Volume 3, Number 5
February 2023

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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Subscription Rate: 1 year (11 issues) $875.00. Price subject to change without notice. Circulation and Subscription Offices: Argent Communications Group; P.O. Box 1135, Batavia, IL 60510-1135; 530-852-7222 or 1-800-419-2741. Argent Communications Group is a division of Argent & Schuster, Inc., a California corporation. President/CEO, Gala Argent; Vice-President and Secretary, Robert M. Schuster,.

ENVIRONMENTAL NEWS

FINAL RULE DEFINING CLEAN WATER ACT 'WATERS OF THE UNITED STATES' PUBLISHED IN FEDERAL REGISTER

On January 18, 2023, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (the agencies) published the "Revised Definition of 'Waters of the United States'" rule in the Federal Register. This final rule will become effective March 19, 2023, 60 days after its publication. [88 Fed. Reg. 3004, Jan. 18, 2023]

The final rule purports to return to the pre-2015 definition of waters of the United States (WOTUS), which was implemented by the agencies for over 40 years, and, according to an EPA fact sheet on the new Rule, prioritizes:

> . . .practical, on-the ground implementation by providing tools and resources to support timely and consistent jurisdictional determinations[.]

Background

Justice Kennedy's "significant nexus" test, articulated in the concurring opinion in *Rapanos v. United States*, 547 U.S. 715 (2006), predominated jurisdictional determinations for "waters of the United States" until 2015, when President Obama's administration adopted the "Clean Water Rule: Definition of 'Waters of the United States'" (2015 Clean Water Rule). The 2015 Clean Water Rule significantly expanded the regulatory definition of WOTUS. The 2015 Clean Water Rule was immediately challenged, resulting in a number of federal court decisions that stayed the application of the rule in a number of jurisdictions. This effectively created a patchwork of applicable WOTUS definitions that varied based on geography.

On October 22, 2019, the Trump administration issued a repeal rule, which took the WOTUS definition back to pre-2015 regulations. Then, three months later, on January 23, 2020, the Trump administration issued a final rule —the "Navigable Waters Protection Rule: Definition of 'Waters of the United States'" (2020 NWPR). For the first time, the 2020 NWPR defined "waters of the United States" based primarily on Justice Scalia's plurality test from *Rapanos*. Among other changes, the NWPR purported to categorically exclude from federal Clean Water Act jurisdiction ephemeral streams and features, regardless of whether they had a "significant nexus" with traditionally navigable waters. The 2020 NWPR was also subject to a series of legal challenges.

Revised Definition of 'Waters of The United States'

On January 20, 2021, President Biden signed Executive Order 13990, entitled "Executive Order on Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis." In conformance with the Order, the agencies reviewed the 2020 NWPR to determine its alignment with three principles laid out in the Executive Order: science, climate change, and environmental justice.

Five Categories of WOTUS

The final rule defines "waters of the United States" to include (a): (1) traditional navigable waters, the territorial seas, and interstate waters; (2) impoundments of "waters of the United States"; (3) tributaries to traditional navigable waters, the territorial seas, interstate waters, or paragraph (a)(2) impoundments when the tributaries meet either the relatively permanent standard or the significant nexus standard (jurisdictional tributaries); (4) wetlands adjacent to paragraph (a)(1) waters; wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments or to jurisdictional tributaries when the jurisdictional tributaries meet the relatively permanent standard; and wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard ("jurisdictional adjacent wetlands"); and (5) intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) that meet either the relatively permanent standard or the significant nexus standard.

Further definitions are intended to help interpret and apply these five categories of jurisdictional wa-

ters. For example, the final rule states that "relatively permanent standard" means relatively permanent, standing or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to paragraph (a)(1) waters. The "significant nexus standard" means waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity of traditional navigable waters, the territorial seas, or interstate waters. A waterbody that meets either the significant nexus test or the relatively permanent test is likely to be treated as a WOTUS, and subject to EPA and Corps permitting jurisdiction under the final rule. These definitions, however, are not bright-line rules and will likely require the assistance of an expert.

Exclusions from WOTUS

Finally, the final codifies eight exclusions from the definition of "waters of the United States" in the regulatory text to provide clarity, consistency, and certainty to a broad range of stakeholders. The exclusions are: (1) Prior converted cropland, adopting USDA's definition and generally excluding wetlands that were converted to cropland prior to December 23, 1985; (2) Waste treatment systems, including treatment ponds or lagoons that are designed to meet the requirements of the Clean Water Act; (3) Ditches (including roadside ditches), excavated wholly in and draining only dry land, and that do not carry a relatively permanent flow of water; (4) Artificially irrigated areas, that would revert to dry land if the irrigation ceased; (5) Artificial lakes or ponds, created by excavating or diking dry land that are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing; (6) Artificial reflecting pools or swimming pools, and other small ornamental bodies of water created by excavating or diking dry land; (7) Water-filled depressions, created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand, or gravel unless and until the construction operation is abandoned and the resulting body of water meets the definition of "waters of the United States" and ; (8) Swales and erosional features (*e.g.*, gullies, small washes), that are characterized by low volume, infrequent, or short duration flow.

Conclusion and Implications

Based on recent history, it is reasonable to expect legal challenges to the final rule. Moreover, the U.S. Supreme Court is expected to issue a ruling this year in *Sackett v. EPA*, 8 F.4th 1075 (9th Cir. 2021), cert. granted Jan. 24, 2022, a case argued in October 2022, which focuses on the question of how regulators should interpret WOTUS. For more information, *see:* https://www.epa.gov/system/files/documents/2023-01/Revised%20Definition%20of%20Waters%20of%20the%20United%20States%20FRN%20January%202023.pdf.

(Tiffany Michou; Rebecca Andrews)

GOLDEN STATE WIND SECURES LEASE FOR OFFSHORE FLOATING WIND FARM ALONG CALIFORNIA'S CENTRAL COAST

A new joint venture from Ocean Winds (OW) and Canada Pension Plan Investment Board (CPP Investment), called Golden State Wind, has been awarded an 80,000-acre lease by the United States Office of Ocean Energy Management (OEM) in the Morro Bay area off California's Central Coast for the development of an offshore wind project. The lease area awarded by OEM is one of just five areas located off the California coast that OEM has offered as the subject of recent auctions. This auction stands out from the rest, however, as it is the first floating offshore wind lease sale in the country and the first offshore wind lease sale of any type on the West Coast.

Floating Offshore Renewable Energy Comes to California

California has long had the goal of reaching 100 percent renewable energy, and to do so the state will need to have a diverse portfolio of sources. One of the newest areas of renewable energy development has come in the form of floating offshore wind energy.

In early December, the Golden State Wind joint venture put up $150.3-million to secure a lease for

oceanic management rights, with OW and CPP Investment each maintaining a 50 percent investment in the project. The site of the lease, OCS-P 0564, covers over 80,000 acres of deep ocean waters and is located about 20 miles off the coasts of Morro Bay. Although the project is still years away from being realized, when it is fully built out and operational the lease area could accommodate roughly two gigawatts of offshore wind energy facilities. That amount of power would provide electricity equal to about 900,000 homes and make a sizeable impact on California's renewable energy portfolio.

Offshore wind energy production is still a relatively new idea as a whole, but the floating variant of wind technology that Golden State Wind is bringing to California is as promising as it is complex. With floating offshore wind, the facilities involve wind turbines as tall as 120 meters fixed to floating platforms, which in turn are anchored by cables to the sea bed hundreds of meters below. The technology required for these floating farms to generate clean power is still advancing and getting cheaper, but at the end of the day floating offshore is fairly novel compared to other renewable sources, such as traditional wind and solar, and is years away from becoming a popular option.

Floating offshore wind projects have been implemented elsewhere, such as the Windfloat Atlantic project of the coast of Portugal, but Golden State Wind's project is notable as being part of the first floating offshore lease sale in the United States, and one of the first offshore wind leases of any kind awarded on the West Coast. Importantly, projects such as this fit right into California's plan to generate 140 gigawatts of renewable energy by 2045, including 10 gigawatts from offshore wind. The rest of this total is expected to come from a wide array of renewable energy sources, although it seems the bulk of these sources could include solar power complemented by long-duration energy storage and traditional wind energy.

Interest in floating wind farms has been growing in countries such as Britain, France and Japan. While conventional offshore wind is limited to shallow waters with sea beds suitable to installing turbines, floating platforms open the door to moving the turbines much farther offshore, where winds are higher and more consistent, and the environmental effect could be lower.

The duo working together on the Golden State Wind project both stand out in the arena of renewable energy development. OW has expertise spanning over a decade in offshore wind, including its role in the above mentioned Windfloat Atlantic project near Portugal. CPP Investment also comes into the project with familiarity in the world of renewables and power generation, having significant investments in Calpine Energy Solutions, a producer of gas and geothermal energy, and in Pattern Energy Group LP, specializing in wind and solar energy.

Conclusion and Implications

Obtaining the lease area itself was a major step towards floating offshore coming to California, but there are still significant hurdles that stand in the way of Golden State Wind's success. On the technological side of things, developing floating platforms capable of supporting turbines and distributing their weight in the water comes as an obvious challenge. Coming as a bigger challenge, however, is the development of floating substations at sea that can be used to gather power from offshore turbines and transport that power back to shore.

In addition to the technological challenges the project will have to overcome, there are also hurdles in the form of regulatory approvals and permits to transfer the power onshore and connect it with California's energy grid, not to mention the process of arranging power purchase agreements with local utilities. Furthermore, the project will undoubtedly need to prepare for environmental challenges along the way as some environmental groups have already raised concerns about the effect the cables and turbines might have on oceanic life.

Despite the challenges the future has in store for the Golden State Wind project, the securing of the lease area represents a huge step forward in California as it means a new technology has found its way to the state. In order for California to build an energy grid fueled by renewables that is sufficiently stable, the state will have to become host to many different kinds of renewable energy-based projects, and Golden State Wind's new project is certainly one to keep an eye on as it comes to fruition. For more information on the project, *see:* https://www.oceanwinds.com/news/uncategorized/golden-state-wind-a-joint-venture-of-ocean-winds-and-cpp-investments-wins-2-gw-california-wind-energy-lease/.
(Wesley A. Miliband, Kristopher T. Strouse)

LEGISLATIVE DEVELOPMENTS

WASHINGTON STATE AGENCY REQUESTS LEGISLATION AFFECTING WATER RESOURCES, LEGISLATING CLIMATE RESILIENCY

With still some weeks left for new bills to be filed during the 2023 Legislative Session, the Washington Legislature has more than a dozen bills to consider with climate policy implications. Arguably an expected sign of the times in a state that has seen both sudden and record droughts, and sudden and record floods within the same calendar year every year for the last several years.

