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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE™
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FEATURE ARTICLE

THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD APPROVES EMERGENCY REGULATIONS FOR WATER RIGHT CURTAILMENT ORDERS IN SCOTT AND SHASTA RIVERS

By Austin C. Cho

On August 17, 2021, the State Water Resources Control Board (State Water Board) approved Emergency Regulations for the Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath watershed (Emergency Regulations), authorizing curtailments of water rights on the Scott and Shasta rivers in Siskiyou County, to meet minimum instream flows for fish while allowing for necessary livestock watering and minimum human health and safety needs. The Emergency Regulations are part of the state's ongoing efforts to address one of California's worst drought on record. Along with establishing minimum stream flow requirements for fish and setting forth State Water Board enforcement authority, the Emergency Regulations also provide opportunities for local cooperative solutions and voluntary efforts that may reduce the need for direct curtailment orders.

Background

The Scott and Shasta rivers are tributary to the Klamath River, the second largest river in the state, and supply water necessary for agriculture, domestic uses, tribes, and recreational activities. The tributaries also provide spawning habitats and nurseries for the threatened coho salmon, culturally significant chinook salmon, and steelhead trout. Klamath Basin tribes have historically relied on the chinook and coho salmon for sustenance and spiritual wellbeing. However, dry conditions and low natural flows in the Klamath watershed for the past two years, further exacerbated by water demands in the system, have impaired the ability of newly hatched fish fry to emerge from their gravel beds and reach their summer rearing habitats. Worsening drought conditions across California have prompted the State Water Board to evaluate what measures can be taken to protect the state's water supplies and the species and communities that depend on them.

Under existing law, the State Water Board is authorized to take enforcement actions to prevent unauthorized diversions of water or other violations of water right permits or licenses on an individual basis. Diversion of water in excess of a water right is considered a trespass against the State, with potential fines of up to $1,000 per day of violation and $2,500 per acre-foot of water diverted in excess of the diverter's rights. (Wat. Code, § 1052.) With a large-scale drought emergency and supplies dwindling, the State Water Board has utilized its emergency powers to limit diversions regionally. (*See*, Wat. Code, § 1058.5 [granting the State Water Board authority to adopt emergency regulations to prevent the unreasonable use of water, to require curtailment of diversions when water is unavailable, and to require related monitoring and reporting].)

In May of this year, Governor Gavin Newsom issued a drought emergency proclamation for most of California, including Siskiyou County. The proclamation directed the State Water Board and the California Department of Fish and Wildlife (CDFW) to analyze what level of minimum flows are needed by salmon, steelhead trout, and other native fish, and determine what protective steps could be taken to protect those species and their habitats through emergency regulations or other voluntary measures. Under

the Governor's drought proclamation, the State Water Board considered and adopted emergency regulations for the Russian River watershed on June 15, 2021, and for the Sacramento-San Joaquin Delta watershed on August 3, 2021. On August 17, 2021, the State Water Board adopted the Emergency Regulations for the Scott and Shasta Rivers to respond to the severe drought conditions that may continue into 2022.

Curtailment Authority Under Emergency Regulations

The Emergency Regulations were adopted for the Klamath River watershed to authorize curtailments in the Scott and Shasta rivers when natural flows are insufficient to support the commercially and culturally significant fall-run chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. (Emergency Regulations, § 875.) Upon a determination that flows in the Scott or Shasta rivers are likely to fall below minimum stream flows specified in § 875(c), the Deputy Director of the State Water Board is authorized to issue curtailment orders based on diverter priority, in which water users subject to the order must cease diversions immediately. (Emergency Regulations, §§ 875, 875.5.) Similarly, curtailment orders may be issued upon a finding that flows in the Klamath River watershed are insufficient to support all water rights, under the provisions of § 875. (Emergency Regulations, § 875.4(b).) Where flows are found to be sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of priority as set forth in § 875.5. In deciding to subject some diversions to curtailment, the Deputy Director must consider "the need to provide reasonable assurance that the drought emergency flows will be met." (Emergency Regulations, § 875(b).)

Curtailments are to be issued in the Scott River and Shasta River based on respective grouped priority levels, as established in § 875.5 of the Emergency Regulations, taking into account the classes of diverters and diversion schedules established in various court decrees for surface water and groundwater adjudications, and the relative priorities of other water rights not contemplated in those decrees. (Emergency Regulations, § 875.5(a)-(b).)

Rescission of Curtailment Orders

To the extent that curtailment of fewer than all diversions in the priority groupings listed in § 875.5 would reliably result in sufficient flow to meet the minimum fisheries flows for the drought emergency, the Deputy Director is authorized to issue, suspend, reinstate, or rescind curtailment orders for partial groupings, based on the priorities set forth in the relevant decrees or by appropriative priority date. (*Id.* at subd. (a)(1)(D); § 875.4(c).)

For the purpose of rescinding curtailment orders, the Deputy Director must determine the extent to which water is available under a particular diverter's priority of right, including consideration of monthly demand projections based on annual diversion reports, statements of water use for riparian and pre-1914 water rights, and judicial decrees of water right systems, and decisions and orders issued by the State Water Board. (Emergency Regulations at § 875.4(c)(1).) Precipitation forecast estimates, historical periods of comparable temperatures, precipitation, and surface flows, and available stream gage data are used to calculate water availability projections. (*Id.* at subd. (c)(2).) The Deputy Director may issue informational orders to some or all diverters or water right holders in the Scott River and Shasta River watersheds related to water use to support those determinations, taking into account the need for the information and the burden of producing it. (Emergency Regulations, § 875.8(a).)

Exceptions to Curtailments

Notwithstanding the issuance of curtailment orders, diversion under any valid basis of right may continue without further approval from the Deputy Director if the diversion and use does not act to decrease downstream flows. (Emergency Regulations, § 875.1.) Such non-consumptive use, such as diversion for hydropower generation, dedication to instream use for the benefit of fish and wildlife, or diversions in conjunction with approved releases of stored water, is not affected by the curtailment orders.

Like the other emergency regulations adopted this summer, the Emergency Regulations for the Shasta and Scott rivers provide an exception for diverters to draw water necessary for minimum human health and safety needs, despite the existence of curtailments. Section 875.2 provides certain water uses may qualify

for this exception where there is no feasible alternate supply. Such human health and safety needs include domestic water uses for consumption, cooking and sanitation, energy sources necessary for grid stability, maintenance of air quality, wildfire mitigation such as preventing tree die-off and maintaining ponds or other sources for firefighting, immediate public health or safety threats, and other water uses necessary for human health and safety as determined by a state, local, tribal, or federal health, environment, or safety agency. (Emergency Regulations, § 875.2.) Such human health and safety diversions may be authorized to continue after receipt of a curtailment order.

Livestock Watering

The Emergency Regulations find that inefficient livestock watering—diverting more than ten times the amount of water needed to reasonably support the number of livestock—during the fall migration of fall-run chinook salmon and coho salmon results in "excessive water diversion for a small amount of water delivered for beneficial use," and declares such diversion unreasonable during those conditions. (Emergency Regulations, § 875.7.) However, limited diversions will still be allowed, upon self-certification that the water is necessary to provide adequate water to the diverter's livestock based on established standards, and is conveyed without seepage. (Emergency Regulations, § 875.3.)

Voluntary Actions that May Mitigate the Need for Curtailments

The Emergency Regulations also include provisions for voluntary actions that may mitigate the need for curtailments of water use for certain diverters. Benefits to fisheries such as cold-water safe harbors, localized fish passage, strategic groundwater management, or the protection of redds (the depressions in gravel stream beds fish create to lay eggs) may be proposed to the State Water Board's Deputy Director through a petition for cooperative solution. (Emergency Regulations, § 875(f).)

Petitions, supported by reliable evidence, may propose:

> (a) watershed-wide solutions that provide assurances that minimum flows for fish will be achieved for specified periods;
>
> (b) tributary-wide solutions that a pro-rata flow for a tributary will be satisfied or CDFW finds sufficient in-tributary benefits to anadromous fish;
>
> (c) individual solutions where a water user has agreed to cease diversions in a specified time frame or has entered into a binding agreement with CDFW to provide benefits to anadromous fish equal or greater than the protections provided by their contribution to flow for that time period;
>
> (d) groundwater-basin-wide solutions of continued diversions in conjunction with measures would result in a net reduction (of 15 to 30 percent) of water use during the irrigation season compared to the prior year and other assurances are adopted; or
>
> (e) voluntary reductions to more senior rights in favor of continuing diversion under a more junior right otherwise subject to curtailment. (*Id.* at § 875(f)(4)(A)-(E).)

The Emergency Regulations were partially amended prior to the State Water Board's approval, in response to public requests to add increased flexibility for local solutions and an opportunity for CDFW and the National Marine Fisheries Service to revise the minimum instream flow recommendations if lower flows will be protective of fish.

Submission of a Certification for Water Rights Subject to Curtailment Orders

A water right user subject to a curtailment order is required to submit within seven calendar days of receipt of the order, a certification that water diversion under the curtailed right has ceased, or alternatively, continues to the extent that it is non-consumptive use, instream use, or is necessary for minimum human health and safety needs or necessary for minimum livestock watering as defined and limited in the Emergency Regulations. (Emergency Regulations, § 875.6.) Reporting on diversions during curtailment periods must provide sufficient information to ensure water is being used only to the extent necessary and consistent with the Emergency Regulations' constraints.

