Volume 3, Number 8
May 2023

ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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RECENT STATE DECISIONS

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Subscription Rate: 1 year (11 issues) $955.00. 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

BIDEN ADMINISTRATION ANNOUNCES $300 MILLION IN BIPARTISAN INFRASTRUCTURE LAW SPENDING TOWARDS CALIFORNIA WATER INFRASTRUCTURE

Early last month, the Biden administration announced that nearly $585 million from the Bipartisan Infrastructure Law—signed into law back in 2021—would be put towards infrastructure repairs on water delivery systems throughout the western United States. Specifically, the funding will be provided to 83 projects across 11 states with the stated purpose of improving water conveyance and storage, increasing safety, improving hydroelectric power generation, and providing water treatment.

The projects selected for funding are all located within major watersheds with ongoing U.S. Bureau of Reclamation (Bureau) operations, including the Colorado River Basin and the San Francisco Bay Delta watershed. Much of the funding will be provided to projects that seek to increase canal capacity, provide water treatment for Tribal entities, replace equipment for hydroelectric power production, and provide maintenance to aging facilities. The list of western states benefitting from this allocation of funds includes California as well as Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington.

California's Share of the Funds

Out of all the states receiving funding for water infrastructure improvements, perhaps it comes as no surprise that California is set to receive the largest share of the funding. With over $300 million in funding provided to California projects alone, the Golden State will be getting a little over half of the $585 million announced last month.

The long list of projects set to receive funding was broken up by project area in the Bureau's description of the Fiscal Year 2023 Aging Infrastructure Projects. Among the project areas listed are the federal Central Valley Project, the Klamath Project, and the All-American Canal System, among other smaller project areas throughout the state.

The Central Valley Project

The vast majority of the funds will be dedicated to the maintenance and modernization of facilities in the Central Valley Project. Of California's 24 projects that were allocated funds in the recent announcement, 12 of them are located along the Central Valley Project and will be receiving a whopping $279 million out of the $307 million allocated for California projects in total. These funds will predominantly be used for projects in the Shasta-Trinity area, which will see roughly $133 million in total funding. On the Shasta side, the dam will receive $25 million in funding for the refurbishment of tube valves and replacement of parts for the Shasta Dam Temperature Control Device.

The Trinity River

Along the Trinity River, two major projects will be funded by the recent allocation: the Trinity River Fish Hatchery and the Spring Creek Power Facility. The Trinity River Fish Hatchery will be getting a massive overhaul thanks to its $65.9 million allocation. As part of this overhaul, the project will utilize the funds to install a Supervisory Control and Data Acquisition (SCADA) system, replace corroded and leaking pipes, install new filtration systems and incubation jars, implement sound dampening measures to reduce hazardous noise from hatchery operations, and replace deteriorated iron supports for 150 shallow troughs and 26 deep tanks. The Spring Creek Power Facility will likewise see a substantial injection of funds, totaling $42.25 million, earmarked for the replacement of the transformers that provide power to pumps at the Spring Creek, J.F. Carr and Trinity pump generation units, all of which are used to move water from the Trinity River into the Sacramento River for using the Central Valley Project.

Folsom and Nimbus Reservoirs

Further south, the Folsom and Nimbus reservoirs will be receiving $31 million in combined funding for refurbishment and upgrades to facilities as well as modernization of the Nimbus Fish Hatchery. The Jones Pumping Plant, which moves water from the Delta into the Delta-Mendota Canal, will be getting $25 million worth of refurbishments while the Delta-Mendota and Friant-Kern canals will be getting nearly $50 million to combat the impacts of land subsidence in the Central Valley. Lastly for the Central Valley Project, the Gianelli Power Plant at the San Luis Reservoir is set to receive $43 million in funds for the refurbishment of the San Luis Unit 8 motor generator, turbine, and butterfly valve.

All-American Canal and Other Colorado River Project

Although the funding for the Central Valley Project overshadows the remaining project funds by a wide margin, the All-American Canal and other Colorado River facilities was allocated a healthy $10 million in funding for the five projects named in that region. Among these projects, the announcement including funding for maintenance work along the Colorado River and its levee system in addition to allocations of $5.67 million towards the replacement of the All-American Canal's Desilting Basin's Clarifier Arms and another $2.57 million for necessary repairs at the Imperial Dam.

Klamath and Truckee River Areas

Other recipients of funding under the recent announcement included projects along the Klamath and Truckee rivers as well as projects located within the Bureau of Reclamation's Yuma Project area. For the Klamath Project, $8.75 million was dedicated to implementing upgrades on canal systems. Along the Truckee River, roughly $3 million each was dedicated to maintenance at the Stampede Dam and for studying the benefits of replacing the Lake Tahoe Dam which helps regulate the flow of water from Lake Tahoe into the Truckee. As for the Yuma Project, a modest $4.1 million will be provided for the refurbishment of the Laguna Dam gate, installation of governor controls at the Siphon Drop Power Plant, and to assist in the replacement of some 220 power pole structures for the Yuma County Water Users' Association.

Conclusion and Implications

The Bipartisan Infrastructure Law included $8.3 billion for water infrastructure projects in fiscal years 2022-2026 to improve drought resilience and expand access to clean water. The Inflation Reduction Act brought another $4.6 billion in funding to further address these issues. Together, the two initiatives represent the largest investment in climate resilience in the history of the United States. Building on the $240 million allocated through the Bipartisan Infrastructure Law in fiscal year 2022, the $585 million represents a significant ramp up in funding for much needed infrastructure repairs and improvements. The next application period for funds is expected to take place in October 2023, and given the significant jump from 2022 to 2023 and the pool of funds remaining it is not unlikely the total funding provided increases even more in 2024. For more information on the Bipartisan Infrastructure Law, *see:* https://www.congress.gov/bill/117th-congress/house-bill/3684/text

(Wesley A. Miliband, Kristopher T. Strouse)

CALIFORNIA GOVERNOR ISSUES EXECUTIVE ORDER TERMINATING PROVISIONS OF PRIOR DROUGHT EMERGENCY PROCLAMATIONS AND EXECUTIVE ORDERS

In late March 2023, Governor Newsom issued Executive Order N-5-23 (Order), terminating numerous provisions of multiple drought executive orders and state of emergency proclamations related to drought conditions. While the Governor did not go so far as to declare an end to the statewide drought, the Order eases certain drought restrictions, though other water conservation regulations remain in effect.

Background

In response to the current multi-year drought, Governor Newsom issued a series of state of emergency proclamations and executive orders between April 2021 and February 2023 related to drought conditions and water conservation. Conservation measures identified in these orders included: a request for the State Water Resources Control Board to require water suppliers to implement Stage 2 demand reduction measures identified in suppliers' Water Shortage Contingency Plans, as well as a call for all Californians to voluntarily reduce their water use by 15 percent from 2020 usage levels.

However, after years of prolonged drought, recent storms resulted in the wettest three-week period on record in California. The Department of Water Resources (DWR) found that, in part due to the significant precipitation during the winter of 2022–2023, surface water supplies have been partially rehabilitated in some parts of the state. In particular, DWR and partner agencies found that most regions of the Sierra Nevada are above average for snow water content, and some regions are nearing record amounts of snow, with snow and rain continuing to fall across many regions of the state with more precipitation forecasted. Accordingly, the Governor's office determined that improved conditions have helped rehabilitate surface water supplies but have not abated severe drought conditions that remain in some parts of the state, including the Klamath River basin and the Colorado River basin, and that many groundwater basins throughout the state remain depleted from overreliance and successive multi-year droughts. While the Order observed that the drought is ongoing, it calls for the implementation of "an even more targeted State response," such that certain provisions of prior orders and proclamations can be rolled back.

The Executive Order

The Order rescinds portions of four state of emergency proclamations made in 2021, as well as portions of Executive Orders N-10-21, N-7-22, and N-3-23. Among these changes, it rescinds the Governor's direction to the State Water Resources Control Board (Water Board) to adopt emergency regulations requiring local agencies to move to Stage 2 of their Water Shortage Contingency Plans. However, those emergency regulations that have already been adopted by the Water Board remain in effect until June 2023. Termination of Stage 2 water shortage demand reduction measures before the emergency regulations expire or before the Water Board rescinds them could be deemed a violation punishable by fine of up to $500 per day and enforcement action by the Water Board under Water Code § 1058.5, subdivision (d).

The Order also withdrew the Governor's previous direction that all Californians voluntarily reduce their individual water use by 15 percent of 2020 usage levels.

What the Executive Leaves in Place

Perhaps equally significant are those declarations, rules, and regulations that the Order *leaves in place*. Among them is the declaration that the drought state of emergency declaration remains in effect in all 58 California counties.

In addition, before issuing a permit for non-exempt, new groundwater wells or alterations to existing wells, well-permitting agencies such as cities and counties are still required to:

- In high and medium priority groundwater basins, obtain a verification from the applicable groundwater sustainability agency that the proposed well is consistent with the groundwater sustainability plan for that basin; and

- In all groundwater basins, determine whether the proposed well is unlikely to interfere with nearby

wells and cause subsidence that would damage nearby infrastructure.

The prohibition on watering certain non-functional turf remains effective.

Local agencies cannot prohibit the hauling of water outside the basin of origin if such hauling is necessary for human health and safety in communities threatened with the loss of affordable, safe drinking water.

State agencies must prioritize and assist local agencies with capturing water from high precipitation events for local storage or recharge.

The Water Board must continue to increase its efforts to investigate illegal diversions and waste and to stop such actions with its enforcement powers.

The Order also directs the State Water Board, DWR, and the Department of Fish and Wildlife to continue collaborating on expediting permitting of recharge projects and working with local water districts to facilitate recharge projects. The purpose of this directive is to maximize the extent to which winter precipitation recharges underground aquifers, for instance by capitalizing on high-flow events and percolating flood waters below ground for the benefit of local aquifers.

Finally, the Order directs the Water Board to "consider" modifying requirements for reservoir releases or diversion limitations in the Central Valley Project or State Water Project facilities to (1) conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, (2) enhance instream conditions for fish and wildlife, (3) improve water quality, (4) protect carry-over storage, (5) provide opportunities to maintain or to expand water supplies north and south of the Sacramento-San Joaquin Delta. Importantly, the Order suspends the applicability of the California Environmental Quality Act (CEQA) and the state's water quality law, Porter-Cologne, as well as their implementing regulations, to effectuate actions taken pursuant to the Order and any approvals granted in furtherance thereof.

Conclusion and Implications

Governor Newsom's Executive Order acknowledges recent improvements to certain surface water supplies, and rescinds certain high-level directions from the Governor to reduce water usage. However, the drought emergency declaration persists statewide. It remains to be seen whether the Order will facilitate the capture of high flows throughout the state for the benefit of water supplies and beneficial uses thereof. The *Executive Order N-5-23* (March 24, 2023) is available online at: https://www.gov.ca.gov/wp-content/uploads/2023/02/Feb-13-2023-Executive-Order.pdf?emrc=b12708
(Miles Krieger, Steve Anderson)

REGULATORY DEVELOPMENTS

EPA PROPOSES FIRST-EVER ENFORCEABLE NATIONWIDE PRIMARY DRINKING WATER STANDARDS FOR PFAS

On March 29, 2023 the U.S. Environmental Protection Agency (EPA) published a preliminary regulatory determination and a proposed rule that would establish first-ever legally enforceable federal primary Maximum Contaminant Levels (MCLs) for six per- and polyfluoroalkyl substances (PFAS) in drinking water. In addition to creating these enforceable national drinking water standards, these MCLs, if adopted, could be used as a benchmark for establishing groundwater remediation goals or be used in other regulatory or litigation contexts. EPA expects to finalize the rulemaking by the end of this calendar year.

The Proposed Rule and its Requirements

PFAS are a large family of synthetic chemicals that have been in use since the 1940s, and are highly stable and resistant to degradation in the environment, thus. colloquially being named as "forever chemicals." People can be exposed to PFAS through use of consumer products, and/or consuming food and drinking water containing these forever chemicals. The scientific evidence demonstrates that PFAS consumption by humans can result in harmful health effects, including:

> . . .negative impacts on fetal growth after exposure during pregnancy, on other aspects of development, reproduction, liver, thyroid, immune function, and/or the nervous system; and increased risk of cardiovascular and/or certain types of cancers.

