility, simply directing the board to comply with CEQA and the APA as it exercised its discretion moving forward. The court affirmed that understanding of the judgment.

**Board's Choice of Baseline.** Although the board's early approval required that the court void approval of the contested modifications, as it had noted the board could continue to pursue those or similar modifications. As such, the court turned to the actual environmental analysis completed to determine whether it ultimately complied with CEQA. In this review, the parties first disputed whether the board adopted a baseline determination of the environmental conditions absent the proposed project that was consistent with CEQA.

**Board Selected Appropriate Baseline.** Both parties agreed, consistent with the case law, that the board should normally adopt as a baseline "the physical environmental conditions in the vicinity of the project, as they exist ... at the time the environmental analysis is commenced" [CEQA Guidelines § 15125; *see Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal. 4th 310]. However, according to plaintiffs, the board "did not employ this standard to its environmental analysis" because it "created a fictional universe in which the Existing Regulations did not exist," measuring the current environment without regard to expected reductions in future pollution based on the existing regulations.

Regardless of where the arguments fell specifically, the court did not agree with plaintiffs that the board either

adopted a baseline that was inconsistent with CEQA or erroneously measured the existing conditions by excluding future expected declines. Rather, the court concluded that the board was within its discretion to adopt a baseline calculation that measured the current environment without further reducing figures based on regulations that should have taken effect during the course of the analysis.

The court stated that *Communities* provided strong support for its conclusion. Like this case, *Communities* involved an agency issuing a negative declaration. However, in that case, the declaration arose because the baseline chosen for the project was the operation of certain boilers at their full permitted operational levels, despite the fact simultaneous maximum operation was not a realistic description of the existing conditions at the time. The Supreme Court explained "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 was so because "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 court stated that in line with *Communities*, the administrative record in this case demonstrated that full compliance with the existing regulatory standards would also create an illusory comparison. The record basis for proposing a delay in the regulatory mandates was the recognized fact that limitations in credit and capital had left many small fleet operators unable to comply with the standards as written. There were many who had not yet complied and it takes no unrealistic inference to recognize that future emissions estimates based on full compliance would mislead the public as to the effectiveness of the current regulations. The natural unevenness in implementation and enforcement of regulations means regulatory expectations based on full compliance are rarely likely to accurately identify the current environmental conditions relating to those regulations. Nor should such predictions be used. The court noted that CEQA is not meant to stand as a barrier to appropriate modifications to environmental regulations, whether they tighten or loosen existing regulations, provided the lead agency properly informs the public of the effects of those modifications and no significant environmental impact will arise [*see Neighbors, above*]. Plaintiffs' insistence that current existing conditions had to account for those trucks that should comply with regulations in the future, but as of yet had not, suffered from the same flaw as the decision in *Communities* to rely on permitted standards that had not been utilized previously, differing only in whether the decision artificially inflated or deflated the appropriate baseline. Both metrics assumed future potential conditions rather than evaluate the actual current environmental conditions.

Although plaintiffs sought to distinguish *Communities* in the context of this argument, they did so by arguing that the trial court "found that the '"existing conditions" included the [Existing Regulations], and the emissions reductions that could be expected from enforcement of that regulation.'" The court stated that this argument added no weight to respondents' positions. The court does not review the trial court's action, nor does it defer to the trial court's findings in these matters [*Center for Biological Diversity, above*]. As the court's analysis of *Communities* showed, existing conditions did not properly include expected regulatory reductions. Including such predictions in the baseline added a potential for gamesmanship and misdirection to the analysis and created a scenario whereby the relevant conditions were no longer statically defined or tied to the existing circumstances at the beginning of the review.

The court found that substantial evidence supported the board's decision to measure current existing conditions without reference to future expected reductions based on existing regulations. As a matter of logic, future expected reductions were not inherently relevant to a measurement of existing conditions in the same way that constantly fluctuating conditions, such as existed in *Communities, above*, would be to ensuring decision makers were provided adequate information on the project's impacts. Thus, the board was within its discretion to determine reliance on such factors when measuring the baseline was not proper. In addition, the record before the court demonstrated that these expected reductions were already in jeopardy due to financial costs associated with upgrading existing vehicles not in compliance and the continued issues with availability of capital for small fleets following the global recession. The board was considering alternatives to the regulations based on this evidence and the court concluded that such information constituted substantial evidence supporting the board's decision to measure based exclusively on current outputs.

The court took no issue with plaintiffs' statement that "plainly, the 'existing environmental conditions' include applicable laws and regulations," but such a recitation did not prove the error plaintiffs pursued. The court stated that by adopting as a baseline the current environmental conditions, the board did take into account the applicable laws and regulations as they had affected the environment to that point in time. The initial report noted in Appendix F the many ways the board updated its analysis to determine the most current environmental conditions. That the board properly exercised its discretion when not adjusting its

baseline to include speculative future reductions based on expected implementations under those laws and regulations did not mean those laws and regulations were retroactively excluded from the board's baseline analysis. The court found no error in this methodology.

**Possibility Project Would Substantially Impact Environment.** Having determined that the board adopted a proper baseline, the court next considered whether plaintiffs produced any evidence supporting a fair argument that the project would have a substantial impact on the environment. In doing so, the court took up plaintiffs' related argument concerning how CEQA Guidelines § 15125(e) impacted the board's decision not to consider a temporary increase in pollutants significant. Although the court concluded that the board properly determined there would be no substantial impact on the environment under the significance standards it chose to apply, the court found a fair argument existed that the project would impact the environment in the short term. The court further recognized that the board could not rotely apply standards of significance that did not address that potential effect once evidence of the risk had been identified. Accordingly, the court concluded that the board abused its discretion in issuing the functional equivalent of a negative declaration.

The parties' dispute with respect to this issue centered on the criteria relied upon by the board to assess whether any alleged impacts on the environment from modifying the regulation were significant. According to the board, the modifications had no substantial impact under two different analyses. Firstly, when measured against the current output of pollutants, the board found that implementing the amendments would result in a continual decrease in pollutant output. Thus, at no point would the regulations result in an absolute increase in pollutants. Secondly, when compared to California's long term air pollution reduction plans, the board found implementation of the amendments resulted in a slower projected decrease in pollutants but that this slower pace would have no impact on California's ability to meet its 2023 emission goals. Plaintiffs did not directly attack these findings. Rather, plaintiffs contended a fair argument existed that three types of pollutants, oxides of nitrogen, particulate matter, and greenhouse gases, would increase in the short term over the measurements that would have existed had the original regulations remained in place. Plaintiffs claimed that these increases were significant, both at a local and statewide level.

**Board Ignored Fair Argument in This Case.** The court noted that "CEQA excuses the preparation of an EIR and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment'" [*Rominger v. County of Colusa* (2014) 229 Cal. App. 4th 690]. Thus, one of the critical first steps in CEQA "is to determine whether the project *may* have a significant effect on the environment" [*Amador Waterways v. Amador Water Agency* (2004) 116 Cal. App. 4th 1099; *see* Pub. Res. Code § 21082.2(d)].

The court noted that if "there is substantial evidence, in light of the whole record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR" [CEQA Guidelines § 15064(a)]. "An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting" [CEQA Guidelines § 15064(b)]. With respect to greenhouse gases, lead agencies "should consider the following factors, among others, when assessing the significance of impacts from greenhouse gas emissions on the environment: (1) The extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting; (2) Whether the project emissions exceed a threshold of significance that the lead agency determines applies to the project; (3) The extent to which the project complies with regulations or requirements adopted to implement a statewide, regional, or local plan for the reduction or mitigation of greenhouse gas emissions. . . . If there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements, an EIR must be prepared for the project" [CEQA Guidelines § 15064.4(b)]. More generally, agencies are encouraged to develop thresholds of significance to use in determining whether a project has significant environmental effects. "A threshold of significance is an identifiable quantitative, qualitative or performance level of a particular environmental effect, non-compliance with which means the effect will normally be determined to be significant by the agency and compliance with which means the effect normally will be determined to be less than significant" [CEQA Guidelines § 15064.7(a)].

The court noted that despite the encouragement to develop thresholds of significance and to consider environmental impacts against certain standards, such comparisons "cannot be used to determine automatically whether a given effect will or will not be significant. . . . In each instance, notwithstanding compliance with a pertinent threshold of significance, the agency must still consider any fair argument that a certain environmental effect may be significant" [*Amador Waterways, above*]. In other words, "a lead agency cannot avoid finding a potentially significant effect on the environment by rotely applying standards of

significance that do not address that potential effect." Thus, if one can point to substantial evidence in the record that a project might constitute a significant effect on the environment notwithstanding the agency's applied standard of significance, then the agency cannot avoid its obligation to prepare an EIR by rotely relying on its standard [*Rominger, above*].

In reviewing an agency's decision to adopt a negative declaration, courts utilize the same fair argument test applied by the agency [*Rominger, above*]. "The fair argument standard is met if the agency's initial study of the project produces *substantial evidence supporting a fair argument that the proposed project may have a significant adverse effect on the environment.*" "The fair argument standard is a low threshold" [*Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal. App. 4th 340]. The court reviews this issue independently [*Rominger, above*].

In challenging the board's decision in this case, plaintiffs needed "to 'demonstrate by citation to the record the existence of substantial evidence supporting a fair argument of significant environmental impact'" [*Rominger, above*]. With respect to oxides of nitrogen, particulate matter, and greenhouse gases, plaintiffs pointed to specific data in the initial statement showing that each would increase across California under the amended regulations when compared to the then-existing regulations. Plaintiffs further pointed to evidence the increases identified were significant on a statewide basis and with respect to specific geographical areas.

The court stated that the board did not directly tackle these alleged increases in its briefing. Rather, in its opening brief, the board recognized that it found emissions were projected to decline at a slower pace between 2015 and 2017, with the overall decrease being nearly identical by 2018. It then conceded that "this comparison *could* show the potential for a lower rate of reductions, and thus, an unrealized emissions benefit," before, without citation to the record, arguing "the emissions reductions as projected in 2010 were no longer valid and reliable to use as a baseline in 2014." In reply, it further attempted to tie its baseline determination to the significance issue by arguing that "in erroneously finding [the board] used the incorrect baseline, the trial court improperly found a 'fair argument.'" Ultimately, the board's argument was that the evidence supported the board's "finding of no significant impacts because the 2014 amendments result in the same emissions reductions in 2023 allowing California to meet its State Implementation Plan, which is the primary objective of the Truck and Bus Regulation."

The court noted that the board could not simply rely on its settled baseline determination and factors of significance in the face of substantial evidence the project might have a significant impact on the environment [*Rominger, above*]. The court stated that while the board could reasonably rely on either the direct reduction in emissions or the ultimate compliance with California's air pollution reduction goals when conducting its initial study [*see Center for Biological Diversity, above*], its reliance on these significance standards did not alleviate it from its obligation to proceed further if plaintiffs identified evidence in the record suggesting that the project could significantly impact the environment under different standards.

Here, the court found that plaintiffs did just that. Although plaintiffs raised the issue in the context of determining a proper baseline, they correctly noted that under the CEQA Guidelines the board was obligated to discuss "inconsistencies between the proposed project and applicable general plans, specific plans and regional plans," including the state implementation plan (reflecting the state's long-term air pollution reduction goals) and plans for the reduction of greenhouse gas emissions in any EIR's generated [CEQA Guidelines § 15125(d)]. In its initial statement, the board provided information regarding such a comparison, although it found no inconsistency in the long term. It was this same evidence that plaintiffs cited to for their "fair argument." The court stated that while the board might disagree with the conclusions drawn by plaintiffs regarding the short- to medium-term impacts, the evidence was sufficient to require the board to make that disagreement public through the equivalent of an EIR, where such a comparison was generally required [*see Neighbors, above*]. The board's failure to acknowledge and act upon this fair argument violated CEQA.

**Contentions Under APA.** Although the court found that the modified regulations could not stand under CEQA, the parties also disputed whether the board properly complied with the APA's provisions regarding the need to assess certain potential adverse economic impacts arising from the modifications. The trial court found the board did not proceed according to the APA's requirements in conducting its analysis and responding to community comments. The court reached this issue because proper compliance with the APA would be required if the board further pursued regulatory modifications. On this point, the court received amicus briefing from a coalition of 10 business and industry organizations interested in the proper application of the APA's economic impact analysis requirements.

**Relevant APA Principles.** The court noted that born from a perception that "there existed too many regulations

imposing greater than necessary burdens on the state and particularly upon small businesses," the APA provides a procedural vehicle to review proposed regulations or modifications thereto in order to "advance 'meaningful public participation in the adoption of administrative regulations by state agencies' and create 'an administrative record assuring effective judicial review'" [*Western States Petroleum Assn. v. Board of Equalization* (2013) 57 Cal. 4th 401]. In other words, the APA establishes basic minimal procedural requirements for rulemaking in California. "Pursuant to those procedural requirements, agencies must, among other things, (1) give the public notice of the proposed regulatory action; (2) issue a complete text of the proposed regulation with a statement of reasons for it; (3) give interested parties an opportunity to comment on the proposed regulation; (4) respond in writing to public comments; and (5) maintain a file as the record for the rulemaking proceeding" [*POET I, above*].

The court noted that as part of the initial disclosures required under step two, a rulemaking agency "must include 'facts, evidence, documents, testimony, or other evidence on which the agency relies to support an initial determination that the action will not have a significant adverse economic impact on business.'" The agency's initial statement is followed by a public comment period, after which, "if the agency decides to enact the regulation, it must prepare a 'final statement of reasons' for adopting the proposed rule, which must include 'an update of the information contained in the initial statement of reasons.'" This final statement "must also include 'a summary of each objection or recommendation made regarding the specific adoption, amendment, or repeal proposed, together with an explanation of how the proposed action has been changed to accommodate each objection or recommendation, or the reasons for making no change.'" This aspect of the procedures is referred to as the economic impact assessment requirement [*Western States, above*].

The court noted that looking at this requirement more granularly, under Gov. Code § 11346.5(a)(8), "if a state agency, in adopting, amending, or repealing any administrative regulation, makes an initial determination that the action will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states, it shall make a declaration to that effect in the notice of proposed action." Similarly, under Gov. Code § 11346.3(a), "a state agency proposing to adopt, amend, or repeal any administrative regulation shall assess the potential for adverse economic impact on California business enterprises and individuals, avoiding the imposition of unnecessary or unreasonable regulations or reporting, recordkeeping, or compliance requirements." This section requires the agency to "prepare a standardized regulatory impact analysis," that "shall address" several factors including the "creation or elimination of jobs within the state," the "creation of new businesses or the elimination of existing businesses within the state," and the "competitive advantages or disadvantages for businesses currently doing business within the state" [Gov. Code § 11346.3(c)(1)].

The court noted that an agency's initial determination "need not be conclusive, and the qualifying adjective 'significant' indicates that the agency need not assess or declare *all* adverse economic impacts anticipated." Similarly, "an agency's initial determination of economic impact need not exhaustively examine the subject or involve extensive data collection. The agency is required only to 'make an initial showing that there was some factual basis for [its] decision.'" "A regulation will not be invalidated simply because of disagreement over the strict accuracy of cost estimates on which the agency relied to support its initial determination." Once the initial assessment is complete, "affected parties may comment on the agency's initial determination and supply additional information relevant to the issue." The agency "must respond to the public comments and either change its proposal in response to the comments or explain why it has not" [*Western States, above*].

**Board's Conduct Violated APA.** In its briefing, the board argued that "the standard of review for a purely procedural APA claim is not precisely clear" and, relying primarily on *Yamaha Corp. of America v. State Bd. of Equalization* [(1998) 19 Cal. 4th 1], argued that its conduct fell within its regulatory and rulemaking authority and thus was subject to a deferential review where the court accords the board's decisions great weight and respect. The court stated that although there were circumstances where such a standard of review was applicable to the board's conduct, it was not in review of APA procedural compliance issues. The court held so definitively in *POET I, above*, where it rejected this same argument and reliance on *Yamaha.* Contrary to the board's arguments in response to amici, *POET I* was not distinguishable because it dealt specifically with rules relating to maintaining the record file during rulemaking. As the court noted in *POET I*, the procedures set forth in chapter 3.5, article 5 of the APA, which include not only the rulemaking file requirements but all the contested provisions in this case, govern "the adoption and amendment of regulations by state agencies" and "establish 'basic minimum procedural requirements' for

rulemaking," the violation of which may result in the regulation being declared invalid [*POET I, above*]. The court stated that its conclusion in *POET I*, that it independently review and interpret the procedural requirements of the APA, controlled.

The court further stated that this conclusion comported with the California Supreme Court's precedent in *Tidewater Marine Western, Inc. v. Bradshaw* [(1996) 14 Cal. 4th 557], and *Armistead v. State Personnel Board* [(1978) 22 Cal. 3d 198]. Both of those cases explained that an agency's decision to include non-APA compliant interpretations of legal principles in its regulations will not result in additional deference to the agency. Here, the board claimed that its economic analysis resulted from its interpretation of how the APA's analytical process should be conducted—that is, that the board need only consider whether California companies would be harmed vis-à-vis competition with out-of-state companies. The court stated that although the board attempted to rely on an approval of its economic analysis from the department of finance to claim its interpretation of the APA was proper, it pointed to no formal regulation supporting its interpretation and, as plaintiffs pointed out, the record itself provided no indication that the board's interpretation was even conveyed to the department of finance when it reviewed the board's work. Even if within the realm of the board's authority, which the court's conclusion in *POET I* demonstrated was not the case, such unstated and undeveloped interpretations did not comply with the APA and were entitled to no deference [*Tidewater Marine Western, Inc., above*]. Ultimately, review here was not fundamentally different from any other set of laws under which the board must operate when engaged in its rulemaking activities, including CEQA.

The court noted that under the APA's economic analysis requirements, the relevant agency must consider whether the regulation will have a significant statewide adverse economic impact directly affecting business. The board's argument in support of its economic analysis under this standard centered on accepting the premise that the board "interpreted this provision as requiring an analysis of the competitiveness of the whole California trucking industry relative to the industry outside the state." The board contended that it had no obligation under the APA to extend its analysis further, in part because the evidence offered of harm to certain trucking fleets was "speculative, and expressed the general sentiment that the truck fleets that had already complied would be at a financial disadvantage as compared to the truck fleets that had not yet complied."

The court did not agree with the board that the economic impact analysis requirements are so narrowly drawn. Nothing in the language of the relevant statutes suggests that the economic interests relevant to the APA analysis are solely inter-state interests. Gov. Code § 11346.5 broadly requires consideration of "significant, statewide adverse economic impacts directly affecting business." While it then references inter-state impacts, it does so by adding them to the required analysis rather than limiting the analytical scope [Gov. Code § 11346.5(a)(8)]. Likewise, Gov. Code § 11346.3 requires an analysis of several factors that are broadly drafted in a manner which does not suggest solely inter-state impacts, such as the "creation of new businesses or the elimination of existing businesses within the state," and the "competitive advantages or disadvantages for businesses currently doing business within the state" [Gov. Code § 11346.5(c)(1)]. This later provision strongly suggests that the board must look at each type of business subject to the relevant proposals and consider whether those proposals will advantage or disadvantage that particular type, despite the source of those impacts being advantages the regulations bring to other in-state businesses. The court stated that finally, the APA's general purpose of relieving stress on small businesses subject to unnecessary regulation further supports a broad reading of the required analysis. The desire to relieve burdens on small businesses necessarily entails a consideration of how those small businesses are impacted by regulations relative to larger in-state businesses that will not feel the impact of such regulations at the same scale. The court, therefore, concluded that the board was not permitted under the statutory scheme to ignore evidence of impacts to specific segments of businesses already doing business in California from benefits to other in-state businesses when proceeding under the APA. If the board's proposed regulatory amendments placed the state's thumb on the scale for one group of in-state businesses over another, it needed to consider that impact.