Among the bids for legislation addressing climate impacts is Agency request legislation to update the state's Integrated Climate Response Strategy. The cornerstone of State Department of Ecology's (Ecology's) Legislative Agenda for 2023 are the companion measures of House Bill 1170 / Senate Bill 5093 titled:

> "AN ACT Relating to improving climate resilience through updates to the state's integrated climate response strategy."

Washington first legislated creation of a climate response policy in 2009, enacted as Ch. 70A.05 RCW. The so-called "Integrated Climate Change Response Strategy," directed Ecology and five other state agencies to prepare a climate change strategy. Ecology was the lead in preparing a report ultimately published in 2012 under document number 12-01-004, entitled "Preparing for a Changing Climate, Washington State's Integrated Climate Response Strategy" (2012 Climate Response Strategy). The primary objective of this initial effort directed the formation of a "state integrated climate change response strategy." To develop this strategy, multiple state agencies were to work with state and local governments as well as public and private businesses and individuals "to prepare for, address, and adapt to the impacts of climate change." The report was to identify barriers and opportunities.

The 2012 report was organized by areas that were affected by climate change: Human Health; Ecosystems, Species, and Habitats; Ocean and Coastlines; Water Resources; Agriculture; Forests; and Infrastructure and the Build Environment (including utilities). Ecology established technical advisory groups comprised primarily of state agencies and academia with limited participation from environmental groups, local governments, and a few business interests.

The Water Resources Section of the 2012 Climate Response Strategy identifies Impacts (declining snowpack, changes in streamflow, higher drought risk, more severe flooding, and water quality concerns) and makes a number of Recommendations for Adaptation and Actions. The Recommendations from 2012 include initiatives still under discussion today in water resources—more reliance on regional planning groups that use integrated strategies, improvement in climate planning by water utilities and agriculture, increased efforts in conservation by all sectors, restoration of stream flows, improvements in data collection and monitoring use, increased reliance on strategies like water banking, storage, and reuse, and better preparation for droughts.

2023 Agency Request Legislation

Fast forward to 2023. Ecology is back with Agency request legislation to "update" the Climate Response Plan through the creation of a Climate Resiliency Plan. Following on the heels of the State's "Climate Commitment" in 2021 to reduce the state's greenhouse gas emissions and build a clean energy economy (*See*, Ch. 70A.65 RCW), the 2023 legislation is seeking to use the broader Climate Response Plan to expand climate consciousness into all levels of state government. How will this climate plan differ?

The table is bigger: in addition to Ecology, Agriculture, Fish and Wildlife, Natural Resources, and Transportation, the table now includes Commerce (replacing Community, Trade and Economic Development), Health, the State Conservation Commission, the Puget Sound Partnership, and the Emergency Management Division. Tribal governments are aligned with local governments as collaborating partners. In addition to local and tribal governments, Ecology is directed to collaborate and engage with nongovernmental organizations, business entities,

"overburdened communities" and other "marginalized groups" not previously consulted.

The costs are higher: The fiscal note issued by the Official of Financial Management for the 2009 effort came in at under $1m. The current fiscal note estimates between $2m and $3m per biennium through 2029 for a total cost of close to $9m.

The science is bigger: Ecology is directed to engage with the University of Washington Climate Impacts Group to develop, solicit and host relevant scientific and technical data collection efforts.

The task is bigger: The directive is no longer just to develop a strategy and plans; the emphasis is now on implementation and action. The directive includes evaluating a range of scenarios and timescales to among other things, "inform agency action." The agencies are also directed to prioritize solutions to be implemented within and across state agencies. The legislature is providing guiding principles in the focusing of these actions: reduce greenhouse gas emissions and build climate preparedness; protect "overburdened communities and vulnerable populations and provide more equitable outcomes"; "prioritize actions that deploy natural solutions, restore habitat, or reduce stressors that exacerbate climate impacts"; "prioritize actions that promote and protect human health"; and the catch-all, to "consider flexible and adaptive approaches for preparing for uncertain climate impacts, where relevant."

And the timeline is faster: The first recommendations are due within one year of the funding authorization (July 1, 2024); with an update anticipated every four years and interim biennial work plans to be presented to the legislature, not in cycle with the biennial budget process but in "off" years.

What is missing? While there is a reporting loop back to the legislature and the legislature's ongoing funding oversight, there are no current links back to the legislature to review or adopt the final plan, despite the directive that the plan addresses real actions to be undertaken by state government. As designed, this shifts the action on climate resilience and the associated and necessary policy trades from the legislative branch to the executive branch.

Conclusion and Implications

From a water resources standpoint, the Department of Ecology already exercises a great deal of discretion in its decision process for approving, denying, and managing water resources actions related to water rights and water resources. The policy and action directives use a planning process as a means to integrate climate policy into government actions, giving the agency additional decision-making directives without public discussion. The link to the 2012 strategy is available here: https://apps.ecology.wa.gov/publications/documents/1201004.pdf. The link to Ecology's 2023 Legislative Strategy is available here: https://

REGULATORY DEVELOPMENTS

DEPARTMENT OF THE INTERIOR ANNOUNCES $85 MILLION FOR WESTERN DROUGHT RESILIENCE PROJECTS

On December 22, 2022, the U.S. Department of the Interior announced an investment of $84.7 million to help 36 communities in the western United States prepare for and respond to the challenges of drought, including for projects such as groundwater recharge, rainwater harvesting, aquifer recharge, water reuse, and other methods to maximize existing water supplies. More than $36 million will go to 17 projects in California.

Background

The Department of the Interior (Interior) conducts water-related infrastructure projects in the West through the U.S. Bureau of Reclamation (Bureau). The Bureau was established in 1902 and develops and manages water resources in the western United States and is the largest wholesale water supplier and manager in the United States, managing 491 dams and 338 reservoirs. The Bureau delivers water to one in every five western farmers on more than 10 million acres of irrigated land. It also provides water to more than 31 million people for municipal, residential, and industrial use. The Bureau also generates an average of 40 billion kilowatt-hours of energy per year.

Under the Bipartisan Infrastructure Law of 2021 (Infrastructure Law), the Interior is set to receive $30.6 billion over five years. The Infrastructure Law allocated $8.3 billion of this $30.6 billion for the Bureau water infrastructure projects, to be provided in equal increments over five years to advance drought resilience and expand access to clean water for domestic, agricultural, and environmental uses. The Bureau has developed a spending plan (Plan) under the Infrastructure Law that includes four key priorities: increase water reliability and resilience; support racial and economic equity; modernize infrastructure; and enhance water conservation, ecosystem, and climate resilience. Under the Plan, the Bureau considers a potential projects' ability to effectively address water shortage issues in the West, to promote water conservation and improved water management, and to take actions to mitigate environmental impacts of projects. Accordingly, the Bureau generally gives priority to projects that complete or advance infrastructure development, make significant progress toward species recovery and protection, maximize and stabilize the water supply benefits to a given basin, and enhance regional and local economic development as well as advance tribal settlements. The $85 million announced by Interior is part of the funding allocated under the Infrastructure Law.

Plan Funding

The Bureau's Plan for 2022 provided for significant investment in water and groundwater storage and conveyance projects. The purpose of these projects is to increase water supply, and the Plan allocates funding across a broad range of project types related to construction of water storage or conveyance infrastructure or by providing technical assistance to non-federal entities: ($1.05 billion); aging infrastructure to support, among other things, developing and resolving significant reserved and transferred works failures that prevented delivery of water for irrigation ($3.1 billion); rural water projects, including developing municipal and industrial water supply projects ($1.0 billion); water recycling and reuse projects ($550 million) and "large scale" water recycling and reuse projects ($450 million) to promote greater water reliability and contribute to the resiliency of water supply issues; water desalination ($250 million); safety of dams to ensure Bureau dams do not present unacceptable risk to people, property, and the environment ($500 million); WaterSMART grants to provide adequate and safe water supplies that are fundamental to the health, economy, and security of the country ($300 million); watershed management projects ($100 million); aquatic ecosystem restoration and protection ($250 million); multi-benefit watershed health improvement ($100 million); and endangered species recovery and conservation programs in the Colorado River Basin ($50 million).

WaterSMART Program

Specifically, the funding announcement of $85 million is part of the Bureau's WaterSMART program, which supports states, tribes, and local entities plan for and implement actions to increase water supply through investments to modernize existing infrastructure and avoid potential water conflicts. Under that program, the Bureau provides financial assistance to water managers for projects that seek to conserve and use water more efficiently, implement renewable energy, investigate and develop water marketing strategies, mitigate conflict risk in areas at a high risk of future conflict, and accomplish other benefits that contribute to the sustainability of the western United States. The Bureau had selected 255 projects across the western states since January 2021 to be funded with $93 million in WaterSMART funding and $314.3 million in non-Federal funding, with a total of $1 billion provided for WaterSMART grants in 2022. In addition to advancing the WaterSMART program, the $85 million investment will help repair aging water delivery systems, secure dams, complete rural water projects, and protect aquatic ecosystems.

Projects in California

There are 17 projects in California that will receive funding from Interior's $85 million investment. There are a number of different entities and project types represented across the 17 funded projects. For instance, a number of public agencies will receive funding related to the development of conjunctive use modeling (e.g., using groundwater instead of surface water to meet demand), recycled water reuse projects, water treatments projects including for per- and poly-fluoroalkyl (PFAS), groundwater recharge projects, pipeline conveyance projects, and aquifer storage and recovery. Other projects include drought resiliency projects for state parks—also referred to as "mitigation actions" in drought contingency planning documents that provide for fish and wildlife benefits—and rural water supply planning for smaller communities in northern California. A number of municipal projects include treatment and pipeline projects.

Conclusion and Implications

The drought resilience funding announced by Interior is part of an overarching and substantial investment in Western water planning efforts by the Bureau, local entities, tribes, and others. While it remains to be seen to what extent the funded projects will achieve their objectives, particularly as water tensions in the West appear to be increasing, the funding is a step forward in federal and non-federal efforts to address ongoing drought impacts. For more information, *see: Biden-Harris Administration Invests More Than $84 million in 36 Drought Resiliency Projects* (Dec. 22, 2022), https://www.usbr.gov/newsroom/news-release/4395.