As such, the rulemaking, also referred to as EPA's National Primary Drinking Water Regulation (NPDWR), proposes to establish primary MCLs for the following six different PFAS compounds:

- Perfluorooctanoic acid (PFOA)
- Perfluorooctane sulfonic acid (PFOS)
- Perfluorononanoic acid (PFNA)
- Hexafluoropropylene oxide dimer acid (HFPO-DA, commonly known as GenX Chemicals)
- Perfluorohexane sulfonic acid (PFHxS)
- Perfluorobutane sulfonic acid (PFBS).

Under the proposed rule, PFOA and PFOS would be treated as individual contaminants, both with primary MCLs set at 4.0 parts per trillion (ppt or ng/L). For PFHxS, PFNA, PFBS, and HFPO-DA (commonly referred to as GenX Chemicals), EPA proposes the use of a "Hazard Index" MCL where the maximum limit is based on any mixture containing one or more of the four compounds. Compliance with the Hazard Index MCL is calculated as the sum of the ratios of the measured concentration compared to the allowable concentration. To determine the Hazard Index, water systems will need to monitor and compare the amount of each PFAS compound in drinking water to its associated Health-Based Water Concentration (HBWC), which is the level at which no health effects are expected for that compound. The HBWC levels of each GenX Chemical is as follows:

- PFNA: 10.0 ppt
- PFHxS: 9.0 ppt
- PFBS: 2000 ppt
- GenX chemicals: 10.0 ppt.

Water systems will need to then add the comparison values for each compound contained within the mixture. A value greater than 1.0 (the index is unit less) would be considered an exceedance of the proposed Hazard Index MCL. Therefore, the proposed MCL for any mixture containing PFHxS, HFPO-DA and its ammonium salt, PFNA, and/or PFBS is a Hazard Index exceedance of 1.0.

EPA also proposed health-based, non-enforceable MCL Goals (MCLGs) for each of the six PFAS compounds. An MCLG is the maximum level of a contaminant in drinking water where there is no known or anticipated negative effects in an individual's

health. The proposed MCLG for PFOA and PFOS is 0.0 ppt, , based on EPA determination that each PFOA and PFOS is "likely to cause cancer," whereas the proposed MCLG for PFNA, PFHxS, PFBS, and/or GenX Chemicals is a Hazard Index equal to or less than 1.0

Conclusion and Implications

If adopted, EPA's proposed rule will require public water systems to monitor for the six PFAS compounds, notify the public of the concentrations detected, and reduce concentrations in drinking water if they exceed the proposed primary MCLs. While there are existing methods available to monitor for the constituents (*e.g.*, method 1633 for PFOA and PFOS), treatment technologies to remove the constituents (*e.g.*, granular activated carbon (GAC), anion exchange resins (AIX), reverse osmosis (RO), and nanofiltration) are like to be seen by the regulated community as expensive and cost of compliance a significant concern. Importantly, if adopted, for states delegated authority to regulate their own programs under the Safe Drinking Water Act, the Proposed Rule would require these states to establish PFAS-related drinking water standards in-line with EPA's final rule and conform to EPA's standards.

Some level of debate regarding the EPA's scientific basis for its proposed MCLs and MCLGs can be anticipated, as the federal Safe Drinking Water Act [https://www.epa.gov/sdwa] obligates the agency to use best available science when setting standards. As such, challenges to the proposed rule related to the costs of implementing it, procedural mechanisms, and the sufficiency of the scientific evidence supporting EPA's conclusions, are also anticipated. The proposed rule is available online at: https://www.federalregister.gov/documents/2023/03/29/2023-05471/pfas-national-primary-drinking-water-regulation-rulemaking

(Jaycee Dean, Hina Gupta)

NEW EPA REGULATIONS TARGETING GREENHOUSE GAS EMISSIONS FROM EXISTING POWER PLANTS REPORTED TO BE IMMINENT

On April 22, 2023, both the *New York Times* and the *Washington Post* reported that the U.S. Environmental Protection Agency (EPA) is on the cusp of announcing new regulations requiring dramatic reductions in greenhouse gas emissions from existing coal- and gas-fired power plants. The proposed regulations are reported to be currently undergoing review by federal agencies with the aim of bolstering them against challenges, including under last year's Supreme Court decision in *West Virginia v. EPA*, 142 S.Ct. 2487 (2022), which struck down the Obama administration's Clean Power Plan regulations as applied to existing power plants.

Background

The Biden administration has pledged to reduce, by 2030, the nation's total greenhouse gas emissions to 50 percent of those emitted in 2005.

The Department of Energy (DOE) projects reductions in greenhouse gas emissions from clean energy investments and other provisions under the Inflation Reduction Act that "will help drive 2030 economy-wide greenhouse gas emissions to 40 percent below 2005 levels." DOE Office of Policy, *Inflation Reduction Act Fact Sheet*, p. 2 (DOE/OP-0018, Aug. 2022). EPA regulations proposed in November 2022 would reduce methane emissions from oil and gas operations. 87 Fed. Reg. 74702 (Nov. 11, 2022). Emissions from cars and light duty trucks are the subject of proposed regulations noticed on April 12, 2023, requiring reductions in emissions beginning in model year 2027. EPA-HQ-OAR-2022-0829 (Federal Register publication pending).

In 2021, the electricity producing sector was responsible for 25 percent of the nation's greenhouse gas emission, according to the EPA's *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2021*. According to the U.S. Energy Information Administration (EIA), fossil fuels account for 60 percent of the nation's electricity generation. *EIA - Electric Power Monthly: Data for February 2023*, Table 1.1 (Apr. 25,

2023). While utilities have been adding generation from wind and solar, the pace at which these non-carbon sources of electricity have been displacing fossil fuel generated power has slowed—while an average of 11 gigawatts of coal-fired electricity generation capacity was retired annually from 2015 to 2020, in 2021 less than 6 gigawatts of coal-fired capacity were retired, and less than 9 gigawatts of coal-fired capacity is scheduled to be phased out in 2022. *EIA-Today in Energy* (Feb. 7, 2023).

Without additional reductions in greenhouse gas emissions from the electricity generation sector, by its own projections the Biden administration will fall short of its goal to reduce emissions to 50 percent of those in 2005.

The Proposed Rule

As reported by the *Times* and the *Post*, the scope of the proposed rule would be confined to regulating emissions from operations within the fence line of existing coal- and gas-fired power plants, and would focus on reductions in smokestack emissions. The stringent standards under consideration could force existing plants to implement carbon-capture technologies, currently in use by fewer than ten of the nation's fossil fuel-powered plants, or to switch from coal or natural gas fuel sources to hydrogen. The rules reportedly would apply to both new and existing power plants, and would require the latter to capture the overwhelming majority of their carbon dioxide emissions by 2040.

Challenges to the new regulations are likely inevitable. In 2022, the U.S. Supreme Court held the Obama-era EPA had exceeded its authority in promulgating the 2015 Clean Power Plan's regulations of greenhouse gas emissions from existing natural gas and coal-fired power plants. The Court relied on the "major questions doctrine," which it described as an:

> . . .identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. 142 S. Ct. at 2609.

Under the doctrine, per the Court, regulations of "economic or political significance" or which regulate a "fundamental sector of the economy" require "clear congressional authorization." *Id.* at 2614.

The Biden administration is likely relying on several post-*West Virginia* developments to bolster the new regulations against challenges. The Inflation Reduction Act included language classifying greenhouse gases as pollutants to be regulated by EPA. It also updated the 45Q tax credit to incentive the use of carbon capture and storage technologies. And advances in carbon capture technology may reduce costs, heretofore a significant barrier to widespread adoption.

On January 23, 2023, DOE's Pacific Northwest National Laboratory announced a new system for efficient capture of carbon dioxide from coal-, gas-, or biomass-fired power plants, as well as cement kilns and steel plants, and its conversion into methanol, a chemical with widespread industrial applications. That system is projected to reduce the cost of carbon dioxide capture from $47.10 per metric ton of CO2 (MTC) to about $40 per MTC. *Journal of Cleaner Production*, Energy-effective and low-cost carbon capture from point-sources enabled by water-lean solvents (Vol. 388, Feb. 15, 2023).

Conclusion and Implications

If the regulations are proposed as reported, there were surely be a race to the courthouse to challenge them under *West Virginia* and other authorities. Notwithstanding the Supreme Court's increasing willingness to entertain challenges to executive action with a rapidity previously unheard of, were the Republican party to capture control of both houses of Congress and/or the Presidency, both the regulations and litigation may become moot. What will remain, however, is the existential threat of climate change. (Deborah Quick)

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U.S. BUREAU OF RECLAMATION RELEASES SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT ON COLORADO RIVER OPERATIONS AT LAKE MEAD AND LAKE POWELL

On April 14, the United States Bureau of Reclamation (Bureau) released for comment a draft Supplemental Environmental Impact Statement (SEIS) for proposed modifications to interim guidelines pertaining to the management of the Colorado River. The SEIS focuses on modifications to operational guidelines for Lake Powell and Lake Mead, and specifically on those guidelines governing shortage conditions, elevation and release tiers for the reservoirs, and mid-year reviews of reservoir operating conditions. The Bureau expects to release a final SEIS by late summer 2023.

Background

Extending approximately 1,450-miles, the Colorado River is one of the principal water sources in the western United States and is overseen by the United States Bureau of Reclamation. The Colorado River watershed drains parts of seven U.S. states and two Mexican states and is legally divided into upper and lower basins, the latter comprised of California, Arizona, and Nevada. The river and its tributaries are controlled by an extensive system of dams, reservoirs, and aqueducts, which in most years divert its entire flow for agriculture, irrigation, and domestic water. In the lower basin, Lake Mead provides drinking water to more than 25 million people and is the largest reservoir by volume in the United States.

The Colorado River is managed and operated under a multitude of compacts, federal laws, court decisions and decrees, contracts, and regulatory guidelines collectively known as the "Law of the River." The Law of the River apportions the water and regulates the use and management of the Colorado River among the seven basin states and Mexico. The Law of the River allocates 7.5 million acre-feet (maf) of water annually to each basin. The lower basin states (lower Basin states) are each apportioned specific amounts of the lower basin's 7.5 maf allocation, as follows: California (4.4 maf), Arizona (2.8 maf), and Nevada (0.3 maf). California receives its Colorado River water entitlement before Nevada or Arizona.

For at least the last 20 years, the Colorado River basin has suffered from appreciably warmer and drier climate conditions, substantially diminishing water inflows into the river system and decreasing water elevation levels in Lake Mead. Lake Powell, which is formed by the Glen Canyon Dam upstream of Lake Mead where the upper and lower Colorado River basin meet, is operated to affect Lake Mead lake levels and to meet electricity and water supply demands in the region. In response, the Bureau, with the support and agreement of the seven basin states, developed and implemented the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead (2007 Interim Guidelines) to, among other things, provide incentives and tools to store water in Lake Mead and to delineate annual allocation reductions to Arizona and Nevada for elevation-dependent shortages in Lake Mead beginning at 1075 feet. The 2007 Interim Guidelines are currently set to expire by January 1, 2027.

The 2007 Interim Guidelines have four operational elements: shortage guidelines, coordinated reservoir operations, storage and delivery of conserved water, and surplus guidelines. Relevant here, the shortage guidelines determine conditions under which the Bureau will reduce the annual amount of water available for consumptive use from Lake Mead. Cutbacks under the 2007 Interim Guidelines only affect Arizona and Nevada. When Lake Mead is projected to be at or below 1,075 feet but at or above 1,050 feet, the Bureau will apportion the lower basin 7.167 maf, rather than 7.5 maf. To meet this amount, reductions will be made to Arizona and Nevada's allocations, but not California's allocation. Additional shortages will further reduce Arizona and Nevada's allocations.

Also, in 2019, the lower Basin states entered into a Lower Basin Drought Contingency Plan Agreement (DCP) to promote conservation and storage in Lake Mead. Importantly, the DCP established elevation dependent contributions and required contributions by each lower basin state. This includes implementation of a Lower Basin Drought Contingency Opera-

tions rule set (LBOps). The LBOps provides that the lower basin states and the Bureau must consult and determine what additional measures will be taken by the Bureau and the lower basin states if Lake Mead levels are forecast to be at or below 1,030 feet during the succeeding two-year period, and to avoid and protect against the potential for Lake Mead to decline below 1,020 feet. The Bureau makes annual determinations regarding the availability of water from Lake Mead by considering factors including the amount of water in system storage and forecasted inflow. To assist with these determinations, the Bureau releases operational studies called "24-Month Studies" that project future reservoir contents and releases.