The court stated that the board's discussions in the relevant documents appeared to recognize this requirement, despite its current arguments on appeal. When discussing expected changes in costs for particulate matter filter upgrades for heavier trucks, the initial statement explained "long-haul trucking fleets that are based in California or outside California do not compete in the same markets as vocational trucks and are affected differently because of their business model and type of truck used." Likewise, the initial statement, when discussing changes in costs for long-haul fleets, explained that there may be potential differences in impact between large and small fleets,

"fleet owners that have acted early or have downsized, and owners that cannot afford to comply." The initial statement also included a separate discussion of impacts on small businesses and took the time to recognize, although not analyze, the fact that there needed to be a balancing between the needs of compliant and non-compliant fleets.

The court further recognized that evidence of in-state effects between compliant and non-compliant fleets was presented to the board in the form of testimonials provided by impacted businesses. These testimonials informed the board that significant expenditures had been required to comply with the previous compliance deadlines, that non-compliant fleets without those additional expenses were therefore able to undercut compliant fleets on pricing, and that providing additional time for those non-compliant fleets to meet the relevant standards under the modified regulations could result in substantial harm to some of those businesses, including bankruptcy. The court stated that such evidence was not mere speculation and in similar contexts, specific testimonial evidence from the public was readily identified as substantial evidence supporting the need for a response [*see Architectural Heritage Assn. v. County of Monterey* (2004) 122 Cal. App. 4th 1095]. Accordingly, regardless of whether the board was aware of such impacts at the time it made its initial report, it was made aware of them through the proper procedural mechanism of public comment and, as such, had an obligation to respond under the APA [*see Western States, above*].

The court stated that the board's responses to this evidence were insufficient under the APA. Although the board appeared to respond to the comments received, its responses were not supported by any record evidence. For example, the board alleged that it had considered issues of fairness and structured provisions in the modifications accordingly. Yet it argued the exact opposite on appeal—that it did not consider intra-state competition—and the court had been pointed to no analysis in the administrative record showing that the board actually analyzed such impacts and acted in light of these concerns. As the APA required the board to explain why it chose not to make changes in the face of substantial evidence of impacts, unsupported assertions that evidence—neither actually collected nor reviewed by staff—was considered in drafting the regulations could not satisfy the APA. In failing to properly respond to the comments regarding intra-state competition issues, the board failed to abide by its obligations under the APA in either form or substance.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 21.03 (Timing of CEQA Implementation).

# HAZARDOUS WASTE AND TOXIC SUBSTANCES CONTROL

## Cases

### Manufacturers' Improper Instructions Were Substantial Factor in Causing Pollution

*City of Modesto v. Dow Chemical Co.*
No. A134419, 1st App. Dist., Div. 4.
19 Cal. App. 5th 130, 2018 Cal. App. LEXIS 13
January 8, 2018, cert. for part. pub.

**In 1998, the city, the City of Modesto Sewer District and the Modesto Redevelopment Agency sued various retail drycleaning businesses operating in Modesto together with the manufacturers of drycleaning equipment used at those drycleaners, and the manufacturers and distributors of drycleaning solvent. Plaintiffs alleged that defendants had caused the city's groundwater, sewer system and easements, and the soil of property located within the project area of the redevelopment agency, to become contaminated with perchloroethylene (PCE). Plaintiffs sought recovery for the past, present and future costs of investigation and remediation of the contamination at numerous sites under multiple legal theories. The final judgment awarded plaintiffs damages with respect to three drycleaning sites, including an award of punitive damages against three defendants; as to all other claims, judgment was entered in favor of defendants. In this decision, the court of appeal affirmed in part, reversed in part and vacated in part the judgment. In the part of the decision certified for publication, the court held that no special causation standard applies to claims by redevelopment agencies to recover costs of remediation of contamination under the Polanco Redevelopment Act.**

**Facts and Procedure.** Perchloroethylene (PCE), also known as tetrachloroethylene, is a molecule containing chlorine atoms and carbon atoms. It is also characterized as a "volatile halogenated organic compound," a "halogenated hydrocarbon," a "chlorinated solvent" or a "chlorinated hydrocarbon." As shorthand, it is referred to as "perc" or PCE. All chlorinated hydrocarbons, like all solvents other than water, are "toxic." In 1978, the National Institute for Occupational Safety Hazards (NIOSH) recommended that PCE be handled as if it were a human carcinogen. In 1980, the State of California began regulating PCE as a hazardous waste. In 1984, when the Resource Conservation Recovery Administration (RCRA) was reauthorized, its regulations

brought "small dry cleaners" under the same requirements as major hazardous waste sources with respect to PCE.

The State Department of Health Services has set the maximum contamination level (MCL) for PCE in drinking water at five parts per billion based on its finding that PCE potentially causes cancer in humans. Applying this standard, if one cup of PCE were completely dissolved in water, it could contaminate 24 million gallons of groundwater. There are also regulations to prevent migration of PCE vapors in concentrations that could cause cancer. All parties agreed that the applicable regulatory standards are not arbitrary and address genuine public health risks.

PCE is a colorless liquid, and is therefore difficult to see once released into soil. It is a cleaning solvent used by drycleaners and also in degreasing operations. Because in its pure form it is a dense nonaqueous phase liquid (DNAPL), it is heavier than water and so when placed in water it will sink and sit below the water. This is distinguished from a light nonaqueous phase liquid (LNAPL), such as gasoline, that is lighter than water and will therefore float on top. PCE also has lower viscosity (internal friction) than water and so it is very mobile and can move quickly to penetrate, for example, small cracks or joints in concrete. PCE does not readily dissolve in water—thus, "nonaqueous"—although it will dissolve very slowly over time. PCE is also quite volatile, meaning it will quickly become a gas when it is heated or released into soil where it mixes with the soil gas.

PCE is particularly "persistent" and "long lived" compared to other contaminants, making it extremely difficult to accomplish complete remediation.

The City of Modesto uses groundwater as a primary source of its drinking water supply. The hydrologic cycle for groundwater is fairly straightforward. The rain falls and sinks into the "soil zone" which is the layer near the surface where plants and trees take it up with their roots. The rest of the water continues to move downward through the soil into the "vadose zone," in which there are various types of soils—fine grain, such as clay or silt and coarse grain, such as sand or gravel. Some of the water may "perch" on the fine grain materials but other water will flow through the coarser soil media and recharge the water table, which is at the top of the "saturated zone" from which groundwater is pumped by wells. Between the vadose and saturated zones is a "capillary fringe." This space can hold "quite a bit of liquid," and the porous media can pull water up from the water table.

When PCE is released into the ground, it can volatilize and mix with the soil gases. Where there is a very high concentration of PCE in the soil, the PCE gas, which is denser than air, will tend to sink. If it reaches all the way to the capillary fringe, it can then recondense on the water table and begin to dissolve into the groundwater.

When released into the ground, PCE can also remain in liquid form and will sink through the subsurface to the water table. Unlike gasoline—which is an LNAPL and will tend to float on top of the water table—PCE is a DNAPL and so will continue to move past the water table and through the saturated zone. Because it dissolves into water only very slowly, it creates a long-term continuing source of contamination to any groundwater that comes in contact with it.

Small releases of pure PCE will tend to penetrate only into the vadose zone because it gets "pulled apart" as both a gas and a liquid and will eventually get trapped in the soil pores—much like a small amount of coffee will be absorbed into and trapped in a sugar cube. When more PCE is added, however—either a larger release or repeated releases—the PCE breaks out and penetrates deeper. Even if it pools or perches on the fine-grained soil layers, it can still stairstep down through the subsurface and reach the capillary fringe and—if there is enough PCE—the water table. If PCE is being cleaned out of the groundwater, the PCE that pools or has been trapped above the water table will continue to move into the water table—a process called "back diffusion"—and thus is another long-term source of groundwater contamination. PCE that has been trapped in the subsurface can also move downward during a "recharge event"; the PCE can dissolve into the rainwater and be released from the vadose zone, and is yet another long-term source of contamination.

PCE that pools on top of fine-grained layers will stop moving vertically but then will begin to move in other directions due to differing soil strata and "fine textural changes" in the sand; as a result, PCE will have a very complicated pattern of distribution, making it more difficult to locate. Also, because DNAPL's can be trapped in various ways, and then dissolve and move over time, they are extremely difficult to clean up. There are sites in the United States where they have been trying to clean up PCE for decades.

As described, PCE is particularly "persistent" and "long lived" compared to other compounds, making it difficult to remediate but advantageous for industrial use because it can be reused after being distilled back to its pure state. Drycleaning equipment therefore has the capacity to do that. An elementary description of how the various machines work is provided here.

From the 1950s to the 1970s, drycleaners used what is now referred to as "first generation" equipment. In that iteration, the washer and the dryer were separate machines.

In this equipment, PCE was continuously pumped into, and drained out of, the washer from a tank on the bottom of the machine into the basket containing the clothing. As the solvent drained out, it was sent through a filter to clean out the solids, dyes, and soil being removed from garments, before it was pumped back into the washing basket. After the cleaning cycle was complete, the washer entered a spin cycle to remove and drain as much solvent as possible back into the tank. The clothing was then moved to the "reclaiming dryer." This dryer did not vent to the air during the drying cycle; the vapors were kept in the machine in order to recover the solvent. The dryer also had a lint trap. As will be explained, the vapor was then cooled using water coils to recondense the solvent back to liquid form.

The "second generation" machines were used from the 1970s to the mid-1980s. This equipment operated in the same way, but combined the washing and drying functions into one "dry-to-dry" machine. Also, after reclaiming most of the vapor, some residual vapors were vented into the air at the end of the dry cycle. An operator, however, could add a "sniffer" (carbon adsorber) to capture the vapors. These were very large and contained perhaps 100 pounds of charcoal or carbon in which the vapors were caught.

The "third generation" machines were used from the mid-1980s to the mid-1990s. These were also dry-to-dry machines, but used refrigeration coils instead of water to cool the vapor, which was far more efficient in turning vapors to liquid for recovery. The "fourth generation" machines added a built-in carbon adsorber to filter out the last traces of PCE vapors before the door to the machine was opened.

Reclaiming dryers (or "reclaimers") operate with hot air, so the solvent on the clothing vaporizes. Those vapors are continually blown out of the reclaimer by a fan, through the lint filter. The vapors enter a pipe with cooling coils, where the solvent turns to liquid and drips off the coils into a pipe leading to the water separator.

The water separator is a device by which any water—even just from humidity in the air—is removed from the recaptured solvent. All used solvent, no matter from where it is reclaimed or distilled, must go through the water separator before it is reused. The water separator operates by gravity. Because PCE is heavier than water, it will settle to the bottom of the separator. It is then siphoned out by a drain that is piped back to the tank. The water, called "contact water" or "separator wastewater" is drained out through a different pipe located higher in the separator, and was (during the pertinent time period) sent either down a drain or into a pail, depending on how the machine was set up. All contact water has a certain amount of PCE left in it, because the separation is "imperfect."

As noted, some drycleaners added a sniffer, or carbon adsorber, to collect solvent vapors. To release the solvent from the sniffer, live steam would be applied to the charcoal bed to release the solvent as vapor; the steam and vapors were then vented to the pipe with the cooling coils where they would condense and go to the water separator. This process creates significantly more separator wastewater than other reclaiming processes because of the large amount of steam.

The final major piece of equipment is the still, which is used to clean the solvent. All solvent is periodically sent to the still, because it will accumulate residual oil, grease, wax, detergent, and other impurities. The solvent is heated with steam coils until it begins to vaporize. The vapors are sent through pipes with cooling coils and then to the water separator. The residue, that is, what remains behind after the PCE is vaporized, is called "still bottom residue" or "muck."

A still is also used to extract PCE from the filters in the machines that capture the solids, dyes, and soils. Historically, drycleaners used diatomaceous earth (a powder) to filter the PCE, but later they began to use cartridges filled with carbon or carbon and activated clay; some had pleated cellulose on the outside. The still had mechanical paddles to continuously stir the mixture to release the PCE. The residue, or "muck" was then shoveled into a container, and disposed of as waste. This residue contained about 20 percent to 25 percent PCE. A similar process was used for the cartridges. When the cartridge needed to be changed, it was removed and drained for 24 hours; that liquid went into the still and was processed leaving a residue like very heavy heating oil, which was drained out through a valve into a pail. In the first generation equipment, the PCE content left in the residue could be as high as 50 percent. In the new equipment (being sold in the early 2000s) there is as little as 10 percent.

Even after draining the filter for 24 hours, there could be as much as a gallon and a half of PCE remaining in the filter. At some point prior to 1984, a process was developed by which, like cleaning out a sniffer, high pressure steam was used to release the remaining PCE from the filter cartridge, although it could never remove 100 percent. This was accomplished by a "solvent recovery system" or "SRS." The cartridges were placed into a tank and steam was released into the tank to vaporize the PCE which, again, goes to the water separator. This involves a great deal of steam, and creates a "tremendous" amount of contact water—up to 20 to 25 gallons.

In very general terms, PCE releases into the environment occurred as a result of equipment failures or leaks during operation or maintenance of the machine or the water separator, leaks in joints or valves due to vibration

of equipment, and leaks or spills during solvent delivery or transfers which are flushed to the outdoors, or which permeate the concrete floors, or seep through the cracks or joints in the floors. PCE releases also occurred as a result of tossing filter cartridges into the garbage, tossing muck into the trash or into dumpsters, or "out the back door"; and by PCE disposal practices which have been described as "dumping" or "back lot burial." PCE also entered the soil by releases of separator water on the ground or down the drain and into the sewer system, thence out of sewer pipes into the ground.

In addition, those servicing the drycleaners on behalf of the manufacturers or distributors performed tests to check on the amount of detergent in the solvent. The drycleaners did not want that liquid to be put back in the machines because it used a strong dye, so as a practical matter the test liquid, which contained about 25 percent PCE, was poured down the drain.

Defendants, drycleaners, manufacturers of drycleaning equipment and solvent, did not dispute that the soils at many drycleaning sites in Modesto were contaminated by PCE. It was also not the subject of serious dispute that this contamination dispersed through the subsurface and into the groundwater at many sites. PCE contamination can enter a municipal supply well by migrating with the groundwater generally according to the natural gradient, but when it is near a well, it will come within the "cone of draw" and will be captured and pumped into the well.

The residents of Modesto relied on groundwater wells to produce most of their potable water. The city was served by a network of 90 wells designed to serve specific neighborhoods, and operating interdependently. PCE has been detected in four of the city's wells, and two were removed from service after exceeding the state-mandated MCL. If a well is taken offline, nearby wells are required to pump at greater capacity and the contamination plume is likely to migrate to those wells.

PCE has been detected in four of the city's wells, and two were removed from service after exceeding the state-mandated MCL. The parties disputed whether and when the third and fourth wells (or additional wells) would exceed the MCL for PCE.

This action was filed as a result of the PCE contamination from the drycleaning sites in Modesto.

The city was a plaintiff and the principal appellant. The Modesto Redevelopment Agency (RDA) also filed a separate action, which was consolidated with the city's action. In 2012, however, the Legislature effectively dissolved all redevelopment agencies [Health & Safety Code § 34172]. The city became the RDA's "successor agency" by operation of law [Health & Safety Code § 34173], and pursues the RDA's appeal. The Sewer District was also a plaintiff and a cross-defendant but was involved in this appeal only with respect to the cost award entered against it. For ease of reference, plaintiffs are referred as the city.

The operative complaints named 28 defendants. Along the way, however, most of the defendants settled, and there now remained only five active participants. They were: two drycleaning establishments; two PCE manufacturers; and one PCE distributor, which also manufactured some equipment used by the drycleaners (collectively defendants). One of the PCE manufacturers was the sole cross-appellant on the issue of punitive damages.

Plaintiffs contended that in the phase IV Polanco Act bench trial, the court erred in applying an exceptionally stringent standard of causation based on its erroneous interpretation of *City of Modesto Redevelopment Agency v. Superior Court* [(2004) 119 Cal. App. 4th 28] (*Modesto I*). The court of appeal held that no special causation standard applied and accordingly, remanded and vacated the trial court's ruling.

**Polanco Act.** The court stated that the trial court aptly summarized the act's core provisions. "'The Polanco Act involves cleanup of the release of hazardous substances in the context of a redevelopment project.' Subject to certain statutory conditions, the Act authorizes a redevelopment agency to 'take any actions that the agency determines are necessary . . . to remedy or remove a release of hazardous substances on, under, or from property within a project area, whether the agency owns the property or not. ' If an agency takes such action, 'any responsible party or parties shall be liable to the . . . agency for the costs incurred in the action.' An action for cost recovery under the Act 'is in addition to, and is not to be construed as restricting, any other cause of action available to a redevelopment agency.'" Thus, it was held that under the Polanco Act, a redevelopment agency is entitled to recover from "any responsible party or parties" the costs it incurs "to remedy or remove, or to require others to remedy or remove . . . a release of hazardous substance" including "compelling a responsible party through a civil action, to remedy or remove a release of hazardous substance" [Health & Safety Code § 33459.4(a)].

**Responsible Party.** The court pointed that the term "responsible party" is defined by reference to two other laws. First, the act incorporates a provision of the Carpenter-Presley-Tanner Hazardous Substance Account Act (HSAA) [Health & Safety Code § 25323.5(a)(1)], which, in turn, incorporates the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) [42 U.S.C. § 9601 et seq.], definition of "covered persons" for purposes of liability [*see* 42

U.S.C. § 9607(a)]. The city did not contend that defendants (other than the drycleaners themselves) fell within that definition. Second, the statute incorporates Water Code § 13304(a) which provides, in pertinent part, that any person who "has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance" shall be responsible for remedial action. The court stated that it is this definition that was the subject of its prior opinion in this matter.