Conclusion and Implications

On August 20, 2021, the State Water Resources Control Board submitted its Emergency Regulations for the Klamath River watershed to the California Office of Administrative Law (OAL), commencing a brief comment and review period. Before curtailment orders can be issued in the Scott or Shasta rivers, the State Water Board must obtain approval by OAL and file the Emergency Regulations with the Secretary of State. The Emergency Regulations, as well as information and updates on the State Water Board's Scott River and Shasta River watersheds drought response, are available at: https://www.waterboards.ca.gov/drought/scott_shasta_rivers/.

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ENVIRONMENTAL NEWS

DROUGHT STRICKEN CALIFORNIA STATE WATER PROJECT'S LAKE OROVILLE PLUMMETS TO LOWEST LEVEL IN DECADES

As the drought continues to ravage the western United States and California descends into one of the worst droughts on record, California's second-largest reservoir, Lake Oroville, has reached its lowest water level since September 1977.

Background

Lake Oroville was created by Oroville Dam, which the California Department of Water Resources (DWR) completed in 1967. Lake Oroville conserves water for distribution by the California State Water Project to homes, farms, and industries in the San Francisco Bay area, the San Joaquin Valley and throughout southern California. The Oroville facilities also provide flood control and hydroelectric power and recreational benefits.

Water from Lake Oroville contributes to the irrigation of more than 755,000 acres in the San Joaquin Valley and comprises a critical source of supply to water agencies that collectively serve more than 27 million people. At full capacity, the lake can supply enough water to 7 million average California households for one year.

Lowest Water Surface Levels Since 1977

When the lake is full, the water surface level is 900 feet above sea level. Two years ago, the lake reached 98 percent capacity at 896 feet. Now, the water level has plummeted and recently measured just 643.5 feet above sea level, which is 28 percent of its total capacity and 36 percent of its historical average for this time of year. According to California Department of Water Resources (DWR), Lake Oroville received only 20 percent of expected runoff from snowmelt this year, which DWR characterized as a record low. The reservoir dropped by an average of more than one foot per day in July as DWR made releases to meet water quality and wildlife sustainability requirements.

Imagery from the lake's levels, in particular the exposed barren lake floor in places, provides an illustrative snapshot of how dire the drought is in California.

Low Lake Elevation Threatens Edward Hyatt Power Plant

The water from Lake Oroville is used to power the Edward Hyatt Powerplant (Hyatt Plant). The Hyatt Plant is designed to produce up to 750 megawatts of power but typically produces between 100 and 400 megawatts, depending on lake levels. According to the California Energy Commission, the typical average high daily demand across California is approximately 44,000 megawatts. The Hyatt Plant's production of 400 megawatts alone represents meeting nearly 1 percent of California's total peak daily energy demand.

The Hyatt Plant opened in the late 1960s and has never been forced offline by low lake levels. DWR reports that once the lake's surface level falls below 630 feet above sea level, the Hyatt Plant will be unable to generate power due to lack of sufficient water to turn the plant's hydropower turbines. With the lake level at its recent condition, California State Water Project officials anticipated at the time of this writing that the Hyatt Plant could go offline as soon as late August or early September.

The California Energy Commission has confirmed it is actively planning for the Hyatt Plant to go offline this Fall. If the plant stops generating power, it will likely remain offline until November or December before sufficient precipitation hopefully arrives in the region to turn the underground turbines back on.

Conclusion and Implications

Lake Oroville serves as a stark emblem of the severity of this drought and its dramatic impact in such a relatively short period of time. Two years ago, the lake reached 98 percent capacity but has quickly plummeted to historically low levels not seen in nearly half a century. Lake Oroville also highlights the significant role water plays in energy generation and the implications that a far-reaching drought can have on hydro-energy generating facilities and power production in California.

(Chris Carrillo, Derek R. Hoffman)

CLIMATE CHANGE SCIENCE

RECENT SCIENTIFIC STUDIES ON CLIMATE CHANGE

How Green Is Blue Hydrogen?

In the race to transition hard-to-decarbonize sectors to zero emission fuels, hydrogen fuel is often considered a pivotal strategy since it only emits water and warm air when used in fuel cells. When compared to diesel, natural gas, and coal, which all emit large quantities of carbon dioxide during combustion, it is clear why investments into hydrogen production, such as the new largest and cheapest hydrogen facility planned for construction in North Dakota, inspire optimism in those interested in decarbonizing our national energy usage.

Unfortunately, the production of hydrogen fuel is energy intensive and typically depends on fossil fuels. Around 75 percent of hydrogen is produced using steam methane reforming (SMR), in which high temperature steam is used to produce hydrogen from natural gas; about 16 percent comes from coal gasification; and only 4 percent of hydrogen fuel globally is "blue" or "green" hydrogen produced from non-fossil fuel sources, such as water. While there are many potential applications of renewable hydrogen, the current state of renewable hydrogen production, technology development and costs raise serious questions about the feasibility of hydrogen playing a significant role in decarbonization.

To investigate these doubts, researchers at Stanford University and Cornell University conducted a "life-cycle assessment" of blue hydrogen (hydrogen fuel produced concurrently with carbon capture and storage). While prior research has investigated the life cycle emissions of blue hydrogen, this is the first peer-reviewed publication that accounts for inefficiencies in the carbon capture and fugitive methane emissions during hydrogen production.

To estimate both carbon dioxide and methane emissions per MJ of gray hydrogen (hydrogen produced using SMR, without carbon capture storage), researchers used a combination of theoretical stoichiometric calculations, literature values, satellite data on methane leaks from natural gas fields, and the gross calorific heat content of natural gas. This included methane and carbon dioxide emissions from natural gas consumption, the energy needed to heat the steam used for SMR, and upstream emissions from the production of natural gas used in the reaction, including methane leaks from gas fields and transportation. To understand the impact of carbon capture and storage on blue hydrogen, the researchers then applied an 85 percent capture efficiency to the SMR emissions and a 65 percent capture efficiency to the natural gas combustion flue gas, and accounted for the carbon capture electricity requirements.

The results show a bleak picture for blue hydrogen. Previously, carbon capture was understood to reduce between 56-90 percent of greenhouse gas (GHG) emissions associated with gray hydrogen. However, this study suggests that the emissions reduction is closer to 9-12 percent, likely a result of both low capture efficiencies and high energy demand of carbon capture. In fact, GHG emissions per MJ of energy for both gray and blue hydrogen are greater than emissions per MJ of fossil fuels, largely due to the fugitive methane emissions. Furthermore, the study demonstrates that blue hydrogen production still results in significant emissions even when powered by renewable energy. As the authors highlight, the research demonstrates that even the "greenest" blue hydrogen does not have a role in a carbon-free future.

See: Howarth, RW, Jacobson, MZ. How green is blue hydrogen? Energy Sci Eng. 2021; 00: 1– 12. https://doi.org/10.1002/ese3.956

The Impact of Climate Change on Volcanic Plumes

Volcanic eruptions impact the climate in multiple ways. When a volcano erupts, it releases sulfur dioxide (SO2), which is converted to sulfate aerosols in the atmosphere. When sulfate aerosols enter the upper part of the atmosphere, the stratosphere, they reflect sunlight and thus cause a cooling effect in the lower part of the atmosphere, the troposphere. Understanding the impacts of climate change on the behavior of sulfate aerosols is important for refining current climate models.

A recent study conducted by Aubry, et al. at the University of Cambridge analyzed the ways in which climate change affects the life cycle of sulfate aerosols released by moderate and large volcanic eruptions. The researchers used a combination of climate and volcanic plume models to determine how volcanic sulfate aerosols would behave under different global warming scenarios. They found that the plumes of larger, more rare volcanic eruptions would travel higher in the stratosphere in a warmer climate. The higher plumes would also travel farther due to drier conditions in the stratosphere that prolong particle life. This change in large volcanic plume behavior would result in an approximately 15 percent increase of the cooling effect felt in the troposphere and at the earth's surface. The plumes of smaller, more frequent volcanic eruptions, in contrast, would not travel as high into the stratosphere in a warmer climate. As the climate warms, the height of the boundary between the troposphere and stratosphere, known as the tropopause, increases; thus, the smaller, more frequent aerosol plumes would disperse more before reaching the stratosphere and could therefore have up to a 75 percent less of a cooling effect at the earth's surface.

The study concludes that the noted impact of global warming on volcanic plume behavior should be further studied and incorporated into climate models. One outstanding question that has yet to be analyzed in depth is which effect (the increased cooling effect of the larger eruptions or the decreased cooling effect of the smaller eruptions) would have more of an impact on climate over time.

See: Aubry, T.J., Staunton-Sykes, J., Marshall, L.R. et al. Climate change modulates the stratospheric volcanic sulfate aerosol lifecycle and radiative forcing from tropical eruptions. Nat Commun 12, 4708 (2021). https://doi.org/10.1038/s41467-021-24943-7

Atlantic Hurricane Frequency and Intensity Trends from 1859-2019

Summer is hurricane season in the Atlantic, and in recent years, there has been a growing sense that these hurricanes are more frequent, intense, and destructive. Scientists are especially interested in how observed trends fit into long-term, multi-decadal weather and climate system trends and to what degree anthropogenic climate change influences these extreme weather events.