Analysis

The SEIS focuses on the 2024 operating year. The operating year for Glen Canyon Dam, which forms Lake Powell, begins October 1. For Hoover Dam, which forms Lake Mead, the operating year begins January 1. The modified guidelines will also take into account the August 2023 24-month study. The SEIS nonetheless will inform operating guidelines for 2025 and 2026, although guidelines for those years may be further refined based on the outcome of the 2024 operating year. The Bureau will release a new environmental impact statement for post-2026 operations in the future.

The SEIS proposes three alternatives: a No Action Alternative, Alternative Action 1, and Alternative Action 2. The No Action Alternative would continue the existing 2007 Interim Guidelines without change. Notably, under the existing guidelines, reservoir releases are assessed at a scheduled mid-year review, and any changes to projected releases must only be for increasing, not reducing, releases.

Alternative Action 1

Alternative 1 proposes reduced releases from Lake Mead based on the concept of priority, *i.e.*, the Law of the River. Reductions are limited to a total of 2.083 million acre-feet from Lake Mead because that is the maximum amount of reductions analyzed in the final EIS for the 2007 Interim Guidelines. According to the Bureau, using that previously analyzed figure will help finalize the SEIS by late summer, before the 2024 operating year begins.

Alternative Action 1 also contemplates 6-8.23 maf of releases from Lake Powell when Lake Powell is below 3,575 feet elevation. In particular, Alternative Action 1 modifies coordinated reservoir operations at Lake Powell and Lake Mead. When elevations at Lake Powell (projected as of January 1) are below 3,575 feet, an initial annual release in the amount of 6 maf would be set. Adjustments based on the April 24-Month Study would be made depending on projected end-of-year lake levels. Depending on end-of-year projections, releases could total from 6 maf to 8.23 maf. However, Alternative Action 1 preserves water levels of 3,500 feet at Lake Powell because the minimum power pool at that reservoir, *i.e.* the lowest lake level where power can still be generated from Glen Canyon Dam, is 3,490 feet. If lake levels are below 3,500 feet in any month, the Bureau would impose a 6 maf maximum release limit and such releases would be set to maintain or increase lake elevations consistent with existing operating criteria for Glen Canyon Dam. Finally, under Alternative Action 1, the mid-year review would allow for further reductions in deliveries.

Alternative Action 2

Under Alternative Action 2, the Bureau proposes to reduce releases from Lake Mead in the same amount as contemplated by Alternative Action 1, *i.e.*, to a maximum of 2.083 maf. However, reduced releases would not be based exclusively on the concept of priority. Instead, reductions are distributed in the same percentage across all lower Basin water users. Depending on levels at Lake Mead, additional percentage reductions (*i.e.* in excess of reductions already contemplated by the 2007 Interim Guidelines and DCP), range from 2.67 percent to 13.11 percent for each lower Basin state. Coordinated reservoir operations and allowances for further reductions following mid-year review are the same under Alternative Action 2 as they are for Alternative Action 1.

Conclusion and Implications

The draft SEIS is not a final document. Written comments are due May 30. At this time, the Bureau does not have a preferred alternative. It remains to be seen which action the Bureau adopts, or whether

additional changes will be made based on public responses. Nonetheless, the likelihood of further reductions in releases for water users in likely in operating year 2024. The Supplemental Environmental Impact Statement is available online at: https://www.usbr.gov/ColoradoRiverBasin/documents/NearTermColoradoRiverOperations/20230400-NeartermColoradoRiverOperations-DraftEIS-508.pdf (Miles Krieger, Steve Anderson)

CALIFORNIA DEPARTMENT OF WATER RESOURCES SPELLS OUT NEXT STEPS FOR INADEQUATE GROUNDWATER SUSTAINABILITY PLANS AT STATE WATER BOARD MEETING

On April 4, the State Water Resources Control Board (State Water Board) conducted a public meeting during which it addressed its ongoing implementation of the Sustainable Groundwater Management Act (SGMA). The California Department of Water Resources (DWR) presented six groundwater basins to the State Water Board that were deemed to have inadequate Groundwater Sustainability Plans (GSPs) after DWR review, and outlined the next steps that the State Water Board could take to correct those deficiencies. DWR and the State Water Board emphasized that no action would be taken during the meeting; rather, the meeting focused on addressing the process that the Board was required to implement to address GSP deficiencies and conduct probationary hearings.

Background

In 2014, then-Governor Jerry Brown signed SGMA into law. SGMA requires local Groundwater Sustainability Agencies (GSAs) in medium- and high-priority groundwater basins, which includes 21 critically overdrafted basins, to develop and implement GSPs. GSPs are intended to provide a roadmap for reaching the long-term sustainability of a groundwater basin, which includes near-term actions like expanding monitoring programs, reporting annually on groundwater conditions, implementing groundwater recharge projects and designing allocation programs. GSPs are intended to achieve sustainability in overdrafted groundwater basins within a 20-year time horizon.

In January 2022, after reviewing GSPs that had been submitted by 24 basins, DWR determined that 12 of those GSPs were incomplete and thus could not be approved. Under SGMA, the GSAs had 180 days to correct the deficiencies and resubmit the GSPs to DWR for re-evaluation. In July 2022, all 12 of the basins that had been deemed incomplete and inadequate resubmitted their GSPs. In March of 2023, DWR determined that six of the 12 had been adequately completed and were approved, while the other six remained inadequate and were not approved.

Six Basins Remained Inadequate after Resubmittal

The six basins that remained inadequate even after resubmittal were the (1) Chowchilla Subbasin, (2) Delta-Mendota Subbasin, (3) Kaweah Subbasin, (4) Tule Subbasin, (5) Tulare Lake Subbasin, and (6) Kern Subbasin, all in central California. According to DWR, these basins did not sufficiently address deficiencies in how GSAs structured their sustainable management criteria. In particular, DWR described the management criteria set forth in the GSPs as providing an "operating range" for how groundwater levels would prevent undesirable effects such as overdraft, land subsidence and groundwater levels that may impact drinking water wells, within the applicable 20-year time horizon. However, DWR determined that the management criteria did not adequately explain what DWR concluded were continued groundwater level declines and land subsidence. Moreover, DWR viewed the management criteria of the GSPs to be sufficiently unclear such that the criteria did not demonstrate they would prevent undesired effects on groundwater users in the basins or on critical infrastructure.

After deeming the six basins inadequate, DWR referred those to the State Water Board to decide whether to move forward with state intervention, as required by SGMA. SGMA required that the State Water Board go through a public process, including

public notice and hearing, to determine whether the inadequacies identified by DWR in the six GSPs warranted those basins being placed in probationary status. Those six basins are required to continue to be in communication with DWR and the State Water Board regarding the ongoing process.

On April 4, 2023, the State Water Board held a meeting to discuss, among other things, an update on the implementation of SGMA. Prior to the meeting, the State Water Board announced that discussions at the meeting would focus on DWR's determinations and the process that the Board might implement to conduct probationary hearings, as well as what the public could expect from the process. The meeting would mainly address the Board's options regarding its overall approach to SGMA and probationary hearings.

Next Steps

During the April 4 Board meeting, DWR noted that, for the six basins whose GSPs were deemed inadequate, DWR had afforded a 60-day public comment period and given each basin 180 days to correct any deficiencies and re-submit their GSPs. DWR also listed the steps that had been taken by the six basins that had started with inadequate GSPs and had resubmitted GSPs that were then deemed adequate, including (1) taking an inventory and disclosing all groundwater uses and users in the basin, including domestic wells; (2) taking responsibility as stewards of the basin; (3) making plans to minimize or eliminate land subsidence by identifying critical infrastructure that could be impacted and coordinating to identify next steps; and (4) identifying interconnected surface water. In terms of interconnected surface water, DWR had recommended corrective actions in most basins, and while the agency plans to release more guidance for interconnected surface water in 2025, basins can identify stream reaches that are interconnected, beneficial uses including groundwater ecosystems, and data gaps in their GSPs.

DWR then addressed the six basins that remained inadequate even after resubmittal and listed some of the general deficiencies in their GSPs, including: (1) failure to conduct analysis to show the GSP's impacts on groundwater levels for beneficial users and failure to develop a sufficient management criteria for groundwater levels; (2) failure to modify criteria related to land subsidence and failure to identify critical infrastructure that could be affected by subsidence or to coordinate with key interested parties; and (3) failure to establish sufficient management criteria for water quality. DWR mentioned that the Tule and Kern basins were continuing to overdraft groundwater by over 500,000 acre-feet per year, and that Delta-Mendota was the only one of the six that was not over-drafting groundwater. DWR also mentioned that the Tule, Tulare Lake, and Kaweah basins were experiencing up to six and seven feet of land subsidence in some areas.

DWR then outlined the next steps in the process for addressing the six inadequate GSPs. DWR noted that their finding of inadequate GSPs was the "trigger" in the system that led to potential state intervention. The inadequate GSPs will then be referred to the Board, which will evaluate DWR's inadequacy determination and decide whether further state intervention is necessary. If the State Water Board decides further intervention is necessary to achieve groundwater sustainability, the State Water Board will issue public notice of a probationary hearing to the basin and the affected cities and counties. The State Water Board will then conduct a probationary hearing to determine whether the basin should be placed in probationary status until the GSP deficiencies are corrected. If a basin is placed in probationary status, the State Water Board must identify the deficiencies in that basin's GSP and certain remedial actions, and the basin will have a minimum of one year to correct its GSP before an interim plan is put into place. During probation, the basins must continue to implement the parts of their GSPs that are adequate.

Within 90 days after the State Water Board determines a GSP to be inadequate, extractors will begin to collect data in the correlating basin and prepare an extraction report. The basin must report all groundwater extraction in the GEARS reporting system at that time, including well locations and the amounts extracted there. The State Water Board can enact fees for well pumping, if necessary, as an emergency regulation, although small domestic well owners would likely be exempt from such fees. If the deficiencies in the GSP are not cured within the probationary period, which would be a minimum of one year long, the State Water Board would issue public notice for a hearing for adoption of an interim plan for the deficient basin.

DWR noted that, because there are currently six basins with inadequate GSPs, the State Water Board would need to space out the probationary hearings. DWR suggested that the Board could hold one or two hearings per month for a period of three months, or could conduct three hearings at a time, with a gap of six to 12 months until the next three hearings are held. DWR also noted that, at this point, DWR has provided the inadequacy determinations to the State Water Board, so if the Board were to issue notices of probationary hearings in May of 2023, the first hearings could potentially be held in September of 2023.

Conclusion and Implications

DWR has now referred six basins with inadequate and incomplete GSPs to the State Water Resources Control Board. The State Water Board now must make a determination as to whether the DWR was correct in those deficiency determinations, and whether further state intervention is warranted in the six basins. If the State Water Board determines further state action is warranted, it could release notices of probationary hearings for any of the 6 basins as early as May of 2023. It remains to be seen how the State Water Board will proceed.
(Miles Krieger, Steve Anderson)

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

• April 27, 2023—The Department of Justice and the Environmental Protection Agency (EPA) today announced that Tesoro Refining and Marketing Company will pay a $27.5 million penalty for violating a 2016 consent decree ordering the company to reduce air pollution at its petroleum refinery in Martinez, California. In particular, according to today's settlement, Tesoro failed to limit air emissions of nitrogen oxides (NOX), a pollutant that contributes to smog. The settlement requires Tesoro to adhere to strict pollution controls at the facility. The facility is currently undergoing conversion into a renewable fuels plant, which will use renewable sources such as vegetable oils to produce fuels instead of crude oil. The settlement also sets up a framework for additional pollutant reductions, including significant climate co-benefits. Specifically, the settlement requires Tesoro to forego hundreds of annual emission credits that it could otherwise sell to area sources who could then increase their emissions.

In May 2020, Tesoro suspended operations at the Martinez refinery and then announced its plan to convert the refinery to a renewable fuels plant. Today's agreement includes requirements to limit air pollution from the future renewable fuels plant. The agreement does not prohibit Tesoro from resuming petroleum refining, but if it does so, Tesoro must install specific air pollution control technology, at an expected cost of $125 million, to ensure stringent NOX emission limits are met.