***Modesto I* Decision.** The court stated that early on in this case, the manufacturer defendants filed a motion for summary adjudication of the Polanco Act and negligence per se claims. They argued that they were not "responsible parties" under the Polanco Act because they neither themselves discharged the PCE nor did they control any site where the discharges occurred. The court noted that the trial court granted the motion, ruling that the manufacturers were not "responsible parties" under the statute because in order for a party to "cause" a discharge "you have to have some sort of physical control or the ability to stop it from happening" [*Modesto I,* above]. Plaintiffs filed a petition for writ of mandate in this court, which was granted because the court disagreed with the trial court's conclusion that only those who physically engage in a discharge or who control the waste disposal activities of others were liable under the *Polanco Act.*

The court further stated that in the decision, it first rehearsed the statutory language. As described, the Polanco Act defines "responsible parties" by reference to Water Code § 13304(a), which provides: "A person . . . who has caused or permitted, causes or permits, or threatens to cause or permit any waste to be discharged or deposited where it is, or probably will be, discharged into the waters of the state and creates, or threatens to create, a condition of pollution or nuisance, shall . . . clean up the waste or . . . take other necessary remedial action." The court therefore began its analysis by asking whether the word "cause" refers to "a party who was directly involved with a discharge, to anyone whose actions were a substantial factor in causing the discharge, or even, as city argued below, to anyone who places a hazardous substance into the chain of commerce" [*Modesto I, above*].

To answer that question the court noted, first, that environmental legislation by which government exercises its traditional power to regulate public nuisances should be construed in light of common law principles bearing on nuisance, citing *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* [(1984) 153 Cal. App. 3d 605]. Determining that the Porter-Cologne Water Quality Control Act [Water Code § 13000 et seq.] was in fact such a legislative scheme [*Modesto I, above*], the court identified certain principles which would govern its construction of the statute.

**Whether Defendant Created or Assisted in Creating Nuisance.** The first principle, which has "long been the law in California," is that "not only is the party who maintains the nuisance liable but also the party or parties who create or assist in its creation are responsible for the ensuing damages". Thus, "liability for nuisance does not hinge on whether the defendant owns, possesses or controls the property, nor on whether he is in a position to abate the nuisance; the critical question is whether the defendant created or assisted in the creation of the nuisance" [*Modesto I, above*].

**Law of Nuisance Could Not Serve As Surrogate for Products Liability.** The second principle was a limiting one. The court concluded that, "while liability for nuisance is broad, . . . it is not unlimited" and the "*City of San Diego [v. U.S. Gypsum Co.* (1994) 30 Cal. App. 4th 575 [35 Cal. Rptr. 2d 876]] established one important limitation." The court stated that in that case the city sued the manufacturers, distributors, and suppliers of asbestos-containing building materials that had contaminated the city's buildings, seeking recovery, inter alia, under a nuisance theory for the costs of abatement. The court concluded that the city could not maintain an action based on nuisance where it is seeking recovery for a defective product, because it would convert almost every products liability action into a nuisance claim. The court affirmed the summary adjudication in favor of the defendants because it was "a products liability action in the guise of a nuisance action." The court agreed with that conclusion, expressing the view that the law of nuisance "is not intended to serve as a surrogate for ordinary products liability" [*Modesto I, above*].

The court then proceeded to the next question: Whether, in this case, "the Polanco Act claims fall within the realm of nuisance or of products liability"; that is, "has city presented evidence that the defendants assisted in the creation of a nuisance, or *only* that they produced or supplied defective products?" (italics added by the court). The court first looked to *Selma Pressure Treating Co. v. Osmose Wood Preserving Co.* [(1990) 221 Cal. App. 3d 1601*, disapproved on other grounds in Johnson v. American Standard, Inc.* (2008) 43 Cal. 4th 56]. In *Selma, above*, the state and the Regional Water Quality Control Board sued the operators of a wood treatment facility, alleging that they improperly disposed of hazardous waste. The plaintiffs sought, among other things, damages flowing from a nuisance. The defendants cross-complained against the company that designed the wood treatment

technique, installed the equipment, provided training and made recommendations on operations that resulted in the wood-treating chemicals being deposited into soil overlying an aquifer. Other cross-defendants were chemical suppliers that provided "assistance and advice" and knew or should have known that the disposal could threaten the safety of the water supply, but failed to warn of those risks. The court concluded that both were potentially liable as persons who created or assisted in creating the nuisance. The designer and installer could be liable because it had direct involvement in creating the disposal system by which the waste products were discharged into an unlined dirt pond, which could threaten the water supply. The court also held that the chemical companies could be held liable if the plaintiffs proved their allegations that "the [operators] were foreseeable users; disposal of the chemical residue was a foreseeable use of the product; the chemical companies knew or should have known of the dangers of improper disposal of the chemicals; the owners did not know of those dangers; the companies failed to warn of the dangers; and that failure to warn was a substantial factor in causing the damage. [*Selma, above,* 221 Cal. App. 3d 1601, 1621–1624)" [*Modesto I, above*].

In *Modesto I, above*, the court agreed with the first conclusion—"that those who create or assist in creating a system that causes hazardous wastes to be disposed of improperly, or who instruct users to dispose of wastes improperly, can be liable under the law of nuisance." Citing the plaintiffs' evidence that some of the defendants instructed the drycleaners to set up their equipment in a way that water containing PCE would be discharged directly into drains and sewers, and other defendants "gave dry cleaners instructions to dispose of spilled PERC on or in the ground," the court concluded that, "these kinds of affirmative acts or instructions could support a finding that those defendants assisted in creating a nuisance, and therefore would defeat a summary adjudication motion on the *Polanco Act* cause of action."

Defendants argued that liability should be limited to those who "controlled either the discharge activity or the premises where the discharge occurred" citing to a number of State Water Resources Control Board decisions. The court rejected that argument because the board's decisions did not address "the responsibility of a party that *instructs* users to dispose of hazardous wastes in an unsafe manner or a party that *creates* a system that would result in improper disposal of hazardous wastes" [*Modesto I, above*]. The court also pointed out that the state board has concluded that even a relatively minor contribution to a discharge may support a finding of responsibility, citing *In re County of San Diego* (Feb. 22, 1996) State Water Resources Control Board Order No. WQ 96-2 [1996 Cal. Env Lexis 3].

At the other end of the spectrum, the city argued that liability for nuisance could be fixed by proving only that defendants manufactured and sold solvents to drycleaners with knowledge of the hazards of those substances and without alerting the drycleaners to proper methods of disposal. The court rejected that contention as well. It reasoned that "failure to warn [is] not an activity directly connected with the disposal of solvents. In our view, such behavior is analogous to the manufacture, distribution, and supplying of asbestos-containing materials in *City of San Diego [v. U.S. Gypsum Co., supra, 30 Cal. App. 4th 575]*; it does not fall within the context of nuisance, but is better analyzed through the law of negligence or products liability, which have well-developed precedents to determine liability for failure to warn" [*Modesto I, above*].

Accordingly, the court held that "those who took affirmative steps directed toward the improper discharge of solvent wastes—*for instance*, by manufacturing a system designed to dispose of wastes improperly or by instructing users of its products to dispose of wastes improperly—may be liable under [Water Code section 13304, subdivision (a)] but those who merely placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal are not liable under that section of the [code]" (italics added by the court). The court issued a writ of mandate directing the superior court to reconsider defendants' motion for summary adjudication of the Polanco Act and negligence per se claims "in accordance with the views expressed herein" [*Modesto I, above*].

**Defendants' Interpretation of *Modesto I* Rejected.** The court stated that on remand, the trial court reconsidered the matter, and issued a tentative decision denying the motion. The court explained: "With regard to the solvent manufacturer defendants, the Court of Appeal instructed that simply placing this material in the stream of commerce without warnings would not be enough, . . . but if there were affirmative steps taken by the solvent manufacturers directed towards improper discharges, then that would be enough." The trial court found that plaintiffs produced sufficient evidence to raise fact questions as to whether the manufacturers would be responsible parties under the Polanco Act. Seeking to convince the court otherwise, defendants argued that the *Modesto I* opinion addressed "only the first question in the chain of causation that has to be established"; plaintiffs had to also prove, they contended, that the instructions were received by the drycleaners, that the drycleaners acted in response to those instructions, and that their actions in response to the instructions were actions that caused the contamination. It was defendants' position that because *Modesto I* required an "affirmative step . . . directed toward improper discharge," this was a "special circumstance . . . where the Court of Appeal did not accept the idea that substantial

factor itself was sufficient for liability under nuisance or under the Polanco Act." Hence, defendants argued, instead of the standard substantial factor causation test, plaintiffs had to prove the instruction got to the drycleaner, "the dry cleaner looks at it, acts on it and causes the contamination."

The court noted that the trial court pointed out, however, that the question before it was not whether it could make findings on causation, but only whether there were sufficient facts that would "rationally allow a juror" to make such findings. Rejecting defendants' arguments, the trial court affirmed its tentative ruling, concluding that, under the standard articulated in *Modesto I*, a reasonable juror could find a violation of the Polanco Act based on the evidence before the court.

The court found that defendants renewed their *Modesto I* causation theory at closing argument in the first Polanco Act trial (phase II). Relying on the word "cause" in the Water Code, defendants argued: "Causation is built right into this. So in order to find liability under that Water Code section, not only do you have to start with an instruction that's improper, you have to get it to the site, somebody has to follow it, a release has to occur as a result, and that release has to cause the contamination that's at issue." Defendants insisted that this was precisely what *Modesto I* required.

The court noted that the trial court again rejected defendants' interpretation of *Modesto I.* The judge identified the "critical inquiry" as "whether the defendants' [PCE manufacturers'] actions, taken as a whole, 'created or assisted in the creation of the nuisance.'" As that court explained, "the appellate Court cited the giving of 'instructions' as an example of something that may 'assist in the creation' of a nuisance, but did not suggest that this is the only conduct that would qualify." The court noted that *Modesto I* identified one limitation on the otherwise broad liability for nuisance, that is, that the law of nuisance is not intended to serve as a surrogate for ordinary products liability. It then reasoned: If "'defendants who fail to warn of the dangers of improper disposal of hazardous materials but give no guidance or instructions pertaining to that disposal [pose] a more difficult question' [citing *Modesto I*]," then "defendants who *do* give 'guidance or instruction' do *not* pose a difficult question—they are covered by the Act."

The court noted that the trial court then quoted the language by which it would be guided. "'Those who took affirmative steps directed toward the improper discharge of solvent wastes—*for instance* by manufacturing a system designed to dispose of wastes improperly or by instructing users of its products to dispose of wastes improperly—may be liable under the statute, but those who *merely* placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal are not liable under that section of the [Water Code].' *City of Modesto, 119 Cal. App. 4th at 43* (emphasis added)." Applying that standard, the court recited its findings: "The manufacturer defendants in this case did more than simply place their PCE products into the stream of commerce without adequate warnings. Because their PCE products were fungible, the manufacturers competed in the marketplace by touting their expertise, professionalism, and individualized services. Their customers were relatively high volume businesses that used substantial amounts of PCE on a daily basis, and the manufacturers encouraged these businesses to rely on the manufacturers' advice, instructions and expertise. The manufacturers published newsletters to their customers, provided technical literature to their customers, and trained sales personnel to promote reliance by the customers on the manufacturers' expertise. The evidence included numerous examples of manufacturer instructions, advice, and guidance to customers to discharge separator water, which the manufacturers knew to contain PCE, into sewers, as well as to release waste PCE onto the ground. These kinds of recommendations were repeatedly made and reinforced by the manufacturers over the course of many years and led to the recommended PCE waste handling and disposal practices being generally followed by the customers. The effect of the manufacturers' recommendations, considered both individually and in combination, was that risky waste handling and disposal practices became the norm among customers." The court noted the fact that a similar course of conduct had been found by the jury in phase I to support liability for the creation of a nuisance at one of the drycleaner sites.

The court found, in addition, that at the time the manufacturers were holding themselves out as experts, they knew that PCE could cause groundwater contamination; that employees of a PCE distributor company visited a drycleaning establishment over the course of two decades and during those visits poured PCE from "titration tests" into the drain; and that the manufacturers delayed too long in correcting their communications to their customers concerning the improper waste handling and disposal practices. "The record, taken as a whole," the court concluded, "establishes that the manufacturer defendants are 'responsible parties' under the Polanco Act . . . because they 'created or assisted in the creation of a nuisance.'"

**Defendants' *Modesto I* Causation Theory Accepted.** The court stated that the trial court's rejection of defendants' causation theory in the first Polanco Act trial did not deter them from making the same argument in the second Polanco Act trial, presided over by a different judge. Describing themselves as "remote manufacturers," defendants again characterized the *Modesto I* opinion as setting

forth a "specific instruction test," which necessitated a showing of "an affirmative recommendation or instruction by a defendant to a dry cleaner that in turn was relied upon . . . by the dry cleaner to discharge material to the environment which in turn caused the contamination which occurred here." "It's not only whether affirmative instructions existed during that timeframe, . . . it's whether some dry cleaner came into court and said I read that instruction, and I relied on that instruction, and then whether an expert said that conduct caused the contamination we're talking about today."

The city, for its part, urged the court not to focus on the manufacturers' disposal instructions in isolation but to look at the totality of defendants' conduct over decades, in addition to the provision of instructions, to determine whether all of their activities in the marketplace, including a failure to take corrective action, could be found to have assisted in creating the PCE pollution, citing as an example, the findings of the judge in the phase II trial. The city argued that the correct inquiry was "what did defendants do *in addition* to placing PCE into the stream of commerce without adequate warnings that would make this case more than simply a failure to warn case, and therefore subject defendants to Polanco Act . . . liability?"

The court found that in the end, the trial court agreed with defendants. Although the court accurately summarized the reasoning and holding of *Modesto I*, it interpolated into that opinion the proof requirements which defendants had championed. Noting that the Polanco Act implicitly requires proof that "defendant's conduct *caused* the discharge in question," the court observed that *Modesto I* did not spell out the "kind of factual showing a plaintiff must make in order to prove that a solvent manufacturer's improper disposal instruction(s) *caused* a release of PCE. (Italics added.)" It nevertheless decided that specific proof requirements "follow" from *Modesto I*'s holding: "First, the user must have received the instruction(s). Second, the user must have disposed of hazardous waste in a manner consistent with the instruction(s). Third, the contamination for which cost recovery is sought under the Act must have been caused by a release mechanism contained in the instruction(s) and employed by the user, . . . since the release could have been caused by an operator acting independently of a defendant's instruction(s) or by some other event unrelated to the actions of a defendant. Finally, with respect to the release of PCE, the user must have purchased the defendant's solvent, since the manufacturers in this case only provided PCE-related information to their customers and end users."

The court noted that the trial court specifically rejected the city's argument that the court should consider whether other conduct—including whether defendants touted their expertise and individualized services with respect to PCE and its disposal; whether defendants promoted reliance by their customers on defendants' expertise; and whether, once defendants knew that PCE could contaminate groundwater, they failed to send out corrective information about disposal practices—to determine whether defendants were responsible parties. The court concluded that *Modesto I* neither required nor even suggested that these factors were relevant. The court specifically rejected consideration of "whether Defendants' actions, taken as a whole, created or assisted in the creation of a nuisance." The court explained, this interpretation of *Modesto I* was incorrect.

***Modesto I* Did Not Address Causation.** The court stated that the trial court's focus on the provision of disposal instructions to the exclusion of all other potentially relevant factors was not supported by the holding of *Modesto I.* As the judge in phase II observed, *Modesto I* held that "those who *merely* placed solvents in the stream of commerce without warning adequately of the dangers of improper disposal are not liable," but that those who take "affirmative steps" toward the improper discharge of solvents could be liable. *Modesto I* did not preclude consideration of any other factors that might be relevant to the question of whether such a defendant "assisted in the creation of [a] nuisance."

The court further stated, *Modesto I* simply did not address the issue of how causation must be proven. Defendants argued that *Modesto I* required proof of a special "chain of causation," demonstrating by *direct* evidence that a specific disposal instruction was received, read, and acted on by a specific drycleaner, which act caused contamination at a specific site. In support, they cited and emphasized phrases in the *Modesto I* opinion indicating that those whose involvement in discharges was "remote and passive" or who had "no active involvement" in activity that was "directly connected with the disposal of solvents" could not be liable under the Polanco Act. But these phrases merely explained how the court construed the term "responsible party" in the statute; they said nothing about proof of causation. As the trial court correctly observed, the *Modesto I* opinion did not address the quantum or nature of proof required to prove the causation element of liability. In short, nothing in the opinion either stated or implied that any unusual or special causation test would apply.

**Substantial Factor Test of Causation.** Defendants also contended, however, that the substantial factor causation test required this same heightened standard of proof. Defendants began by reciting some basic legal principles, such as, that liability cannot be premised on a mere possibility of causation, nor on probabilities that are, at best,

evenly balanced, nor on speculation or conjecture, citing *Saelzler v. Advanced Group* 400 [(2001) 25 Cal. 4th 763] and *Merrill v. Navegar, Inc.* [(2001) 26 Cal. 4th 465]. The court stated that no one disputed these principles. But this case was not akin to *Saelzler*, where the plaintiff could not prove that additional security guards in a 300-unit, 28-building complex would have prevented a criminal assault, or *Merrill*, where the plaintiff provided no evidence either "direct or circumstantial" that the promotion and marketing of a firearm by a manufacturer bore any causal relation to the purchase and use of that firearm by an individual to kill various victims. Defendants nevertheless argued that the principles enunciated in *Saelzler* and *Merrill* required, in this case, direct evidence linking a given instruction to a specific drycleaner who would testify that he read and followed it, thence to expert testimony proving the drycleaner's act was the mechanism of contamination. Otherwise, they argued, the evidence supported only the possibility that a defendant contributed to the contamination in a particular location. For example, defendants contended that even the conformance of a drycleaner's disposal practices to a defendant's instructions was not sufficient to prove causation because "such happenstance does nothing more than allow for the 'mere possibility' that the defendant's instruction had something to do with the drycleaner's conduct." The court disagreed that the substantial factor test of causation requires the kind of incontrovertible linkage proposed by defendants.

**Direct Proof of Every Link in Chain of Causation Was Not Required.** The court noted that "although a finding of causation may not be based on mere speculation or conjecture, such finding may be predicated on reasonable inferences drawn from circumstantial evidence" [*Smith v. Lockheed Propulsion Co.* [(1967) 247 Cal. App. 2d 774]. The court stated that direct proof of each link in a chain of causation was not required. "Circumstantial evidence of sufficient substantiality" from which reasonable inferences could be drawn would support a finding of causation in fact [*Smith, above*]. "Causation may in many instances be inferred from evidence that does not itself constitute direct evidence of reliance on an individual basis." "Just as factors such as the magnitude and temporal proximity of the unlawful conduct might evidence or negate the existence of fraud, so too might many of the same factors influence the extent to which an inference of causation is appropriate" [*State ex rel. Wilson v. Superior Court* (2014) 227 Cal. App. 4th 579].

Defendants cited *Viner v. Sweet* [(2003) 30 Cal. 4th 1232] for the propositions that the substantial factor test subsumed the traditional requirement of "but for" causation, and that there could be no liability if any link in the chain of causation was missing. The court stated that these statements were accurate, but did not answer the question posed—whether defendants' "specific instruction test" was the only means of proving that defendant's conduct was a substantial factor in causing the PCE pollution. In *Viner*, the trial court ruled that the usual test of causation for attorney malpractice—that the plaintiff's outcome would have been better but for the attorney's negligence—did not apply to malpractice in the performance of transactional work. The court of appeal affirmed, holding that "a plaintiff suing an attorney for transactional malpractice need not show that the harm would not have occurred in the absence of the attorney's negligence." The California Supreme Court disagreed. The court of appeal effectively removed causation from the liability matrix, and that was error, the court concluded.