(Miles Krieger, Steve Anderson)

EPA'S AMENDMENTS TO THE NATIONAL EMISSIONS STANDARDS FOR HAZARDOUS AIR POLLUTANTS FOR SITE REMEDIATION ELIMINATES CERTAIN CERCLA AND RCRA EXEMPTIONS

On December 22, 2022, the U.S. Environmental Protection Agency (EPA) promulgated a final rule amending the national emission standards for hazardous air pollutants (NESHAP) for the site remediation source category. The amendments in the recent rule eliminate certain exemptions from NESHAP for site remediation activities performed under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA).

Regulatory Background of NESHAP

In 2003, the EPA promulgated a rule to control certain hazardous air pollutants (HAP) from remediation sites located at major sources of HAP, *i.e.* where remediation technologies and practices are used at the site to clean up contaminated soil, groundwater, or surface water, or where certain materials posing a reasonable potential threat to contaminate soil, groundwater, or surface water are stored or disposed (Site Remediation NESHAP). Under the Site Re-

mediation NESHAP, only volatile organic HAP were being controlled. The Site Remediation NESHAP also exempted certain site remediations including those (1) performed under CERCLA as remedial action or non-time-critical removal action; and (2) performed under a RCRA corrective action conducted at a treatment, storage, and disposal facility (TSDF) either required by a permit issued by EPA or an EPA-authorized state program under RCRA. EPA's reasoning was that programs using remediation approaches would generally address protection of public health and the environment from air pollutants and be "functionally equivalent" to the HAP emissions control under the Site Remediation NESHAP. Further, certain site remediations are not subject to the Site Remediation NESHAP unless they are co-located at a facility with one or more other stationary sources that emit HAP and meet certain affected source definitions (co-location exemption).

Following the promulgation of the Site Remediation NESHAP in 2003, citizen groups petitioned the EPA Administrator for reconsideration, including petitioning EPA's authority to create the CERCLA and RCRA exemptions. In a lawsuit regarding the petition for reconsideration, the petitioner citizen groups and EPA agreed to place the case in abeyance so that EPA could review the petition for reconsideration. *See, Sierra Club et al. v. EPA*, Case No. 03-1435 (D.C. Cir. 2003). EPA failed to address the issues in a 2006 amendment to the Site Remediation NESHAP, and in 2014 the court in *Sierra Club* ordered the parties to explain why the case should not be terminated. In the explanation, the parties jointly informed the court that the agency would issue a Federal Register notice to initiate the reconsideration process.

In 2016, EPA proposed to remove the CERCLA and RCRA exemptions as well as the co-location conditions in the Site Remediation NESHAP and requested comment regarding the same. In 2019, EPA sought further comments about removing the exemptions, including whether there were other methods of distinguishing among appropriate requirements for CERCLA and RCRA-exempt sources. For example, could monitoring, recordkeeping, reporting, and compliance demonstration be structured so that exempt sources could comply with the Site Remediation NESHAP. In 2020, EPA made certain amendments without addressing the CERCLA and RCRA exemptions again. This prompted another lawsuit and petitions for reconsideration from citizen groups.

In the recent 2022 rule, EPA finalized removing the CERCLA and RCRA exemptions from the Site Remediation NESHAP. On EPA's reconsideration, the agency agreed that it lacked authority to exempt affected sources in a listed source category from otherwise applicable NESHAP requirements. The agency further reasoned that the requirements of the Site Remediation NESHAP were appropriate and could be achieved at all subject site remediations, including those under CERCLA and RCRA authority.

Removal of CERCLA and RCRA Exemptions

Several comments to the 2022 amendments raised that EPA failed to provide a sufficient basis and purpose for the amendments, as required by the federal Clean Air Act (CAA). The same commenters also stated that nothing in CERCLA, RCRA, or CAA has changed in a way to make the exemptions improper. EPA responded that the basis and purpose of the amendments is to meet the obligations under the CAA to establish NESHAP for all sources in listed source categories. Because site remediation is among the listed source categories, CAA mandates EPA to establish emissions standards. While CAA does allow EPA to distinguish among classes, types, and sizes of sources, there is nothing in CAA that allows EPA to exempt sources based on the regulation of another statute like CERCLA or RCRA. EPA ultimately reasoned that simply because a source in a listed source category may be subject to similar requirements through other statutes, the source is not exempt from NESHAP requirements.

Co-Location Exemption Retained

Despite EPA's consideration to remove the co-location exemption, i.e. the requirement that an affected site remediation is subject to NESHAP if it is co-located with a facility that is a major source already subject to at least one other NESHAP, the agency declined to remove the co-location requirement. This was largely based on the agency's finding that remediation facilities that are not co-located with major sources are not major sources of HAP.

Conclusion and Implications

The final rule initiates a compliance date of 18 months from the effective date of the 2022 amend-

ments for existing sources, and for new sources subject to NESHAP due to the removal of the CERCLA and RCRA exemptions, on the later of either the effective date or upon initial startup. During this time, the owners and operators of site remediation affected sources will need to evaluate whether additional emissions control is necessary.
(Alexandra Lizano and Hina Gupta)

EPA REACTIVATES ITS PREVENTION OF SIGNIFICANT DETERIORATION REACTIVATION POLICY

On November 19, 2022, the United States Environmental Protection Agency (EPA) found that a refinery located in the U.S. Virgin Islands, which last regularly operated in 2012, would require a new prevention of significant deterioration (PSD) permit under the federal Clean Air Act to reactivate.

In reaching this decision, EPA effectively reversed its decision in 2018 to transfer the existing PSD permits to a new owner and reaffirmed its 1999 "Reactivation Policy" finding that reactivation of the refinery, formerly known as the Limetree Bay Refinery, constituted construction of a new source, subjecting the refinery to onerous permitting requirements under the PSD program.

Background

In February 2012, HOVENSA, then owner of the refinery, shutdown down the facility citing significant financial losses and stated that it had no plans to restart. In subsequent negotiations with the U.S. Virgin Islands government, HOVENSA indicated it planned to convert the refinery into an oil storage terminal. However, at the request of the government, HOVENSA began attempts to find a buyer that would restart refining operations.

In 2016, HOVENSA entered into an agreement to sell the refinery to Limetree Bay Terminals and Limetree Bay Refining (Limetree). In 2018, EPA agreed to transfer the existing air permits to Limetree and Limetree initiated construction activities to restart the refinery. After an investment of $4.1 Billion into the facility, by late 2020, Limetree began to restart. Limetree made several failed attempts at restart resulting in alleged violations of its permit terms and emission incidents that impacted nearby residents. On May 14, 2021, EPA issued an order under Section 303 of the Clean Air Act finding an imminent and substantial endangerment to public health and welfare and the environment and ordered the refinery to pause all operations.

In June 2021, Limetree informed EPA it would not restart the refinery and in December 2021, the West Indies Petroleum Limited and Port Hamilton Refining and Transportation Company acquired the refinery in a bankruptcy auction. In March 2022 EPA informed the new owners that it was considering PSD actions that may be required should the new owners pursue startup of the refinery.

EPA's Reactivation Policy

In its November 2022 letter to the new owners, EPA found that HOVENSA, the owner at the time of the shutdown in 2012, intended the shutdown to be permanent, thus the refinery must obtain a PSD permit as a new source. The PSD program, implemented under the Clean Air Act, applies to new major sources and major modifications to existing sources in areas that are in attainment with the National Ambient Air Quality Standards (NAAQS). (42 U.S.C. §§7470-7479). Obtaining a PSD permit at a new or modified source requires the facility to install best available control technology, perform an air quality analysis to demonstrate that the new emissions will not cause or contribute to a violation of a NAAQS, and submit to public comment.

EPA based this decision regarding PSD permits on its Reactivation Policy, articulated in a June 11, 1999 EPA Environmental Appeals Board decision, *In re Matter of Monroe Electric Generating Plant Entergy Louisiana, Inc.* Proposed Operating Permit, Petition No. 6-99-2. In *Monroe,* EPA stated that whether a shutdown is permanent, such that a restart or reactivation requires new permits, depends, in part, on the intent of the owner or operator at the time of the shutdown. Should the shutdown last two years, however, there is a presumption that the shutdown is permanent, unless this presumption is rebutted by a continuing intent by the owner to reopen. Where

a source has been shutdown for more than two years, EPA examines six factors to determine whether there is a continuing intention to restart:

- Length of time the facility has been shut down
- Time and capital needed to restart
- Evidence of intent and concrete plans to restart
- Cause of the shutdown
- Status of permits
- Maintenance and inspections during shutdown

Application of the Reactivation Policy to the Limetree Refinery

In reaching its current determination that the Limetree Refinery will require new PSD permits for a newly constructed facility, EPA applied the six-factor test found in its Reactivation Policy. First, the agency noted that the facility was shutdown for more than six years before construction for restart began and more than eight years before restart was attempted. This is far longer than the two years after which there is a presumption that a facility has been permanently shutdown, under the Reactivation Policy. Next EPA cited the $4.1 billion in expenditures and two years required for construction to facilitate restart as additional compelling reasons to support its conclusion the shutdown was permanent. It notes that facilities that have not been shutdown should be able to restart within weeks or a few months.

Regarding intent and concrete plans to restart, EPA finds the opposite, noting several public statements by HOVENSA that it intended for the 2012 shutdown to be permanent. EPA reasons that the cause of the shutdown stated by HOVENSA, significant financial losses from operating and no path towards profitability reinforce HOVENSA's intent that the shutdown was permanent.

EPA found that HOVENSA and Limetree took actions to maintain the required operating permits, however the agency questions whether the companies did this under the belief that these permits would also be necessary to operate the facility as an oil storage terminal. Finally, EPA notes that maintenance records provided by HOVENSA and Limetree indicate the companies failed to perform adequate maintenance through the shutdown period that would be expected if there was an intention to restart.

Although not part of the six-factor test in the Reactivation Policy, EPA in its letter to the current owners of the refinery also discusses, in detail, the compliance issues alleged against the refinery, including excess emission issues and impacts on the surrounding community.

Citing the totality of the factors, EPA concluded that the intent of the operator at the time of the shutdown was that the shutdown would be permanent. Thus, EPA finds that restart of this source would require review as a new source under the PSD air permitting program.