In a recent study published in Nature Communications, Vecchi et al. analyzed the frequency of Atlantic hurricanes (HU) between 1851 and 2019. Major hurricanes (MH) are defined as Categories three to five hurricanes and have historically accounted for approximately 80 percent of hurricane damage in the US despite only comprising 34 percent of all US tropical cyclones. According to Vecchi et al, models predict that hurricane intensity increases with warming global temperatures, but there is less certainty when it comes to predicting frequency. For instance, increased frequency over the past few decades is in part due to improved technology which allows for better observations, while the data pre-1900 may be underrepresented. In complete data records must be accounted for when attempting to attribute frequency trends to natural or anthropogenic weather and climate patterns.

Vecchi et al. determined that between 1851 and 2019, the frequency of HUs have roughly tripled and the proportion of events classified as MHs has also increased. The minima MH/HU ratio of 25-30 percent was observed in both the 1850s and the 1980s, while the maxima MH/HU ratio of 40-50 percent was observed in the early and mid-1900's and early 2000's. The non-linear trend indicates that the increase in MH frequency (and general HU intensity) in recent decades is not part of a single upward trend, but rather what Vecchi et al. refers to as a "rebound" from a low point in the 1980s. As illustrated by this study, the MH/HU trend does not strongly align with century-scale impacts of climate change. That said, Vecchi et al. suggest that there are several trends over the past century that may complicate and obscure the direct trends one might expect from warming temperatures (models predict that increased temperatures mean increased HU activity and intensity). For example, aerosol forcing in the 19th and 20th centuries may have masked greenhouse-gas-induced effects. Thus, continued research is required to better parse out the component of MH and HU trends that relates to anthropogenic climate change.

See: Vecchi, G.A., Landsea, C., Zhang, W. et al. Changes in Atlantic major hurricane frequency since the late-19th century. Nat Commun 12, 4054 (2021). https://doi.org/10.1038/s41467-021-24268-5.

Impacts of Acute Oxygen Loss on a Caribbean Coral Reef

Climate change is impacting ecosystems across the globe, and marine ecosystems often experience these changes through increasingly warm water and periods of lower oxygen concentrations. Coral reefs are hot-spots of ecological activity that support marine biodiversity. While the impacts of warming on coral have been studied extensively, the impacts of deoxygenation on coral reefs in tropical environments is not well understood. Improving our understanding of how this threat impacts coral reefs and what can be done to mitigate this threat is vital to marine environmental management.

A new study published in Nature by the Woods Hole Oceanographic Institution provides insight into the impacts of deoxygenation on coral reefs and the marine life directly reliant on reefs. The study analyzes the conditions and responses associated with a period of acute deoxygenation (hypoxia) surrounding a shallow coral reef. The researchers observed that the hypoxia led to dead and dying sponges and invertebrates, as well as coral bleaching, tissue loss, and death. Coral bleaching, a sign of physiological stress due to the expulsion of the algae that lives within the coral, was evaluated during the 6-day hypoxic event. The algae densities used to measure bleaching were 78 percent lower in areas that experienced the hypoxia, indicating loss of algae, or bleaching.

The study also monitored the benthic community, which refers to the macroscopic dominant life of the reef, including coral, sponges, and algae. The benthic community was observed to decline during the period of hypoxia and had not fully recovered a year after the event. Live coral cover decreased by 50 percent during the event, and a year later remained 23 percent lower than the live coral cover prior to the event. In contrast with the benthic macroorganisms, the microorganisms returned to a near- normal state within a month after the hypoxic event. During the period of hypoxia, microorganisms that are more prone to thriving in low-oxygen environments were more present, and the microorganism make-up of the reef also normalized relatively quickly after normal oxygen concentrations returned. The study also compared the impacts of acute hypoxia on shallow reef and deep reef communities, finding that shallow reef communities showed greater resilience and potential for recovery. Almost half of the shallow reef living coral survived, whereas the deep reef coral suffered observably higher rapid mortality.

The study encourages research and consideration of deoxygenation in future studies on coral reef health. Research in this space often presumes warming is the main contributing threat to coral reef rather than distinguishing between the impacts from multiple but related threats. Increased monitoring of oxygen levels in coral reef ecosystems may contribute to improved coral preservation.

See: Johnson, M.D., Scott, J.J., Leray, M. et al. Rapid ecosystem-scale consequences of acute deoxygenation on a Caribbean coral reef. Nat Commun 12, 4522 (2021). https://doi.org/10.1038/s41467-021-24777-3.

(Abby Kirchofer, Libby Koolik, Shaena Berlin Ulissi, Ashley Krueder)

REGULATORY DEVELOPMENTS

U.S. SECURITIES AND EXCHANGE COMMISSION STAFF TO DRAFT MANDATORY CLIMATE RISK DISCLOSURE RULES FOR RELEASE BY THE END OF 2021

Supported by the response to a public comment process initiated in March of 2021, Securities and Exchange Commission (SEC) Chair Gary Gensler announced that by the end of 2021, SEC staff will release a draft mandatory disclosure rule requiring publicly-traded companies to disclose direct, or Scope 1, greenhouse gas (GHG) from sources that are controlled or owned by a company, and indirect, or Scope 2, resulting from the generation of the electricity, steam, heat, or cooling purchased by the company. In addition, Chair Gensler directed staff to "make recommendations about … whether to disclose Scope 3 emissions"--GHG emissions of other companies in a reporting company's value chain. *Remarks of Securities and Exchange Commission Chair Gensler, July 28, 2021*

Background

The SEC addressed GHG emissions disclosures in a 2010 interpretive release providing guidance to publicly traded companies regarding the application of then-existing disclosure requirements to climate change. 75 Fed.Reg. 6290 (Feb 8, 2010). The 2010 guidance indicated that climate change risks, and opportunities, might relate to the reporting entity's business description, as well as its disclosures of "legal proceedings, risk factors, and management's discussion and analysis of financial condition and results of operations," including in light of evolving:

> . . .legislation and regulations governing climate change, international accords, changes in market demand for goods or services, and physical risks associated with climate change. March 15, 2021 Public Statement of Acting Chair Lee, "Public Input Welcomed on Climate Change Disclosures."

Eleven years later, in March 2021 the SEC opened a 90-day public comment period soliciting input on climate change disclosures. Among the "Questions for Consideration" enumerated in the March 15, 2021 solicitation for public comment were included:

- How to "best regulate, monitor, review, and guide climate change disclosures in order to provide more consistent, comparable, and reliable information for investors while also providing greater clarity to registrants as to what is expected of them?"

- How can GHG emissions be "quantified and measured," and which measures "may be material to an investment of voting decision?"

- What are the advantages and disadvantages of allowing "industry-led disclosure standards," and what minimum disclosure standards should the SEC impose in an industry-led system?

- Should different standards be established for different industry sectors?
  Should the SEC adopt elements from previously-established disclosure regimes, and is there value in a global system of consistent disclosure standards?
  March 15, 2021 Public Statement of Acting Chair Lee. Chair Gensler's Remarks

Speaking before a meeting of the Principles for Responsible Investment focused on climate change and financial markets, Chair Gensler on July 28, 2021, announced the SEC's next steps in light of the public input received.

First, that input. More than 550 "unique comment letters" were submitted, and "[t]here out of every four of these responses support mandatory climate change disclosure rules." Further, the Chair noted that many companies are already issuing "sustainability reports. . .using third-party standards." However, the lack of uniformity among those standards, and the lack of a mandatory reporting requirement, prevent investors from being able to "compare company disclosures to the degree that they need." Issuing companies, on the

other hand, lack "clear rules of the road." The Chair concluded that the SEC "should step in when there is this level of demand for information relevant to investors' decisions."

Thus, SEC staff have been directed to make recommendations regarding mandatory disclosures for direct, or Scope 1, GHG emissions from the reporting company's own facilities, and indirect, or Scope 3, emissions resulting from the generation of energy purchased by the reporting company. Staff were directed to"

> . . .consider a variety of qualitative and quantitative information about climate risk that investors either currently rely on, or believe would help them make investment decisions going forward.

Specifically, staff will recommend qualitative disclosures addressing matters:

> . . .such as how the company's leadership manages climate-related risks and opportunities and how these factors feed into the company's strategy. . . .Quantitative disclosures could include metrics related to greenhouse gas emissions, financial impacts of climate change, and progress towards climate-related goals.

More ambitiously, staff have been directed to consider whether companies should be required "to disclose Scope 3 emissions — and if so, how and under what circumstances." Scope 3 GHG emissions are those "of other companies in an issuer's value chain."

The Chair declined to further explore whether the SEC should adopt any pre-existing, third-party disclosure regimes:

> I've asked staff to learn from and be inspired by these external standard-setters. I believe, though, we should move forward to write rules and establish the appropriate climate risk disclosure regime for our markets, as we have in prior generations for other disclosure regimes.

Lastly, the Chair announced the SEC's intention to explore requiring standardized disclosures and transparency from investment funds:

> Labels like "green" or "sustainable" say a lot to investors. Which data and criteria are asset managers using to ensure they're meeting investors' targets — the people to whom they've marketed themselves as "green" or "sustainable"? I think investors should be able to drill down to see what's under the hood of these funds.