To mitigate pollution resulting from its violation of the 2016 consent decree, Tesoro agreed to surrender most of its existing NOX emission trading credits. Tesoro also agreed to forego almost all trading credits from the shutdown of petroleum refining equipment should it convert to a renewable fuels plant. A company can receive emission credits by shutting down equipment and then apply such credits to offset emissions from new projects or trade such credits to other companies for their use. By requiring Tesoro to surrender existing credits and forego petroleum-related shutdown credits if it converts to a renewable fuels plant, the settlement prevents Tesoro and other local sources from using these credits. As a result, the settlement filed today will limit emissions in the San Francisco Bay area.

Specifically, if Tesoro resumes petroleum refining, the settlement requirements will reduce annual air emissions by about 261 metric tons of NOX. If Tesoro converts the facility to a renewable fuels plant, the settlement will result in annual air emissions reductions of about 440 tons of NOX, 327 tons of sulfur dioxide, 697 tons of carbon monoxide, 69 tons of volatile organic compounds, 301 tons of fine particulate matter and the equivalent of 1,342,025 tons of carbon dioxide.

The terms of a 2016 federal consent decree, which resolved Clean Air Act violations at the Martinez refinery and five other refineries nationwide, established emission limits for multiple pollutants including NOX. The settlement announced today, which will modify the 2016 settlement, includes new requirements that apply whether Tesoro chooses to reopen the Martinez facility as a petroleum refinery or a renewable fuels plant.

There will be a 30-day public comment period on the modification to the 2016 settlement. Information on how to comment on the modification will be available in the Federal Register and at www.justice.gov/enrd/consent-decrees

• April 20, 2023—The Department of Justice and the Environmental Protection Agency (EPA) today

announced three separate settlements with natural gas processors that will require the companies to pay a combined $9.25 million in civil penalties and make improvements at 25 gas processing plants and 91 compressor stations. These settlements will reduce harmful air pollution and improve air quality in 12 states, including in communities disproportionately impacted by pollution and in Indian Country. The states of Alabama, Colorado, Louisiana, North Dakota, West Virginia, and Wyoming, and the Southern Ute Indian Tribe, are also settling claims against the companies.

When fully implemented, the combined settlements with The Williams Companies Inc., MPLX LP and WES DJ Gathering LLC fka Kerr-McGee Gathering LLC will reduce ozone-producing air pollution by an estimated 953 tons per year and greenhouse gases by 50,633 tons per year of carbon dioxide equivalent, including methane. This reduction equates to taking 11,267 gasoline-powered passenger vehicles off the road for one year. The settlements, lodged simultaneously today in the Federal District Courts of Colorado and Utah, resolve allegations that the companies violated the Clean Air Act and state air pollution control laws.

The settlements filed address allegations that The Williams Companies Inc., MPLX LP and WES DJ Gathering LLC violated federal and state clean air laws related to leak detection and repair (LDAR) requirements for natural gas processing plants at various facilities that they own and operate across the nation. These facilities emit volatile organic compounds (VOCs), nitrogen oxides (NOx), hazardous air pollutants such as benzene and formaldehyde, and greenhouse gases into the atmosphere, according to the complaints filed against the companies.

VOCs are a key component in the formation of smog or ground-level ozone.

Under the settlements, the companies will spend approximately $16 million combined on injunctive relief requirements. To minimize emissions at the natural gas processing plants, the defendants will install and operate new technologies, as well as improve and expand existing control techniques. These commitments include installing equipment that leaks less, conducting audits, reviewing compliance with leak detection and repair requirements, and repairing leaking equipment faster. The companies will improve staff training for leak detection and repair at their facilities, and they have agreed to use optical gas imaging technology at their facilities to improve the visual detection of leaks and quickly repair them.

Finally, The Williams Companies Inc., MPLX LP and WES DJ Gathering LLC will implement additional projects to mitigate the harm caused by the excess emissions resulting from their violations of the CAA. These projects vary by company, and more information about each project can be found in the fact sheets linked above.

Civil Enforcement Actions and Settlements—Water Quality

• April 26, 2023—The U.S. Environmental Protection Agency has ordered the Chemours Company to take corrective measures to address pollution from per-and polyfluoroalkyl substances (PFAS) in stormwater and effluent discharges from the Washington Works facility near Parkersburg. The order on consent also directs Chemours to characterize the extent of PFAS contamination from discharges.

This is the first EPA Clean Water Act enforcement action ever taken to hold polluters accountable for discharging PFAS into the environment. PFAS are a group of man-made chemicals that have been manufactured and used in industry and consumer products since the 1940s. There are thousands of different PFAS chemicals, some of which have been more widely used and studied than others.

According to the EPA order, PFAS levels in the discharges from the facility exceed levels that are set in the facility's Clean Water Act permit.

Under the Clean Water Act, it is unlawful to discharge pollutants into U.S. waterways except pursuant to a National Pollution Discharge Elimination System (NPDES) permit, issued by EPA or a state. The permit sets pollution discharge limits, monitoring and reporting requirements, and other conditions designed to protect water quality. More information on the NPDES program.

Chemours operates several manufacturing units at the Washington Works facility, which produce fluorinated organic chemical products including fluoropolymers. The facility discharges industrial process water and stormwater to the Ohio River and its tributaries, under the terms of a NPDES permit issued in 2018 by the West Virginia Department of

Environmental Protection. E.I. du Pont de Nemours and Company was the NPDES permit holder at Washington Works until 2015. In 2015, the permit was transferred to Chemours.

The permit imposes discharge limits and requires monitoring of certain pollutants, including PFAS such as perfluorooctanoic acid (PFOA), which was used in the past as a processing aid for manufacturing, and HFPO Dimer Acid, also known as GenX—which replaced PFOA as a processing aid.

In an administrative compliance order on consent (AOC) issued today, EPA sets forth that this facility exceeded permit effluent limits for PFOA and HFPO Dimer Acid on various dates from September 2018 through March 2023, and that Chemours failed to properly operate and maintain all facilities and systems required for permit compliance.

As an initial step in characterizing PFAS in surface water discharges, EPA's order requires Chemours to implement an EPA-approved sampling plan to analyze PFAS and conduct analysis to further understand the presence of PFAS in stormwater and effluent discharged from the facility. Also, Chemours will submit and implement a plan to treat or minimize the discharge of PFAS to ensure compliance with numeric effluent limits of PFOA and HFPO Dimer Acid.

In addition, to identify best practices to reduce PFAS discharges from the site, Chemours will submit its existing Standard Operating Procedures relating to the management of wastewater for various systems and its revised Storm Water Pollution Prevention Plan.

•March 31, 2023— The U.S. Environmental Protection Agency (EPA) and in coordination with the U.S. Attorney's Office for the Northern District of Ohio, the Justice Department's Environment and Natural Resources Division announced a complaint against Norfolk Southern Corporation and Norfolk Southern Railway Company (Norfolk Southern) related to the Feb. 3, derailment in East Palestine, Ohio. The complaint seeks penalties and injunctive relief for the unlawful discharge of pollutants, oil, and hazardous substances under the federal Clean Water Act, and declaratory judgment on liability for past and future costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

This action follows EPA's issuance on Feb. 21, 2023 of a Unilateral Administrative Order under CERCLA to Norfolk Southern Railway Company requiring the company to develop and implement plans to address contamination and pay EPA's response costs associated with the order.

The United States Attorney's Office stands with our district's residents in pursuing accountability and justice in both the immediate and distant future, as we work together to deal with the damage and destruction this disaster has caused," said First Assistant U.S. Attorney Michelle Baeppler for the Northern District of Ohio.

On Feb. 3, 2023, a Norfolk Southern train carrying hazardous materials, including hazardous substances, pollutants, and oil derailed in East Palestine, Ohio. The derailment resulted in a pile of burning rail cars, and contamination of the community's air, land, and water. Residents living near the derailment site were evacuated. Based on information Norfolk Southern provided, the hazardous materials contained in these cars included vinyl chloride, ethylene glycol monobutyl ether, ethylhexyl acrylate, butyl acrylate, isobutylene, and benzene residue. Within hours of the derailment, EPA and its federal and state partners began responding to the incident, including providing on-the-ground assistance to first responders and conducting robust testing in and around East Palestine.

The fire caused by the derailment burned for several days. On Feb. 5, monitoring indicated that the temperature in one of the rail cars containing vinyl chloride was rising. To prevent an explosion, Norfolk Southern vented and burned five rail cars containing vinyl chloride in a flare trench the following day, resulting in additional releases.

Since the EPA's issuance of the Unilateral Administrative Order to Norfolk Southern Railway Company, the EPA has been overseeing that company's work under the order. Approximately 9.2 million gallons of liquid wastewater, and an estimated 12,932 tons of contaminated soils and solids have been shipped off-site.

The EPA and other federal agencies continue to investigate the circumstances leading up to and following the derailment. The United States will pursue further actions as warranted in the future as its investigatory work proceeds.

•March 20, 2023— ABF Freight System Inc. (ABF), a freight carrier that operates more than 200 transportation facilities in 47 states and Puerto Rico, has resolved allegations that it violated requirements of the Clean Water Act (CWA) relating to industrial stormwater at locations across the country. Under the proposed settlement, ABF will enhance and implement its comprehensive, corporate-wide stormwater compliance program at all its transportation facilities except those located in the state of Washington, and will pay a civil penalty of $535,000, a portion of which will be directed to the Louisiana Department of Environmental Quality, the State of Maryland, and the State of Nevada who all joined this settlement.

The complaint in the case, filed contemporaneously with the proposed consent decree, alleges that ABF failed to comply with certain conditions of their CWA permits (e.g., spills that had not been cleaned up; failure to implement required spill prevention measures; failure to implement measures to minimize contamination of stormwater runoff; failure to conduct monitoring of stormwater discharges as required; and failure to provide all required training to ABF's employees) at nine of its transportation facilities.

In April 2015, ABF voluntarily disclosed to EPA that it failed to obtain industrial stormwater permit coverage at multiple facilities and had discovered additional areas of noncompliance with the CWA through the company's own compliance audits which were conducted at nearly all its facilities during 2013 and 2014. Between October 2016 and April 2019, EPA, the Louisiana Department of Environmental Quality, the State of Maryland, and the State of Nevada conducted 15 inspections of ABF's facilities and observed noncompliance with applicable stormwater laws at both CWA permitted facilities and No Exposure Certification (NEC) facilities.

To address the extent of ABF's noncompliance, the proposed consent decree requires ABF to continue to implement and enhance its comprehensive, corporate-wide stormwater compliance program. This includes a memorialization of stormwater roles and responsibilities, comprehensive employee training with contractor awareness, implementation of standard operating procedures, stormwater pollution prevention plan management, and tracking facility-specific corrective actions. The settlement also requires ABF to conduct tiered management oversight inspections at its permitted and NEC facilities throughout the three-year implementation of this consent decree.

The injunctive relief measures set forth in the proposed consent decree are designed to result in effective stormwater runoff management at ABF's facilities, including those facilities that conduct vehicle maintenance and equipment cleaning.

The consent decree, lodged in the U.S. District Court for the Western District of Arkansas, is subject to a 30-day federal public comment period and approval by the federal court.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

•April 25, 2023—The U.S. Environmental Protection Agency announced Arctic Glacier USA Inc. will pay penalties totaling $232,593 to resolve alleged violations of federal requirements to report on the releases of hazardous substances. The settlement follows a release of ammonia resulting from a pipe failure at the company's ice manufacturing facility in Grayling, Michigan.

EPA alleges Arctic Glacier violated the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) by failing to report a release of 1,580 pounds of anhydrous ammonia from its facility on June 3, 2022. Under EPCRA, anhydrous ammonia qualifies as an "extremely hazardous substance" and facilities are required to report the details of releases that exceed 100 pounds. The company failed to provide immediate notification of the release to the National Response Center, state and local authorities, and the written follow-up notification to state and local emergency response agencies.

Criminal Enforcement

•April 25, 2023—E. I. du Pont de Nemours and Company Inc. (DuPont) pleaded guilty and has been sentenced for criminal negligence in connection with a 2014 accident that left four company employees dead, announced U.S. Attorney Alamdar S. Hamdani.

On Nov. 15, 2014, DuPont released approximately 24,000 pounds of a highly toxic, flammable gas called methyl mercaptan (MeSH) into the air. In addition

to killing the four, the chemical release injured other DuPont employees and travelled downwind into the surrounding areas.

The company pleaded guilty today along with Kenneth Sandel, 52, Friendswood, unit operations leader of the Insecticide Business Unit (IBU) where the accident occurred.