Conclusion and Implications

It remains to be seen how strictly EPA will apply the Reactivation Policy in the future. The six-factor test provides the agency discretion and the facts surrounding the Limetree facility appear relatively compelling. In addition, although not included in the Reactivation Policy, EPA also appears to have given consideration the compliance history and the excess emission events in its decision to require new permits. For more information, *see:* (*Letter from Joseph Goffman, Principal Deputy Assistant Administrator, EPA to Julie Domike, Babst Calland, regarding* Refinery located in Christianshed, St. Croix, U.S. Virgin Islands, available at Refinery on St. Croix, U.S. Virgin Islands | US EPA).
(Darrin Gambelin)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD EXTENDS EMERGENCY WATER CONSERVATION REGULATIONS

The California State Water Resources Control Board (State Water Board) recently extended emergency water conservation regulations originally adopted in January 2022, which will now remain in place through December 2023. Additional water conservation regulations adopted in May 2022 remain in effect through June 2023.

Background

The State Water Board's stated mission is to preserve, enhance and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper resource allocation and efficient use for the benefit of present and future generations. Despite sporadic, intense wet months, California has generally been experiencing one of the most severe droughts in its recorded history. In response, the State Water Board adopted two sets of emergency water conservation regulations. The regulations implement directives contained in drought emergency declarations and executive orders issued by Governor Gavin Newsom.

Emergency Drought Proclamations

Throughout the Summer of 2021, Governor Newsom issued evolving proclamations declaring drought states of emergency for a total of 50 counties and directing state agencies to take immediate action to preserve critical water supplies, to mitigate the effects of drought and to ensure the protection of health, safety, and the environment. In late Fall 2021, Governor Newsom issued a further proclamation extending the drought emergency declaration to the remainder of the state and urging Californians to reduce water use.

Emergency Regulations

The State Water Board implemented two sets of emergency regulations in response to Governor Newsom's directives.

First Water Conservation Emergency Regulation

The first set of water conservation emergency regulations were adopted and took effect in January 2022. These regulations prohibit: (1) application of potable water to outdoor landscapes in a way that causes more than incidental runoff; (2) the use of a water hose to wash a motor vehicle, unless it has a shut-off nozzle; (3) use of potable water for washing sidewalks, driveways, buildings, structures, or other hard surfaces; (4) the use of potable water for street cleaning or construction site preparation purposes; (5) the application of water to irrigate turf and ornamental landscapes during and within 48 hours after measurable rainfall of at least one fourth of one inch of rain. The regulations also prohibit cities and homeowners associations from preventing homeowners from replacing their lawns with drought-tolerant vegetation.

Second Water Conservation Emergency Regulation

The State Water Board's second set of water conservation regulations took effect in May 2022. These regulations build upon the first set of regulations and further prohibit the watering of non-functional turf at commercial, industrial, and institutional properties. The ban does not apply to watering grass that is used for recreation or other community activities. The regulation also requires urban water suppliers to implement all demand-reduction actions under Level 2 of their Water Shortage Contingency Plans, which are actions meant to address a 10 percent to 20 percent water shortage. Level 2 actions may vary with each water supplier, but they often include things such as: (1) increasing communication about the importance of water conservation; (2) limiting outdoor irrigation to certain days or hours, and (3) increasing patrolling to identify water waste.

Additionally, the second set of emergency regulations requires suppliers who do not have drought plans to take conservation actions. These actions may include conducting outreach to customers about conservation and limiting outdoor irrigation to two days a week. Water suppliers are also required to communicate with their customers about the requirements of the emergency regulation. Violations of the non-functional turf irrigation provision are subject to enforcement through fines of up to $500.

Readoption of Wasteful Water Ban

The State Water Board recently extended the first set of water conservation regulations that were originally adopted in January 2022. Those regulations will remain in place through December 2023. The regulation applies to water suppliers and individual water users. Violations may be subject to enforcement through warning letters, water audits or fines.

State Water Board officials have indicated that the extension of the emergency regulation is intended not only bolster the state's conservation efforts, but to also further efforts to make water conservation a daily habit and way of life for Californians.

Conclusion and Implications

The State Water Resources Control Board continues to adopt, extend and implement emergency regulations in response to severe drought conditions. The current water year has experienced unprecedented storm events and is seeing improvements in snowpack and surface water reservoir levels; however, California has seen similar patterns in recent years erode to hot, dry conditions accelerating runoff and limiting long-term supplies. The State Water Board's extension of the emergency regulations reflect the possibility of another dry year. In the meantime, may Californians would likely urge pursuit of more stabilizing, long-term water supply solutions that could minimize the need to operate in seemingly perpetual emergency conditions. Information on the latest updates to the Water Conservation Emergency Regulations can be found on the State Water Board website at: https://www.waterboards.ca.gov/water_issues/programs/conservation_portal/regs/emergency_regulation.html
(Christina Suarez, Derek Hoffman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•Jan. 31, 2023—U.S. Environmental Protection Agency has issued a finding of violation to Fritz Enterprises Inc., a scrapyard in Flint, Michigan, alleging federal Clean Air Act violations by failing to prevent the release of ozone-depleting substances into the atmosphere.

Fritz Enterprises failed to verify that all refrigerants had been properly recovered from the appliances accepted by their scrapyard. These violations caused emissions of substances, including chlorofluorocarbons and hydrochlorofluorocarbons, which deplete the stratospheric ozone layer that protects life on earth from the sun's harmful ultraviolet radiation. These violations also caused emissions of substitute refrigerants that contribute to global warming and climate change.

EPA has notified Fritz Enterprises of their noncompliance and met with company representatives on Jan.18 to discuss next steps.

Under the Clean Air Act, EPA has several enforcement options to address the alleged violations, including administrative or judicial civil action.

•Jan 4, 2023—The U.S. Environmental Protection Agency (EPA) announced a settlement with Earth City, Missouri, polyurethane manufacturer Foam Supplies Inc. to resolve alleged violations of the federal Clean Air Act's Risk Management Plan Rule.

The settlement requires the company to pay a $7,398 civil penalty. The company also agreed to purchase no less than $35,500 in emergency response equipment to be donated to a local fire department.

According to EPA, the company stores over 10,000 pounds of methyl formate, a regulated flammable substance, and failed to comply with regulations intended to protect the surrounding community from accidental releases of regulated substances. Alleged violations included failure to submit a risk management plan and implement a hazard assessment. In response to EPA's findings, Foam Supplies Inc. took the necessary steps to bring the facility into compliance.

The donated equipment will go to the Pattonville, Missouri, Fire Department. It includes gas detectors to help determine if the atmosphere is safe for entry by firefighters; air bags for rapid extrication of entrapped individuals; and new fire hoses. This project will improve the ability of the local emergency response team to detect and respond to releases of regulated substances.

The federal Clean Air Act's Risk Management Plan Rule regulations require facilities that use regulated toxic and/or flammable substances to develop a Risk Management Plan that identifies the potential effects of a chemical accident; identifies steps a facility is taking to prevent an accident; and spells out emergency response procedures should an accident occur. These plans provide valuable information to local fire, police, and emergency response personnel to prepare for and respond to chemical emergencies in their community.

EPA has found that many regulated facilities are not adequately managing the risks they pose or ensuring the safety of their facilities in a way that is sufficient to protect surrounding communities.

Civil Enforcement Actions and Settlements—Water Quality

•Dec. 16, 2022—The Department of Justice and the Environmental Protection Agency (EPA) announced today a proposed consent decree with 85 potentially responsible parties, requiring them to pay a total of $150 million to support the cleanup work and resolve their liability for discharging hazardous substances into the Lower Passaic River, which is part

of the Diamond Alkali Superfund Site in Newark, New Jersey.

The Justice Department and EPA alleged that these 85 parties are responsible for releases of hazardous substances into the Lower Passaic River, contaminating the 17-mile tidal stretch, including the lower 8.3 miles. The proposed consent decree seeks to hold the parties accountable for their share of the total cost of cleaning up this stretch of the river.

"Newark, Harrison, and many other vibrant communities have borne the brunt of pollution along the Lower Passaic River for too long," said First Assistant U.S. Attorney Vikas Khanna for the District of New Jersey. "This agreement is an important step forward. It will support significant cleanup efforts that restore this historic waterway, advance a new chapter of responsible land use, and return the river to the people of New Jersey.

On behalf of EPA, the Justice Department lodged the consent decree with the U.S. District Court for the District of New Jersey. If and when the settlement becomes final, EPA expects to use the settlement funds to support ongoing efforts to clean up the site, specifically the lower 8.3 miles and the upper 9 miles which make up the entire 17-mile Lower Passaic River Study Area. In addition to the proposed consent decree, EPA has reached several related agreements, including one whereby many parties investigated the 17-mile Lower Passaic River, another whereby Occidental Chemical Corporation, a potentially responsible party, is designing the cleanup chosen for the lower 8.3 miles, and several cost recovery agreements that resulted in payments to EPA of millions of dollars.

This consent decree is subject to a 45-day public comment period and is available for public review on the Justice Department website.

•Dec. 13, 2022— In a decision issued on December 9, the U.S. District Court for the Eastern District of California granted the request of the Justice Department to direct John Sweeney and his company, Point Buckler Club LLC, to restore sensitive tidal channels and marsh they unlawfully harmed. The court's decision follows an earlier order dated Sept. 1, 2020, when the court found defendants committed "very serious" violations of the federal Clean Water Act associated with the construction of a nearly mile-long levee without a permit.

The defendants' violations occurred on Point Buckler Island, an island in the greater San Francisco Bay that Sweeney had purchased in 2011. The Island's tidal channels and marsh are part of the Suisun Marsh, the largest contiguous brackish water marsh remaining on the west coast of North America. The Island is located in a heavily utilized fish corridor and is critical habitat for several species of federally protected fish.

When Sweeney acquired the Island, nearly all of it functioned as a tidal channel and tidal marsh wetlands system. Beginning in 2014, without a permit, Sweeney excavated and dumped thousands of cubic yards of soil directly into the Island's tidal channels and marsh. This unlawful conduct, the court found, eliminated tidal exchange, harmed aquatic habitat and adversely impacted water quality.

In its detailed remedial decision, the court concluded that restoration is the appropriate goal, and an injunction is necessary to achieve it.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•Jan. 26, 2023— The U.S. Environmental Protection Agency announced a proposed $5.4 million settlement with The Dow Chemical Co. to recover costs for EPA's cleanup work at the Tittabawassee River, Saginaw River & Bay Superfund site in Midland, Michigan. EPA began a 30-day public comment period today.