Conclusion and Implications

In establishing standardized, mandatory GHG emissions disclosures for publicly traded companies, the SEC would be bringing a level playing field to an area where investor demand has outstripped regulatory action for years. Nonetheless, mandating disclosure of standardized metrics for reporting Scope 3 emissions is an ambitious goal.
(Deborah Quick)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD IMPLEMENTS EMERGENCY WATER REPORTING AND CURTAILMENT REGULATIONS IN LIGHT OF HISTORIC DROUGHT

At its August 3, 2021 Public Meeting, the State Water Resources Control Board (State Water Board) considered whether to adopt emergency regulations that would instate certain reporting requirements and allow for the curtailment of water rights in the Sacramento-San Joaquin Delta Watershed (Delta Watershed). As the public meeting came to an end, the State Water Board ultimately decided to adopt these Emergency Reporting and Curtailment Regulations, passing them on to the Office of Administrative Law who approved the Regulations as of August 19, 2021. With these new Regulations coming into effect, thousands of water users either have been or are expected to be issued curtailment orders to cease water diversions under their curtailed water rights.

Emergency Regulations as Adopted: Curtailment of Diversions due to Drought Emergency

The Emergency Regulations, as adopted, add to Title 23 of the California Code of Regulations, Division 3, Chapter 2, Article 24 §§ 876.1 and 878.2. The Emergency Regulations will also amend 23 CCR § 877.1, 878, 878.1, 879, 879.1, and 879.2.

Beginning with the newly added 23 CCR 876.1, this section applies to water diversions within the Delta watershed and authorizes the Deputy Director to issue curtailment orders, subject to: (a) the several exceptions provided in §§ 878, 878.1, and 878.2, and (b) to the considerations provided in § 876.1(d). This section also provides a process to request a correction to a water right's priority date or to propose that curtailment may not be appropriate for a specific diverter or stream system. Initial Orders issued pursuant to this section will require reporting under § 879 and will either require curtailment or will instruct right holders regarding procedures for potential future curtailments. Furthermore, § 876.1(g) authorizes temporary suspensions of curtailment orders in the event that water availability increases. Finally, § 876.1(h) provides that by October 1, 2021 the Deputy Director must consider the suspension, extending of suspensions, or reimposition of curtailments, and must continue to do so every "by no more than every 30 days thereafter."

As noted above, several exceptions to these curtailment orders are laid out in §§ 878, 878.1, and 878.2. First among these exceptions, diversions solely for non-consumptive use may not be required to curtail in response to a curtailment order if their diversion and use of water does not decrease downstream flows and if they submit to the Deputy Director a certification describing the non-consumptive use and evidencing how the use does not decrease downstream flows. Second, under § 878.1, diversions that are necessary for minimum human health and safety standards may not be required to curtail, so long as several conditions are met that vary based upon whether the diversions are less than or greater than 55 gallons per person per day. Lastly, § 878.2 provides an exception for water users under alternative water sharing agreements that achieve the purposes of the curtailment process and that are submitted to and approved by the Deputy Director.

In addition to the requirements imposed by curtailment orders issued pursuant to the Emergency Regulations, reporting requirements are also established, with water rights holders of rights in excess of 1,000 acre-feet annually potentially subject to more stringent and continuous reporting requirements.

Initial Orders in the Delta Watershed

On August 20, 2021, the day after the Emergency Regulations were approved, the State Water Board sent out Initial Orders to diverters in the Delta Watershed. These Initial Orders came with strict reporting requirements for such diverters, demanding a Compliance Certification be submitted by diverters no later than September 3, 2021—a turnaround of only two weeks. Furthermore, larger diverters (*i.e.* diverters in excess of 5,000 AFA) are subject to enhanced reporting requirements, including monthly reporting for water diversions and use and monthly reporting of projected demand data.

In addition to the reporting requirements detailed in the Initial Orders, the orders also point out that any diverter seeking to utilize an exception as either non-consumptive use or necessary for human health and safety standards must submit a request by September 10, 2021, regardless of whether such water right has been curtailed as of this time.

Conclusion and Implications

The Initial Orders sent out by the State Water Resources Control Board will have major impacts on water users within the Delta Watershed. Thousands of users are expected to curtail diversions for the latter portion of August as well as for the duration of September, with many of these diverters facing the potential for further curtailments into October and beyond. The reporting requirements will certainly have water users' hands full in effort to maintain compliance. In any event, it seems just as likely that the State Water Board will face legal challenges to these new Emergency Regulations as water users scramble to respond to curtailment orders.

For more information on the Emergency Regulations and curtailments, readers can access the State Water Board's Sacramento-San Joaquin Delta Watershed Drought & Curtailment Information webpage at: Sacramento-San Joaquin Delta Watershed Drought Information | California State Water Resources Control Board.

(Wesley A. Miliband, Kristopher T. Strouse)

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

•July 21, 2021—MDV SpartanNash LLC will pay a $47,429 penalty to resolve alleged federal Clean Air Act violations at its food distribution center in Norfolk, Virginia, the U.S. Environmental Protection Agency (EPA) announced. EPA cited the company for violating the "General Duty Clause," § 112r(1) of the Clean Air Act, which makes the owners and operators of facilities that have regulated and other extremely hazardous substances responsible for ensuring that their chemicals are managed safely. Specifically, EPA alleged that MDV SpartanNash failed to take necessary steps to prevent releases by failing to install appropriate alarms, failing to properly seal around ammonia refrigeration pipes, and failing to inspect and repair pipe insulation and more. As part of the settlement, the company has certified that it is now in compliance with applicable requirements.

•July 27, 2021—EPA and the U.S. Department of Justice (DOJ) announced that Advanced Flow Engineering (aFe), an automotive parts manufacturer and distributor based in Corona, Calif., has agreed to stop manufacturing and selling parts for motor vehicles that, when installed, defeat, disable, or override EPA-approved emission controls and harm air quality. The complaint, filed simultaneously with the settlement, alleges that aFe's manufacture and sale of these parts violate the Clean Air Act. From 2014 to the present, aFe manufactured and/or sold over 63,000 of these parts, widely known as 'defeat devices.' The company will also pay a $250,000 penalty, which was based on its financial situation. Based on prior sales that are now prohibited under the settlement, EPA estimates that this enforcement action will prevent the release of approximately 112 million pounds of NOx and one million pounds of particulate matter from vehicles that would have been installed with aFe's defeat devices

•July 28, 2021—EPA reached a settlement with Green Mountain Power Corporation, a power company located in Vergennes, Vermont, for alleged violations of the Clean Air Act. Under the settlement, Green Mountain Power agreed to pay a penalty of $28,800 and come into compliance with the Clean Air Act's monitoring and reporting requirements. EPA alleged that Green Mountain Power operated two diesel generators subject to the National Emission Standards for Hazardous Air Pollutants for Stationary Reciprocating Internal Combustion Engines (RICE NESHAP). These generators lacked the proper monitoring equipment and required reports and plans, which serve to show that its generators are in compliance with this rule.

Civil Enforcement Actions and Settlements—Water Quality

•July 1, 2021—EPA reached settlements with seven Massachusetts construction companies for violations of stormwater regulations that serve to reduce pollution from construction runoff. Under these settlements, the seven companies agreed to pay penalties for their noncompliance and, where applicable, obtain permit coverage and follow the terms of their permits for discharging stormwater. The recent enforcement actions include:

383 Park Street, LLC agreed to pay a $9,000 penalty for allegedly failing to obtain permit coverage, maintain adequate erosion controls, and store and contain petroleum products in a manner designed to prevent discharge of pollutants at the Shay Lane construction site in North Reading, Massachusetts

Dat Tieu Enterprises, LLC agreed to pay a $3,000 penalty for allegedly discharging stormwater without

a permit at the Woodland Park construction site in Brockton, Massachusetts.

Egan Development, LLC agreed to pay a $7,200 penalty for allegedly failing to obtain permit coverage at the Heritage Park Development in Whitman, Massachusetts.

Harbor Classic Homes LLC agreed to pay a $4,200 penalty for allegedly failing to obtain permit coverage at the Elm Street construction site in Lunenburg, Massachusetts.

Mujeeb Construction Company, Inc. agreed to pay a $7,200 penalty for allegedly failing to obtain permit coverage at the Carpenter Estates Development in Northbridge, Massachusetts.

Otis Land Management, LLC agreed to pay an $8,700 penalty for allegedly failing to obtain permit coverage, implement adequate erosion controls, and for a turbid discharge at the Sturbridge Road Development in Charlton, Massachusetts.

Royal Haven Builders, Inc., based in Tyngsborough, Massachusetts, agreed to pay a $7,800 penalty for allegedly failing to obtain permit coverage and implement adequate erosion controls at the Mayflower Landing Development in Pelham, New Hampshire.

• July 20, 2021—EPA settled a series of alleged industrial storm water violations under the federal Clean Water Act by Fought & Company, Inc, located in Tigard, Oregon. Fought & Company, Inc. agreed to pay a civil penalty of $82,000 to resolve EPA's allegations. Fought & Company, Inc. fabricates structural steel components for large-scale construction projects such as bridges, high-rises, stadiums, and industrial buildings. An EPA inspection at the facility in 2019 found Fought & Company, Inc. had a deficient Stormwater Pollution Control Plan, failed to properly implement corrective actions and failed to monitor all storm water discharge points. In addition to paying a civil penalty, Fought and Company, Inc. has agreed to conduct a storm water evaluation period, revise and update its Storm water Pollution Control Plan, and install additional treatment capacity at its facility to address excess zinc discharges.