U.S. District Judge Lee H. Rosenthal ordered DuPont to pay a $12 million penalty. The company must also serve two years of probation during which time the company must give the U.S. Probation Office full access to all of its operating locations. Judge Rosenthal also ordered Sandel to serve one year of probation. At the hearing, the court asked DuPont's corporate representative whether the company had to publicly disclose their conviction, noting the importance of that fact.

They will also make a $4 million community service payment to the National Fish and Wildlife Foundation to address the harm they caused by funding projects that benefit air quality in and around areas adjacent to the western shores of Galveston Bay.

As a result of this case and other related civil cases tied to the explosion, DuPont will have paid a total of $19.26 million for its unlawful conduct.

The release of the MeSH on Nov. 15, 2014, resulted in the introduction of the pesticides into the air which travelled downwind into the city of Deer Park and beyond. In addition to killing the four employees, several others were injured.

The fatal accident occurred after an employee inadvertently left open a piping valve which caused a slushy material to block the flow of liquid MeSH into the Lannate process. To melt it, DuPont day shift employees began applying hot water to the outside of the blocked piping and opened other valves to vent MeSH gas into a waste gas system. However, the MeSH piping was still blocked at the end of the day.

As the IBU leader, Sandel was responsible for ensuring shift supervisors, operators and engineers understood and complied with government safety, health and environmental regulations. Specifically, Sandel was responsible for implementing a safety procedure at the IBU by making sure employees understood and followed the procedure's requirements and did not release toxic chemicals inappropriately to the environment.

Sandel and other employees failed to provide sufficient instructions to the oncoming shift for how to safely clear remaining blockage. It finally cleared early the next morning, and a large volume of liquid MeSH began flowing into the waste gas system. At that time, an employee mistakenly believed the waste gas system only contained materials present during normal operations and opened valves that resulted in the release of the toxic gas.

Records indicate employees at DuPont's LaPorte plant disregarded a federally mandated safety procedure when opening those valves on the waste system. Sandel should have known operators did not have a safe and effective way to drain the vent system and should have prevented it from happening.

As part of the pleas, DuPont and Sandel admitted to negligently releasing an extremely hazardous substance into the ambient air. The company also acknowledged negligently placing a person in imminent danger of death or serious bodily injury in violation of the federal Clean Air Act. The IBU has since been demolished.

(Robert Schuster)

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RECENT FEDERAL DECISIONS

NINTH CIRCUIT FINDS FAA FAILED TO TAKE REQUISITE 'HARD LOOK" UNDER NEPA AT NOISE IMPACTS FROM AIRPORT TERMINAL REPLACEMENT PROJECT

City of Los Angeles v. Federal Aviation Administration, ___F.4th___, Case No. 21-71170 (9th Cir. Mar. 29, 2023).

In *City of Los Angeles v. Federal Aviation Administration* the U.S. Court of Appeals for the Ninth Circuit panel (Panel), in a split 2-1 decision, held that the Federal Aviation Administration (FAA) did not comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370m-11 (1969), when it failed to adequately analyze simultaneous noise impacts that would accompany construction of the proposed replacement terminal for the Bob Hope "Hollywood Burbank" Airport (Project). In all other respects, the Panel agreed that the FAA's environmental review of the Project, including the agency's analysis of a reasonable range of alternatives, was adequate.

Project Background

The existing terminal at the Bob Hope "Hollywood Burbank" Airport (Airport) has been out of compliance with FAA standards for airport operations since 1980. While the FAA has determined that the existing terminal is safe to use, the Burbank Pasadena Airport Authority (Authority), who owns and operates the Airport under a Joint Powers Agreement between the cities of Burbank, Glendale, and Pasadena, has been working with the FAA to replace the terminal since 1981. Although approximately 20 percent of the Airport is within the City of Los Angeles (City), the Authority does not represent the City.

In 2015, the City of Burbank (Burbank) and the Authority entered into an agreement to build a new 14-gate terminal that was not to exceed 355,000 square feet, and Burbank residents approved the Project via ballot measure (Measure B). The Authority submitted an Airport Layout Plan for the Project to the FAA, who then prepared an Environmental Impact Statement (EIS), conducted public hearings, and took comments on the Project pursuant to NEPA's procedural requirements. The FAA issued a final EIS (FEIS) and approved the Project in a Record of Decision (ROD) in 2021, and the City filed a petition for review challenging the adequacy of the ROD directly with the Ninth Circuit, who has exclusive jurisdiction over these types of FAA actions.

The Ninth Circuit's Decision

NEPA Project Alternatives Analysis

On review, the City argued, among other things, that the FAA failed to include a detailed statement of alternatives to the Project, and that the FAA improperly eliminated viable alternatives due to conditions imposed on the Project by Measure B. Employing the "rule of reason" standard, which only finds an abuse of discretion in violation of NEPA where the record plainly demonstrates that the agency made a clear error in judgment, the Ninth Circuit determined that the FAA employed a reasonable range of alternatives in the FEIS. In making this determination, the court found that the FAA acted reasonably in taking pertinent safety regulations and the Authority's goals into account when crafting the purpose and need statement for the Project. This reasonable purpose and need statement was then, in turn, used to eliminate a number of project alternatives from in-depth review. In response to the City's contention that the FAA impermissibly used the constraints found in Measure B to rule out potentially viable alternatives, the court found that the FAA properly cited technical and economic reasons for culling these alternatives from in-depth review. Given these independent justifications, and the City's inability to identify a viable alternative that was not considered, the court held that the FAA did not violate NEPA in consideration of a reasonable range of alternatives. Further, the court also

determined that the FAA did not make an irreversible commitment to the Project by including Measure B requirements in its screening criteria as the agency could have chosen the "no action" alternative after reviewing the Project's environmental impacts.

Project Noise Impacts

NEPA requires federal agencies to consider every significant aspect of the environmental impacts of a project, and, to accomplish this objective, imposes procedural requirements forcing agencies to take a "hard look" at the environmental consequences. Although courts defer to agency decisions, the hard look requirement is not satisfied when an agency relies on "incorrect assumptions or data in an EIS."

Here, the City argued that the FAA failed to take the requisite hard look at the Project's noise impacts because its analysis rested on the "unsupported and irrational assumption" that construction equipment would not be operated simultaneously. While the FAA did conduct an analysis of construction noise, the majority of the Ninth Circuit panel agreed with the City and held that the FAA's failure to account for increased noise levels from multiple pieces of equipment running at the same time was a "fundamental error" that rendered the EIS's environmental and cumulative impacts analysis inadequate.

In response to the dissenting opinion's contentions that the majority relied on an argument that was not raised before the agency and failed to defer to the FAA's reasonable assumptions, the majority noted that the City did, in fact, raise the construction noise issues before the FAA. Further, the majority found that, even if the comment letters were inadequate, the FAA bore the responsibility of complying with NEPA's standards. Given that the FAA's own reference materials instructed it to add sounds from multiple sources together, the majority held that the flaws in the agency's noise analysis were "so obvious" that the FAA had to address them, regardless of the alleged inadequacy of public comments. Accordingly, the majority remanded to the FAA to address the deficiencies in its noise analysis along with the resulting deficiencies in its analysis of environmental and cumulative impacts from construction noise.

Concusion and Implications

As the dissent in this case noted, courts generally give agencies a great degree of deference when it comes to the adequacy of their environmental analysis under NEPA. But this decision may indicate that there is some disagreement, at least among the judges within the Ninth Circuit Court of Appeals, regarding the scope of deference that agencies receive regarding "reasonable assumptions" that they rely on in making environmental impact determinations. Therefore, agencies within the jurisdiction of the Ninth Circuit may in the future wish to conduct a more searching review when considering the adequacy of the assumptions made in their environmental documents, and ensure that they minimize or address any inconsistency of such assumptions with the agencies' own guidance documents and reference materials. The Ninth Circuit's panel opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/opinions/2023/03/29/21-71170.pdf
(Dustin Peterson, Hina Gupta)

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FOURTH CIRCUIT UPHOLDS VIRGINIA'S CLEAN WATER ACT SECTION 401 PERMIT FOR NATURAL GAS PIPELINE

Sierra Club v. State Water Control Board, 64 F.4th 187 (4th Cir. Mar. 29, 2023).

The United States Court of Appeals, Fourth Circuit upheld Virginia's grant of a section 401 water quality certification for an in-stream natural gas pipeline.

Background

This appeal is the latest installment in a series of challenges to Mountain Valley Pipeline, LLC's (MVP) plans to build a natural gas pipeline (Pipeline) that will span approximately 304 miles from Wetzel County, West Virginia to Pittsylvania County, Virginia.

In February 2021, MVP submitted an application requesting both a Virginia Water Protection individual permit (VWP Permit) from Virginia's Department of Environmental Quality (DEQ) and the State Water Control Board (Board) (collectively: the Agencies) and a certification from the United States Army Corps of Engineers (Corps) pursuant to Section 404 of the federal Clean Water Act (CWA). On December 14, 2021, the Board adopted DEQ's recommendation to approve MVP's application.

The Sierra Club, Appalachian Voices and eight other conservation groups (collectively: Petitioners) sued the Agencies and several individuals associated with the Agencies (Respondents), alleging that its approval of a state water protection permit and water quality certification violated the Clean Water Act.

Petitioners asserted that the VWP Permit should be vacated because the Agencies failed to: (1) evaluate whether alternative crossing locations would be environmentally preferable and practicable; (2) independently verify whether each of MVP's proposed water crossing methods was the least environmentally damaging practicable alternative (LEDPA); and (3) determine whether the Pipeline will comply with Virginia's narrative water quality standards. In addition, Respondents contended that the court lacked jurisdiction to review the petition.

The Fourth Circuit's Decision

Petitioners argued that the Agencies' issuance of the VWP Permit was not in accordance with the law because the Agencies failed to: (1) evaluate alternative crossing locations; (2) verify MVP's crossing methods were the least environmentally damaging practicable alternative (LEDPA); and (3) evaluate whether the Pipeline will comply with Virginia's narrative water quality standards. The court rejected each argument.

Evaluation of Alternative Crossings

Petitioners' first argument turned on whether the Agencies were required to ask:

> . . .on a crossing-by-crossing basis, whether alternative sites for MVP's proposed crossings would avoid or result in less adverse impact to state waters.

Respondents explained that the Pipeline is a large, contiguous project, and, as such, changing one stream crossing would alter the Pipeline's siting in other places. The Court of Appeals found that Petitioners failed to present any evidence indicating that any crossing could be moved without altering the Pipeline's siting elsewhere and concluded that the Agencies correctly applied Virginia law by approving MVP's proposed crossing locations.

Least Environmentally Damaging Practicable Alternatives Analysis

Petitioners next argued that the Agencies acted arbitrarily and capriciously by failing to independently verify whether each of MVP's proposed water crossing methods was the LEDPA. Specifically, that the Agencies failed to address Petitioners' expert report. The court noted that DEQ did not simply grant MVP's application without considering its merits. Rather, the agency held multiple public meetings where it heard directly from the public, considered nearly 8,000 public comments, addressed several recurring issues raised by the commenters, and provided a Final Fact Sheet detailing its reasons for recommending that the Board grant MVP's application for a VWP Permit. The court found evidence in the record

indicating that the Agencies asked a number of clarifying questions to ensure they were satisfied that the project minimizes the impact on the environment. The court was satisfied that the Agencies considered the relevant data and provided a satisfactory explanation for their conclusion. The court concluded that the Agencies' review of MVP's proposed crossing methods was neither arbitrary nor capricious.

Compliance with Virginia's Narrative Water Quality Standards

Lastly, Petitioners argued that the Agencies acted arbitrarily and capriciously by failing to address whether the Pipeline would comply with Virginia's narrative water quality standard. DEQ addressed this issue in its responses to the public comments, in which it listed a host of conditions that it placed on the VWP Permit to ensure that Virginia's water quality is protected both during and after construction. In addition, DEQ described the indicators it uses to measure water quality, which Petitioners have not challenged. The court concluded that the Agencies did not act arbitrarily and capriciously by determining that the Pipeline will comply with Virginia's narrative water quality standard.

Federal Court Jurisdiction

Finally, the court addressed Respondents' argument that the court lacked jurisdiction. Respondents argued that the court lacked jurisdiction because (1) Petitioners' claims were rooted in state law and (2) Virginia did not waive sovereign immunity by participating in the regulatory schemes of the Natural Gas Act and Clean Water Act.