In 1897, the 1,900-acre Dow facility began producing various chemicals along the Tittabawassee River. Most of the plant is located on the east side of the river and south of the city of Midland. At various times, the Midland Plant produced more than 1,000 different organic and inorganic chemicals. Historical operations at Dow's Midland Plant caused the release of toxic chemicals known as dioxins into the Tittabawassee River which moved downstream and mixed with sediment in the Saginaw River and Bay.

The costs recovered by the proposed settlement are associated with EPA performing sampling work at the site, negotiating time critical and non-time critical removal orders with Dow prior to 2010, as well as negotiating the 2010 Administrative Settlement Agreement and Order on Consent for the remedial investigation, feasibility study, and remedial design at the site.

Public comments on the proposed settlement will be accepted online until Feb. 26.

•Jan. 30, 2023—The U.S. Environmental Protection Agency (EPA) and Department of Justice announced a settlement with Logan Square Aluminum Supply Inc., resolving alleged violations of the federal Lead Renovation, Repair and Painting regulations, known as the RRP rule, at renovation projects Logan Square and its contractors performed in Chicago and Chicago suburbs.

Under the court settlement, Logan Square will implement a comprehensive program to ensure that its contractors are certified and trained to use lead-safe work practices to avoid creating lead dust during home renovation activities. Under a parallel administrative settlement agreement, Logan Square will also pay a $400,000 penalty, and perform $2 million of lead-based paint abatement work in lower-income properties located in Chicago and Chicago suburbs in communities with a higher incidence of childhood lead poisoning.

EPA first discovered the alleged violations through customer complaints about a project performed in Evanston, Illinois. EPA learned that Logan Square frequently subcontracted work to uncertified firms and did not use lead-safe work practices, perform required post-renovation cleaning, provide the EPA-required lead-based paint pamphlets to occupants, or establish records of compliance. Logan Square also conducts business under other names, including Climate Guard Thermal Products Co. and Studio 41.

The consent decree was lodged in the U.S. District Court for the Northern District of Illinois. Notice of the lodging of the consent decree will appear in the Federal Register allowing for a 30-day public comment period before the consent decree can be entered by the court as final judgment.

•Jan 25, 2023—The U.S. Environmental Protection Agency (EPA) announced the latest action to protect communities and hold facilities accountable for controlling and cleaning up the contamination created by coal ash disposal. The agency issued six proposed determinations to deny facilities' requests to continue disposing of coal combustion residuals (CCR or coal ash) into unlined surface impoundments.

For a seventh facility that has withdrawn its application, Apache Generating Station in Cochise, Arizona, EPA issued a letter identifying concerns with deficiencies in its liner components and groundwater monitoring program.

Coal ash is a byproduct of burning coal in coal-fired power plants that, without proper management, can pollute waterways, groundwater, drinking water, and the air. Coal ash contains contaminants like mercury, cadmium, chromium, and arsenic associated with cancer and various other serious health effects.

EPA is proposing to deny the applications for continued use of unlined surface impoundments at the following six facilities:

(1) Belle River Power Plant, China Township, Michigan.

(2) Coal Creek Station, Underwood, North Dakota.

(3) Conemaugh Generating Station, New Florence, Pennsylvania.

(4) Coronado Generating Station, St. Johns, Arizona.

(5) Martin Lake Steam Electric Station, Tatum, Texas.

(6) Monroe Power Plant, Monroe, Michigan.

EPA is proposing to deny these applications because the owners and operators of the CCR units fail to demonstrate that the surface impoundments comply with requirements of the CCR regulations.

Evidence of potential releases from the impoundments and insufficient information to support claims that the contamination is from sources other than the impoundments.

If EPA finalizes these denials, the facilities will have to either stop sending waste to these unlined impoundments or submit applications to EPA for extensions to the deadline for unlined coal ash surface impoundments to stop receiving waste.

Indictments, Sanctions, and Sentencing

Jan. 19, 2023—Empire Bulkers Limited and Joanna Maritime Limited, two related companies based in

Greece, were sentenced today for committing knowing and willful violations of the Act to Prevent Pollution from Ships (APPS) and the Ports and Waterways Safety Act related to their role as the operator and owner of the Motor Vessel (M/V) Joanna.

The prosecution stems from a March 2022 inspection of the M/V Joanna in New Orleans that revealed that required pollution prevention equipment had been tampered with to allow fresh water to trick the sensor designed to detect the oil content of bilge waste being discharged overboard. The ship's oil record book, a required log presented to the U.S. Coast Guard, had been falsified to conceal the improper discharges.

During the same inspection, the Coast Guard also discovered an unreported safety hazard. Following a trail of oil drops, inspectors found an active fuel oil leak in the engine room where the pressure relief valves on the fuel oil heaters, a critical safety device necessary to prevent explosion, had been disabled. In pleading guilty, the defendants admitted that the plugging of the relief valves in the fuel oil purifier room and the large volume of oil leaking from the pressure relief valve presented hazardous conditions that had not been immediately reported to the Coast Guard in violation of the Ports and Waterways Safety Act. Had there been a fire or explosion in the purifier room, it could have been catastrophic and resulted in a loss of

U.S. District Court Judge Mary Ann Vial Lemmon sentenced the two related companies to pay $2 million ($1 million each) and serve four years of probation subject to the terms of a government approved environmental compliance plan that includes independent ship audits and supervision by a court-appointed monitor.

The U.S. Coast Guard Investigative Service investigated the case with assistance from Coast Guard Sector New Orleans and the Eighth Coast Guard District.
(Robert Schuster)

LAWSUITS FILED OR PENDING

CALIFORNIA TRIBES AND ENVIRONMENTAL ORGANIZATIONS FILE CIVIL RIGHTS COMPLAINT AND PETITION FOR RULEMAKING WITH EPA FOR SAN FRANCISCO BAY-DELTA WATER QUALITY STANDARDS

A coalition of California Tribes and environmental justice organizations, including Save California Salmon, Restore the Delta, Winnemem Wintu Tribe, Shingle Springs Band of Miwok Indians, and Little Manila Rising (collectively: Coalition), filed a civil rights complaint and petition for rulemaking (Complaint) with the U.S. Environmental Protection Agency (EPA). The Coalition's Complaint urges the EPA investigate the State Water Resources Control Board's (State Water Board) alleged civil rights violations and initiate rulemaking to adopt federal Clean Water Act-compliant water quality standards for the San Francisco Bay/Sacramento-San Joaquin Bay-Delta Estuary (Bay-Delta). [*Title Vi Complaint and Petition for Rulemaking* (EPA).]

Background

The State Water Board is responsible for implementing the federal Clean Water Act and the California Porter-Cologne Water Quality Act. (Wat. Code §§ 13141, 13160.) Pursuant to this authority, the State Water Board adopted the first Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Estuary (Bay-Delta Plan) in 1978. (Complaint, at p. 26.) The Bay-Delta Plan designates beneficial uses for the Bay-Delta, establishes water quality objectives for those uses, and sets forth an implementation program to achieve those objectives. (Bay-Delta Plan (2006) at p. 26.) As part of the State Water Board's duties under Porter Cologne, it must periodically review the Bay-Delta Plan. (Wat. Code § 13240.) The State Water Board has conducted three full reviews of the Bay-Delta Plan since its initial adoption—1991, 1995, and 2006. (Complaint, at pp. 26–27.)

After its most recent review in 2006, the State Water Board began the review process again in 2008 via a bifurcated process. (Resolution No. 2008-0056 (2008) State Water Board.) First, the State Water Board would review and update the salinity and flow objectives for the southern Delta and San Joaquin River in Phase I. (*Id.*) Then, in Phase II, the State Water Board would review and update standards to protect native fish and wildlife in the Sacramento River, Delta, and associated tributaries. (*Id.*) The State Water Board adopted amendments relevant to the Phase I update of the Bay-Delta Plan in December, 2018. (*Adoption of Amendments to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary* (Dec. 12, 2018) State Water Resources Control Board, Resolution 2018-0059.) The State Water Board is currently in the process of conducting Phase II, which includes consideration of voluntary agreements in which water users would agree to limit surface water diversions to attain water quality standards. (*See, Draft Scientific Basis Report Supplement in Support of Proposed Voluntary Agreements for the Sacramento River, Delta, and Tributaries Update to the San Francisco Bay/Sacramento-San Joaquin Delta Water Quality Control Plan* (2023) State Water Board.)

Civil Rights Complaint and Petition For Rulemaking

The Coalition's Complaint is the latest in a series of actions over the past year regarding updates to the Bay-Delta water quality control plan. On May 22, 2022, the Coalition filed a petition for rulemaking before the State Water Board. (Complaint, at p. 31.) The Board rejected the petition on June 24, and then denied a request for reconsideration on September 21, 2022. (*Id.*) Then, on December 16, 2022, the Coalition submitted its Complaint pursuant to Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d), and the Administrative Procedures Act (5 U.S.C. § 551 *et seq*) before the U.S. EPA. (Complaint, at p. 2.)

Civil Rights Act Allegations

Under Title VI of the Civil Rights Act, federal agencies are authorized and directed to adopt rules and regulations implementing the act. (42 U.S.C. §

2000d-1.) Accordingly, the EPA promulgated regulations prohibiting entities or programs that receive EPA assistance from discriminating on the "basis of race, color, national origin or . . . sex." (40 C.F.R. § 7.35.) Individuals who believe their civil rights were violated by an entity that receives funding from the EPA can submit a complaint to the EPA's External Civil Rights Compliance Office, which will then investigate and resolve the complaint. (*External Civil Rights Compliance Office Compliance Toolkit* 8 (2017) U.S. EPA.).

The Coalition alleges the State Water Board is violating Title VI of the Civil Rights Act by failing to update the Bay-Delta Plan. (Complaint, at p. 33.) According to the Coalition, the EPA External Civil Rights Compliance Office should investigate the Complaint because the State Water Board's failure to update the Bay-Delta Plan's water quality standards disproportionately impacts Native American Tribes and communities of color in the Bay-Delta watershed. (*Id.*) Specifically, the Coalition alleges that the State Water Board is violating native tribes' civil rights by failing to maintain water quality standards that result in impaired tribal access to fish, riparian resources, and waterways. (*Id.*) Additionally, the Coalition argues the same failures resulted in outsized impacts from harmful algae blooms to communities of color. (*Id.*) Finally, the Complaint alleges that the State Water Board's purportedly preferred approach to Phase II—the consideration of voluntary agreements—has excluded communities of color and tribes from the decision making process. (*Id.*) The Coalition seeks an investigation into the Complaint's allegations, and remedies such as withholding or terminating State Water Board funding, and withholding approvals for permits for Delta Conveyance Project and for water quality standards that result from the Voluntary Agreements. (*Id.* at p. 55.)