• July 26, 2021—EPA announced a settlement with Carl Grissom of West Richland, Washington for unauthorized suction dredge mining in the South Fork Clearwater River in central Idaho in 2018. The agency is proposing that Grissom pay a $24,000 penalty. Suction dredge operations can destroy fish eggs and newly hatched fish. The eggs and fish can be sucked out of the gravel into the dredge, and they can be smothered and crushed with sand, silt, and gravel from upstream dredging. The South Fork Clearwater River is home to Snake River fall Chinook salmon and Snake River Basin steelhead, both of which are listed as "threatened" under the Endangered Species Act. The river is also designated as "Critical Habitat" for Snake River Basin steelhead under the ESA and as "Essential Fish Habitat" for chinook and coho salmon. To protect these fish and their habitat, in 2018, EPA issued an updated General Permit for Small Suction Dredge Miners In Idaho that limits suction dredge operations in the South Fork Clearwater.

• July 27, 2021—EPA announced a settlement with Starostka-Lewis LLC for alleged violations of the federal Clean Water Act, including unauthorized discharges of pollutants from the company's residential construction site in Lincoln, Nebraska, into an adjacent stream. Under the terms of the settlement, the company agreed to pay a civil penalty of $60,009. According to EPA, Starostka-Lewis LLC violated terms of a Clean Water Act permit issued to the company for its Dominion at Stevens Creek residential construction site. EPA inspected the site in 2019 and alleges that, among other permit violations, the company failed to implement practices to limit the release of construction pollution into streams and other waters. EPA says those failures resulted in discharges of sediment and construction-related pollutants into a tributary to Stevens Creek and Waterford Lake. In the settlement documents, Starostka-Lewis certified that it took the necessary steps to return to compliance.

• August 2, 2021—EPA announced settlement with Hussey Copper under which the company agreed to perform a comprehensive environmental audit, implement an updated environmental management system, and pay an $861,500 penalty to resolve alleged violations of the federal Clean Water Act (CWA) at its smelting facility in Leetsdale, Allegheny County, Pennsylvania. EPA alleged that the company had chronic exceedances of effluent limits for discharges of copper, chromium, nickel, oil and grease, lead, pH, total suspended solids and zinc.

Under the settlement, along with payment of the penalty, Hussey Copper will:

Conduct a comprehensive review of its wastewater treatment system.

1) Hire third-party consultants to conduct a compliance audit and implement corrective measures; 2) Hire third-party consultants to review, update, and audit compliance with the facility's environmental management system; 3) Implement a process to prevent and correct violations of permit effluent limits; 4) Conduct annual compliance training of employees and contractors and 5) Pay agreed-upon penalties on demand for future violations.

• August 5, 2021—EPA announced a settlement with the City of Wapato, Washington for alleged violations of the Clean Water Act at its city wastewater treatment facility. Wapato lies in central Washington's Yakima County, within the external boundaries of the Confederated Tribes and Bands of the Yakama Nation Reservation and discharges to tribal waters. EPA alleged that the city failed to comply with its National Pollutant Discharge Elimination System (NPDES) permit at the facility. Alleged violations include: 1) 3,000 effluent limit violations for exceedances of ammonia, copper, and zinc; 2) Failure to update the facility's Quality Assurance Plan; 3) Failure to update the facility's Operations and Maintenance Plan.

As part of the settlement, the City agreed to pay a penalty of $25,750 and entered into an Administrative Order on Consent (AOC), which requires the City to take specific actions to prevent the continued discharge of pollutants in excess of its permit limits.

• August 9, 2021—EPA announced a settlement with the LPG Land & Development Corporation under which the company will pay a $125,000 penalty and pay more than $600,000 for stream restoration improvements. The settlement addresses alleged federal and state water pollution violations at the Mon Fayette Industrial Park in Morgantown, West Virginia.

• August 10, 2021—EPA and the Department of Justice announced that Noble Energy, Inc., Noble Midstream Partners LP, and Noble Midstream Services, LLC (collectively, Noble) have agreed to pay $1 million and implement enhanced containment measures and electronic sensors at tank batteries operating in Colorado floodplains. The agreement, lodged as a proposed consent decree with the U.S. District Court for the District of Colorado, resolves Clean Water Act claims at two oil and gas production facilities in Weld County, Colorado. The United States concurrently filed a civil complaint with the proposed consent decree detailing alleged violations of the Clean Water Act at the facilities. These violations include a 2014 unauthorized discharge of oil from the state M36 Facility into the Poudre River and noncompliance with regulations issued to prevent and respond to oil spills at the state M36 Facility and the Wells Ranch Facility. The settlement requires installation of steel oil-spill containment berms and remote monitoring sensors, as well as tank anchoring at all of Noble's active tank batteries in Colorado floodplains. Noble Midstream must also implement and provide periodic reports on a facility response training, drills, and exercises program at the Wells Ranch facility.

• August 13, 2021—EPA announced that the John F. Kennedy Center for the Performing Arts in Washington, D.C. settled alleged Clean Water Act violations at its facility adjacent to the Potomac River. The Kennedy Center has a Clean Water Act permit regulating its discharges of condenser cooling water from the facility's air conditioning system into the Potomac River, which is part of the Chesapeake Bay watershed. This settlement addresses alleged violations of temperature and pH discharge permit limits required under the Kennedy Center's Clean Water Act permit. EPA also cited the Kennedy Center for failing to timely submit monitoring reports and failing to submit pH influent data. As part of the settlement, the Kennedy Center is required to submit a compliance implementation plan.

• August 24, 2021—EPA announced that Sixteen to One Mine, one of California's oldest operational gold mines, has agreed to an Administrative Order on Consent requiring the mine to install a new treatment system that will remove pollutants from mine drainage before entering local waters. The mine was found to be in violation of its permit under the Clean Water Act after consistently discharging mine-influenced water that exceeded limits on pollutants. The agreement addresses elevated pollutant levels by requiring the mine to install a system to treat total

suspended solids, antimony, arsenic, cadmium, copper, lead, nickel, and pH to levels at or below permit limits. The Sixteen to One Mine has agreed to submit sampling and treatment plans, install an approved water treatment technology, repair stormwater management features in disrepair, update its stormwater management plan, and apply for coverage under the California Statewide Industrial General Permit. The Sixteen to One Mine has 220 days to complete this work. The facility will report sampling results to EPA for three years to demonstrate the treatment system's effectiveness, ensure compliance with the permit, and protect the water quality of Kanaka Creek.

Civil Enforcement Actions and Settlements—Chemical Regulation and Hazardous Waste

•June 24, 2021—EPA issued a second Stop Sale, Use, or Removal Order (SSURO) to Seal Shield, LLC (Seal Shield) in Orlando, Florida, requiring the company to immediately halt the sale/distribution of unregistered pesticides and a misbranded pesticide device. The SSURO is being issued to Seal Shield because it is making unqualified public health claims for certain products it sells. These products include, but are not limited to keyboards, computer mice and screen protectors. The SSURO further requires Seal Shield to stop the sale and distribution of the pesticide device, the ElectroClave UV-C Disinfection System, because Seal Shield is making claims on its website in connection with sales of the device that the device is recommended or endorsed by EPA.

•June 28, 2021—EPA announced a settlement with Safety Kleen Systems, Inc. to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA) at the company's facility in Dolton, Illinois. The settlement includes a $350,000 civil penalty. Safety-Kleen's Dolton facility is a RCRA-permitted organic chemical and solvent reclamation and recycling facility that regenerates spent solvent and blends hazardous waste into fuel. EPA alleged that Safety-Kleen violated RCRA by treating hazardous waste in thin-film evaporators that were not authorized in Safety-Kleen's RCRA permit to treat hazardous waste. EPA also alleged that Safety-Kleen violated several conditions of its RCRA permit and federally authorized Illinois RCRA regulations. Under the terms of the Consent Agreement and Final Order with EPA, Safety-Kleen has addressed the alleged RCRA violations at the Dolton facility and will pay a civil penalty of $350,000.

•July 8, 2021—EPA issued a Stop Sale, Use or Removal Order (SSURO) to Allied BioScience for their product SurfaceWise2. SurfaceWise2, a residual antimicrobial surface coating, was previously authorized for emergency use in Arkansas, Oklahoma, and Texas to help address the COVID-19 pandemic. EPA investigations found the company was marketing, selling, and distributing SurfaceWise2 in ways that were inconsistent with the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), EPA's regulations, and the terms and conditions of the emergency exemption authorizations. Specific use sites included American Airlines aircraft and airport facilities and two orthopedic facilities in Texas. As a result, EPA issued a SSURO that requires Allied BioScience, the product manufacturer, to immediately stop selling and distributing SurfaceWise2. The SSURO will remain in effect unless revoked, terminated, suspended or modified in writing by EPA. Additionally, EPA is revoking SurfaceWise2 emergency exemptions for Arkansas and Texas due to the company misconduct described above and scientific concerns regarding product performance.