The court noted that in *Viner* the high court found no reason to except transactional malpractice from the traditional "but for" standard applied in malpractice cases. It went on, however, to caution that "the plaintiff need not prove causation with absolute certainty. Rather, the plaintiff need only '"introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result."'" And "the plaintiff may use circumstantial evidence to satisfy his or her burden."

So, the court stated, for example, in *Wilson*, that the plaintiff brought a qui tam action against a drug company (BMS) alleging it provided lavish gifts to physicians and members of formulary committees to induce them to prescribe BMS's drugs. The plaintiff alleged that "as a result of kickbacks BMS provided to them," the physicians and formulary committees selected BMS's drugs, and submitted insurance claims therefor, in violation of a statute prohibiting the employment of persons to procure patients to obtain insurance benefits. The trial court granted summary adjudication on the following question: Assuming BMS provided an "item or service" of value to a doctor, and the doctor thereafter prescribed BMS's drugs, is the statute violated "absent proof that the item or service caused the prescription?" The trial court ruled that it was "not enough to prove that the unlawful conduct was a substantial factor resulting in the prescription."

The court of appeal reversed. It concluded that the trial court erred when it ruled that the plaintiffs must establish not only that BMS's conduct was a substantial factor resulting in the prescriptions, but also that it was *essential* to the result, i.e., "that if the prescription would have been written even without BMS's unlawful inducement, the unlawful conduct cannot be found to have caused the prescription and claim." The appellate court observed that the trial court's standard would make proof of an unlawful claim almost impossible to establish. The court

also noted that but-for causation was not required where there could be, as in that case, independent concurrent causes [*Wilson, above*].

Similarly, the court stated that in *Stevens v. Parke, Davis & Co.* [(1973) 9 Cal. 3d 51], the plaintiffs' family member died after her physician prescribed a drug manufactured by Parke, Davis, due to a condition induced by the drug. In addition to suing the prescribing physician, the plaintiffs successfully sued Parke, Davis for "overpromoting" the drug, and "watering down" the warnings concerning the drug's link to the fatal condition. In the California Supreme Court, the drug company argued its overpromotion and watered-down warnings were not proven to be the cause of death because the prescribing doctor admitted he was aware that the drug had been linked to the condition and that its "prolonged administration carried some danger of fatality." The doctor also testified that he obtained that information from articles in medical journals and from discussions with fellow physicians, and he could not remember specific instances in which he received any information, promotional or otherwise, directly from Parke, Davis, although he received visits from drug salesmen and read journals which contained advertisements for the drug.

The court noted that the *Stevens* court affirmed the jury's verdict. It concluded that there was "adequate circumstantial evidence in the record . . . to support a reasonable inference by the jury that [the physician] was induced to prescribe the drug for [the decedent] because of Parke, Davis' overpromotion. Like many others of the profession, he had been exposed to the promotional tactics employed by Parke, Davis. It is reasonable to assume that the company's efforts consciously or subconsciously influenced him" [*see also Toole v. Richardson-Merrell, Inc.* (1967) 251 Cal. App. 2d 689]. The court held that these authorities supported the conclusion here that direct proof of every link in the chain of causation, on a site-by-site and instruction-by-instruction basis, was not required. Liability can be proven by sufficient circumstantial evidence that would allow a reasonable fact finder to find that all of defendants' conduct—to include affirmative steps toward the discharge of toxic wastes—was a contributing factor to the pollution. As the court noted, "the State Board has concluded that even a relatively minor contribution to a discharge may support a finding of responsibility" [*Modesto I, above*].

The court stated that as in *Stevens*, the absence of proof that a drycleaner consciously followed an improper disposal instruction—or even a statement that a drycleaner did not rely on a disposal instruction—did not ipso facto break the chain of causation. To be sure, it was the drycleaners and not the manufacturers who discharged the PCE. But "'"the substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical." Thus, "a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor," but a very minor force that does cause harm is a substantial factor'" [*Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal. App. 4th 1103].

Defendants also contended that product identification was, itself, always required for liability because one manufacturer could not be held liable for the injury resulting from another manufacturer's product [*O'Neil v. Crane Co.* (2012) 53 Cal. 4th 335]. There are exceptions, however, and one was where "the defendant's own product contributed substantially to the harm—or because the defendant participated substantially in creating a harmful combined use of the products." Defendants, in any event, were not contending that there was no product identification at the phase IV sites; they were contending that it was not proven by direct evidence that during the years their product was provably sold at any phase IV site, an improper disposal instruction was disseminated. Connecting those dots was one way to prove causation; but other evidence, both direct and circumstantial, could also demonstrate that the manufacturers' instructions and other conduct were substantial factors in causing the pollution. Thus, the court concluded, in keeping with common law nuisance principles [*Modesto I, above*], "in the ordinary case, the liability . . . arises because one person's acts set in motion a force or chain of events resulting in the invasion. The acts may be a direct and immediate cause of the invasion, . . . or they may be an indirect cause of the invasion." [Rest.2d Torts § 824, com. B].

Finally, defendants argued that permitting abatement liability to be imposed on manufacturers without proof of each causal link—"that a specific affirmative instruction was received, read, and acted on by a particular drycleaner, and then resulted in contamination at a given site"—would be adverse to public policy, citing *Ferguson v. Lieff, Cabraser, Heimann & Bernstein* [(2003) 30 Cal. 4th 1037] and *O'Neil, above*. The court stated neither these authorities nor any such policy issues control here.

The court stated that in *Ferguson*, the high court held that allowing plaintiffs in a malpractice action to recover, as compensatory damages, the punitive damages their attorneys failed to recover from the tortfeasor, would violate public policy in various ways. Primarily, it would contravene the entire purpose of punitive damages which was not to compensate the plaintiff but to punish the tortfeasor and deter him or her from similar egregious conduct. In addition, it would exact too great a social cost because it would hinder the courts' ability to manage and resolve mass

tort claims, increase the cost of malpractice insurance, and discouraged the use of mandatory non-opt-out class actions for punitive damages. The court stated that none of these considerations applied here.

The court further stated that in *O'Neil*, the plaintiff had not been exposed to any asbestos-containing product manufactured or sold by the defendant, but only to the products of others used to replace, many years later, the packing and gaskets in the defendant's pumps and valves. The court declined to impose liability because a manufacturer could not "reasonably be expected to foresee the risk of latent disease arising from products supplied by others that may be used with the manufacturer's product years or decades after the product leaves the manufacturer's control." The court further reasoned that imposing a duty on such an attenuated basis would not be consistent with public policy, not only because the manufacturer's conduct was lacking in moral blame, but also because such a duty would not be likely to prevent future harm, and it was "doubtful that manufacturers could insure against the 'unknowable risks and hazards' lurking in every product that could possibly be used with or in the manufacturer's product." The court held that, again, no such concerns were at play here.

Defendants cited to the principle that "'proximate cause "is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct"'" [*Ferguson, above*]. But, the court stated, defendants did not apply that principle to the facts of this case nor to their causation argument. Defendants asserted no policy reasons for restricting their liability here; instead, they merely repeated their claim that *Modesto I* intended to impose this "restriction on nuisance liability." However, the court rejected defendants' interpretation of *Modesto I*, and it provided no support for defendants' policy argument. If anything, the social costs of limiting the responsibility of chemical manufacturers under defendants' formulation would fall far too heavily on the victims of the pollution by setting an almost insurmountable standard for proving liability [*cf. Wilson, above*].

The court stated that the measure of proof for causation should be no different here than that applied in any other similar action. As noted, the plaintiff need only "introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result" [*Viner, above*; *accord People v. ConAgra Grocery Products Co.* (2017) 17 Cal. App. 5th 51].

**HSAA and CERCLA Liability Standards Did Not Apply.** The city advanced an alternative argument to support causation. It contended that the Polanco Act incorporated by reference CERCLA's "scope and standard of liability" [Health & Safety Code § 33459.4 (c)] and therefore, under CERCLA case law, defendants bore the burden of proving that they did not cause the release that triggered the response costs, citing *U.S. v. Alcan Aluminum Corp.* [(2d Cir. 1993) 990 F.2d 711]. The court stated that the trial court correctly rejected that argument. As was explained in *Redevelopment Agency v. Salvation Army* [(2002) 103 Cal. App. 4th 755], Health & Safety Code § 33459.4, part of the Polanco Act, incorporated CERCLA's *liability* standards, "to wit, strict liability regardless of knowledge or intent, joint and several liability, and retroactive liability." However, the court stated that these liability standards did not negate or supplant the requirement to prove causation. As explained by the court, the Polanco Act incorporates by reference the HSAA/CERCLA categories as one set of "responsible parties" but plaintiffs did not contend that defendant manufacturers fell within any of those categories. The shifting burden of proof found in those schemes only applied in that context [*see Orange County Water Dist. v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal. App. 5th 252; *see also Asarco LLC v. NL Indus.* (E.D. Mo. 2015) 106 F. Supp. 3d 1015]. The court concluded that the HSAA and CERCLA liability standards did not apply here.

Defendants argued and the trial court concluded that *Modesto I* set up a special proof standard under the Polanco Act, that is, that causation could be demonstrated *only* by proof that a specific disposal instruction was received by a drycleaner who read, relied on and followed the instruction and by that act caused the contamination, to the exclusion of any other evidence that might be relevant to prove defendants assisted in creating the pollution [emphasis added by the court]. The court stated that this was not a fair reading of the opinion. *Modesto I* did not set limits on how *causation* was to be proven; it articulated a liability standard that required, as a threshold matter, that the provider of the product be something more than a mute, passive supplier. "Those [manufacturers] who took affirmative steps directed toward the improper discharge of solvent wastes—for instance, . . . by instructing users of its products to dispose of wastes improperly—may be liable under [that statute]" but those who merely placed solvents in the stream of commerce without warning about the dangers of improper disposal are not liable [*Modesto I, above*]. That formulation did not change the causation analysis, which was, considering the evidence as a whole, more likely than not that defendants' improper instructions, and any other relevant conduct, were a substantial factor in causing the pollution. Because the trial court imposed a far more stringent proof of causation requirement in the phase IV trial, the court vacated that portion of the judgment.

The court stated that under the substantial factor test, there might or might not be sufficient evidence to support liability for the phase IV sites but that question was not presented before the court, and hence would have to be resolved on remand.

# WILDLIFE PROTECTION AND PRESERVATION

## Cases

### Insufficient Evidence to Warrant Delisting of Coho Salmon South of San Francisco

*Central Coast Forest Assn. v. Fish & Game Com.*
No. C060569, 3d App. Dist.
18 Cal. App. 5th 1191, 2018 Cal. App. LEXIS 8
January 5, 2018

**A petition to delist coho salmon south of San Francisco from the list of endangered species in California was properly denied because it did not contain sufficient scientific evidence to justify the delisting, considered in light of the Department of Fish and Wildlife's scientific report and expertise. The coho salmon museum specimens collected in 1895 from four adjacent streams in Santa Cruz County proved coho salmon existed in streams south of San Francisco before hatcheries. The court agreed with the Fish and Game Commission that a portion of an endangered species may be delisted only if it can be defined as a separate species, subspecies, or evolutionary significant unit that is not endangered.**

**Facts and Procedure.** Petitioners, Central Coast Forest Association and Big Creek Lumber Company, petitioned the Fish and Game Commission to delist coho salmon south of San Francisco from the list of endangered species in California. Petitioners owned and harvested timber from lands in the area of the coho salmon spawning streams in the Santa Cruz Mountains. In 1993, the Santa Cruz County Fish and Game Advisory Commission filed a petition requesting the listing of coho salmon in Scott and Waddell Creeks in Santa Cruz County south of San Francisco as endangered. In 1994, the commission designated the coho salmon as a candidate species [Fish & Game Code § 2068]. It provided notice thereof to Big Creek. The Department of Fish and Wildlife conducted a status review and prepared a rulemaking file for the commission setting forth scientific information showing that the coho salmon was an endangered species and recommending that it be listed as endangered.

The commission accepted the recommendation and enacted a rule listing the coho salmon as endangered, effective December 31, 1995 [14 Cal. Code Reg. § 670.5(a)(2)(N)]. The commission's determination stated it was "based on the best available scientific information regarding the distribution, abundance, biology and nature of threats to coho salmon south of San Francisco Bay." The commission found that "coho salmon numbers south of San Francisco Bay have declined over 98 percent since the early 1960's and currently were restricted to one remnant population in Waddell Creek, one small naturalized (hatchery-influenced) population in Scott Creek, and a small hatchery-maintained, non-native run in the San Lorenzo River, Santa Cruz County. There is minimal possibility of successful natural expansion of the remnant Waddell and Scott Creek populations to neighboring drainages due to the functional extinction of two of the three brood year lineages, inadequate numbers of adult coho to naturally produce the necessary founder populations for successful recolonization of streams, loss of genetic and population viability, and general lack of secure adjacent suitable habitat."

The department recommended recovery measures. "The first priority should be to set minimum flows necessary to sustain the coho salmon on Scott and Waddell Creeks. . . . Following the establishment and maintenance of minimum flows, restoration of coho salmon habitat should be initiated to produce enough habitat to allow for more juvenile coho to be reared in Scott and Waddell Creeks. Instream habitat restoration in Scott and Waddell Creeks is a viable option [because] County and State regulations, land ownership patterns, and improvement in present land use practices can bring about better control of accelerated erosion in the watershed."

The commission published a notice of its determination and distributed it to a list of interested persons including Big Creek.

Five years later, in July 2000, the commission received a petition from the Salmon and Steelhead Recovery Coalition to add coho salmon from the area north of San Francisco Bay to the Oregon border to the list of endangered species. In November 2000, the department recommended to the commission that it accept the petition for consideration. In April 2001, the commission held a hearing and took testimony from numerous persons including a representative of Big Creek. In April 2002, the department submitted a status report identifying two groups of coho salmon, one from Punta Gorda to the Oregon border, referred to as the Southern Oregon/ Northern California Coasts evolutionary significant unit

(SONCC ESU) and the other from south of Punta Gorda to the San Lorenzo River in Santa Cruz County, referred to as the CCC ESU.

The department based its determination on the scientific analysis of the reproductive isolation and genetic differences between the two groups. In April 2002, the department submitted a written report on the status of the species to the commission as required by Fish & Game Code § 2074.6. On May 28, 2002, the department recommended to the commission that it "list coho salmon north of Punta Gorda (Humboldt Co.) as a threatened species and coho salmon south of Punta Gorda (Humboldt Co.) . . . as an endangered species." Coho salmon south of Punta Gorda were joined in the report with coho salmon south of San Francisco as the CCC ESU. On August 30, 2002, the commission found "that coho salmon north of Punta Gorda and coho salmon south of Punta Gorda warrant listing as [respectively] threatened and . . . endangered," but delayed rulemaking for one year while the department prepared a recovery plan. On February 11, 2004, the commission proposed a rule to "add the populations of coho salmon between San Francisco Bay and Punta Gorda, California, to the [California Code of Regulations, title 14,] Section 670.5 list as an endangered species." On February 25, 2004, the commission staff issued a notice of intent to begin the "rulemaking process to add coho salmon north of Punta Gorda and coho salmon south of Punta Gorda to the list [respectively] of threatened and endangered species."

On August 5, 2004, the commission amended the 1995 regulation that listed coho salmon south of San Francisco as endangered by joining them with coho salmon north of San Francisco. The rule, to be found at 14 Cal. Code Reg. § 670.5(a)(2)(N), declares that the following species are endangered: "Coho salmon . . . south of Punta Gorda (Humboldt County), California." The context of the regulation made it clear that south of Punta Gorda includes the streams south of San Francisco, the subject of the 1995 final determination of the commission. The court of appeal upheld the 2004 listing in *California Forestry Assn. v. California Fish & Game Commission* [(2007) 156 Cal. App. 4th 1535].

Although Big Creek was given notice of the 1995 proceeding and participated in the 2004 proceeding it did not seek review of the commission's findings in either matter pursuant to Code Civ. Proc. § 1094.5. Rather, petitioners initiated a collateral attack on the listing by filing a separate, delisting petition asking that the commission redefine the southern boundary of the CCC ESU to remove coho salmon in streams south of San Francisco from the rule listing endangered species.

Petitioners' delisting petition was filed on June 17, 2004, two months before the commission's final action in the 2004 proceeding. It stated that "the petitioners hereby request that the California Fish and Game Commission redefine the southern boundary of the Central California Coast coho salmon evolutionary significant unit [ESU] to exclude coastal waterways south of San Francisco, thereby delisting coho salmon south of San Francisco from the list of endangered or the list of threatened species." The petition made it clear that it was challenging the facts underlying the 1995 decision placing the coho salmon on the list of endangered species. It stated that "the status review prepared by the California Department of Fish and Game indicating whether the petitioned action is warranted must be based on the best scientific information available. The preponderance of previously unconsidered scientific and historical evidence presented herein clearly shows that the legal standard for listing under the California Endangered Species Act has not been met. Archeological evidence strongly supports the concept that coho salmon populations were not present prehistorically in coastal streams south of San Francisco. . . . Harsh environmental conditions for coho survival beyond the fringe of their range (south of San Francisco) prevented the establishment of permanent populations in this area. The scientific and historical record since the arrival of Europeans substantiates the absence of coho populations. In particular, professional ichthyologic surveys in the latter part of the 1800s report the absence of coho south of San Francisco." Further, "although no single scientific disciplinary source may be sufficient to conclude unequivocally that coho are or are not native south of San Francisco, the mutually consistent patterns disclosed independently by multiple scientific disciplines and historical records provide a preponderance of evidence. This same evidence also indicates that populations of coho salmon south of San Francisco are not an important component in the evolutionary legacy of the species. Most importantly, no petition or [department] status review presents any legitimate or compelling evidence to the contrary. Therefore, coho salmon populations south of San Francisco do not constitute nor are part of any evolutionary significant unit."

Petitioners further asserted that the department's "status reviews of coho salmon in 1995 and 2002 . . . were undertaken without benefit of the information in [their] 2004 Petition." The 2004 petition explains that "in order to qualify for listing under the [CESA], a species or subspecies must be native and represent an important component in the evolutionary legacy of the species. Additionally, the status review prepared by the [department] indicating whether the petitioned action is warranted must be based on the best scientific information available. The preponderance of previously unconsidered scientific and historical

evidence presented herein clearly shows that the legal standard for listing under the [CESA] has not been met." Petitioners asserted that "scientific and historic research unequivocally establishes that there have never been permanent colonies of native coho in these streams. The artificially introduced and hatchery maintained coho populations south of San Francisco are not native, carry no important genetic heritage and do not qualify for listing as an ESU or part of an ESU under the CESA."