Seeking Promulgation of Water Quality Standards

In addition to alleging civil rights violations, the Coalition asks the EPA to promulgate water quality standards for the Bay-Delta under the Administrative Procedure Act and its discretionary oversight authority to promulgate federal water quality standards. (Complaint, at p. 47; 33 U.S.C. § 1313(c)(4)(B).) The Coalition asks that the EPA designate Tribal Beneficial uses and adopt flow-based and temperature water quality criteria, including criteria for cyanotoxins to address harmful algal blooms. (*Id.* at p. 55.)

Conclusion and Implications

As of this writing, the U.S. Environmental Protection Agency has not publicly commented on the complaint or petition for rulemaking. The EPA's External Civil Rights Compliance Office's website further states the Coalition's complaint is pending under jurisdictional review.
(Nico Chapman, Sam Bivins)

RECENT FEDERAL DECISIONS

FIFTH CIRCUIT FINDS SCOPE OF STATE WHISTLEBLOWER PROTECTIONS FOR ENVIRONMENTAL COMPLIANCE WORKERS TO BE SETTLED BY THE LOUISIANA SUPREME COURT

Menard v. Targa Resources, L.L.C., 56 F.4th 1019 (5th Cir. 2023).

On January 6, 2023 the Fifth Circuit Court of Appeals certified questions of state law to the Louisiana Supreme Court regarding the scope and interpretation of a state whistleblower statute, including whether an exclusion applies that would deny protections to environmental compliance workers for reports that are among those workers' normal job duties. This issue is common to, and the conclusion varies, several state whistleblower statutes.

Background

Kirk Menard worked as an environmental, safety, and health specialist at Targa Resources' Venice, Louisiana wastewater treatment plant, with job duties including ensuring compliance with state and federal environmental and safety standards. On a conference call in October 2018, Menard reported to three of superiors, including Perry Berthelot, a District Manager, that certain water samples had total suspended solids exceeding regulatory limits.

At the end of the call, Berthelot told Menard to call him back to discuss the plan for rectifying these exceedances. Menard obliged, and he alleges that Berthelot told him he should dilute the sewage samples with bottled water. Menard claims that in response he nervously laughed and said, "no, we're going to correct it the right way."

Menard subsequently reported Berthelot's request to Menard's official supervisor, who responded, "no we're not going to do that, because that will not correct the problem." Six days later, Menard was terminated by Targa for supposed work performance issues.

Menard filed suit under the Louisiana Environmental Whistleblower Statute (LEWS or the Statute):

> . . .which prohibits businesses from retaliating 'against an employee, acting in good faith, who … [d]iscloses' an employer's practice that he 'reasonably believes' violates an environmental laws or regulation. LA. STAT. ANN. § 30:2027(A)(1).

Menard alleged he was fired for:

> (1) refusing to comply with Berthelot's request to dilute certain sewage samples with bottled water to ensure they met certain environmental regulatory standards, and (2) reporting the request to his supervisor.

Menard prevailed at a bench trial, and Targa appealed.

The Fifth Circuit's Decision

The Fifth Circuit examined "whether Menard engaged in a 'protected activity' under LEWS," an inquiry turning on two questions: (1) whether 'refusals' to engage in an illegal activity constitute 'disclosures' under the current version of the Statute, and (2) whether LEWS applies to reports made as part of an employee's normal job duties.

Regarding the second question, Targa argued that Menard did not enjoy LEWS's protection with respect to his report of Berthelot's request to Menard's direct supervisor "because reporting was 'part of is normal job responsibilities.'" While LEWS's text and prior Louisiana Supreme Court precedent have not recognized such an exclusion, the state's lower courts have generated conflicting opinions.

While *Stone v. Entergy Servs., Inc.*, 9 So. 3d 193, 200 (La. Ct. App. 2009) and *Matthews v. Mil. Dep't ex rel. State*, 970 So. 2d 1089, 1090 (La. Ct. App. 2007) have "embraced" a reporting exclusion, *Derbonne v. State Police Commission*, 314 So. 3d 861, 870–73 (La. Ct. App. 2020) "reject[ed] the exclusion as atextual and contrary to the purpose of whistleblower statutes."

The Circuit Court noted as well that: "This indeterminacy is furthered by the fact that other state courts grappling with the same issue have reached contrary conclusions. (*See, e.g., City of Fort Worth v. Pridgen*, 653 S.W.3d 176, 186 (Tex. 2022) (rejecting the existence of a job-duties exclusion in the Texas Whistleblower Act). *But see Kidwell v. Sybaritic, Inc.*, 784 N.W.2d 220, 228 (Minn. 2010) (holding that an "employee cannot be said to have 'blown the whistle'" under Minnesota's whistleblower statute "when the employee's report is made because it is the employee's job to investigate and report "wrongdoing"). These fractured opinions also reveal the competing policy implications at stake: On the one hand, adopting a job-duties exclusion may undermine protections for the employees who are best-positioned to report misconduct but most vulnerable to retaliation. On the other hand, rejecting the exclusion risks insulating a massive class of employees from discipline. Accordingly, we are left with a split of authority and no clear way to resolve it.

This question was therefore certified to the state Supreme Court for resolution pursuant to *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (whether to certify a question to a state supreme court depends on: "(1) 'the closeness of the question[s]'; (2) federal–state comity; and (3) 'practical limitations,' such as the possibility of delay or difficulty of framing the issue.").

Analysis under the *Cheramie* State Decision

On the first question, the U.S. District Court had relied on *Cheramie v. J. Wayne Plaisance, Inc.*, 595 So. 2d 619, 624 (La. 1992) to conclude that Menard's refusal to dilute the samples. However, while: "*Cheramie* squarely holds that LEWS covers refusals to engage in illegal activity," the pertinent statutory language was subsequently amended. Pre-amendmen:

> LEWS … prohibited employers from retaliating against 'an employee, acting in good faith, who *reports* or *complains* about possible environmental violations.'
>
> Post-amendment, the statute:
>
> . . .protects an employee who '*[d]iscloses, or threatens to disclose, to a supervisor* ... [a] practice of the employer ... that the employee reasonably believes is in violation of an environmental law, rule, or regulation.' LA. STAT. ANN. § 30:2027(A)(1) (emphasis added by the Court).

Left with the choices of applying *Cheramie*'s holding to the amended language and possibly thereby "treading on the state legislature's toes" or "conclud[ing] that it is a dead precedent," the court also chose to certify this issue as one "which implicates such important state interests" to the state's Supreme Court.

Conclusion and Implications

The scope of whistleblower protections for environmental compliance workers is a state law issue with important implications for both individual workers, the public, and the natural environment. Louisiana's high concentration of refinery and other industrial operations, alone, raises the stakes for resolution of this issue.
(Deborah Quick)

D.C. CIRCUIT VACATES HYDROELECTRIC DAM LICENSE OVER DEFICIENCIES WITH THE CLEAN WATER ACT WATER QUALITY CERTIFICATION

Waterkeepers Chesapeake v. Federal Energy Regulatory Commission, 56 F.4th 45 (D.C. Cir. Dec. 20, 2022).

The United States Circuit Court of Appeals for the District of Columbia recently determined that the State of Maryland could not retroactively waive its previously-issued water quality certification for a license for a hydroelectric dam. The license was vacated and remanded to the Federal Energy Regulatory Commission (FERC).

Background

Constellation Energy Generation, LLC is the operator of Conowingo Dam, a hydroelectric dam on the Susquehanna River in Maryland. In 2014, Constellation Energy submitted a request for a water quality certification under Section 401 of the Clean Water Act to Maryland's Department of the Environment. After years of negotiation, public notice, commenting, and a public hearing, Maryland issued a section 401(a)(1) water quality certification in 2018.

The water quality certification required Constellation to develop a plan to reduce the amount of nitrogen and phosphorus in the dam's discharge, improve fish and eel passage, make changes to the dam's flow regime, control trash and debris, provide for monitoring, and undertake other measures for aquatic resource and habitat protection. Constellation challenged the certification and its conditions, calling the conditions unprecedented and extraordinary.

As part of settling Constellation's challenge to the water quality certification, Maryland and Constellation agreed to submit a series of proposed license articles to FERC for incorporation into the dam's license. If those articles were incorporated into the license, Maryland agreed to conditionally waive any and all rights it had to issue a water quality certification. FERC issued a 50-year license that included the proposed license articles.

Several environmental groups, collectively referred to as "Waterkeepers," filed a petition for rehearing with FERC. They argued that Maryland had no authority to retroactively waive its 2018 water quality certification and that FERC therefore exceeded its authority under the federal Clean Water Act by issuing a license that failed to incorporate the conditions of that certification. FERC rejected Waterkeepers' argument and denied the petition. Waterkeepers petitioned for review.

The D.C. Circuit's Decision

Retroactive Waiver Argument

The court first considered Waterkeepers' argument that the Clean Water Act does not allow a retroactive waiver of the kind Maryland has attempted. In opposition, FERC argued that Section 401 of the Clean Water Act does not prevent a state from affirmatively waiving its authority to issue a water quality certification. The court rejected FERC's argument, reasoning that the Clean Water Act provides two routes for a state to waive a water quality certification: failure or refusal to act on a request for certification, within a reasonable period of time. If a state has not granted a certification or has not failed or refused to act on a certification request, section 401(a)(1) prohibits FERC from issuing a license. Because the state acted when it issued the water quality certification in 2018, the subsequent backtracking of that issuance through a settlement agreement was not a failure or refusal to act. In the end, the court agreed with Waterkeepers.

Remedy

The court next considered what the appropriate remedy should be. FERC argued that the appropriate remedy would be to remand the license back to FERC without vacating the license. This would allow the license to remain in place while a new permit was issued and would avoid disruptive consequences that result from vacating a license with environmental protections in place. The decision whether to vacate depends on the seriousness of the license's deficiencies and the disruptive consequences of an interim change that may itself be changed.

The court determined *vacatur* was appropriate. First, the license had serious deficiencies because FERC issued it without statutory authority. Second, disruptions to the environmental protections can be avoided through issuance of interim, annual licenses until a permanent license can be issued. Further, Waterkeepers' brought the action for the very purpose of strengthening the environmental protections, and Waterkeepers agreed with vacatur. Finally, vacating the license would allow the administrative and judicial review to be completed after being interrupted by the settlement agreement.