•July 22, 2021—EPA settled alleged civil chemical accident prevention and preparedness violations with three companies operating a total of eight cold storage facilities in Yakima County, Washington. All involved facilities use Anhydrous Ammonia for Refrigerated Cold Storage. Under EPCRA, Anhydrous Ammonia has a 500-lb. reporting and planning requirement threshold. Each facility owner or operator has agreed to pay a penalty as part of these settlements:

Company: Stadelman Fruit LLC-Penalty: $238,875-Facilities: 1st Avenue, Zillah, Washington; Cheyne Road, Zillah, Washington; Bella Terra Road, Zillah, Washington; West Northstone Parkway, Zillah, Washington; Company: Hollingbery and Sons, Inc.-Penalty: $21,600-Facility: North 1st Avenue, Yakima, Washington; Company: Hollingbery CA and Cold Storage LLC-Penalty: $96,600-Facilities: North 1st Avenue, Yakima, Washington (three facilities)

•July 22, 2021—EPA announced a settlement with PM Properties, Inc. under which the company

will pay $27,483 in penalties for environmental violations associated with underground storage tanks of fuel at CrossAmerica Partners fuel stations in Verona and Weyers Cave, Virginia. The penalties stem from two settlements that address compliance with environmental safeguards protecting communities and the environment from exposure to petroleum or potentially harmful chemicals. PM Properties will pay a $25,603 penalty for alleged violations at the Verona location. These alleged violations included failure to have adequate spill prevention equipment and failure to conduct proper testing of the tanks, transmission lines and leak detectors. In a separate settlement, PM Properties will pay a $1,880 penalty for alleged violations at the Weyers Cave location that included failure to have adequate spill prevention devices on two underground storage tanks. The company has certified that both locations are now in compliance with environmental regulations.

•July 26, 2021—EPA reached a settlement with Aerosols Danville, Inc. (formerly known as KIK Custom Products) to resolve alleged violations of the Resource Conservation and Recovery Act (RCRA) at the company's facility in Danville, Illinois. The settlement includes a $175,000 civil penalty. The company was required to comply with various provisions of RCRA's hazardous waste air emission regulations. EPA alleged that Aerosols Danville violated RCRA by failing to monitor valves and pumps for leaks, maintain records, tag valves and flanges, inspect roof closures, and obtain a written tank assessment. Under the terms of the consent agreement and final order with EPA, Aerosols Danville will address the alleged RCRA violations at the facility and pay a civil penalty of $175,000 to the federal government.

•July 27, 2021—EPA announced settlements with three manufacturing companies that generate hazardous waste to resolve alleged violations of the federal Resource Conservation and Recovery Act (RCRA). According to EPA, the violations created the potential for releases of hazardous wastes, including harmful air emissions, from the companies' facilities. Fuchs Lubricants Co. of Kansas City, Kansas, which manufactures lubricating oils and greases, paid a civil penalty of $255,344. United Industries Corporation of Vinita Park, Missouri, which manufactures herbicides, plant food, pesticides, cleaners, and pest repellants, agreed to pay a civil penalty of $95,000. DCW Casing LLC of Oelwein, Iowa, a manufacturer of a blood anticoagulant called heparin, paid a civil penalty of $80,562.

•August 3, 2021—EPA Region 6 announced a settlement regarding alleged hazardous waste violations at the US Technology Corporation (UST) site in Fort Smith, Arkansas. The settlement alleges several companies generated hazardous waste that was proposed for recycling but was instead stored by the owner and operator of UST without a Resource Conservation and Recovery Act (RCRA) permit. In April 2018, EPA's investigation of the UST facility found a warehouse containing an estimated 10,000 drums and 1,200 super sacks of waste which contains a blend of spent, blast, and related material that when recycled is used to make concrete products known as SBM, totaling about 6,854,400 pounds of material. Under the settlement, Respondents will remove the majority of the waste, including waste that had been generated by companies that EPA could not locate or are currently out of business. EPA will continue to work with any other RCRA generators to remove the remaining drums while this settlement addresses the removal of nearly 80 percent of the waste in a timely manner. The ten respondents to the case who are working to remove the hazardous waste are: National Oilwell Varco L.P.; VSE Corporation; American Airlines, Inc.; Solar Turbines Incorporated; Goodrich Corporation; AAR Landing Gear Corporation; AV Task, Inc.; Varec Biogas, Inc.; Honeywell International, Inc.; and Kansas Dry Stripping, Inc.

•August 4, 2021—EPA announced a settlement with Praxair Inc., now known as Linde Inc., for violations of federal chemical release prevention and reporting requirements at its carbon dioxide liquification plant. The company will pay a $127,000 civil penalty and make safety improvements to its Carson, California facility to protect the public and first responders from dangerous chemicals. Following a release of anhydrous ammonia in January 2019, Praxair failed to immediately notify the National Response Center, in violation of the federal Comprehensive Environmental Response, Compensation, and Liability Act, ultimately reporting the release several hours after it occurred. EPA also found that Praxair violated multiple chemical accident prevention provisions of

the Clean Air Act, which requires that facilities storing more than 10,000 pounds of anhydrous ammonia are properly designed, operated, and maintained to minimize the risk of an accidental release. In addition, EPA found that Praxair failed to: properly label the facility's process and emergency equipment; have proper emergency controls; replace damaged or missing insulation; properly seal doors; and protect electrical equipment with proper coverings.

• August 10, 2021—EPA announced a $29.5 million cost recovery settlement with Shell Oil Company for the ongoing cleanup of waste and contaminated groundwater at the McColl Superfund Site in Fullerton, California. Shell was found liable by a federal court for the cleanup and disposal of contaminated waste at the McColl Superfund Site. The principal contaminants of concern are benzene, metals, and a volatile chemical known as tetrahydrothiophene. As one of the responsible parties for the contamination, Shell has agreed to pay $29.5 million to resolve its share of costs that the federal government incurred through the cleanup process to date. Shell will also pay 58 percent of EPA's future cleanup costs.

• August 11, 2021—EPA announced a settlement with Cargill, Inc., a Minnesota based company with a facility in Vermont that produces animal feed, for alleged violations of the Emergency Planning and Community Right-to-Know Act (EPCRA)'s Toxic Release Inventory (TRI) Program. Cargill, Inc. agreed to pay a penalty of $40,294 for allegedly failing to timely file TRI reports for zinc and manganese compounds processed at its plant in Swanton, Vermont.

• August 11, 2021—EPA announced six lead-based paint enforcement actions against renovation firms doing work in Los Angeles Unified School District (LAUSD) elementary schools that serve historically marginalized communities. The renovation firms in this case failed to comply with the Toxic Substances Control Act (TSCA), which requires them to protect workers, the public, and children from exposure to lead. They will pay a combined total of over $55,000 in penalties. EPA settled with Buena Park-based Bitech Construction Company Inc., Whittier-based Kemp Brothers Construction Inc. and MIK Construction in Santa Fe Springs for violations of the Renovation, Repair and Painting Rule (RRP) under the Toxic Substances Control Act (TSCA). All firms performed renovation work on schools without EPA certification and did not retain proper records, including documentation ensuring that a certified renovator was assigned to the project, that on-the job training was conducted for workers, and that workers performing renovation were certified or trained by a certified renovator. The firms will pay the following penalties: Bitech: $18,982; Kemp: $16,691; and MIK: $16,814. Each firm will pay $1,000 for bidding on a RRP job without first obtaining an EPA Firm Certification. Under the terms of the settlements, the companies agreed to pay the civil penalties and to certify that they are in compliance with the RRP Rule, which requires the use of lead-safe work practices during renovations.

• August 26, 2021—EPA announced a settlement with Chevron USA Inc. for violations of the Resource Conservation and Recovery Act (RCRA) at the company's facility in Montebello, CA. Under this settlement, the company will pay a $132,676 civil penalty. An October 2019 EPA inspection of the facility identified violations of federal Resource Conservation and Recovery Act (RCRA) regulations, including failure to conduct assessments and maintain certifications for tanks storing hazardous waste and failure to maintain records regarding compliance with RCRA Air Emission Requirements. In response to the inspection findings, the facility agreed to pay the civil penalty and comply with the statutory and regulatory requirements.

Indictments, Sanctions, and Sentencing

• July 12, 2021—Nebraska Railcar Cleaning Services LLC (NRCS), its president and owner, Steven Michael Braithwaite, and its vice president and co-owner, Adam Thomas Braithwaite, pleaded guilty in federal court in Omaha to charges stemming from an investigation into a 2015 fatal railcar explosion that killed two workers. The charges include conspiracy, violating worker safety standards resulting in worker deaths, violating the Resource Conservation and Recovery Act (RCRA), and submitting false documents to the Occupational Safety and Health Administration (OSHA). According to court documents, NRCS failed to implement worker safety standards and then tried to cover that up during an inspection

by OSHA. In addition, the company mishandled hazardous wastes removed from rail tanker cars during the cleaning process. NRCS pleaded guilty to all 21 of the counts it was charged with in the indictment. The defendants are scheduled to be sentenced on Oct.25. Steven Braithwaite faces a maximum penalty of 15 years in prison and a fine of the greater of $750,000 or twice the gain or profit caused by the offense. Adam Braithwaite faces a maximum penalty of 20 years in prison and a fine of the greater of $1,250,000 or twice the gain or profit caused by the offense and NRCS faces a maximum penalty of five years' probation and a fine of the greater of $9,500,000 or twice the gain or profit caused by the offense.