In February 2005, the commission considered the delisting petition and denied its consideration on the ground that it did not contain sufficient scientific information that delisting should have warranted. It ratified the denial in March 2005, and published a notice of its findings. Petitioners challenged the rejection of the petition in the superior court which remanded the matter to the commission in November 2006. The commission again denied the petition in March 2007, and filed a notice of its findings and statement of reasons in April 2007. The commission joined issue with petitioners in considering the petition pursuant to the threshold test of Fish & Game Code § 2072.3, whether the petition contained sufficient information to indicate that the petitioned action could be warranted. The commission said that "one of the most obvious omissions in the petition is a failure to include specific information that the species in question is 'no longer threatened by any one or any combination of the . . . factors'" set forth in 14 Cal. Code Reg. § 670.1(i)(1)(A) [14 Cal. Code Reg. § 670.1(i)(1)(B)]. This is the regulatory standard for judging the substantive merits of a petition to delist a species.

The superior court again overturned the commission's decision and the commission appealed the resulting judgment. The court reversed the trial court, reasoning that a delisting petition was not appropriate to collaterally attack the commission's listing decision. The court held that a delisting petition must be directed to events that occur after the listing of a species. The Supreme Court disagreed, holding that a delisting petition may be based on new evidence that challenges an earlier listing decision by showing that the listed species does not qualify for listing [*Central Coast Forest Assn. v. Fish & Game Com.* (2017) 2 Cal. 5th 594]. The Supreme Court remanded the case back to the court to consider the merits of the appeal. The court reversed the judgment of the trial court.

**Evidentiary Standard Applied by Commission.** To be successful before the commission, petitioners were required to present "sufficient information to indicate that the petitioned action [i.e., delisting] may be warranted" [Fish & Game Code § 2074.2(e)(2)]. The court considered the evidentiary standard embodied in the above phrase, and concluded it means "that amount of information—when considered in light of the Department of Fish and Game's written report and the comments received—that would lead a reasonable person to conclude there is a 'substantial possibility' the [petitioned action] 'could' occur" [*Natural Resources Defense Council v. Fish & Game Com.* (1994) 28 Cal. App. 4th 1104]. "Substantial possibility" is something more than a fair argument, and something less than "more likely than not."

Thus, the phrase "may be warranted" means simply "may be justified" by the criteria set forth in the statute and implied from the scientific evidence submitted in support of the petition and evaluated by the department staff in the light of the department's scientific information and expertise. The court noted that the evidence is sufficient if it is credible and supports the petition, in this case delisting. In that sense, it must be worthy of rational and relevant consideration. The evidence related to the standard "may be warranted" definitionally, that is, it was an example of "may be warranted." Here, for example, the petition argued that the coho south of San Francisco could not be listed as endangered, because they were not native. As evidence of this criterion, the petition tendered archaeological, environmental, and historical evidence. This evidence would be sufficient to meet the "may be warranted" standard only if it were material to the criteria at issue, were credible, supported the petition, and, when weighed against the department's written report and any comments received, were strong enough to indicate that delisting could be justified.

In making its determination, "the commission takes evidence for and against [the petition], weighs it, and determines in its discretion what is essentially a question of fact" [*Natural Resources Defense Council, above*].The commission not only weighed the evidence, it evaluated the evidence, that is, determined whether the evidence was scientifically credible, reasonable, and reliable [*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal. 4th 105]. The commission's decision was a discretionary one.

The court noted that Fish & Game Code § 2076 provides that the commission's final decision is subject to judicial review under Code Civ. Proc. § 1094.5. The court determined that review of the commission's determination at this initial stage was also reviewed pursuant to Code Civ. Proc. § 1094.5 [*Natural Resources Defense Council, above*].

"Commentators have characterized CESA's listing and delisting process as 'quasi-judicial,' finding the Commission's 'wide discretion to make listing determinations similar to a judge's decision-making role in a courtroom. [Fn. omitted.]' (Dwyer & Murphy, *Fulfilling the Promise: Reconsidering and Reforming the California Endangered Species Act* (1995) 35 Nat. Resources J. 735, 745; see also

Kelly & D'Angelo, *Near Extinction: California's Protection of Endangered Species* (Spring/Summer 1990) 10 Cal. Regulatory L. Rptr. 1, 4, 9.)" [*Mountain Lion Foundation, above*]. "It follows that [the agency decision] can be vacated only in the manner and upon the grounds that would justify the vacation of a judgment rendered by a court of record, and a mere error in the adjudication of a question of fact, not procured by fraud extrinsic or collateral to such question, is not a ground upon which it may be vacated, since, if it were, no adjudication of a question of fact would ever become final, so long as new evidence could be had" [*People ex rel. Skelton v. Los Angeles* (1901) 133 Cal. 338].

The court reviewed the commission's decision, rather than the trial court's decision [*Center for Biological Diversity v. Fish & Game Com.* (2008) 166 Cal. App. 4th 597]. The court's task in reviewing the commission's decision was to determine whether it was supported by substantial evidence in the record. "We look to the information adduced as a whole to determine whether that ultimate finding can be upheld as within the range of discretion accorded to the Commission" [*Center for Biological Diversity, above*]. The court did not reweigh the evidence, but indulged all presumptions and resolved all conflicts in favor of the commission's decision [*Donley v. Davi* (2009) 180 Cal. App. 4th 447]. The court stated that when conflicting inferences may be drawn from the evidence, it cannot substitute its own deductions for that of the commission.

The court noted that if the commission's decision was clearly justified by the weight of the evidence, it would of course affirm. If the balance of the evidence was unclear, it would also affirm the commission's decision. Only if the evidence clearly weighed against the commission's decision it would reverse [*Center for Biological Diversity, above*].

**Degree of Deference.** The court stated that because the matters at issue were technical and scientific in nature, it accorded the commission a degree of deference. The commission, in turn, had to accord substantial deference to the conclusions of the department staff, as indicated by the structure of CESA, and the fact that the commission's decision was ultimately a technical, scientific determination. The structure of the legislation governing the listing and delisting of species indicated the Legislature intended that the commission accord substantial deference to the recommendation of the department's staff.

The court stated that the department's substantial role in the process was consistent with the deference the court had to accord its determination when reviewing the commission's decision. Where the question at issue was one in which the administrative agency possesses some expertise, it was accorded some degree of judicial deference. "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is thus fundamentally *situational.* A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command." [*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1]. Judicial deference is more likely where "the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion." The court observed that the matters reviewed in this case fit this description.

The court stated that it must be mindful of the Legislature's express policy to "conserve, protect, restore, and enhance any endangered species or any threatened species and its habitat" [Fish & Game Code § 2052] and that the conservation, protection, and enhancement of endangered and threatened species and their habitat was a matter of statewide concern [Fish & Game Code § 2051.)

**Whether Coho a Native Species or Not.** The court stated that coho were a native species South of San Francisco because they inhabited the streams prior to known hatchery activity and there was no evidence that the current population was descended from out-of-state stock**.**

The court noted that CESA provides that an "Endangered species" is a "native species or subspecies . . . in serious danger of becoming extinct throughout all, or a significant portion, of its range" [Fish & Game Code § 2062]. Petitioners' argument that the fish were not native, reduced to its essential elements, was as follows: (1) coho were never native south of San Francisco because they never existed there prior to hatchery plantings; (2) coho were only in streams south of San Francisco currently because of nonnative hatchery plantings; and (3) the coho south of San Francisco were not a unique species, subspecies, or part of an ESU.

Petitioners offered four categories of evidence to show that coho were not native because they never existed south of San Francisco and were there now only because of hatchery plantings: (1) archaeological evidence; (2) historical accounts; (3) natural conditions that were too harsh to support coho south of San Francisco; and (4) evidence of extensive hatchery plantings.

**Archaeological Evidence Presented to Commission.** The court noted that petitioners' argument that coho were not native south of San Francisco was based in part on archaeological excavations of Native American refuse

middens south of San Francisco. The delisting petition stated that while other fish remains were discovered, no salmonid remains were found south of San Francisco. The petition relied heavily on studies performed by Kenneth Gobalet.

The department's report, looking specifically at Gobalet's studies as well as others that found no identifiable coho remains in Native American middens south of San Francisco, noted that the reason there was little evidence of coho remains was because of the difficulty of distinguishing between species of salmonid bones, because salmonid bones did not preserve well, and because the fish could have been prepared where they were caught. Even in areas where salmonid were plentiful, finding salmonid bones in archaeological middens was problematic. Gobalet stated that "because of this paucity of materials, far more sampling is required to use the archeological record as definitive evidence for the absence of coho salmon from this section of coast." Gobalet also warned that "we must . . . be cautious because the absence of evidence is not evidence of absence."

The commission also considered a 2006 study from an archaeological site at Año Nuevo State Reserve, which is south of San Francisco. As was pertinent here, the study found two salmonid vertebral centra, which one team of experts identified as two coho, and another expert identified as one coho and the other steelhead. The study stated that "the significance of these findings at SMA-18 is that they establish that coho salmon were native to the coastal streams of San Mateo and Santa Cruz Counties, as species spawning in streams near the site, e.g., Green Oaks Creek, Año Nuevo Creek, or Waddell Creek to the south of Año Nuevo. The latter is an especially likely source, because coho are found there today. The only definitive representatives of the salmonid family hitherto defined among archeological remains south of San Francisco have been steelhead rainbow trout . . . . This finding has important legal, conservation, and management implications in establishing coho as a native species."

At the hearing before the commission, petitioners' attorney argued that the coho bones found at Año Nuevo were most likely from fish caught in the ocean, rather from coastal streams. The attorney noted that since the petition was filed, the thesis of the petition turned into a scientific journal article. That article, published in the August 2006 publication of Fisheries magazine, was written by V.W. Kaczynski, a consulting fisheries scientist in Parkdale, Oregon, and Fabian Alvarado, a former staff researcher with Big Creek and a graduate student at Yale University [Kaczynski et al., *Assessment of the Southern Range Limit of North American Coho Salmon: Difficulties in Establishing Natural Range Boundaries* (Aug. 2006) Fisheries].

Gobalet, whose work petitioners relied upon, wrote a letter to Robert Briggs, director of Central Coast Forest Association. In the letter, Gobalet stated that the Kaczynski and Alvarado article "distorted the archaeological record north of San Francisco." Gobalet stated that the archaeological record north of San Francisco, which consisted of a single find in Del Norte County, was "paltry and up until recently the only documentation from coastal California."

Also before the commission was a draft article that was submitted to Fisheries magazine for publication. The article was written specifically as a rebuttal to the 2006 Kaczynski and Alvarado article. The authors were Peter Adams of the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries Service (NMFS); Louis Botsford of the University of California, Davis; Kenneth Gobalet; Robert Leidy of the United States Environmental Protection Agency (EPA); Dennis McEwan of department; Peter Moyle of the University of California, Davis; Jerry Smith of San José State University; John Williams, a fisheries consultant; and Ronald Yoshiyama of the University of California, Davis. This article, like Gobalet's letter, remarked on the paucity of archaeological evidence of coho anywhere in California. It stated that "to be accurate, Kaczynski and Alvarado (2006) should have reported that the archaeological record for coastal California showed no coho salmon south of Mendocino County and not just south of San Francisco." With the discovery of coho remains at Año Nuevo, the archaeological record of coho south of San Francisco is just as extensive as the record north of San Francisco.

**Commission's Findings.** The commission found that the petition "omitted a clear qualification" in the Gobalet article it cited as support. That article noted that "far more sampling is required to use the archaeological record as definitive evidence for the absence of coho salmon from this section of coast." The commission stated that Gobalet indicated that if coho south of San Francisco existed in the archaeological records at the same frequency as in the San Francisco Bay area, at least 7,506 elements would have to be recovered before a single coho would be found. The commission also found that salmonid bones did not preserve well due to higher porosity and because they were thinner than other bony fish, as stated by Gobalet. The commission relied on Gobalet's research indicating that coho remains were only documented at archaeological sites in the eastern San Francisco Bay and Del Norte County, despite the fact that the species was known to be native to Marin, Sonoma, Mendocino, and Humboldt Counties. The commission found that the coho remains discovered at Año Nuevo south of San Francisco "positively refutes petitioners' arguments that

archaeological remains of coho salmon have never been found south of San Francisco."

**Evidence of Historical Accounts Presented to Commission.** In support of its claim that coho never existed south of San Francisco, the petition offered two scientific historical statements and four historical newspaper articles.

The scientific statements were made by David Starr Jordan, a Stanford University ichthyologist. These two comments were: "Only the king salmon [Chinook] has been noticed south of San Francisco," and "Only the quinnat [Chinook] and the dog [chum] salmon have been noticed south of San Francisco." The first of these comments was published in 1892 and 1894. The second comment was published in 1904 and 1907. The petition admitted that there was little detailed natural history information prior to the late nineteenth century, and admitted the literature from the latter period "reveals a great deal of confusion over the different types of fish, and especially the different varieties of anadromous fish in California." The petition also cited a number of other indefinite comments made in the late nineteenth century that did not rule out the presence of coho south of San Francisco.

The petition also cited two newspaper and two magazine articles. One article from December 1905 anticipated the upcoming planting of Chinook and coho salmon eggs from Washington, and stated that "it is believed if raised and planted here they will frequent our streams and thus give us another valuable game fish." An article from 1906 noted that 50,000 coho eggs from Washington were being hatched, and stated that "if they thrive here as hoped they will prove a valuable addition to the piscatorial tribe of our Santa Cruz waters." An article from 1907 stated that "the hatching of the silver [coho] salmon is an experiment . . . with the hope of introducing into the streams of the county a new species of fish." A 1909 article stated that "the silverside [coho] salmon have been hatched at the Brookdale hatchery and much is expected from this fine fish. The first planting in this State was made in the San Lorenzo River and a number have been taken this fall making a run up that stream." Petitioners argued these articles indicated that coho were not native to the locale, but were introduced to offer a new type of game fish.

Regarding the absence of historical accounts of coho, the department noted that there were specimens of coho from Scott and Waddell Creeks in the California Academy of Sciences (CAS) ichthyology collection that were collected in 1895, years before the first known planting of hatchery coho south of San Francisco in 1906. Eleven coho were collected from Waddell Creek and four from Scott Creek on June 5, 1895. Two were collected from San Vincente Creek and one from Gazos Creek by the same party, and although those samples were not dated, the reasonable assumption was that they were collected during the same period. Furthermore, coho were commercially harvested on the Pescadero and San Gregorio Creeks in San Mateo County as late as 1870.

Petitioners offered the Kaczynski and Alvarado article to explain the CAS specimens as follows. These specimens were collected from Scotts, Waddell, San Vicente, and Gazos Creeks by a Stanford University expedition in 1895. The Stanford University accession register and two original labels incorrectly identified the fish as chum and Chinook specimens, not coho. These specimens were kept at Stanford University before they were transferred to CAS. A recent examination determined that all but one of the specimens were coho. The article asserted that "the chain of custody has been broken and the reliability of the specimens is questionable." The article also speculated that because the 1906 earthquake broke over 1,000 bottles and jars, although the majority survived intact, the specimens and date labels may have been switched after the earthquake damage. The article further speculated that even if the specimens were correctly labeled, they came from "obscure fish planting activities" or stray spawning and represent "ephemeral populations."

A letter from David Catania, the senior collection manager at the CAS, stated that the specimens were examined in the last few years by three experts who positively identified 17 of the fish as coho. As to the possibility that the specimens were damaged and misidentified in the earthquake, Catania stated that "the 1906 earthquake broke fewer than 25% of the bottles [in the collection]. The ichthyologists used their expertise to salvage specimens and the corresponding data from jars that had broken. Unless they were relatively certain, the specimens were discarded. Although one cannot completely rule out the possibility, there is no indication that any of the four bottles containing these 17 coho was ever broken."

The Adams article also discussed and refuted the claims that the CAS specimens were unreliable. It dismissed the chain of custody argument, saying that "it is unlikely that any museum specimens collected prior to the 1906 San Francisco earthquake, or even most modern reference collections, could withstand this legal standard." With regard to any possible label mix up, the article stated that after the earthquake "broken jars were recorded and accounted for, with their specimens bearing a unique label stating 'Bottle broken during earthquake.' Specimens were discarded if it could not be determined which broken bottle they belonged to and specimens for which there was some doubt were placed in jars with labels." The coho specimens at issue were in the original jars and included the original locality labels and metal identification tags.

The Adams article noted that Jordan was the first president of Stanford University, where he established a major ichthyological program and fish collection. The article argued that Jordan's statement that only the quinnat (Chinook) or dog (chum) salmon was noticed south of San Francisco had no bearing on the absence of coho in light of the misidentification of juvenile salmon from the region. In fact, the timing of Jordan's statements coincided with the collection of the misidentified specimens at the Stanford collection. "Jordan added chum (dog) salmon as one of the only species noticed south of San Francisco between 1894 and 1904, indicating that he was aware of these collections . . . and accepted them as legitimate. This would be logical since he was based at Stanford University where these fish collections were being held."

The department stated at the commission hearing that it did not believe the lack of documented coho sightings in the historical literature to be determinative. The department quoted a statement by W.H. Shebley, the superintendent of hatcheries for the department, from 1913: "Strange as it may appear, the presence of the silver or coho salmon in the waters of the state remained unnoticed until Dr. Gilbert a few seasons ago called attention to them. Heretofore, all the salmon taken in our rivers have been commercially classed as Quinot or Chinook salmon."

Also J.O. Snyder, a West Coast ichthyologist, stated in 1931: "Silver salmon are said to migrate to the headwaters of the Klamath to spawn. Nothing definite was learned about them from inquiry because most people are unable to distinguish them" [Snyder, *Salmon of the Klamath River California* (1931) Division of Fish and Game of California Fish Bulletin No. 34].

**Commission Findings.** The commission found that the general statements of Jordan indicating coho were abundant elsewhere did not mean they were absent south of San Francisco. The commission discounted the early newspaper articles as "non-scientific reports of already depressed salmonid populations rather than as definitive scientific proof that these fishes were unquestionably absent from the area." The commission did not address Jordan's comments that only the king and dog salmon were found south of San Francisco.

The commission stated that early scientific collection efforts produced "clear evidence of historic coho salmon populations south of San Francisco." The commission was referring specifically to the CAS specimens. The commission concluded that petitioners' claims regarding the validity of the CAS specimens were "pure speculation." In so concluding, the commission considered the letter from the CAS ichthyology collections manager asserting the reliability of the specimens.

**Environmental Conditions Evidence Presented to Commission.** The petition posited the theory that geographic conditions limited the coho to a prehistoric range with San Francisco as its southern limit. The petition emphasized the volatile nature of precipitation in the Santa Cruz Mountains. Comparing the precipitation trends in Santa Cruz County versus precipitation within the Puget Sound ESU, the petition stated that although Santa Cruz County receives less rainfall annually, the severity of local storm events exceeds those of Puget Sound from November through May. The petition reasoned that these storms wash out coho nests ("redds"). At the same time, the Santa Cruz Mountains were more likely to experience drought conditions throughout the year. This created a tendency for the streams to develop sandbars that prevented fish from entering or leaving the streams. The petition stated that "in California" the droughts of the 20th century were "eclipsed several times by droughts earlier in the last 2000 years, and as recently as the late sixteenth century." The petition concluded that coho salmon did not prehistorically establish permanent populations in streams south of San Francisco.