Conclusion and Implications

This decision is another case reminding states and project proponents to proceed with caution when attempting to resolve disputes surrounding Section 401 water quality certifications. Under the Clean Water Act. The court's opinion is available online here: https://www.cadc.uscourts.gov/internet/opinions.nsf/3A0ACFE0A2A87BFE8525891E00572389/$file/21-1139-1978279.pdf .
(Rebecca Andrews)

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RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL'S DENIAL OF ANTI-SLAPP MOTION ALLOWS MALICIOUS PROSECUTION ACTION TO PROCEED AGAINST PETITIONER'S ATTORNEY WHO FILED CEQA SUIT

Charles Jenkins et al. v. Susan Brandt-Hawley et al., 86 Cal.App.5th 1357 (1st Dist. 2022).

In an opinion certified for publication on December 28, 2022, the First District Court of Appeal in *Charles Jenkins et al. v. Susan Brandt-Hawley et al.* upheld the trial court's denial of a petitioners' attorney's anti-SLAPP motion to a malicious prosecution suit—an action that stemmed from petitioners' earlier California Environmental Quality Act (CEQA) lawsuit that challenged a homeowner's application to demolish and reconstruct a single-family residence in San Anselmo.

Factual and Procedural Background

Project Approval

In 2017, Charles and Ellen Jenkins (Jenkins) bought a one-bedroom home with a small accessory cottage on a residential property in the Town of San Anselmo (Town). The original Craftsman-style home was built in 1909, while the accessory unit was built sometime thereafter. The couple met with an architect and contractors, who ultimately concluded the main house was not worth saving due to poor structural integrity and other reasons. Before embarking on a design for the new house, the Jenkins met with the Town's Planning Director, who confirmed the house had not been designated as "historic." The couple therefore applied for permits to demolish the existing structures and construct a new three-bedroom home with a small, detached studio (Project).

In January 2018, the couple learned that planning staff had completed its review of the original design and were preparing a report that recommended approval, subject to a few conditions. The report also explained that the project was not a historic resource and was categorically exempt from CEQA under Guidelines § 15303, subdivision (a), for new construction of a single-family residence.

Neighbors on an adjacent street, however, objected to the design, claiming that the house would not fit in with the neighborhood and would intrude on their privacy. Following an initial hearing and several meetings with neighbors, the Jenkins agreed to several modifications, which included planting a privacy hedge, reducing the accessory unit to a single story, and increasing the setback of the back cottage from the property line. The Planning Commission approved the project with those changes and once again found the project categorically exempt from CEQA and the structures slated for demolition "not historic."

A week after the Planning Commission's decision, several neighbors appealed the Commission's approval to the Town Council, arguing that a Historic Resource Analysis of the site's existing structures was required before the Town could categorically exempt the Project from CEQA. The Jenkins obliged and conducted the analysis, which affirmed the structures were not historic. The Council thus denied the appeal and approved the Project. The neighbors sued.

CEQA Litigation

Save Historic San Anselmo and an individual (collectively: petitioners), jointly represented by Susan Brandt-Hawley of the Brandt-Hawley Law Group, filed a petition with two causes of action that alleged violations of CEQA and the Town Municipal Code. After amending the petition, counsel for the Jenkins—Rick Jarvis—sent Ms. Brandt-Hawley a meet-and-confer letter, which explained his view that the petition was frivolous and listed over ten reasons why the claims lacked merit. Ms. Brandt-Hawley did not respond in writing to Mr. Jarvis's letter, but later explained via telephone why she held a different legal opinion.

The trial court denied the petition on the merits, finding that petitioners advanced an unfounded interpretation of the Town's Municipal Code and the

General Plan with respect to the old house's historic status, and that they failed to exhaust their administrative remedies regarding their claim that the conditions of approval constituted "mitigation measures," thus rendering the Project ineligible for a categorical exemption.

The trial court stayed the order, during which the Jenkins received a demolition permit. In response, Ms. Brandt-Hawley filed a petition for writ of supersedeas seeking an emergency stay, but withdrew the petition the same day following correspondence from the Jenkins' attorney. Petitioners nevertheless appealed the trial court's denial, but then offered to dismiss the appeal if the Jenkins would waive fees and costs. The Jenkins declined. And on the date petitioners' opening brief on appeal was due, Ms. Brandt-Hawley voluntarily dismissed the appeal.

Malicious Prosecution Lawsuit

After the appeal was dismissed, the Jenkins filed a complaint against Brandt-Hawley and her firm for malicious prosecution. Brandt-Hawley and her firm responded with a special anti-strategic litigation against public participation (anti-SLAPP) motion to strike and accompanying declarations.

The Jenkins opposed the anti-SLAPP motion, explaining that Mr. Jenkins reviewed the underlying CEQA petition and identified over nine passages that were misleading or that materially misrepresented facts. Mr. Brandt-Hawley's reply memorandum did not dispute Mr. Jenkins' declaration.

The trial court denied the anti-SLAPP motion, concluding that the Jenkins had met their burden under "step two" of the anti-SLAPP analysis by demonstrating a probability of prevailing on their claim for malicious prosecution. Of the requisite factors for a malicious prosecution claim, the trial court concluded the Jenkins established a probability of succeeding on their claims that the Municipal Code and CEQA causes of action were legally untenable, and that the litigation had been pursued with malice. Ms. Brandt-Hawley appealed.

The Court of Appeal's Decision

The Anti-SLAPP statute (Code of Civil Procedure, § 425.16, subd. (b)(1)) protects an individual from litigation that arises from any act that is taken in furtherance of that person's right of petition or free speech, unless the plaintiff has demonstrated a probability of prevailing on the claim from which the action arose.

Courts employ a two-step process for determining whether an action is a "SLAPP." First, the court decides whether the defendant has made a threshold showing that the challenged action is one that arises from protected activity, as set forth under the statute. If the court finds that such a show has been made, it must then determine the second step—*i.e.*, whether the plaintiff has demonstrated a probability of prevailing on the underlying claim.

Here, the parties and the First District Court of Appeal agreed that there was no dispute that the first step of the anti-SLAPP analysis was satisfied, as the statute specifically identifies claims of malicious prosecution as causes of action that arise from a protected activity. As to the second step of the analysis, the court concluded that Jenkins demonstrated the "minimum level of legal sufficiency and tribality" required to show a probability that they would prevail on their malicious prosecution claim.

Probability of Prevailing on Malicious Prosecution Claim

To establish a claim for malicious prosecution, a plaintiff must establish that the prior action was: (1) commenced by or at the direction of the defendant and was pursued to a legal termination in the plaintiff's favor; (2) brought without probable cause; and (3) initiated with malice. Where the prior action alleges more than one cause of action, a malicious prosecution suit can succeed if any of those claims were brought without probable cause.

Here, the court determined that the Jenkins adequately pleaded the "favorable termination" element, as there was no discrepancy that the CEQA and Municipal Code actions were commenced at the direction of the defendant (Brandt-Hawley) and pursued to a legal termination in plaintiff's (the Jenkinses') favor. The court thus considered whether the Jenkins satisfied the second and third elements regarding probable cause and malice.

Probable Cause

Where there is no dispute as to the facts upon which an attorney acted before filing the prior action, the question of whether there was probably cause to

bring the action is purely legal and one for the court to resolve. But where there is a dispute as to the state of the defendant's knowledge and the existence of probable cause turns on resolving that dispute, there becomes a question of fact that must be resolved before the court can determine the legal question of probable cause.

Here, the face of the Jenkinses' pleading adequately established that the Municipal Code and the CEQA claims were legally untenable, and thus brought without probable cause.

As to the Municipal Code claim, the court determined that the Town satisfied the Municipal Code's requirements for issuing a demolition permit. Contrary to Brandt-Hawley's arguments, the Code did not require that the Town make a finding that "immediate and substantial hardship" would result without the demolition. The court explained that it would be unreasonable and arbitrary for the Town to prevent itself from ever issuing a demolition permit absent immediate and substantial hardship. Moreover, the court emphasized that the Town's interpretation of its own Code is entitled to considerable deference and Brandt-Hawley failed to demonstrate that the Town had ever previously required a showing of immediate and substantial hardship before approving a demolition permit.

The court also pointed to Brandt-Hawley's failure to fairly present the record. For example, petitioner's brief failed to quote the actual text of the Municipal Code, and instead relied on a summary of the Code that omitted key permissive phrasing. The briefing also made misleading statements regarding the record and failed to cite to the evidence therein to substantiate claims that the project would have unmitigated environmental impacts.

For these reasons, the court also concluded that the Jenkins demonstrated they would prevail on their claim that the CEQA cause of action was maliciously prosecuted. The court agreed that petitioners failed to exhaust their assertion that the "unusual circumstances" exception applied to the project's categorical exemption because they never raised the issue to the Town during the administrative proceedings.

And even if petitioners *had* exhausted this argument, the claim would still fail because:

> . . .any reasonable attorney would conclude that the modifications [made to the project in response to neighbors' concerns] were not 'mitigation measures' under CEQA as they did not meet the two-part test required by [the] Supreme Court in a 2015 case in which Ms. Brandt-Hawley was the attorney for plaintiffs—*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

But Ms. Brandt-Hawley "fail[ed] to come close" to satisfying this test by failing to show that the Town's exemption determination was not supported by substantial evidence or a significant effect on the environment resulting from the project.

The court thus held that Ms. Brandt-Hawley knew the claims in the petition were untenable, "especially given her extensive CEQA and land use law experience and the law from *Berkeley Hillside*."

Malice

In a malicious prosecution action, malice relates to the subjective intent or purpose with which the defendant acted. Malice is therefore not limited to hostility or ill will, but can exist when proceedings are instituted primarily for an improper purpose or where a party continues to pursue a case after learning the claims were untenable (indifference).

Here, the Jenkins showed a probability of prevailing on the "malice" element of their malicious prosecution claim. The court explained that Brandt-Hawley's failure to respond to the factual claims made by Mr. Jarvis' letter (counsel for the Jenkins) regarding the frivolity of the petition, as well as his numerous allegations that Brandt-Hawley made misleading statements as to material facts, demonstrated her indifference to the matter. This indifference and knowledge that the action lacked merit was sufficient to establish malice.

Moreover, the trial court's determination that Brandt-Hawley failed to present the record fairly and made misleading arguments also constitutes evidence of malice. The court noted that Ms. Brandt-Hawley's declaration in support of the anti-SLAPP motion—which recounted the steps she took before filing the CEQA petition—failed to include any testimony that showed she thoroughly investigated and researched the propriety of the claims before petitioners filed suit. The absence of legal research is also relevant to the question of whether or not an attorney acted with malice.