• July 12, 2021—The U.S. Department of Justice, on behalf of the EPA, filed a complaint in federal court in the U.S. Virgin Islands against Limetree Bay Terminals LLC and Limetree Bay Refining LLC (jointly Limetree Bay) alleging that the companies' St. Croix petroleum refinery presents an imminent and substantial danger to public health and the environment. In a stipulation filed simultaneously with the complaint that acknowledges that the refinery is not currently operating and that Limetree Bay does not intend to restart the refinery at the present time, Limetree Bay has agreed to a number of requirements. The complaint seeks an injunction requiring Limetree Bay to comply with the requirements of the EPA order, to take all measures necessary to eliminate the imminent and substantial endangerment before restarting refinery operations including complying with the corrective measures plan, and other appropriate relief.

• August 6, 2021—The Department of Justice filed criminal charges under the Clean Water Act against Summit Midstream Partners LLC, a North Dakota pipeline company that discharged 29 million gallons of produced water from its pipeline near Williston, North Dakota, over the course of nearly five months in 2014-2015. The discharge of more than 700,000 barrels of "produced water"—a waste product of hydraulic fracturing—contaminated land, groundwater, and over 30 miles of tributaries of the Missouri River. \In addition to the criminal charges, the United States and the State of North Dakota filed a civil complaint against Summit and a related company, Meadowlark Midstream Company LLC, alleging violations of the Clean Water Act and North Dakota water pollution control laws. Under parallel settlements resolving the criminal and civil cases, the company has agreed to pay a total of $35 million in criminal fines and civil penalties. If the court accepts the plea agreement, Summit will pay $15 million in federal criminal fines for negligently causing the continuous spill, failing to stop it and deliberately failing to make an immediate report as required. Under the terms of the proposed plea agreement, Summit will serve three years of probation in which comprehensive remedial measures are required. Under the proposed civil settlement, Summit, Meadowlark, and a third related company, Summit Operating Services Company LLC, will pay $20 million in civil penalties, perform comprehensive injunctive relief, clean up the contamination caused by the spill and pay $1.25 million in natural resource damages to resolve the civil case. The civil settlement further requires Summit and Meadowlark to take concrete steps to prevent future discharges, including stringent pipeline installation, operation, and testing requirements; a centralized computational pipeline monitoring system; spill response planning and countermeasures; an environmental management system; and data management and training measures. Independent third-party audits are required to ensure that certain injunctive measures are properly developed and implemented. (Andre Monette)

RECENT FEDERAL DECISIONS

FIRST CIRCUIT UPHOLDS MASSACHUSETTS' STATE LAW ENFORCEMENT AS BARRING CLEAN WATER ACT CITIZEN SUIT BUT REQUIRES NPDES PERMITS

Blackstone Headwaters Coalition, Inc. v. Gallo Builders, Inc., 995 F.3d 274 (1st Cir. 2021).

The U.S. Court of Appeals for the First Circuit recently determined that an enforcement action brought by the Massachusetts Department of Environmental Protection (Department) against a developer for sediment-laden stormwater discharges barred a citizen suit under the federal Clean Water Act (CWA) for the same violations. The court also determined that all operators on the project site were required to obtain a National Pollutant Discharge Elimination System (NPDES) CWA permit to discharge from the site.

Factual and Procedural Background

Robert and Janice Gallo and their son Steven Gallo (Gallos) served as the only officers, directors, and shareholders of Gallo Builders, Inc. (Gallo Builders) and as the only members of Arboretum Village, Inc. (Arboretum Village; collectively: Defendants). The Defendants have been involved in the construction of a large residential development in Worcester, Massachusetts, known as Arboretum Village Estates (Development).

Arboretum Village obtained an NPDES permit from the U.S. Environmental Protection Agency (EPA) for the Development (Construction General Permit). The Department monitored the Development for compliance with state regulations and discovered that the site was discharging silt-laden runoff from unstable, eroded soils into an unknown perennial stream, which ultimately ended up in the Blackstone River. As a result, the Department issued a Unilateral Administrative Order (UAO), which required Arboretum Village to undertake numerous remedial actions or face civil penalties. Following the issuance of the UAO, construction of the Development stopped. Arboretum Village appealed the UAO, resulting in Arboretum Village and the Department entering into a settlement agreement and the issuance of the Administrative Consent Order with Penalty (ACOP).

Despite approval of the ACOP, Blackstone Headwaters Coalition, Inc. (Blackstone) filed a citizen suit against Defendants, alleging that Defendants violated the CWA by failing to obtain and comply with the Construction General Permit conditions for the Development. Specifically, Blackstone brought two claims: 1) the Gallo Builders failed to obtain the Construction General Permit for the Development—despite Arboretum Village obtaining their own, and 2) Arboretum Village failed to adhere to the conditions in the Construction General Permit.

The CWA prohibits the discharge of pollutants from point sources into waters of the United States. The CWA's NPDES permit program authorizes discharges into waters of the United States from point sources. The State of Massachusetts regulates and enforces water protection programs through the Massachusetts Clean Water Act (MCWA), but the state has not received authorization under § 402(b) of the CWA to administer the NPDES permit program under the MCWA.

The CWA authorizes individuals to file complaints against those who violate the CWA when the EPA or an authorized state fails to perform an act or duty required by statute. The CWA, however, precludes citizen suits when a state is diligently prosecuting the violation under a comparable state law.

Defendants and Blackstone filed cross-motions for summary judgment to determine whether the ACOP barred Blackstone's citizen suit. Defendants also sought summary judgment on Count I of the complaint concerning Construction General Permit coverage and Count II concerning discharges of sediment-laden stormwater. The U.S. District Court granted summary judgment against Blackstone as to its claims in Counts I and II and denied Blackstone's cross-motion for summary judgment as to the applicability of the statutory preclusion bar for diligent prosecution. Blackstone appealed these determinations.

The Court of Appeals' Decision

Diligent Prosecution Bar to Citizen Suits

The court first addressed the issue of whether the CWA's "diligent prosecution" barred Blackstone's claim that Defendants discharged sediment-laden stormwater in violation of the CWA. The court considered four distinct questions under this issue: 1) whether the Department's action was commenced and prosecuted under a state law comparable to the CWA, 2) whether the Department's action sought to enforce the same violation alleged by Blackstone, 3) whether the Department was diligently prosecuting its action when Blackstone filed its complaint, and 4) whether Blackstone's suit is a civil penalty.

On the first question, the court noted that the Department appeared to have commenced its enforcement action under the MCWA, at least in part. Based on prior case law, the court determined that the MCWA was a comparable state law to the federal CWA. Blackstone did not dispute this conclusion. Instead, Blackstone contended the Department's enforcement action was brought under the Massachusetts Wetlands Protection Act (MWPA) and not under the MCWA, and that the MWPA was not a comparable state law to the CWA. The court agreed with Blackstone that the MWPA is not a comparable state law to the CWA, because it is narrower in scope than the CWA. Nevertheless, the court concluded the Department's enforcement action was brought, at least in part, under a comparable law: the MCWA.

On the second question, Blackstone argued its action targeted the causes of Defendants' water pollution while the Department's action targeted only the Defendants' pollution *per se*, and that the particular violations referenced in the complaint occurred on different days than the violations alleged in the ACOP. The court rejected this argument, reasoning that the ACOP required Defendants to implement actions that would prevent sediment-laden discharges, and that this forward-looking course of action would remedy the violations alleged in Blackstone's complaint.

On the third question, the court reasoned that the ACOP included a series of enforceable obligations on Defendants designed to bring the project into compliance and to maintain compliance with promulgated standards, while at the same time reserving to the Department a full set of enforcement vehicles for any instances of future non-compliance. Thus, the Department was "diligently prosecuting" the same violation.

On the fourth question, Blackstone argued that the "diligent prosecution" provision only bars duplicative citizen suits for civil penalties but not claims seeking declaratory and injunctive relief. The court reasoned that because the CWA's citizen suit provision does not authorize citizens to seek civil penalties separately from injunctive relief, the preclusion bar extends to civil penalty actions and to injunctive and declaratory relief. As a result, the Court of Appeals upheld the award of summary judgment to Defendants on Blackstone's claim for sediment-laden stormwater discharges.

Finally, the court considered whether the Gallo Builders were required to obtain coverage under the Construction General Permit. Defendants contended that because Arboretum Village obtained coverage under the Construction General Permit and because both Arboretum Village and Gallo Builders were both owned by the Gallos, any failure by Gallo Builders, to also enroll under the permit was a nonactionable technical violation. The court rejected this argument, reasoning that the Gallo Builders was an operator of a construction project, and thus needed to obtain coverage under the Construction General Permit in order to discharge from the Development, regardless of Arboretum Village's coverage under the same permit. The court thus reversed the district court's decision and required all operators to obtain coverage under the Construction General Permit.