The petition surmised that coho were not currently abundant south of San Francisco for the same reasons that they were not present there prior to hatchery support. Thus, petitioners claimed that the combination of drought and flood would destroy coho populations without hatchery support.

The department's report argued that the climatic and physical instability of the habitat south of San Francisco was not significantly different from that north of San Francisco, where there were known population of native coho. The department found no evidence the streams south of San Francisco were more prone to flash flooding. A comparison of Lagunitas Creek, a known coho bearing stream in Marin County with the San Lorenzo River south of San Francisco, showed very little variance in the amplitude of flow over a 20-year period that was chosen to include both drought and flood years. There was also little climatic difference from north to south of San Francisco.

Smith wrote a letter in response to the Kaczynski and Alvarado article, and the letter was part of the administrative record. The letter stated in pertinent part: "[The Kaczynski and Alvarado] article made extensive references to my research at Gazos, Waddell and Scott creeks in 1988 and 1992 to 2006 to support their arguments that coho are not native. My research was significantly misquoted and misrepresented in the [Kaczynski and Alvarado] article, and the misrepresentations are corrected here.

"In general, my research can be summarized as showing that coho in my 3 study streams have been severely

impacted by drought and flood impacts. However, these impacts have been recent and probably not typical of historic conditions. Coho of all year classes apparently persisted in Waddell and Scott creeks (and probably Gazos Creek) until drought in 1991 and floods in 1992, 1995 and 1998. Harsh conditions in the 1976–77 drought and in flood years of 1982 and 1983, which also may have been historically atypical, were insufficient to eliminate coho. The recent harsh conditions may have resulted from trends since 1976 in ocean conditions. The harsh conditions, and the weak or missing year classes that they have produced, represent a major additional challenge to restoration of coho throughout California, but are not evidence that coho south of San Francisco are not native."

The letter went on to state that hatchery fish were necessary to restore the coho population because they could fill in "lost or weak year classes." The letter stated that hatchery fish are not "solely responsible for continued coho presence, as the strong year class in 1984, 1993, 1996, 1999, 2002 and 2005 indicates." Smith's letter took issue with the Kaczynski and Alvarado article's claim that all the coho in Scotts and Waddell Creeks are of hatchery origin, stating that the creeks have hatchery-influenced fish, but also contain wild-produced fish.

The letter also addressed the claim that streams south of San Francisco are unsuited for coho because of flooding and drought cycles: "Late and intense winter storms have been a recent problem . . . making the populations quite precarious, but this does not demonstrate that the region was incapable of historically supporting sustainable populations. The present risky situation may be the result of reduction in distribution and abundance of coho by past habitat impacts, ongoing water diversions, combined with a shift in ocean conditions resulting in poorer ocean survival and increases in frequency and intensity of El Nino conditions (which also result in shifting winter storms later in the season, when they are more likely to impact early-spawning coho). The topography and geology of the area also makes storms and high sediment transport likely, *but similar conditions are found further north.* In Redwood Creek in Marin County I have also studied coho since 1992, and a weak year class there has also been impacted by recent drought and flood years. In fact, the decline of coho coast-wide in California is characterized by missing or weak year classes. The problems of maintaining coho are now widespread and are not particular to streams south of San Francisco; they are merely more thoroughly documented because of my geographically restricted research" (italics added by the court).

The Adams article noted that the southern boundary of the EPA's coastal range ecoregion was south of Santa Cruz at the northern edge of the Salinas Valley, and asserted that the southern limit of this ecoregion was an ecologically sound southern boundary for coho salmon because it marked the end of the coastal redwood forests that provided suitable habitat for coho.

The article also discussed the extreme flow conditions, which petitioners asserted was the reason coho could not survive south of San Francisco. "*Extreme flow conditions* are largely based on graphs in Kaczynski and Alvarado (2006) that show that the region south of San Francisco region is more likely to receive more than four inches of rain in a single day than the region immediately north of San Francisco Bay (Marin County). While this is true for all months except October, the difference in rainfall pattern between Santa Cruz County and Marin County is very small. In six months of the year, Santa Cruz County is 0.22% more likely to receive more than four inches of rainfall than Marin County; while in October, Marin County is more 0.1% likely to receive more than four inches. Although extreme flow events can devastate year classes of coho in coastal California streams, it is very unlikely that such small differences in extreme flow events were biologically significant under historical conditions. However, during the 1982–1998 period, severe storms occurred unusually late (February and March) throughout Central California, occurring after most or all coho had spawned. This decadal storm sequence, which included the strongest El Nino years of record (1982–1983 and 1997–1998), resulted in severe redd destruction in southern streams and elsewhere. However, coho year classes persisted."

The article discussed the claim that severe drought conditions make the streams south of San Francisco unsuitable for coho, stating that drought conditions also weakened the population in Marin County, and that water diversions during the drought were a major cause. As to the claim that warmer stream temperatures make the streams south of San Francisco unsuitable, the article noted that the "maximum stream temperature range in the south of San Francisco region is the same as that in several streams north of San Francisco (in Marin and Mendocino counties), while some inland coho streams further north have higher maximum temperatures." Stream temperatures are also more likely to be affected by the distance from the coast than by north-south distances. The article noted that the problem of fine sediment, which is abundant in Santa Cruz County streams, is neither new nor limited to streams south of San Francisco, but is a problem for all streams in the southern coho region, and has impacted northern streams as well.

**Commission's Findings.** The petition claimed that extreme weather events were the principal reason that coho colonies were unsustainable south of San Francisco.

The commission noted that in supplemental material provided by petitioners, the claim was made that information in a joint report of the department and NOAA supported petitioners' assertion. The commission found that petitioners mischaracterized the joint report. The report compared the "Northern Monitoring Area" with the "Southern Monitoring Area" and found that the discharge of the southern streams "is more episodic than northern streams." However, the boundary between the two areas was at the Santa Cruz/Monterey county line, thus the Northern Monitoring area included the streams south of San Francisco that were in dispute.

The commission found that certain graphs cited by petitioners showed that the habitat north of San Francisco was not substantially different from that south of San Francisco: "As the graphs clearly show, percentage of wet days and amount of precipitation per wet day in Santa Cruz and San Mateo counties are essentially identical to those of Marin County and areas farther north along the central and north coast." The commission also relied on a NOAA publication that estimated the historical potential of streams to be suitable for coho based on geomorphic and hydrologic characteristics. The modeling described in the publication showed that Marin County streams are ecologically similar to Santa Cruz County streams.

The commission questioned the Kaczynski and Alvarado article's conclusion that Santa Cruz County was unsuitable for coho because it was more likely to receive four inches of rain in a single day than Marin County in the winter and spring. The commission found that to validate this finding, one would need to examine the rain patterns along the entire range of coho. For example, the difference in precipitation patterns of Marin County and Washington State were likely to be more significant, yet coho persisted in Marin County. Kaczynski and Alvarado also stated that devastating floods south of San Francisco and low stream flows that were insufficient to open sandbars were reasons coho salmon could not have persisted there. However, these conditions were also natural for streams immediately north of San Francisco, yet coho maintained runs in those streams. Likewise, the coastal geology of the Santa Cruz Mountains was not unique, but closely resembled the geology of the Mendocino Range north of San Francisco. While there may be localized habitat differences, there was no conclusive scientific evidence to support a conclusion that the habitat differences north and south of San Francisco were significant enough to preclude coho presence south of San Francisco.

Petitioners claimed that without hatchery support, poor ocean conditions would have caused the extinction of coho populations south of San Francisco. Their argument was that ocean conditions in the region were so unsuitable that coho could not exist there naturally. To make this determination, petitioners used a simple static cohort replacement rate (CRR) calculation. The department opined that the static CRR calculation was too simplistic to accurately model replacement rate dynamics in coho, and the commission agreed. The commission concluded the method used did not accurately model the way that populations behave, or properly characterize the meaning of CRR in terms of population persistence.

The commission stated that even if petitioners' methods were valid for predicting when a population would go extinct, which they were not, real empirical data was largely lacking for freshwater and ocean survival estimates in the region. The commission then pointed out that the only estimate of freshwater survival in the region was from a 1954 study that estimated the "average egg to smolt survival was 1.43%" in Waddell Creek. Using petitioners' simple static CRR model, the commission stated that ocean survival would have to be around 6 percent in order to return one female per spawning female, rather than 8.6 percent as stated by petitioners. The number of eggs per female used in the calculation "greatly affect the result." Citing a 1991 article, the commission stated that individual female coho may produce between 1,983 and 4,706 eggs. Since slight variation may greatly affect the result, this range showed one of the problems with petitioners' simplistic calculations. Coho have experienced periods of poor ocean conditions over the past few decades across their range, and although populations have declined, they did not go extinct during those periods, even though petitioners' calculations could be used to predict such an outcome.

The department presented "a more dynamic simulation" that suggested coho experienced very bad conditions between 1980 and 2000, but did not suffer extinction. The commission concluded that (1) the coho south of San Francisco were part of a larger metapopulation that included population to the north, (2) the structure complicated the assumptions of static survival estimates because these populations were connected by exchange, (3) the three-year spawning cycle of coho also acted as an extinction buffer by retaining a stock of fish in the ocean, and (4) the three-year life history, along with exchange among populations, significantly improved the chances that coho could persist in the face of periodic poor ocean and freshwater conditions.

**Planting and Straying Evidence Presented to Commission.** In making the case that coho were not native to the streams south of San Francisco, petitioners had to account for the fact that coho were now present in those streams and were present for at least 100 years. They maintained coho were not native, but were introduced

through hatchery plantings. They also speculated that strays from northern waters occasionally may have spawned in the coastal streams of Santa Cruz County.

Petitioners presented no evidence that coho were planted prior to 1906, nor evidence that the coho populations prior to 1906 were the result of straying. The first record of coho planting shown by the petition occurred in 1906 at the Brookdale Hatchery on the San Lorenzo River. The petition stated that by 1910, 400,000 coho salmon eggs were shipped from Washington State. The petition speculated that plantings would not have been necessary if coho were already present in Santa Cruz County.

Petitioners stated that the streams of the Santa Cruz Mountains were frequently restocked with hatchery coho, and surmised that without such intervention, the coho would not have survived.

The department report provided evidence to counter petitioners' argument that coho existed in the streams south of San Francisco only because of hatchery fish. The report pointed to the fact that coho eggs were harvested from approximately 518 females at the Scott Creek egg taking station in 1909. The report surmised that this number of females could not have been produced from the 50,000 eggs delivered to the Brookdale Hatchery on the San Lorenzo River in 1906, even if all the fry were planted in Scott Creek. The average egg-to-fry survival rate of 75 percent, combined with the maximum fry-to-smolt survival rate of 9.7 percent and the maximum smolt-to-adult survival rate of 7.7 percent, would yield an estimated 280 adults. This is far less than the estimated 1,036 fish needed to produce 518 females in 1909, assuming a one-to-one ratio of males to females.

While acknowledging that hatcheries operated in the area south of San Francisco since early 1906, the department report argued that there was no data to support the assertion that coho were maintained in streams south of San Francisco only by hatchery input. This was primarily because there was little data available to evaluate the hatchery contribution to natural abundance, and the petition did not provide such data. Moreover hatchery reports indicated that hatchery production south of San Francisco was sporadic and relatively small. From the available data it was not possible to determine whether the level of sporadic production maintained the existing natural populations.

The petition concluded that coho populations south of San Francisco were struggling to survive because of recent reductions in hatchery support and natural hostile conditions. The department report countered that the reduction in hatchery production was because of the decline in broodstock. The department further criticized the petition for dismissing "the well-documented effect that habitat degradation has had on reducing coho salmon populations (e.g. increased sedimentation from land-use practices, elimination of habitat and decreased water quality due to urbanization, reduced stream flows due to water diversion)."

The department also rejected petitioners' argument that clear-cut forestry was actually beneficial to salmonid. The department found that the argument "is a gross oversimplification of the complex process of geomorphology and ecology. Although deforestation can lead to higher flows, these deforested areas tend to have higher peak flows with shorter duration which can leave fishes stranded off-channel or moved to undesirable habitats. Higher peak flows can lead to decreased bank stabilization, modification of the stream through erosion and siltation, and decreased morphological complexity. Destabilized banks increase the potential for landslides and siltation which can bury or smother salmonid redds and alevins. High silt loads have also been a deterrent to migrating smolts and adults and can damage gill tissue of fry, smolt, and adults. Other impacts that can result from deforestation are reduction in cover and shade, reduction in nutrient input, and increased water temperature from solar radiation. All of these factors can have a detrimental effect on salmonid populations."

The department also provided genetic evidence to refute the claim that coho exist south of San Francisco only because of hatchery plantings. The department cited recent studies, which indicated the coho south of San Francisco are part of the CCC coho ESU, and were most closely related to populations immediately to the north in Marin County. "These data, properly interpreted by the scientists who collected them, clearly show that current populations of coho salmon south of San Francisco experience significant genetic exchange with other populations north of them. The pattern of genetic structure seen in these datasets shows that coho salmon south of San Francisco are clearly within the Central California Coast Coho Evolutionary Significant Unit (CCC Coho ESU). South of San Francisco coho runs are most closely related to one another. Contrary to the assertions of the petitioners, the closest relatives of these south of San Francisco populations are immediately north of them in Marin County. The substantial genetic distance observed between Scott and Waddell Creek populations and Noyo River populations make it very unlikely that the southern population is descended from Noyo River hatchery fish as stated by the petitioners. Also contrary to the petitioner's assertions, these two datasets show similar concordance between genetic and geographic population structure."

Gobalet disagreed with petitioners' argument that current coho populations south of San Francisco were

the result of early stocking programs, because such programs were not very successful. "Early stocking programs were so unsuccessful the 'Releasing hatchery fish into a stream is like dropping suburban teenagers into the middle of the Congo and asking them to walk out of the jungle to the coast. Few will make it' Montgomery also quotes Dr. Henry Ward from a AAA symposium in 1938. Ward summarized efforts to transplant and introduce new runs of Pacific salmon: 'A few of these experiments have been successful in a degree but none of them in a large way. On the other hand, most of them have been total failures and these include experiments that were large and were carried out by able, energetic and well trained personnel.'"

Smith also objected to his research being used to support the claim that hatchery introduction was solely responsible for continued coho presence. "I have never stated that the hatchery is solely responsible for continued coho presence, but I have emphasized that the restoration hatchery is probably necessary for the restoration of coho south of San Francisco. . . . The hatchery is probably now necessary for restoration, but is not solely responsible for continued coho presence, as the strong year class in 1984, 1993, 1996, 1999, 2002 and 2005 indicates."

Smith found it "not likely" that all coho found today in Scotts and Waddell Creeks are of hatchery origin. "Coho were present in Gazos, Waddell and Scott creeks prior to any returns from the Big Creek Hatchery, which was reestablished in 1982. Since then all 3 streams have had hatchery-reared fish introduced to them, so they are hatchery-influenced, but wild-produced fish were also present. . . . In fact, the substantial environmental differences between the northern California, Oregon and Washington sources and any native fish and their habitat conditions . . . suggest that the nonnative fish would have had poor success; they would attempt to enter streams early, when sandbars were still in place, and if successful at entering, would spawn early, when winter storms would be more likely to scour redds."

The Adams article stated that the vast majority of out-of-area hatchery fish in the streams south of San Francisco came from the 1960's and 1970's. The numbers of plantings used by Kaczynski and Alvarado to support their claim of coho planted in streams south of San Francisco were actually the number of fertilized eggs brought to the hatcheries, and assumed 100 percent survival of the eggs. Also, in standard early hatchery practice, the fry were released into streams after minimal hatchery rearing, at a stage when even the mortality of wild fish is high. "Kaczynski and Alvarado (2006) do not seem surprised that only 250,000 eggs from stocks adapted to very different conditions could establish coho populations in only a few years [(coho were commonly acknowledged to be in Monterey Bay area streams by 1910)] in habitat they characterize as marginal, harsh, and extreme."

The Adams article supported its conclusion that coho were native south of San Francisco, rather than hatchery plants, with genetic evidence. Recent genetic studies of coho south of San Francisco show the current populations were most closely related to coho from Marin County. This strongly suggested that these fish were not descended from fish introduced from the Noyo River in Mendocino County, as suggested by Kaczynski and Alvarado. As to straying, the Adams article pointed to the coho specimens found in 1895 in four geographically sequential streams south of San Francisco. The presence of coho in all four streams "argues strongly against the concept that these coho are simply strays from more northern populations, especially since all four streams contain coho at the present time."

The article also cited commercial fishing records of coho in Monterey Bay prior to the first fish hatchery planting in 1906: "'Salmon in any considerable amount have been taken in Monterey Bay only since 1900, during which period the catch has increased. In 1904 the fishery began on May 27 and lasted until August 6. . . . The catch in 1904 comprised 132,790 pounds of silver and 531,110 pounds of Chinook salmon. . . . Silver salmon weigh from 4 to 10 pounds each, the average being 6 pounds.' Based on the average weight given in the quote, the coho salmon catch in 1904 would have amounted to about 22,130 fish." The article conceded that the origins of those coho were unknown, but asserted, "their significant presence in Monterey Bay makes it less likely that only a few occasional strays entered the spawning streams south of San Francisco."

**Commission's Finding.** Petitioners argued that there were never any native coho in streams south of San Francisco, and that all the coho that existed there and exist there today were the result of hatchery plantings. The commission found "no scientifically credible data that this assertion is true." "What the petitioners call 'evidence' is actually persuasive writing, not valid scientific evidence, and should be recognized as such." The commission found no evidence that any of the hatcheries raised or planted coho south of San Francisco prior to 1906. The department asked petitioners to provide scientifically credible support for their assertion that coho were maintained in streams south of San Francisco only by hatchery input. Petitioners' response was: "The *most likely times* since their introduction for coho salmon to have succumbed to stochastic extirpation would have been during one of the two most sever [*sic*] California droughts of the last century. These droughts occurred in the early 1930s and mid 1970s. It is

estimated that both of these droughts were severe enough to have a recurrence interval of over 100 years. Although, they were mild in comparison to prehistoric droughts, without anthropogenic intervention *they would probably* have been capable of stressing local coho populations to the point of extirpation. ... The 1970s drought *nearly* extirpated all coho south of San Francisco and led to the creation of the Monterey Bay Salmon and Trout Project ... . Similarly, prior to recent years, residents and anglers took it upon themselves to manually open the sandbars at the mouths of our creeks to allow returning anadromous fish to spawn." The commission found that petitioners provided no evidence in the form of population size estimates or estimates of the ratio of hatchery to natural coho to support their claims. The commission found that petitioners' argument that favorable ocean conditions and human intervention compensated for the two major droughts that would otherwise have extirpated the coho populations was "pure conjecture," unsupported by evidence.

The commission found the department's evidence on stocking data to be the best available scientific information. It indicated that salmon hatchery operations in the region were relatively small and primitive, and that they relied on early stage plants, which have notoriously poor survival prospects. The commission found that genetic information indicated coho south of San Francisco were part of the CCC coho population and were not the result of hatchery introduction. Coho populations south of San Francisco were more closely related to each other than to any other population, and their closest relatives were the population in Marin County. The commission found that the genetic results "are not consistent with the petitioners' claim that plantings replaced lineages in the southern part of the range, or that these populations are non-native introductions."