Because the Jenkins adequately plead facts sufficient to establish a probability of prevailing on the second two elements of their malicious prosecution claim against Ms. Brandt-Hawley, the First District affirmed the trial court's order denying the anti-SLAPP motion.

Comments on *Amicus* Briefs

In closing, the court responded to three *amicus* briefs that were filed in support of Ms. Brandt-Hawley. The court rejected the briefs' urgings that CEQA-related cases should be "insulated" from malicious prosecution cases, despite the uncertainty and complexity of such actions. The court reiterated that nothing in its opinion would preclude public participation or deter citizen involvement. Here, the malicious prosecution claim was advanced only against an attorney—not the underlying administrative process or the individual neighbors—and the record showed that the underlying suit had "nothing to do with significant or negative environmental effects under CEQA.

Conclusion and Implications

The First District Court of Appeal's opinion marks a stark judicial warning that could be seen as an effort to curb overuse of the statute to delay or stop projects, particularly those related to housing. The court's conclusion did not mince words when it noted that the underlying CEQA petition "involved a group of well-off, 'NIMBY' neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy and the design aesthetics of the new build." As the opinion noted, just last year this same panel also authored the opinion in *Tiburon Open Space Committee v. County of Marin*, 78 Cal.App.5th 700 (2022), which similarly warned against "the possible misuse of CEQA actions and the harm they could cause." Now, the First District Court of Appeal has sent a potent reminder to plaintiffs' attorneys that filing legally untenable CEQA suits carries large risks that are not immune from other tortious actions.

A copy of the First District's opinion is available at: https://www.courts.ca.gov/opinions/documents/A162852.PDF.

Editor's Note: An attorney from the authors' firm filed an *amicus* brief in support of Ms. Brandt-Hawley in the above litigation.
(Veronika Morrison, Bridget K. McDonald)

CALIFORNIA COURT OF APPEAL HOLDS CITY DID NOT VIOLATE CEQA OR PLANNING AND ZONING LAW IN APPROVING PROTECTED BICYCLE LANE PUBLIC WORKS PROJECT

Save 30th Street Parking v. City of San Diego, Unpub., Case No. D079752 (6th Dist. Dec 23, 2022).

In an *unpublished* opinion filed on December 23, 2022, the Sixth District Court of Appeal upheld the denial of a petition for writ of mandate that challenged the City of San Diego's (City) approval of a public works project to install protected bicycle lanes through the City's North Park neighborhood (Project). The court held the City did not abuse its discretion in concluding that no further review under the California Environmental Quality act (CEQA) was necessary because the project was consistent with and previously analyzed in a master plan program EIR.

Factual and Procedural Background

The Bikeway Project

In 2018, in connection with a public works project to replace a water pipeline, the City of San Diego explored a potential opportunity to implement bicycle lanes along 30th Street in the North Park Neighborhood. 30th Street has one lane of traffic in each direction with "sharrows" that indicate motorists must share the road with bicyclists.

In 2019, City engineers prepared a study setting forth multiple options to implement protected bicycle lanes along 30th Street, each of which would require the loss of some street parking spaces. In May of that year, the City's mayor issued a memo that endorsed "Option A," which would install a "Class IV" protected bikeway, thereby resulting in the loss of 420 parking spaces on 30th Street.

In August 2019, petitioner Save 30th Street Parking filed a petition against the City and the mayor in his official capacity, arguing that the City inappropriately pre-committed to the Project before conducting CEQA review, and that the Project conflicted with the North Park Community Plan, the Bicycle Master Plan, and the General Plan's Mobility Element.

In December 2019, the City's Mobility Board was presented with a revised plan called "Option A+," which would extend the bicycle lane to the north and restore some of the parking spaces that initially would have been removed.

In January 2020, the program manager of the City's planning department submitted a memo to the program manager of the City's Transportation Department, which discussed the issue of whether the Project complied with CEQA. The memo explained that: (1) the Project was not subject to CEQA because it would not result in direct or reasonably foreseeable environmental impacts, and (2) the Project would implement the goals and policies of the City's Bicycle Master Plan and the North Park Community Plan. Though the memo did not explicitly discuss the Master Plan or North Park Community Plan program Environmental Impact Reports (EIRs), it took the broader position that no further CEQA analysis was required because the Project fell within the scope of the CEQA analysis conducted in those EIRs.

In May 2020, petitioner sought, and the trial court denied, a preliminary injunction to stop the Project. The following November, the City Council approved a construction order to fund the water pipeline replacement project, which also allocated funds to implement the Bikeway Project. Petitioner again sought a preliminary injunction, which the trial court again denied.

At the Trial Court

Petitioner filed a first amended petition in April 2021, which updated the original CEQA and Planning and Zoning Law causes of action with additional facts. The trial court denied the petition by concluding the City was not required to perform a CEQA analysis because the Bikeway Project was consistent with and within the scope of the program EIRs for the Bicycle Master Plan, North Park and Golden Hill Community Plan Updates. Petitioner appealed.

The Court of Appeal's Decision

CEQA Claim

Under the substantial evidence standard of review, the Sixth District Court of Appeal considered whether the City complied with CEQA when it concluded environmental review of the Bikeway Project was not required because it fell within the scope of the program EIRs for the 2013 San Diego Bicycle Master Plan and the 2016 North Park Community Plan (NPCP).

The court noted that the 2016 NPCP program EIR described plan provisions that dealt with bicycle transportation and acknowledged that 30th Street was identified as a Class II or III bikeway. But the program EIR did not specifically analyze the potential *environmental impacts* of implementing bicycle facilities in North Park; therefore, the court concluded there was no substantial evidence to support a finding that the Bikeway Project was "within the scope" of the NPCP program EIR.

The court therefore turned to the Program EIR for the Bicycle Master Plan (BMP), which the NPCP was consistent with. Unlike the NPCP program EIR, the BMP Program EIR extensively discussed the potential environmental impacts of installing bicycle facilities throughout the City. As relevant to the contested Bikeway Project, the EIR analyzed all potential impacts from future projects that contemplated "On-Street Bikeways Without Widening"; therefore, no additional CEQA review would be required because those "projects would only require signage or pavement markings and would not necessitate other roadway modifications."

Here, petitioner's claims centered on the potential environmental impacts associated with the Project's removal of parking spaces on 30th Street. The court noted that the BMP Program EIR "directly addressed this potential environmental impact" by concluding that, although on-street bikeway projects that eliminate parking would result in some secondary effects

related to cars circling and looking for spaces, those effects would be temporary and instead be offset by the long-term benefit of reduced motor vehicle use and increased bicycle use.

The court thus concluded the BMP Program EIR qualified as a sufficiently comprehensive and specific environmental document that previously and adequately analyzed the Bikeway Project's potential impacts. As such, the City properly determined that it was not required to conduct any further environmental analysis before implementing the Project.

Planning and Zoning Law Claim

The court also considered whether the Bikeway Project violated the Planning and Zoning Law because it was inconsistent with the NPCP. Whether a project is consistent with an applicable planning document is highly deferential to the local agency—therefore, the court would defer to the City's finding unless no reasonable person could have reached the same conclusion.

The court rejected petitioner's claim that the Project conflicted with certain bikeway classifications and road designations in the NPCP. Although a map in the NPCP showed a Class III bikeway on 30th Street, that designation was tentative because the NPCP expressly indicated that bikeway designations were subject to change at implementation. The court explained that consistency with a planning document focuses not on *detail*, but on *general policies*. Thus, even though the Project implemented a different bike line classification or road designation from that tentatively indicated on the NPCP map, that variation concerned a minute detail, rather than a fundamental goal, objective, or policy. Moreover, the City could reasonably conclude that installing a Class IV bikeway that eliminated a left-turn lane was consistent with many of the NPCP's overarching principles that encouraged implementing a regional bicycle network and utilizing "road diets" to accommodate varying modes of transportation.

The court similarly rejected petitioner's claim that the Project's elimination of street parking spaces conflicted with policies in the NPCP's Mobility Element that supported access to businesses and preserving parking. The court countered by noting that other policies in the NPCP prioritized the promotion of bicycle transportation as part of a balanced transit system. By selecting "Option A+," which preserved some parking that would have been lost in "Option A," the City did not completely disregard the policy in favor of preserving on-street parking for commercial and adjacent uses. Therefore, the record supported a finding that the City reasonably used its discretion to balance a range of competing interests, in light of the plan's overarching purpose, to find the Project consistent with the NPCP.

Conclusion and Implications

The Sixth District Court of Appeal's opinion is a straightforward application of basic CEQA and Planning and Zoning principles. When considering whether a project is contemplated by a program EIR, agencies and practitioners should ensure that the prior CEQA document adequately analyzes the environmental impacts of that particular project. The court's opinion also reaffirms the long-standing principle that, in determining whether a project is consistent with a governing land use plan, agencies are well-equipped to balance the plan's competing interests to ensure general consistency—inconsistencies with finite, non-mandatory details are not necessarily fatal.

Separately, and though only mentioned in footnotes, the court also identified several non-determinative details that could nevertheless be useful to practitioners who work on analogous projects. First, for example, the court noted that the City's "CEQA memo" was "not a model of thoroughness or clarity with respect to its analysis or conclusions." Though this ultimately did not harm the City's position, it would nevertheless behoove practitioners to ensure all CEQA analyses and conclusions are well documented in the administrative record. Relatedly, the court observed that the memo did not identify any statutory or categorical exemptions to CEQA. The City later noted, however, that should the court find CEQA noncompliance, the City would likely apply one or more of the bicycle-lane exemptions under Guidelines §§ 15304, subd. (h) and 15301, subd. (c). Because CEQA allows agencies to "layer" exemptions when approving a project, it serves to benefit agencies to incorporate those findings at the outset to ensure project approvals are well supported before litigation commences. As a third and final example, the court noted that, by the time this opinion was authored, the contested bicycle lanes had been installed and were in "active use" for over a year; but the City did

not ask the court to dismiss the appeal on mootness grounds. Because courts have increasingly dismissed suits as moot where the challenged project has been completed by the time the action is heard on appeal, adding a mootness argument can provide an additional, albeit helpful, layer of defense. A copy of the Sixth District's *unpublished* opinion is available at: https://www.courts.ca.gov/opinions/nonpub/D079752.PDF. (Bridget McDonald)

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