The court explained that DEQ was acting pursuant to the authority granted to it through the CWA when it issued the VWP Permit, which provided the court jurisdiction to hear this case. As for the second argument, the court explained that a state's voluntary participation in the NGA and CWA's regulatory schemes resulted in federal jurisdiction over the state's decisions made pursuant to that scheme and concluded that the State waived the defense of sovereign immunity by issuing the VWP Permit.

Conclusion and Implications

This case provides a reminder that large projects with multiple layers of regulatory oversight typically undergo extensive public review and evaluation. A challenge based on a deficiency of the factual record is difficult to prove. The Court of Appeals' opinion is available online at: https://www.ca4.uscourts.gov/opinions/212425.P.pdf
(Tiffany Michou, Rebecca Andrews)

COURT OF FEDERAL CLAIMS PARTIALLY GRANTS MOTION TO IMPOSE SANCTIONS FOR SPOLIATION OF EVIDENCE RELATING TO CLEAN WATER ACT PERMITTING OF WASTE DISCHARGES

United Affiliates Corp. v. United States, 164 Fed. Cl. 565, 571 (Feb. 28, 2023).

The United States Court of Federal Claims recently imposed sanctions on a mining company for destroying documents relevant to its ongoing lawsuit against the U.S. Environmental Protection Agency (EPA). The Federal Court of Claims found that the mining company misled the federal government about the existence of documents, which were highly relevant to determining the central claims of the ongoing litigation.

Factual and Procedural Background

Mingo Logan Coal LLC (Mingo) leased land in West Virginia owned by United Affiliates Corp. (United) to operate a surface coal mine. Mingo sought a federal Clean Water Act Section 404 permit to discharge mining-generated waste into two nearby streams. The permit was issued in 2007, after a ten-year application process and environmental impact study. Four years later, in 2011, the EPA withdrew the permit. Shortly thereafter, United and Mingo filed

suit alleging that the permit withdrawal constituted a categorical and regulatory taking of Mingo's property under the Fifth Amendment.

In May 2019, the United States Court of Federal Claims partially granted the federal government's motion to dismiss. The court agreed that the plaintiffs failed to allege a compensable property interest and thus could not state a categorical takings claim as a matter of law, but found the taking sufficiently alleged to support a regulatory takings claim.

During the subsequent discovery process, the federal government sought from Mingo mine models and forecasts that supported the 2007 permit. Mingo provided the modeling files it created in 2006, but the government believed more recent models existed because Mingo conducted contract mining operations for a neighboring mine after the Section 404 permit was issued in 2008. After a series of discovery conferences that failed to resolve the issue, the federal government deposed Mingo Logan in August 2021 in order to obtain the mine modeling it had.

Two days before the scheduled December 8, 2021, deposition, Mingo informed the federal government that certain requested data was lost. The files were on the hard drive of the engineer chiefly responsible for the mine planning and modeling. However, Mingo did not place a litigation hold on the engineer's files. Therefore, when the engineer left Mingo four months after it filed the complaint, his computer and files were not preserved. The federal government moved for evidentiary sanctions against Mingo and United for their failure to preserve those documents.

The Court of Federal Claims' Decision

The court granted in part the motion for sanctions against Mingo and United for committing spoliation of evidence. The court observed that a party has a legal duty to preserve evidence when litigation is 'pending or reasonably foreseeable. Where a party fails in that duty, it commits spoliation. In reviewing the reasonableness of sanctions against a spoliator, the court applied a four-part policy rationale. First, sanctions for spoliation of evidence are imposed to "punish the spoliator" and prevent that party from benefiting from the misdeed; second "to deter future misconduct"; third, to remedy or mitigate damages, evidentiary or otherwise, caused by the spoliation; and fourth, to uphold the judicial process and "its truth-seeking function."

Spoliation of Evidence

Here, the court concluded Mingo committed spoliation. The engineer's files for updated mine models and alternative disposal sites were lost, although Mingo initially asserted that such files did not exist. Only shortly before the deposition did Mingo verify the existence of those deleted files. In actuality, the engineer's files were deleted four months after Mingo filed its complaint. Although Mingo had instructed its employees about data preservation, the court found that Mingo failed to adequately follow up in ensuring compliance with those instructions. Thus, Mingo committed spoliation.

Measuring the Impact of Spoliation

In measuring the impact of that spoliation, the court examined the relevance of the lost evidence as well as the extent the lost evidence prejudiced the federal government. Here, the court determined the lost evidence to be relevant to the litigation. The updated mine models and alternative disposal sites would have provided the government the mine site's conditions at the time of the alleged taking, as well as Mingo's available alternatives for dumping mining waste. Both topics would help determine the economic value of the permit revocation upon which the plaintiffs' regulatory takings claim was based. The court rejected Mingo's argument that the economic value could be based on the 2006 calculations, finding that the updated files would provide a more accurate record when the Section 404 permits were revoked in 2011. Thus, the spoliated evidence was relevant to the litigation.

Prejudice

Further, the court concluded that the federal government was prejudiced by the spoliation. Only Mingo possessed those files, and the government had no way to obtain the information through other means or otherwise verify Mingo's calculations without source data. Again, the court found Mingo's argument that the 2006 models were sufficient to be unpersuasive. Mingo could be correct in that assertion, the court reasoned, but there is no way to know if it is telling the truth without the lost files.

Sanctions

The court found sanctions to be warranted against Mingo, as they failed to produce the requested evidence, intentionally deleted it, and did not provide an adequate substitute for the deleted files. The sanction awarded attorney's fees and costs against Mingo, as the federal government held unnecessary depositions stemming from the spoliation, as well as increased costs from their attempts to reconstruct the lost evidence from available data. However, the sanction awarding attorney's fees did not apply to United, as the court found no evidence to suggest United had anything to do with Mingo's spoliation, thus rejecting part of the federal government's motion. The court's sanction also precluded all plaintiffs, including the United, from relying on the spoliated evidence. Although United was not responsible for the spoliation, the court agreed with the federal government's argument that United, as a co-plaintiff, could still make use of the destroyed evidence, and it would be reasonable to extend the prohibition on spoliated evidence to both plaintiffs.

Conclusion and Implications

This case demonstrates the extent to which spoliation of evidence can extend beyond the spoliator and affect a co-plaintiff. The case also upholds the application of spoliation to acts where the party failed to adequately ensure subordinates' compliance with required litigation holds on relevant documents. The court's opinion is available online at: https://law.justia.com/cases/federal/district-courts/federal-claims/cofce/1:2017cv00067/33981/138/
(Michael Ervin, Rebecca Andrews)

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RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL AFFIRMS JUDGMENT REJECTING CEQA CHALLENGES TO OAKLAND A'S PROPOSED BALLPARK EIR—ADDRESSES WIND IMPACTS MITIGATION

East Oakland Stadium Alliance v. City of Oakland, ___Cal.App.5th___,
Case No. A166221 (1st Dist. Mar. 30, 2023).

The First District Court of Appeal has affirmed the trial court's judgment, which upheld the Environmental Impact Report (EIR) prepared for the Oakland Athletics' proposed Howard Terminal ballpark and related development project. On all but one issue—the EIR's wind impacts analysis and mitigation measures—the Court of Appeal and trial court ruled in favor of the A's. The court's opinion analyzed several issues under the California Environmental Quality Act (CEQA) raised by petitioners and provided helpful guidance to project proponents and CEQA professionals.

Factual and Procedural Background

The Oakland Athletics sought to redevelop the 50-acre Howard Terminal site and five contiguous acres in the Port of Oakland within the City of Oakland (City). The project sought to construct a 35,000-seat ballpark, 3,000 residential units, 270 square feet of retail space, 1.5 million square feet of space for other commercial uses, a performance venue, up to 400 hotel rooms, and 20 acres of publicly accessible open space.

The Howard Terminal borders an estuary southwest of the City's downtown. Portions of the site are used for commercial maritime activities with most of the site dedicated to truck parking and container storage. A rail line runs down the middle of Embarcadero West, a street that runs at the northern border of the Howard Terminal.

The City started preparing the EIR for the project in 2018 and certified a final EIR in 2022. In the city's findings certifying the EIR, it adopted a statement of overriding considerations, concluding that the project's benefits outweighed several significant environmental impacts that could not be fully mitigated.

Petitioners filed three writ petitions that the trial court consolidated for hearing, which made numerous challenges that were resolved by the trial court. Except with respect to one wind mitigation measure, the trial court rejected petitioners' claims, finding the EIR adequate and and in compliance with CEQA. The judgment directed the City to reconsider its adoption of a wind mitigation measure, but otherwise rejected the petitions.

The Court of Appeal's Decision

The Court of Appeal upheld the trial court's decision and included a lengthy discussion of each of petitioners' CEQA claims.

Railroad Impact Mitigation

On appeal, petitioners argued that the EIR's plan to avoid impacts to ballpark visitors from rail traffic was infeasible and ineffective. The railroad tracks at the north of the project site ran down the middle of an urban street and were used by an average of 46 trains daily between 11 a.m. and 11 p.m. To address safety concerns and access issues related to crossing the tracks, the EIR included a number of mitigation measures such as construction of overcrossings, elimination of one intersection and enhanced safety features at others, and a fence to accommodate a multi-use path on railroad property separating the freight line from vehicle traffic for three blocks. Despite these mitigation measures, the EIR found significant and unavoidable impacts due to safety hazards.

The court rejected petitioners' challenge that the proposed multi-use path was "infeasible mitigation." Although the proposed path was located on the railroad's right-of-way and was rejected by the railroad, this was not really a mitigation measure. The real mitigation measure was the fencing, which the railroad accepted. The path was merely an amenity, that

if eliminated would not impact the effectiveness of the fencing. Substantial evidence supported the city's conclusion that the mitigation measure was feasible.

The court moved on to reject petitioners' challenge that the proposed pedestrian and bicycle overcrossing was infeasible on the basis that substantial evidence, comprised of public comments criticizing the location of the overcrossing, showed it will be ineffective. The substantial evidence standard of review evaluates the sufficiency of evidence supporting the EIR, not evidence supporting petitioners' challenge. Substantial evidence therefore supported the city's determination that the overcrossings would significantly mitigate the rail crossing hazard by diverting thousands of visitors from at-grade intersections.

Displacement of Existing Howard Terminal Activities

The court rejected petitioners' claim that the EIR's air quality analysis assumption that overnight truck parking would relocate to nearby lots was not supported by substantial evidence. Although the EIR did not need to evaluate economic impacts of relocated activities, it needed to make reasonable assumptions about relocation to evaluate the associated potential environmental impacts. Despite petitioners' challenges, the court concluded that the EIR's approach and analysis was reasonable and supported by substantial evidence. Petitioners' challenge alleging that the EIR failed to analyze air quality impacts from displaced Howard Terminal users relocating to other areas outside the port was also rejected. Because no reliable methods existed to determine the number of truckers who would relocate and to what locations, the EIR correctly concluded that such impacts were speculative and did not need to be further analyzed.

Air Quality Analysis Related to Emergency Generators

The court also rejected petitioners' challenge to the EIR's air quality analysis related to the project's 17 emergency generators. The court concluded that the project was not in a high fire risk area where regular power shut-offs requiring predictable generator use will occur. The EIR assumed that each of the generators would run for 50 hours a year, which is the maximum allowed by the Bay Area Air Quality Management District (BAAQMD) for testing and maintenance. The EIR also included a mitigation measure restricting annual testing and maintenance of each generator to 20 hours per year. Petitioners argued the EIR should have assumed 150 hours of generator operation, but the court rejected this argument. CEQA does not require an agency to assume an unlikely and worst-case scenario. Here, the EIR reasonably estimated the likelihood of power shutoffs in high fire risk areas and the 50-hour assumption included a 30-hour cushion.

GHG Emissions Analysis

The court rejected petitioners' claim that the EIR improperly deferred mitigation of the project's greenhouse gas emissions (GHG). The EIR's only mitigation measure for GHG impacts prohibits the city from approving any construction related permit for the project unless the sponsor retains an air quality consultant to develop a project-wide GHG reduction plan to meet the standard of significance for GHG emissions for the project. The mitigation measure describes its contents in detail, including how emissions are to be measured and estimated, and requires verifiable and feasible reduction measures, monitoring requirements, and incorporates the EIR's air quality measures.