Petitioners argued that any populations of coho historically existing south of San Francisco were merely "ephemeral." The commission stated that petitioners did not define the term, but implied that if a population was ephemeral, it was not important to overall population viability and could not be protected under CESA. The commission concluded these implications were both wrong.

First, the commission found that petitioners presented no significant or credible evidence that coho south of San Francisco were ephemeral populations. Secondly, petitioners presented insufficient evidence of the relationship of populations south of San Francisco with other nearby groups from which the commission could determine whether ephemeral populations are important to overall population viability. The commission stated that "in potentially non-viable populations, such as the endangered central coast coho salmon, these subpopulations take on a much greater importance for persistence of the metapopulation in that they 1) add to the genetic diversity of the larger associated population, 2) provide a means of recolonization of habitat where they had previously become extirpated, 3) provide a 'safety net' in case of other subpopulations are extirpated, and 4), lead to range expansion and ultimately the recovery of the species."

There was insufficient information about California coho metapopulation structure and dynamics to determine the importance of the population south of San Francisco, but credible scientific evidence was produced that there was substantial gene flow between south of San Francisco coho and coho populations to the north, and that metapopulation processes may be important to long-term viability of coho across their ranges. The commission thus concluded that southern coho populations were important to overall California coho viability.

The commission stated that even if the coho population south of San Francisco was the result of stray spawnings and ephemeral populations, the populations south of San Francisco would represent a range expansion of the species in California and be subject to provisions of CESA, regardless of how they got there.

**CAS Samples Proved Coho Salmon Existed in Streams South of San Francisco Before Hatcheries.** The court stated that petitioners' argument that coho south of San Francisco should never have been listed as endangered was premised on the argument that they did not fit the definition of an endangered species because they were not native. This argument, reduced to its basic elements, was as follows: (1) coho salmon were not native to streams south of San Francisco because they never existed there prior to hatchery plantings, and (2) the coho salmon that currently inhabit the streams south of San Francisco were not native because they were the result of nonnative hatchery plantings.

Petitioners' archaeological, historical, hatchery, and environmental evidence was all offered to show that coho were not native in streams south of San Francisco because they never existed there before hatchery plantings. Indulging all presumptions in favor of the commission's decision, the court held that petitioners' evidence was not strong enough to justify delisting. Petitioners presented circumstantial evidence from which more than one inference could be drawn. For example, the inferences petitioners drew from their archaeological evidence was disputed by the very expert who authored the studies upon which the evidence was based, as well as by other archaeological evidence, that is, the finding at Año Nuevo. Likewise, petitioners drew an inference from the historical

accounts of other fish and salmon in the area that no coho were ever found in the area. This could be because there were none, or because the authors of the statements were unaware of the existence of coho that were there.

While it was not necessary that petitioners' evidence be conclusive, it was necessary that the evidence be substantial enough to warrant delisting when considered with contrary evidence in the record. If there was evidence against the petition that "persuasively, wholly undercuts some important component of [petitioners'] prima facie showing," the court would affirm the commission's decision [*Center for Biological Diversity, above*]. There was such evidence in this case—the CAS specimens. Unlike the conflicting inferences presented by the circumstantial evidence offered by petitioners, the specimens were direct evidence from which no conflicting inferences could be derived. The specimens were captured from four adjacent streams before any recorded hatchery coho were planted. The specimens were in existence today, and were confirmed by experts to be coho salmon. Petitioners' "significant questions as to the legitimacy and significance of specimens in the collection of the California Academy of Sciences" were nothing more than speculation. Specifically, petitioners argued the specimens were not good evidence because they were originally mislabeled as chum and Chinook salmon, because "the chain of custody has been broken," and because the 1906 earthquake broke more than 1,000 bottles and jars in the Stanford collection, "although the majority survived intact." The original mislabeling as other types of salmon was of no importance. The fish specimens existed now and were identified as coho. Petitioners did not explain in what way the chain of custody was broken, nor how this invalidated the evidence. The possibility that the 1906 earthquake broke these particular bottles, and that these particular bottles were then mislabeled was nothing more than speculation. There was no evidence to support the argument. Moreover, the senior collection manager at CAS stated that there was "no indication that any of the four bottles containing these 17 coho was ever broken." The Adams article stated further that the specimens were in the original jars and included the original locality labels and identification tags.

The court stated that CAS specimens were more than just a counter showing that raised a conflicting inference that coho salmon existed in streams south of San Francisco prior to hatchery activity [*see Center for Biological Diversity, above*]. It was "countervailing information and logic [that] persuasively, wholly undercuts some important component of [petitioners'] prima facie showing." Accordingly, the court stated that there was unrefuted evidence to support the commission's conclusion that coho were native to streams south of San Francisco.

**Number of Specimens Sufficient to Show Native Population.** The court observed that perhaps recognizing that the CAS specimens were determinative on the issue of the existence of coho prior to hatchery plants, petitioners set forth a few other lines of argument. Firstly, they argued only a "handful" of specimens were collected, which did not demonstrate a self-sustaining population. The court was unconvinced by the argument that the court should discount the CAS specimens because only a few fish (17 to be precise) were collected and preserved. The court stated that they were samples in a collection meant to be representative of the natural population. The collection was never meant to contain the entire population of coho in existence at the time. The commission acted well within its discretion in finding that the CAS samples were representative of a native population in the streams south of San Francisco.

**Petitioners Present No Evidence That Specimens Were Strays.** The court observed that as to the "self-sustaining" nature of the population, the argument seemed to be that any coho collected in 1895 were simply strays and not evidence that there was a population of self-sustaining fish. There was no evidence—only speculation—that the CAS specimens were the result of a population of strays. As stated in the Adams article, the fact that coho were found in four geographically sequential streams, and that those streams all now contained coho populations, made it unlikely that the specimens were taken from a stray population of northern coho.

Furthermore, the court was aware of no authority that the term "native species" as set forth in CESA contained a requirement that the species or subspecies be self-sustaining, and if so for what period of time. CESA contained no such express requirement. The court noted that this was not the sort of factual question contemplated by the statute, wherein the court reviewed whether the petition provided sufficient information to indicate that the petition might be warranted [Fish & Game Code § 2074.2]. Rather, it posed the legal question of what the legislature intended by protecting native species. The court was presented here with evidence that coho were naturally occurring in the streams south of San Francisco because the CAS specimens were taken prior to documented hatchery activity in that area. Neither the court, the commission, the department, nor petitioners had any way of knowing whether coho lived in those streams for one or one thousand years. Petitioners would put the court in the position of determining how long was long enough for a naturally occurring species to be considered native. Was one year long enough, five years, ten years, a thousand? This was a situation in which the court accorded the commission's judgment a significant amount of deference because it possessed special familiarity with the pertinent

legal and regulatory issues. It was a situation where the court gave great weight to the commission's interpretation because it "'has a comparative interpretive advantage over the courts,' and . . . '. . . the interpretation in question is probably correct'" [*Yamaha, above*]. The court stated that it must err on the side of protecting the species in interpreting CESA because the legislature expressly set forth its policy of conserving, protecting, and restoring any endangered species and its habitat [Fish & Game Code § 2052].

Thus, the court accorded substantial deference to the commission to determine how long was long enough for a species or subspecies to be self-sustaining in a particular area before it was deemed to be a native species capable of being listed as endangered, and to apply the facts here to that determination. Coho were thus "native," as specified in [Fish & Game Code § 2062] and could properly be listed as endangered.

**Persistence Not Criterion for Listing.** The court noted that the data petitioners submitted on environmental conditions south of San Francisco was argued not only to show that coho could never have existed in the area, but also to show that they could not then persist, and as a policy matter should not be protected. Whether coho could now persist in the streams south of San Francisco without hatchery support and whether as a matter of policy they should be protected was not pertinent to the question presented by the petition, that is, whether the species should have been listed as endangered because it was not a native species. The court was unaware of any authority for the proposition that a species was not endangered if it could not "persist" without human interference. On the contrary, under the Federal Endangered Species Act of 1973 [16 U.S.C. § 1531; FESA] persistence of a species has been relied upon to support the delisting of a species [*Friends of Blackwater v. Salazar* (D.C. Cir. 2012) 691 F.3d 428]. The necessity of using hatchery fish to support the survival of an endangered species was consistent with CESA, which declared that it was the policy of the state to conserve endangered species, and that conservation included, inter alia, propagation and transplantation [Fish & Game Code §§ 2055, 2061]. The court stated that the commission correctly rejected an argument that the coho did not qualify as an endangered species because it could not persist without hatchery support.

**Petitioners Presented No Evidence That Native Coho Were Replaced by Nonnative Coho, and Department Presented Evidence That Current Population Was Part of CCC ESU.** Petitioners next made the argument that whatever native coho existed must have died out because of the inhospitable environmental conditions, and the coho that existed in the streams were solely the result of hatchery plantings. However, petitioners presented no evidence that the native coho were extirpated and replaced by hatchery fish. Instead, the petition said the following: "The *most likely* times since their introduction for coho salmon to have succumbed to stochastic extirpation would have been during one of the two [largest] California droughts of the last century. These droughts occurred in the early 1930s and the mid 1970s. It is estimated that both of these droughts were severe enough to have a recurrence interval of over 100 years. Although, they were mild in comparison to prehistoric droughts, without anthropogenic intervention they would *probably* have been capable of stressing local coho populations to the point of extirpation . . . . Coincidentally, during both of these time periods coho salmon were heavily planted in Santa Cruz County" [italics added by the court].

The court observed that petitioners' argument was based on an inference that drought conditions, coupled with other inhospitable environmental conditions, would have resulted in the extirpation of the coho populations without hatchery support. The petition stated that population structure estimations suggested that coho south of San Francisco were more closely related to Noyo River coho than Russian River coho, and that Noyo River stock was planted more recently and in greater numbers than Russian River stock.

However, the court stated that even if petitioners' evidence were sufficient to show that all the native coho salmon were extirpated at some point in the past and replaced by hatchery fish, the court would still conclude that such fish were native, absent proof the current fish were descendants of out-of-state coho salmon. The court's analysis of this issue depended in part on the court's answer to one of the questions put to the court by the Supreme Court on remand: "does the term 'native species' in the definition of 'endangered species' (§ 2062) mean 'native to the area' in which the species is listed, as plaintiffs assert, or 'indigenous to California,' as the Commission claims"? [*Central Coast Forest Assn. v. Fish & Game Com., above*]. The court noted that Fish & Game Code § 2062 provides in pertinent part: "'Endangered species' means a native species or subspecies of a bird, mammal, fish, amphibian, reptile, or plant which is in serious danger of becoming extinct throughout all, or a significant portion, of its range due to one or more causes, including loss of habitat, change in habitat, overexploitation, predation, competition, or disease."

The commission argued that both it and the department consistently interpreted the term "native" to mean that the species as a whole must be native to California. The commission asserted that once listed, the species were protected wherever they may be found throughout the state.

Petitioners argued that "once the focus of the statutory term 'species' is narrowed to a particular geographic area, it advances the purpose of [CESA] to assess 'nativeness' within that particular area." Petitioners argued there were logical problems with defining "nativeness" on a statewide basis when the listing itself was defined by location. For example, coho north of Punta Gorda were native, but they were listed as threatened, rather than endangered. Therefore, a coho north of Punta Gorda was not an endangered species to be protected wherever it was found throughout the state, even though it was native to California.

The answer depended on an interpretation of a statute and its application to the undisputed facts, which was a question of law the court reviewed de novo. "While we exercise our independent judgment in interpreting a statute, we give deference to an agency's interpretation if warranted by the circumstances." "We begin with the basic premise that 'laws providing for the conservation of natural resources' such as the CESA 'are of great remedial and public importance and thus should be construed liberally.' Within the CESA itself, the Legislature has 'expressed the objects to be achieved and the evils to be remedied.' The evils to be remedied include the extinction of 'certain species of fish, wildlife, and plants,' and the danger or threat of extinction of 'other species of fish, wildlife, and plants.' (§ 2051, subds. (a), (b).) The objects to be achieved include the 'conservation, protection, restoration, and enhancement [of] any endangered species or any threatened species.' (§ 2052.)" [*California Forestry, above*].

In *California Forestry, above*, the court held that the "range" part of the definition of an endangered species meant the species's California range. In so holding, the court stated that "it is reasonable to infer that the CESA's focus is protecting species within the state, which is the extent of the state's regulatory authority. In enacting the CESA, the Legislature declared that endangered and threatened species were of 'value to the people of *this state*, and the conservation, protection, and enhancement of these species and their habitat is of *statewide concern.*' (§ 2051, subd. (c), italics added.) . . . In addition, the CESA limits protection of species or subspecies to those that are 'native.' (§§ 2062, 2067.) By narrowing the definition of endangered and threatened species to include only native species or subspecies, the Legislature demonstrated its intent that the CESA apply to protect species or subspecies within the state." The protection of an endangered species was a statewide concern. The commission was correct that in most cases, if the endangered species is determined to be native to California, it is protected wherever it is found in California. This was apparent not only from the declared purpose of CESA, but also from the list of endangered and threatened species. Only coho and Chinook salmon were designated endangered or threatened based on their location [14 Cal. Code Reg. § 670.5 (a)(2)(N), (b)(2)(C)–(D)]. Otherwise, the protection of a native species is limited only by the California border. Thus, the term "native" means native to California.

The court stated that it was apparent that native coho salmon in California were either threatened or endangered, depending on whether they were found north or south of Punta Gorda. There was no specified northern limit, other than the California border, to the listing of threatened coho, and there was no southern limit, other than the California border, to the listing of endangered coho. Thus, the court assumed that a bald eagle was endangered wherever it was found, but a coho salmon was *either* endangered if it was south of Punta Gorda or threatened if it was north of Punta Gorda. Because there was no southern border attached to the listing of endangered coho salmon, any native coho found south of Punta Gorda within the state was endangered, even if the fish found in a particular stream was not genetically identical to the fish that existed there prior to hatchery support.

Since the court determined that "native" meant native to California, petitioners' evidence had to show that the coho salmon currently in the streams south of San Francisco were not native because they had been transplanted from outside California. Petitioners' evidence was wholly insufficient to show this.

The department's evidence, on the other hand, showed that the fish currently inhabiting the streams were part of the CCC ESU.

The court noted that the commission relied on recent genetic evidence to support its finding that the coho population currently inhabiting the streams south of San Francisco was a native population, albeit hatchery-influenced. The commission relied on an NMFS finding, which in turn relied upon a 2005 NMFS/NOAA study that concluded coho salmon existed as functionally independent populations in three streams south of San Francisco, and as dependent populations in the smaller watershed that drain the coastline south of San Francisco. The study stated:

"Recent work at the NOAA Santa Cruz Laboratory provides additional genetic data for evaluation of population structure of coho salmon in the CCC-Coho ESU . . . . . .

"Available genetic data describe a current population structure within the CCC-Coho ESU that is consistent with a plausible hypothesis for historical population structure. In particular, two analyses—the construction of phylogeographic trees . . . and examination of isolation-by-distance . . .—offer strong support for the role of

dispersal among populations in generating concordance between geographical and population genetic structure. Among-basin transfers are likely to have altered the population genetic structure of coho salmon in the CCC-Coho ESU from its historical state, but it is not clear how strong an influence such transfers have had. In some cases, however, weak differentiation among populations suggests that such transfers have had some effect.

"For example, inter-basin transfers are likely to have had at least some effect on population genetic structure of coho salmon south of the Golden Gate. Estimates of pairwise FST, which is inversely related to the rate of gene flow among populations, are substantially smaller among basins south of the Golden Gate than elsewhere in the CCC-Coho ESU, and a lack of strong differentiation among these populations underlies the apparently weak concordance between geographical and genetic structure in this region . . . . These results are consistent with the potential effects of recent transfers of coho salmon from Scott Creek to other nearby small basins. Inter-basin transfers might have had a large effect in this area, since populations of coho salmon occupy small basins and have been at substantially depressed levels for much of the recent past. However, it is also quite likely that natural dispersal among populations contributes substantially to the relatively weak genetic structure observed in this region. Indeed, uniquely high rates of dispersal have been reported among populations of coho salmon in this area by Shapovalov and Taft (1954). Nevertheless, given the intensity of recent outplanting activities relative to the size of the recipient populations, it is difficult to conclude that the degree of connectivity implied by the genetic data is solely a consequence of naturally high rates of migration. . . .

"To summarize, we conclude that the isolation-by-distance relationship and overall concordance between geographic and population genetic structure over the range of the CCC-Coho ESU support the use of geographic structure as a template for interpreting population structure throughout the CCC-Coho ESU. We are less confident that recent genetic information resolves fine-scale historical structure, particularly given the potential effects of among-basin transfers and evidence for the consequences of such transfers in some areas (e.g., south of San Francisco). However, regions where known transfers appear to have blurred historical structure are insufficient to undermine our general conclusion regarding the utility of geography for evaluating historical population structure of coho salmon" [Bjorkstedt et al., NOAA Technical Memorandum NMFS-SWFSC-382 (Oct. 2005)].

The commission also relied on a memorandum from the director of the Santa Cruz Laboratory of the Southwest Fisheries Science Center. The memorandum stated in part:

"These genetic studies provide several lines of evidence indicating that coho salmon from south of San Francisco Bay, i.e., fish in Scott, Waddell and Gazos creeks, are not the result of recent introduction or stocking and are native to the area. First, all analyses performed, including matrices of genetic distance, phylogeographic trees, assignment tests and isolation by distances tests, indicate that the *Central California Coast Coho Salmon ESU is one genetic lineage with all ESU populations more closely related to each other than to any other coho salmon populations.* Moreover, within the ESU all populations south of the Golden Gate are more closely related to each other than to any others, and populations from Marin County are their closest relatives.

"More generally, . . . it is not consistent with the hypotheses that anthropogenic outplanting replaced lineages in the southern part of the range, or that these populations are non-native introductions. . . .

"While salmon from other populations in the Central California Coast ESU, primarily the Noyo River, have been transplanted into coho populations south of San Francisco Bay, they cannot have had a large effect, because there are alleles present at 11 of the 18 microsatellite genes that are not found in the Noyo River. In some cases, alleles in these southern populations do not appear to be present in any other population in the Central California ESU. This result effectively eliminates the possibility that the San Mateo and Santa Cruz county populations were founded by fish planted from the Noyo River or any other California population. . . .

"While these molecular genetic results do not rule out the possibility that coho salmon populations in San Mateo and Santa Cruz counties may have received some small genetic signal from the introduction of foreign stocks, they clearly demonstrate that these populations meet all of the predictions of a native species at the southern edge of their range and should be considered as such" (italics added by the court).