The court rejected petitioners' claim that all mitigation measures finalized after project approval are invalid. It further observed that the CEQA Guidelines have recently been updated to allow for deferral of mitigation measures where specific standards are met. The court also rejected petitioners' argument that "no net increase" can not be an acceptable performance standard.

Hazardous Materials Analysis

The court also rejected petitioners' claims that the EIR's hazardous substances discussion inadequately recognized and addressed potential risks from project development penetrating a concrete cap that covers the site and prevents the escape of fairly extensive soil contaminants.

The court also rejected petitioners' claims that the EIR's hazardous materials description and Health Risk Assessment were deficient for failing to discuss the presence of "hydrocarbon oxidation oxidation products."

Recirculation of the Draft EIR

The court also rejected petitioners' argument that the draft EIR (DEIR) should have been recirculated to provide information about soil and groundwater contamination remedial measures contained in a draft remedial action plan (RAP) completed after certification of the FEIR. The DEIR anticipated preparation of a removal action workplan (RAW) for mitigation and the FEIR changed this requirement to refer to a RAP. A RAP and RAW serve the same essential purposes and a RAP is more thorough. As the court noted:

> . . .[p]etitioners provide no authority suggesting that a private party's preparation of a draft report or plan required by a mitigation measure constitutes the addition of new information to an environmental impact report as required by [Public Resources Code] section 21092.1.

Substantial evidence supported the city's decision not to recirculate the EIR.

Deferred Mitigation of Contaminants

The court also rejected petitioners' claims that the DEIR's deferral of formulation of the specifics of hazardous substances mitigation to a required, later-prepared RAP was an improper deferral lacking a specific performance standard. The EIR's first mitigation measure for handling site contamination required preparation of a RAP, approval by the state Department of Toxic Substances Control (DTSC), land use covenants, and associated plans to identify, and develop and implement remedial measures to clean up areas with COC concentrations above the HRA's target cleanup levels. Another mitigation measure required DTSC concurrence before grading or construction permit issuance, that proposed construction activity was consistent with the required plans referenced above. A third measure required preparation of health and safety plans consistent with applicable regulations to protect workers and the public during remediation activities.

The court concluded that these mitigation measures satisfied CEQA Guidelines requirements.

Cumulative Impacts

The court also rejected petitioners' argument that the EIR's cumulative impacts analysis failed to consider the impact of using a portion of the project site to expand the port's turning basin for large vessels, which would be permitted at the port's discretion. An agreement was being negotiated with the port at the time of the draft EIR regarding the turning basin. Because the expansion would be analyzed as a separate project in the future, the EIR did not consider it to be a future project requiring inclusion in the cumulative impact analysis. The court found this determination was supported by substantial evidence as it was not probable that expansion of the port would be expanded before there was an official determination, through approval of the agreement, that it was feasible.

Cross-Appeal Wind Impacts

The court upheld the trial court's one finding in petitioners' favor that the EIR improperly deferred mitigation of wind impacts, which was cross appealed by respondents.

Standalone buildings, or buildings that are significantly taller than surrounding buildings can redirect and increase wind speeds that might be incompatible with ground-level pedestrian areas. Project site winds averaged 27 miles per hour and the EIR's threshold of significance was creation of winds in excess of 36 mph. A wind tunnel study suggested that the project could cause winds exceeding the threshold for a minimum of 100-150 hours annually. The only mitigation measure was to require a wind tunnel analysis for each building over 100 feet tall before building issuance to determine whether such construction would create a net increase in hazardous wind hours or locations compared to standard conditions. If so, it required the project proponents to work with a wind consultant to:

> . . .identify feasible mitigation strategies, including design changes. . .to eliminate or reduce wind hazards to the maximum feasible extent without unduly restricting development potential.

The court concluded the above mitigation measure employed vague, subjective, and undefined terms, and

failed to fully identify the types of potential actions that would feasibly achieve it.

Conclusion and Implications

The *East Oakland Stadium Alliance* decision was a significant victory for the A's plan to develop the Howard Terminal ballpark, although it did require additional analysis related to wind impacts. The opinion provides helpful guidance for project proponents and CEQA professionals in a wide range of CEQA issue areas. The court's decision can be found online at: https://www.courts.ca.gov/opinions/documents/A166221.PDF
(Travis Brooks)

CALIFORNIA COURT OF APPEAL UPHOLDS STATE WATER RESOURCES CONTROL BOARD'S GENERAL WASTE DISCHARGE REQUIREMENTS IN WQO 2018-0002

Environmental Law Foundation v. State Water Resources Control Board, Case No. C093513, ___Cal.App.5th___, 305 Cal.Rptr.3d 862 (3rd Dist. 2023).

The California Third District Court of Appeal in *Environmental Law Foundation v. State Water Resources Control Board* (*ELF*), affirmed the Sacramento County Superior Court's judgments upholding the State Water Resources Control Board's (State Water Board) adoption of general waste discharge requirements in Water Quality Order 2018-0002 (WQO 2018-02) and denying three petitions for writ of mandate.

Background

Under the Porter-Cologne Water Quality Act, the Central Valley Regional Water Quality Control Board (Central Valley Regional Board) and State Water Board are charged with "primary responsibility for the coordination and control of water quality" in the Central Valley. (*ELF*, 305 Cal.Rptr.3d at 869 [quoting Wat. Code § 13001.].) In doing so, the State Water Board adopted a Nonpoint Source Policy for regulating discharges of waste into waters of the state from non-point sources, i.e., runoff from irrigated agriculture. (*Id.* at 871.) The Nonpoint Source Policy encourages Regional Water Quality Control Boards to be "as creative and efficient as possible in devising approaches to prevent or control pollution." (*Ibid.*) In doing so, the Nonpoint Source Policy requires the Regional Boards incorporate forth five key elements in nonpoint source control programs. (*Ibid.*; Cal. Code Regs., tit. 23, § 2915.)

The Central Valley Regional Board issued Waste Discharge Requirements General Order R5-2012-0116, establishing categorical requirements for non-point source discharges for a category of farmers whom are members of the East San Joaquin Water Quality Coalition (Coalition). Various groups filed petitions for reconsideration of that order to the State Water Board. (WQO 2018-02, at 6.) The State Water Board revised the order and adopted WQO 2018-02. (*ELF*, 305 Cal.Rptr.3d at 868.) WQO 2018-02 manages discharges from irrigated lands to waters of the state within the Eastern San Joaquin River watershed and assigns monitoring and reporting duties to the Coalition and individual growers within the watershed that are members of the Coalition. (*Ibid.*)

Under WQO 2018-02, members of the Coalition must take three steps for compliance. (*ELF*, 305 Cal. Rptr.3d at 873.) First, Coalition members must implement management practices that minimize waste discharge into surface waters from irrigation, and record and report implemented management practices in farm evaluations, irrigation and nitrogen management plans, and irrigated and nitrogen summary reports. (*Ibid.*) Second, Coalition members must take additional actions, such as additional training and certification of their practices, when water quality conditions suggest compliance issues. (*Ibid.*) Third, the Regional Board must verify that implemented management practices are effective in addressing water quality problems. (*Ibid.*)

Three different environmental groups—Environmental Law Foundation , Monterey Coastkeeper, and Protectores del Agua Subterranea (collectively: Petitioners)—filed separate petitions for writ of mandate challenging WQO 2018-02 on numerous grounds. (*ELF*, 305 Cal.Rptr.3d at 868-69.) The trial

court consolidated the cases, granted a motion for leave to intervene by the Coalition and others, and then held a trial on the merits. (*Id.* at 869.) The trial court held that the State Water Board did not abuse its discretion in adopting WQO 2018-02 and denied the Petitioners' writ petitions. (*Ibid.*) The Petitioners timely appealed.

The Court of Appeal's Decision

The Court of Appeal addressed each of Petitioners' arguments on appeal and affirmed the trial court's opinion in its entirety. (*ELF*, 305 Cal.Rptr.3d at 869.) Most of Petitioners' arguments took issue with how WQO 2018-02 permits the Coalition to aggregate and anonymize individual members' data when it reports compliance to the Central Valley Regional Board. (*Ibid.*) As a result, they claim that WQO 2018-02 does not implement the Board's Nonpoint Source Policy in a manner required by law because it conflicts with the language of various key elements of the Nonpoint Source Policy. (*Id.* at 880.)

Nonpoint Source Policy

The Court of Appeal analyzed the Nonpoint Source Policy and distinguished the key elements into two parts. (*Id.* at 881-82.) First, there is the "element" component, which sets forth the binding requirement for how regional boards may implement the policy. (*Id.* at 882) Second, there is the "commentary" component, which describes how regional boards can comply with the element. (*Ibid.*) The Court of Appeal found that the Petitioners arguments cited and relied upon the commentary component of the key elements, which was non-binding and did not preclude reporting of data on an anonymous and aggregated basis. (*Id.* at 882-83.) Instead, the State Water Board reasonably construed its own regulations in the Nonpoint Source Policy and determined that the data reporting was sufficient to enable the Central Valley Regional Board assess the Coalition members' compliance. (*Ibid.*)

Feedback Mechanisms

Petitioners also argued that WQO 2018-02 does not provide the Regional Board with sufficient feedback mechanisms and was unsupported by the evidence. (*ELF*, 305 Cal.Rptr.3d at 869.) Specifically, the Petitioners took issue with the scale by which WQO 2018-02 required the Coalition report data to the Central Valley Regional Board. (*Id.* at 883.) The State Water Board concluded, based on expert reports and testimony, that it could not reasonably require data reporting on a field-level basis because it was nearly impossible to determine what field pollutants came from. (*Id.* at 883-85.) The expert reports and testimony concluded that it was "completely sufficient" to assess performance and compliance with discharge requirements was on a township-level scale. (*Ibid.*) The Court of Appeal found these expert reports and testimony constituted substantial evidence supporting the State Water Board's conclusion to require reporting on a township level. (*Id.* at 885-86.)

Looking to Precedent

Finally, certain Petitioners argued that WQO 2018-02 violated established precedent, *California Sportfishing Protection Alliance et al. v. California Regional Water Quality Control Bd., et al.*, Sacramento Super Ct. Case No. 34-2012-80001186 (*CSPA*) and *Asociacion De Gente Unida Por El Agua, et al., v. Central Valley Regional Water Quality Control Bd.*, 210 Cal.App.4th 1255 (2012) (*AGUA*). (*ELF*, 305 Cal.Rptr.3d at 894, 900.) As to *CSPA*, the Court of Appeal noted that the trial court did not rely on that case, and as an unpublished case, it is neither citable nor binding on the Court. (*Id.* at 894.) The Court of Appeal also affirmed that the State Water Board correctly distinguished *AGUA* because it was "inappropriate to apply a discrete point source discharge approach in the context of" nonpoint source discharges. (*Id.* at 900.)

Conclusion and Implications

The Court of Appeal discussed Petitioners' arguments at considerable length and eventually upheld WQO 2018-02. *ELF* is notable because it affirms that the State Water Board and the regional boards can regulate waste discharges from irrigated agriculture without the use of field-level data or revealing individual grower operations. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/C093513.PDF
(Nicolas Chapman, Sam Bivins)

CALIFORNIA COURT OF APPEAL AFFIRMS RULING SETTING ASIDE ADDENDUM TO PROGRAM EIR AND RELATED APPROVALS FOR OFFICE COMPLEX

IBC Business Owners for Sensible Development v. City of Irvine, 88 Cal.App.5th 1000 (4th Dist. 2023).

In a decision filed on February 5, 2023, the Fourth District Court of Appeal affirmed a trial court judgment setting aside an addendum to a 2010 program Environmental Impact Report (PEIR) and related approvals for a 275,000 square foot office complex on a 4.95-acre parcel within the Irvine Business Complex (IBC), a 2,800-acre development originally constructed in the 1970s. The court also concluded that given the unusual size and density of the project, the unusual circumstances exception applied, meaning that a Class 32 urban infill exemption was not available.

Factual and Procedural Background

The Irvine Business Complex is roughly 2,800 acres in size and was originally developed in the 1970s as a regional economic and employment based. Most of the land in the IBC is currently developed with office uses, with substantial amounts of industrial and warehouse uses, as well as scattered residential uses in mid-to high-rise condominiums.