In 2003, Homer McCrary, vice-president of Big Creek Lumber, filed a federal petition with the NMFS "to redefine the southern extent of the CCC coho salmon ESU boundary by excluding coho salmon populations occupying watersheds in Santa Cruz and coastal San Mateo counties, California, from the ESU" [71 Fed. Reg. 14683, 14686 (Mar. 23, 2006)]. NMFS published its finding pursuant to 16 U.S.C. § 1533(b)(3)(A), which provides that the Secretary of the Interior shall make a finding as to "whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted." The NMFS finding relied on the 2005 NMFS/NOAA study, and the commission relied in part on the NMFS finding. In concluding that

the information in the federal petition did not present substantial scientific information indicating that the petitioned action "may be warranted," NMFS made the following comments regarding the claim that the coho currently inhabiting the streams south of San Francisco are not native, but a result of hatchery activity beginning in 1906:

"The petition is correct in stating that coho salmon fry from sources outside of California have been planted in the streams south of San Francisco; however, coho salmon fry from sources within California and also from local watersheds have also been planted in these streams. Available evidence does not support the hypothesis that the out-of-state Baker Lake introductions founded the coho salmon populations south of San Francisco Bay. In fact, juvenile coho salmon specimens were collected in 1895 from San Mateo and Santa Cruz counties and are currently housed in the CAS Ichthyological Collection. As discussed previously, we do not question the authenticity of these specimens. These collections occurred 11 years prior to the coho salmon egg deliveries from Baker Lake to the Brookdale Hatchery on the San Lorenzo River, and therefore, demonstrate coho presence in the area prior to any introductions from other areas.

"Available records of out-of-area coho salmon plantings prior to 1911 indicate a total of 400,000 eggs were transferred over 5 years from Baker Lake to the Brookdale Hatchery and planted in unspecified Santa Cruz County stream locations between 1905 and 1910 (Bowers, 1906, 1907, 1908, 1909, 1910). The number of Baker Lake eggs is relatively small and is not likely to have contributed to the coho salmon populations observed by Gilbert in 1910. The Baker Lake coho salmon eggs were almost certainly planted as fry, which was the early practice of most hatcheries throughout California, including three plantings in Scott Creek from 1913 to 1930. This practice is no longer used by hatcheries because of the extremely poor survival rate of planted fry. Thus, it is likely that few if any of these planted fish survived to reproduce as adults, much less establish a new population in the area.

"Recent genetic evidence supports this point. Molecular genetic data assembled and analyzed by the Southwest Fisheries Science Center's Santa Cruz Laboratory indicate coho salmon south of San Francisco Bay represent a historic part of the CCC coho salmon ESU and are not the result of anthropogenic introductions . . . . The results are not consistent with the petitioner's claim that anthropogenic outplantings replaced lineages in the southern part of the range, or that these populations are non-native introductions.

"These results suggest that, while coho salmon south of San Francisco have unique genetic characteristics, they nonetheless are clearly part of the CCC coho salmon ESU. These findings do not rule out the possibility that coho salmon populations in San Mateo and Santa Cruz counties may have received some genetic signals from the introduction of out-of-state or out-of-ESU fish; however, the number of unique alleles in the southern populations clearly demonstrates the genetic attributes of a native species at the edge of its range" [71 Fed. Reg. 14683, 14686 (Mar. 23, 2006)].

Petitioners' response to the department's genetic evidence was to argue that the "tiny" differences among coho proved nothing, and that the report did not compare the coho south of San Francisco to Washington State coho. However, petitioners had the burden of presenting evidence that the coho south of San Francisco were not native. The evidence presented in the initial petition that the fish currently inhabiting those streams were not native, that is, out-of-state, was the record of out-of-state hatchery transplants from 1906 to 1910 numbering 400,000. On the other hand, the 2005 NOAA Technical Memorandum showed that out of 2,704,742 transplants, 448,225 were known to have originated outside California. Some additional out-of-state stock was planted between 1977 and 1986 (listed as "Multiple Stocks" in the table below), but the exact number was unknown. The entry listed as "Multiple Stocks" included stocks from Washington, Oregon, and California. The most recent transplants were from Scott and Big Creeks, basins that were south of San Francisco. Petitioners' evidence was insufficient to support a conclusion that the fish currently inhabiting the streams were not from California, and therefore not native.

The commission found petitioners' evidence was not sufficient to show that the current population was not native, and as a result was not sufficient to find that delisting may be warranted. The court affirmed the commission's decision that the current population of coho south of San Francisco was a native population because it was clearly justified by the weight of the evidence [*Center for Biological Diversity, above*].

**Endangerment Listing Did Not Require That Population Be Important Component in Evolutionary Legacy of Species.** The petition's other primary assertion was that the coho south of San Francisco "do not constitute and are not a constituent of any morphologically or behaviorally distinct, phenotypically or genetically unique, or otherwise important component in the evolutionary legacy of the species." For this argument to be material to the "may be warranted" standard, it had to be an assertion that, if true, would have prevented the coho south of San Francisco from qualifying as an endangered species under CESA. However, neither CESA nor any state regulation requires that a population be an important component of

the evolutionary legacy of the species before it can be included as an endangered species [Fish & Game Code §§ 2062, 2067; 14 Cal. Code Reg. § 670.1].

The court observed that NMFS promulgated an ESU policy for purposes of the FESA, which states that a population of Pacific salmonids is considered to be an ESU if it is substantially reproductively isolated from other nonspecific population units and represents an important component in the evolutionary legacy of the species [*Cal. State Grange v. Nat'l Marine Fisheries Serv.* (E.D. Cal. 2008) 620 F. Supp. 2d 1111]. The commission listed the CCC coho ESU, of which coho south of San Francisco were a part, as an endangered species, and in answer to a challenge to that listing, this court determined that an ESU was a species or subspecies for purposes of the CESA [*California Forestry, above*; 14 Cal. Code Reg. § 670.5(a)(2)(N)]. The court agreed with the commission that petitioners were urging the court to misapply the Federal ESU concept. The NMFS policy sets forth the definition of a Pacific salmon ESU for purposes of the FESA [56 Fed. Reg. 58612 (Nov. 20, 1991)]. That determination had been made for the CCC coho ESU, and was why the ESU existed. It was the ESU as a whole that had to represent an important component in the evolutionary legacy of the species, not each individual population that made up the ESU.

Because the "important component in the evolutionary legacy of the species" was relevant only to the identification of an ESU, petitioners necessarily must be arguing that the coho south of San Francisco were not part of the CCC coho ESU, and therefore should not have been listed as endangered with the rest of the ESU. The argument was not supported by the evidence in the record or by the nature of the ESU determination.

Petitioners stated that they "have never conceded that coho salmon south of San Francisco must be regarded" as part of the CCC coho ESU. Instead, they argued that there was little genetic variation among all coho populations across the species. Petitioners quoted portions of two sentences from an over 200-page status review that noted "populations south of San Francisco may be separable from other California stocks," but conceded that "more data are needed." The 2002 status review was prepared by the department in response to a petition to list coho *north* of San Francisco as an endangered species. The status report explained that an ESU was "a group of interbreeding organisms that is reproductively isolated from other such groups." The status report also explained that it reviewed the status separately of the two coho ESU in California. It stated that the CCC coho ESU was from Punta Gorda south to the San Lorenzo River, which included streams south of San Francisco. After making the statement that petitioners quoted, the status report nevertheless concluded that "the Department agrees with NMFS that the coho salmon ESU designations are valid and justifiable constructs, both from a biological and management perspective, and that they represent distinct population segments of coho salmon." The NMFS, in turn, confirmed in 2006 that "while coho salmon south of San Francisco have unique genetic characteristics, they nonetheless are clearly part of the CCC coho salmon ESU" [71 Fed. Reg. 14683, 14686 (Mar. 23, 2006)]. Petitioners also cited the 2005 NOAA/NMFS study. The study was cited for the proposition that the population of coho south of San Francisco was genetically distinct. The purpose of the study was to delineate the historical population structure of, inter alia, the CCC coho ESU to use as a baseline for evaluating the status of the ESU under current and projected conditions.

The study found that the rate of gene flow among populations was "substantially smaller among basins south of the Golden Gate than elsewhere in the CCC-Coho ESU," which it attributed to recent transplanting of fish from Scott Creek to nearby basins, as well as to natural dispersal among populations. However, the memorandum also found that genetic data suggested closely related populations along the Mendocino Coast. Nevertheless, the memorandum did not conclude that either the Mendocino populations or the south of San Francisco populations should be excluded from the CCC coho ESU. Based on this study, NOAA concluded a year later that the coho south of San Francisco were "clearly" part of the CCC coho ESU [71 Fed. Reg. 14683, 14686 (Mar. 23, 2006)].

Thus, while petitioners picked out bits of information that appeared to substantiate their claim that the coho south of San Francisco were not part of the CCC coho ESU, the scientists who analyzed that information had not made the same determination.

As petitioners admitted, the nature of the ESU designation was such that genetics alone are not determinative: "One must look beyond genetics to questions of policy to determine which populations to include in an ESU." The legislature delegated to the commission the authority to list or delist an endangered species. Necessarily included within that authority was the discretion to determine what constitutes a species or subspecies [Fish & Game Code § 2062]. Although the commission clearly could not include members of one species with another—a trout, say, with a salmon—it must have a certain amount of discretion when it comes to delineating one subspecies or ESU from another because it is a highly technical matter within the commission and department's scientific

expertise. Because the inclusion of coho south of San Francisco within the CCC coho ESU was not clearly erroneous and touched upon policy issues with the commission's and department's purview, it was entitled to deference [*Yamaha, above*]. The commission, the department, and the NMFS all, being fully aware of the studies cited by petitioners, determined that the coho south of San Francisco were part of the CCC coho ESU. Because those entities possessed the scientific expertise to make the determination, and because the commission was delegated the discretion on matters of policy, the court concluded that the evidence petitioners relied upon to show the coho south of San Francisco were not part of the CCC coho ESU was not sufficient to support a finding that the petition could be warranted.

**Issues Raised by Supreme Court.** The Supreme Court noted three issues for resolution: "(1) does the term 'native species' in the definition of 'endangered species' (§ 2062) mean 'native to the area' in which the species is listed, as plaintiffs assert, or 'indigenous to California,' as the Commission claims; (2) does the term 'range' in that definition (*ibid.*) mean 'historic,' 'native,' and 'natural range,' as plaintiffs argue, or 'present range,' as the Commission contends; and (3) when a species is listed as endangered—here, 'Coho salmon . . . south of Punta Gorda (Humboldt County)' ([Cal. Code] Regs., [tit. 14,] § 670.5, subd. (a)(2)(N))—under what circumstances, if any, does CESA permit the Commission to delist only a portion of the listed species—here, coho south of San Francisco—i.e., to carve out a population included in the listed species and remove it from CESA's protections?" [*Central Coast Forest Assn., above*]. The Supreme Court indicated that the court should consider these issues should the court find their resolution necessary. They briefly addressed the issues, since they confirmed the court's decision to reverse the judgment.

**"Range" Meant Current Range.** Fish & Game Code § 2062 provides that a species is endangered if it "is in serious danger of becoming extinct throughout all, or a significant portion, of its range." The Supreme Court asked "does the term 'range' in [section 2062] mean 'historic,' 'native,' and 'natural range,' as plaintiffs argue, or 'present range,' as the Commission contends?" [*Central Coast Forest Assn., above.*]

The court stated that because the court determined there was insufficient evidence to support petitioners' argument that the streams south of San Francisco were not a part of the coho's historical range, the answer to this question would not change the outcome of this case. While it was certainly not determinative, the identical language in the FESA ("significant portion of its range" (16 U.S.C. § 1532)) was interpreted by the Department of the Interior to mean current range, not historical range. The Department of the Interior reasoned as follows: "As defined in the Act, a species is endangered only if it 'is in danger of extinction' throughout all or a significant portion of its range. The phrase 'is in danger' denotes a present-tense condition of being at risk of a current or future undesired event. Hence, to say a species 'is in danger' in an area where it no longer exists—i.e., in its historical range where it has been extirpated—is inconsistent with common usage. Thus, 'range' must mean 'current range,' not 'historical range'" [Final Policy on Interpretation of the Phrase "Significant Portion of Its Range" in the Endangered Species Act's Definitions of "Endangered Species" and "Threatened Species," 79 Fed. Reg. 37578, 37583 (July 1, 2014)].

The court found this reasoning persuasive. The Department of the Interior stated in the same policy interpretation that "the term 'range' is relevant to whether the Act protects a species, but not how that species is protected," and that once a species is declared endangered or threatened, "the protections of the Act are applied 'to all individuals of the species, wherever found' (50 CFR 17.11(e), 17.12(e))" [79 Fed. Reg. 37578, 37583 (July 1, 2014)].

**Portion of Endangered Species May Be Delisted Only If It Can Be Defined as Separate Species, Subspecies, or ESU That Is Not Endangered.** The Supreme Court's final question was: "When a species is listed as endangered—here, 'Coho salmon . . . south of Punta Gorda (Humboldt County)' ([Cal. Code] Regs., [tit. 14,] § 670.5, subd. (a)(2)(N))—under what circumstances, if any, does CESA permit the Commission to delist only a portion of the listed species—here, coho south of San Francisco—i.e., to carve out a population included in the listed species and remove it from CESA's protections?" [*Central Coast Forest Assn., above.*]

The commission argued that a population could be "carved out" and delisted only if it could be defined as a separate species, subspecies, or ESU, and if the determination could be made that said species, subspecies, or ESU was not endangered. The court agreed. The court stated if a member of an endangered species were to be protected wherever found, then the requirements for "carving out" a population of an otherwise protected species were a determination that the population was a separate ESU, and a determination that the ESU was not endangered. Such a showing was not made here.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, § 81.51 (California Endangered Species Act – Listing).

# CLIMATE CHANGE

## Regulatory Activity

**Cap and Trade Regulation.** The Air Resources Board is proposing to amend the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms Regulation [17 Cal. Code Reg. §§ 95835 and 95911]. The proposed aregulatory action includes CARB staff's proposal to amend the Cap-and-Trade Regulation to clarify existing requirements related to changes of facility ownership. Specifically, the proposed amendments clarify that the Cap-and-Trade Regulation requires a successor entity after a change in ownership to be responsible for the outstanding, pre-transfer compliance obligation of the predecessor covered entity. This clarification is made in light of ongoing bankruptcy litigation involving a covered entity in the Program. In addition, the proposed amendments would clarify the regulatory procedure for establishing the Auction Reserve Price by ensuring consistency with the procedure for establishing the Auction Reserve Price in the Ontario and Québec regulations, and ensure that California can certify joint auctions regardless of which jurisdiction's Auction Reserve Price is used for a joint auction.

CARB staff is proposing the amendments to achieve two goals. The first goal is to clarify that the Cap-and-Trade Regulation requires a successor entity after a change in ownership to be responsible for the outstanding, pre-transfer compliance obligation of the predecessor covered entity. The second goal is to allow the Auction Reserve Price to be set based upon the highest of three jurisdiction-specific Auction Reserve Price values in the linked program (California, Ontario, and Québec). Without the modification, in specific, and unlikely, circumstances, it may not be possible for the CARB Executive Officer to certify that a joint auction using the Auction Reserve Price set by Ontario is conducted in accordance with the California Regulation. This outcome would reduce market participants' confidence in the market, which could reduce market participation and liquidity, and potentially impact a covered entity's ability to comply. The proposed modification ensures that California can certify joint auctions with other jurisdictions operating a GHG emissions trading system (ETS) to which California has linked, including Ontario.

This item will be considered at a meeting of the Board commencing at 9:00 a.m., March 22, 2018, Riverside County Administrative Center, 4080 Lemon Street, 1st Floor, Riverside, CA. The meeting may continue at 8:30 on March 23. The item is scheduled to be heard on the Board's Consent Calendar, unless removed upon the request of a Board member or if someone in the audience submits a request-to-speak card on the item. *Written comments* by March 18, 2018 to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically at 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 Street, Visitors and Environmental Services Center, First Floor, Sacramento, CA 95814. The documents are also available on ARB's website at www.arb.ca.gov/regact/2018/capandtradeghgl8/capandtradeghg18.htm. *Procedural inquiries*: Bradley Bechtold, Regulations Coordinator, (916) 322-6533. *Substantive inquiries*: Ben Carrier, Attorney, CARB Legal Office, (916) 327-5986.

**Prohibitions on Use of Certain Hydrofluorocarbons in Stationary Refrigeration and Foam End-Uses.** The Air Resources Board is proposing to adopt 17 Cal. Code Reg. §§ 95371-95377 establishing specific prohibitions on the use of high-global warming potential (high-GWP) refrigerants in new and retrofit stationary refrigeration equipment and certain HFCs used as blowing agents in foam end-uses. ARB staff is also proposing to adopt a recordkeeping requirement that would require the production of these documents if ARB requests them, and a disclosure requirement on the invoice produced by the manufacturer for these end-uses. This item will be considered at a meeting of the Board commencing at 9:00 a.m., March 22, 2018, Riverside County Administrative Center, 4080 Lemon Street, 1st Floor, Riverside, CA. The meeting may continue at 8:30 on March 23. *Written comments* by March 19, 2018, to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically at 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 Street, Visitors and Environmental Services Center, First Floor, Sacramento, CA 95814. The documents are also available on ARB's website at www.arb.ca.gov/regact/2018/casnap/casnap.htm. *Procedural inquiries*: Bradley Bechtold, Regulations Coordinator, (916) 322-6533. *Substantive inquiries*: Kathryn Kynett, Air Pollution Specialist, Greenhouse Gas Reduction Strategy Section, (916) 322-8598.

# SOLID WASTE MANAGEMENT

## Regulatory Activity

**Recycling and Disposal Reporting System.** The Department of Resources Recycling and Recovery is proposing to replace Article 9.2 of Division 7, Chapter 9 of Title 14 of the California Code of Regulations with a new Article 9.25 in order to implement the new reporting requirements created by Assembly Bill 901 (Gordon, Chapter 746, Statutes of 2015) (AB 901). The Department also proposes to amend references in sections of Title 14 and 27 to Article 9.2 by replacing them with references to the new Article 9.25. AB 901, Recycling and Disposal Reporting System (RDRS), improves the Department's and local jurisdictions' ability to achieve and measure legislatively mandated goals and programs by expanding reporting to include data on recycling and composting, and creating an enforcement mechanism. A hearing will be held at 2:00 p.m., March 14, 2018, Joe Serna Jr., Cal EPA Building, Coastal Hearing Room, 1001 I S., 2nd Floor, Sacramento, CA. Written comments by 11:59 p.m,: Jane Mantey, Ph.D., 801 K St., 17th Floor, Sacramento, CA 95814, fax: (916) 319-7482, email: AB901.Reporting@CalRecycle.ca.gov. Copies of the proposed text and statement of reasons may be obtained at 801 K Street, Sacramento, CA. The documents are also available on the Department's website at www.calrecycle.ca.gov/Laws/Rulemaking/Reporting/. *Substantive inquiries*: Jane Mantey, Ph.D., above.

## CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2018 forward). This table directs the reader to the page on which each subject discussion begins.

**Vol.:Page**

## CUMULATIVE TABLE OF CASES

The following is a table of cases discussed in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2018 forward). This table directs the reader to the page on which each case discussion begins. Citations to the Official Reports will be included as they become available.

**Vol.:Page**