In 2010, the City of Irvine (City) adopted the IBC Vision Plan which amended the City's General Plan to establish a development guide to create a mixed-use community in the IBC and adopted a Program Environmental Impact Report (2010 PEIR) to analyze the environmental effects of the vision plan. The 2010 PEIR studied the environmental effects from a buildout of the entire vision plan and was designed to "provide environmental clearance for future site-specific development projects within the IBC." Any future projects not consistent with the assumptions in the PEIR may require additional environmental review.

The Vision Plan capped buildout of the IBC at 17,038 residential units and 48,787square feet of non-residential development, with full buildout to occur after 2030. To stay within this cap, each parcel in the IBC was assigned a development budget or "development intensity value" (DIV). DIV allocations for each parcel were tracked in a database and within the IBC a parcel could transfer a portion of its DIV budget to another parcel using transfers of development rights (TDRs) subject to City approval.

The 2010 PEIR included several assumptions about existing conditions, conditions for 2015, and conditions for post-2030. The PEIR only assumed TDRs for projects that had applications pending when it was prepared. Therefore, the PEIR assumed that additional TDRs were possible, but noted that additional traffic analysis and California Environmental Quality Act (CEQA) review would be necessary if such additional TDRs were proposed.

In 2019, real party in interest and developer Gemdale filed an application to develop a 4.95-acre parcel in the IBC in a manner that would convert an existing two story, 69,780 square foot office building into a 275,000 square foot office complex with a five-story office building, a 6-story office building, and a seven-story parking structure. To do this, the project required TDRs from a site on the other side of the IBC equivalent 221,014 square feet of office space and nearly double the largest approved TDR in IBC's history.

Staff initially believed that the project could be CEQA exempt, but then prepared an addendum concluding its impacts were adequately analyzed and mitigated in the 2010 PEIR, meaning that no further environmental review was required. The City Council found the addendum adequate and approved the project.

Petitioner filed a petition for writ of mandate, which the trial court granted, ordering the City to set aside the project approvals, the TDR, the addendum, and any CEQA exemption finding.

The Court of Appeal's Decision

The Court of Appeal agreed with the trial court, finding that the project was not adequately analyzed and mitigated in the 2010 PEIR and that a CEQA exemption did not apply.

The Gemdale Project Was Not Analyzed and Mitigated in the 2010 PEIR

The court held that the City correctly determined

that the project would not cause any new significant traffic impacts, but that substantial evidence did not exist in the record to support the conclusion that the project's Greenhouse Gas (GHG) would not be greater than assumed in 2010 PEIR.

With regard to traffic impacts, the addendum found that the project would not cause new traffic impacts because the project would not result in significant vehicle delays at any of the intersections or roadway segments analyzed in the addendum traffic study. This was the same methodology for analyzing traffic impacts as employed by the 2010 PEIR. A VMT analysis was not conducted and petitioner argued that a VMT analysis was required.

The court concluded that § 15064.3 of the CEQA Guidelines, added in 2018 and giving rise to the requirement for a VMT analysis, did not apply to the addendum. The Guidelines state that agencies do not need to comply with Guideline 15064.3 until July 1, 2020. Here, although the addendum was not adopted until July 14, 2020, the City began preparing the addendum in 2019, which was well before the effective date of Guideline 15064.3.

With regard to GHG impacts, the addendum noted that the project would incorporate all climate change mitigation measures included in the 2010 PEIR and would therefore achieve the 2010 PEIR's "net zero" emissions vision plan. Moreover, the addendum concluded that the project would not change the overall development intensity for the IBC and would not increase GHG emissions beyond those assumed in the 2010 PEIR. The project was able to reach its development intensity through TDRs from other parcels. A shift in development intensity from one site to another would not result in a substantial increase in GHG impacts.

The court disagreed, finding that the addendum concluded, without substantial evidence, that transferring development intensity from one site to another would only change the source of GHG emissions without changing the total amount of emissions. As the court noted:

> . . .[i]t is unclear from the record whether TDRs simply shift the source of [GHG] emissions or may impact total emissions…. [w]e have not been cited anything in the record to support this assertion…. Which is beyond common knowledge.

The court also noted that there was contrary evidence in the record indicating that the project might have significant emissions that could not be mitigated to a less-than-significant level. Although this specific analysis was not included in the addendum, the court found that the addendum had failed to show that the IBC would remain on track to achieve its "net zero" emissions goal.

The Project Was Not Categorically Exempt under The Class 32 Urban Infill Exemption

The court also rejected the City's argument that the project was exempt from CEQA under a Class 32 urban infill exemption. Specifically, the court held that the project did not qualify for the urban infill exemption because "unusual circumstances" existed, which is an exception to the application of any categorical exemption. The city did not make any express findings that the unusual circumstances exception did not apply, so the court had to assume that the city found the project involved unusual circumstances and then conclude that the record contains no substantial evidence supporting: (1) a finding that any unusual circumstances exist, or (2) that a fair argument giving rise to a reasonable possibility that an unusual circumstance identified by the petitioner will have a significant effect on the environment. Here neither of these findings could be made.

Substantial evidence indicated that unusual circumstances existed. The project was two times larger than the largest TDR approved in the IBC's history and was disproportionately large compared to neighboring buildings. This required a significant increase in development intensity budget, equating to more than twice the amount of office space originally allocated to the parcel, even though it would occupy a much smaller space than existing buildings.

The court also concluded that a fair argument gave rise to a reasonable possibility that the project would have significant environmental impacts. Here, there was evidence in the record that the project could have significant GHG impacts that could not be mitigated to a level of insignificance. This was a result of the unusual size and intensity of the project.

Conclusion and Implications

The *IBC* decision provides an illustrative analysis of the appropriateness of preparing and relying on a

project-specific addendum to a program level EIR. Where evidence does not reasonably show that a project will not have new significant or substantially more severe impacts than analyzed in a program level EIR, an addendum is not likely appropriate. Where a project is unique in its intensity and/or scope within the context of a program EIR, the unusual circumstances exception may preclude application of a CEQA exemption. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/G060850.PDF
(Travis Brooks)

CALIFORNIA COURT OF APPEAL VACATES TRIAL COURT ORDER GRANTING UTILITY'S MOTION FOR PRE-JUDGMENT POSSESSION TO MAINTAIN ELECTRONIC TRANSMISSION LINES

Robinson v. Superior Court of Kern County, 88 Cal.App.5th 1144 (5th Dist. 2023).

In a decision filed on March 2, 2023, the Fifth District Court of Appeal overturned a trial court's order granting Southern California Edison's pre-judgment motion for possession under the Eminent Domain Law, which it argued was necessary to access and maintain power transmission lines. The Court of Appeal found that the trial court erred by not making the explicit findings in writing required to justify such pre-judgment possession under state law and that substantial evidence had not been established in the record to support such findings.

Factual and Procedural Background

Robinson owns a five-acre parcel in Kern County within Kawaiisu Tribal treaty territory that contains environmentally sensitive plans and animals and a wildlife research center. Southern California Edison (Edison) owns and operates aerial transmission lines that pass over the property.

Edison claimed that it had a prescriptive aerial-transmission-line easement allowing it access to the property, and on June 21, 2022, filed a complaint in eminent domain to obtain a formal, recorded easement. Edison claimed that eminent domain was required because, despite its easement, Robinson would not allow Edison access to the property to maintain and repair the lines.

The easements requested consisted of a 50 foot wide transmission line easement 115 yards long and an access road easement 16 feet wide that loops across the property.

Edison served Robinson with a motion for prejudgment possession pursuant to Code of Civil Procedure § 1255.410, which included notice that any opposition to the motion must be served and filed within 30 days of service. The 30-day period for filing an opposition expired without Robinson filing an opposition to the motion for prejudgment possession.

On August 23, Robinson filed an opposition to Edison's motion for prejudgment possession and supporting declaration. The opposition argued that the motion for prejudgment possession was unlawful because: (1) Edison had not adopted a resolution of necessity; (2) it had not complied with CEQA, and (3) Edison had not satisfied the requirements for exercising the power of eminent domain in § 1240.30 subdivisions (a) through (c). Robinson specifically argued that Edison had "not even alleged—let alone demonstrated—that the easement will cause the least private injury possible as required by section 1240.30." Robinson also alleged that prejudgment possession of the easement was not necessary because Edison had accessed and maintained all but one transmission line using a bucket truck without entering the property, and could reach the remaining line using a larger bucket truck.

After a hearing on October 19, the trial court granted Edison's motion for an order of prejudgment possession. Importantly, the trial court did not make any explicit oral findings on the record, only stating that "all of the criteria seems to be satisfied" when announcing the tentative ruling to grant the motion. The trial court then signed an order of prejudgment possession signed by Edison's counsel.

On November 4, Edison filed a petition for writ of mandate challenging the order of prejudgment possession and on November 17 the Fifth District Court

of Appeal issued a stay of the order of prejudgment possession.

The Court of Appeal's Decision

The Court of Appeal ultimately vacated the order of prejudgment possession and directed the trial court to conduct further proceedings consistent with its decision.

Public Entities and Eminent Domain

The first question was whether Edison was a public entity as necessary to have the power of eminent domain. Specific provisions of the Public Utilities Code provide that power generating and transmitting companies are public utilities authorized to exercise eminent domain power.

The court then addressed provisions of the Eminent Domain Law providing that a "public entity" may only exercise the power of eminent domain if has first adopted a resolution of necessity. Within the relevant sections of the Eminent Domain Law a "public entity" is defined as including "the state, a county, city, district, public authority, public agency, and any other political subdivision of the state." According to this definition, the court concluded that Edison was not a public entity and therefore was not required to adopt a resolution of necessity.

The court proceeded with a detailed discussion of the procedural requirements by which a public agency may obtain prejudgment possession of property. In situations like the instant one where a motion for prejudgment possession does not receive a timely opposition, the court *shall* make an order for possession of the property if the court finds that: (1) the plaintiff is entitled to take the property by eminent domain, and (2) The plaintiff deposited an amount that satisfies the requirements of the Eminent Domain Law.

The court then analyzed the requirements that a condemning public utility must meet to take property by eminent domain. These requirements are set out in Code of Civil Procedure § 1240.030 which states that:

> The power of eminent domain may be exercised to acquire property for a proposed project only if all the following are established:
> (a) the public interest and necessity require the project.
> (b) The project is planned or located in a manner that will be the most compatible with the greatest public good and least private injury.
> (c) The property sought to be acquired is necessary for the project.

Explicit Findings

The Court of Appeal analyzed whether the trial court was required to make explicit findings that each of the above requirements have been met. The general rule is that a statement of decision is not required when a trial court rules on a motion did not apply. Exceptions to this rule can apply upon balancing: (1) the importance of the issues at stake in the proceeding, including the significance of the rights affected and the magnitude of the potential adverse impact to those rights; and (2) whether appellate review can be effectively accomplished even in the absence of express findings.

In the context of the instant case, the court concluded that the property rights that could be taken away from Robinson were significant, and the adverse effects on those rights, which include the widening of an existing roadway and clearing of a 50-foot easement were potentially significant. Here, the trial court's conclusion that all the necessary criteria "seems to be satisfied" did not resolve uncertainty regarding the trial court's findings to facilitate appellate court review. As a result, the trial court was required to make explicit findings as to each of the three requirements above, and it had not done so.

A Lack of Substantial Evidence to Support Implied Findings

In the alternative, the court held that even if explicit findings were not required and the doctrine of implicit findings applied, substantial evidence did not exist to support such implied findings. Here, substantial evidence did not establish that it was necessary that (1) the roadway easement be 16 feet wide, (2) that it was necessary to clear a 50-foot wide easement, or (2) giving Edison the right to move or relocate guy wires, anchors, crossarms, and other physical fixtures onto the property.

The absence of substantial evidence on these aspects of establishing the easement were sufficient to the court to carry Robinson's burden of showing prejudicial error.

Leave to File Amended Motion Regarding the Scope of the Requested Easement

The court ordered further proceedings be held by the trial court allowing Edison to file an amended motion with additional evidence supporting the scope of easement requested or alternatively narrowing its scope. The court then issued a peremptory writ directing the Kern County Superior Court to vacate its order of post judgment possession and conduct further proceedings involving an amended motion for order of prejudgment possession that are not inconstant with the court's decision.

Conclusion and Implications

The *Robinson* decision provides a helpful discussion of the procedural requirements involved with "quick take" motions for pre-judgment possession under the Eminent Domain Law. The court's opinion is available online at: https://www.courts.ca.gov/opinions/documents/F085211.PDF
(Travis Brooks)

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