Conclusion and Implications

This case supports a diligent prosecution bar to citizen suits, as long as the state enforcement action was brought, at least in part, pursuant to a comparable state law. The case also appears to support a contention that every operator on a construction site may be required to obtain individual permit coverage to discharge from the site. The court's opinion is available online at: https://casetext.com/case/blackstone-headwaters-coal-inc-v-gallo-builders-inc-2.
(Kara Coronado, Rebecca Andrews)

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LAW AND REGULATION REPORTER

NINTH CIRCUIT FINDS THAT THE FAA VIOLATED NEPA BY FAILING TO ANALYZE ENVIRONMENTAL IMPACTS OF DECISION TO AUTHORIZE NEW AIRPORT APPROACH ROUTES

City of Los Angeles v. Dickson, *Unpub.*, Case No. 18-71581, (9th Cir. July 8, 2021).

In an *unpublished* decision, the Ninth Circuit found that the Federal Aviation Administration (FAA) violated the National Environmental Policy Act (NEPA) when it issued a decision altering three arrival routes into Los Angeles International Airport *without first* conducting any final NEPA review. Under federal aviation law, the Ninth Circuit had original jurisdiction to consider petitions by the City of Los Angeles and Culver City challenging the final order by the FAA. The court also found that the FAA's attempt at a post-hoc application of the categorical exclusion to NEPA was unlawful on substantive grounds because the "substantial controversy" surrounding the arrival routes decision gave rise to an "extraordinary circumstance" preventing reliance on that exclusion.

Factual and Procedural Background

In 2018, the FAA published and implemented three amended flight arrival routes into Los Angeles International Airport that lowered altitudes and consolidated flight tracks over certain residential areas in the City of Los Angeles and Culver City. After implementation of the project, the City of Los Angeles filed a public records request seeking all records related to the FAA's environmental review, under the National Environmental Policy Act, of the decision to implement the project. While FAA staff were able to locate draft documents reflecting commencement of an environmental analysis of the project, it was clear that the FAA never prepared a final environmental determination in relation to the FAA's implementation of the project. In an attempt to comply with NEPA after the FAA's decision, FAA staff thereafter prepared a "Memorandum to File: Confirmation of Categorical Exclusion Determination." The FAA prepared this "confirmation" more than three months after the FAAs decision on the new arrival routes.

Under the § 46110(a) of the Federal Transportation Code (Title 49), the Ninth Circuit has original jurisdiction to hear petitions challenging any "final order" issued by the FAA. Accordingly, soon after the FAA issued its arrival routes decision, the City of Los Angeles filed a petition with the Ninth Circuit. Culver City intervened as a petitioner-intervenor. Petitioners alleged that the FAA violated NEPA, the National Historic Preservation Act (NHPA), and § 4(f) of the Department of Transportation Act by making the arrival routes decision without first conducting environmental review under NEPA.

The Ninth Circuit's Decision

The court began by noting that NEPA requires the FAA and other federal agencies to "evaluate and disclose the environmental impacts of their actions." The review processes outlined in NEPA are intended to "ensure that before an agency can act," the agency considers potential environmental review.

The National Environmental Policy Act Claim

The FAA pointed to two documents as evidence that it completed the necessary environmental review of the project under NEPA. First, the FAA pointed to an "Initial Environmental Review" document, and a memo confirming that the project qualified for a categorical exclusion exclusion from CEQA review. However, as the court noted "both documents postdated the publication of the Amended Arrival Routes by several months…[and] cannot constitute the FAA's NEPA review."

The court also struck down the FAA's application of NEPA's categorical exclusion on substantive grounds, finding that application of that exclusion was "arbitrary and capricious" and violative of NEPA. A categorical exclusion cannot be applied when there are "extraordinary circumstances" where a normally excluded action may have a significant environmental effect.

FAA procedures and regulations provide that where a proposed action is "likely to be highly controversial on environmental grounds… meaning that there is a substantial dispute over the degree, extent or nature of a proposed action's environmental impacts" such extraordinary circumstances exist and

a categorical exclusion is not appropriate. The court found that the record clearly indicated there was a substantial dispute about the noise and other impacts of the amended arrival routes decision. Despite this, the FAA's "Initial Environmental Review Document" failed to address the controversy in clear violation of FAA regulations. The court held that the FAA's application of the categorical exclusion was arbitrary and capricious and violated of NEPA. The court granted petitioners' petition for review of their NEPA claims.

The National Historic Preservation Act Claim

The court went on to grant petitioners' petition for review under the National Historic Preservation Act. Here, the FAA failed to consult with the City of Los Angeles or Culver City. The NHPA requires an agency to consider the effects of actions on historic structures, and "in fulfilling this obligation, agencies must consult with certain stakeholders… including representatives of local governments." Here, the FAA's failure to consult with the cities violated the NHPA and denied the cities their right to participate in the process and object to the FAA's findings regarding historical impacts.

The Remedy of Remand

The court concluded that the FAA violated NEPA and NHPA when making the Amended Routes decision. The court noted that while the typical remedy in this circumstance is *vacatur*, the court also has discretion to remand the decision to the agency without *vacatur* "when equity demands." Here, although the FAA's failure to conduct the proper environmental review was a serious error, the FAA asserted that vacating the amended arrival routes would be "severely disruptive in terms of cost, safety, and potential environmental consequences…" As such, the court exercised its discretion to remand without *vacatur*, leaving in place the amended arrival routes while the FAA undertakes a proper NEPA analysis.

Conclusion and Implications

Though *unpublished*, the *Dickson* decision highlights the importance of conducting the appropriate, formal level of environmental review or determination that a project is exempt from review under NEPA before an agency action subject to NEPA is made. Where significant controversy exists regarding an action, regardless of whether such action would not typically require NEPA review, that controversy will often give rise to an "extraordinary circumstance" rendering the exclusion inappropriate. The court's opinion is available online at: https://cdn.ca9.uscourts.gov/datastore/memoranda/2021/07/08/19-71581.pdf.
(Travis Brooks)

THIRD CIRCUIT ADDRESSES POLLUTANT RELEASES ABOVE THE PERMITTED AMOUNTS AND REPORTING REQUIREMENTS UNDER CERCLA

Clean Air Council v. United States Steel Corporation, ___F.4th___, Case No. 20-2215 (3rd Cir. June 21, 2021).

Numerous federal statutes regulate polluting activities, often by setting emission standards that allow for the release of specified amounts of pollutants. When such permits are violated, and unpermitted releases occur, must the violation be reported under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as well as under the pollutant-specific permitting statute? The answer, according to the Third Circuit Court of Appeals, depends on the specific pollutant and permitting statute.

Background

The Mon Valley Works (Works) is a major steel facility located near Pittsburgh, run by U.S. Steel. The Works consists of three, coke-fueled plants: the Clairton Plant processes raw coal into coke; the Edgar Thomson Plant produces steel; and the Irvin Plant processes and finishes the steel.

The control rooms at the Clairton Plant "clean[] up" the raw coke-oven gas, in order to prevent the "belch[ing]" of "benzine, hydrogen sulfide, and other

pollutants into the air." In December 2018 and June 2019, the control rooms were shut down due to fires, taking them offline for months. During those months, U.S. Steel could not fully process the raw gas, but kept burning it as fuel. That emitted pollutants into the air.

U.S. Steel hold Title V permits for each of the Plants under the federal Clean Air Act (CAA). 42 U.S.C. § 7661a(a). Under the CAA's cooperative federalism structure, Pennsylvania implements the act within its territory, including the Title V permit program for major sources, such as the Plants. The state's approved plan:

> . . .leaves local enforcement to local agencies--here, the Allegheny County Health Department. In turn, the County has adopted its own emissions standards, monitoring standards, permitting programs, and reporting requirements. *Grp. Against Smog & Pollution, Inc. v. Shenango Inc.*, 810 F.3d 116, 120 (3d. Cir. 2016); 40 C.F.R. § 52.2020(c)(2).

These local regulations, Article XXI, are incorporated into the state's plan, thereby making them "binding federal law under the Clean Air Act. Grp. Against Smog & Pollution, 810 F.3d at 120." Pursuant to the County's requirements and the terms of its Title V permits, U.S. Steel reported the fires and emissions to the County.

Separately, the federal CERCLA also requires the reporting, to the Coast Guard, of pollution emissions by a facility exceeding certain thresholds. 42 U.S.C. § 9603(a). CERCLA exempts form this reporting requirement "federally permitted release[s]," including, with respect to air pollution:

> . . .any emission into the air subject to a permit or control regulation under" "the Clean Air Act or state Plans implementing it. Ibid., emphasis original.

U.S. Steel did not report the fires or emissions to the Coast Guard.

The Clean Air Council brought suit, alleging that U.S. Steel erred in failing to report the fires or emissions to the Coast Guard, arguing that the emissions, in violation of the Plants' Title V permit, were not emission "subject to" a Clean Air Act permit or control regulation.

The U.S. District court disagreed and dismissed the suit.

The Third Circuit's Decision

As the Third Circuit noted, "[t]his case turns on what 'subject to' means in CERCLA's definition of 'federally permitted release,' § 9601(10)(H)." Under a plan meaning analysis, "[d]ueling dictionary definitions support either side." "Subject to" could mean either "governed or affected by"—as U.S. Steel argued, or it could mean "obedient to"—as the Clean Air Council argued. Left with this ambiguity, the Circuit Court turned to the statutory context to discern Congress' intent.

The court noted that when enumerating the other federally permitted pollution emissions exempted from CERCLA reporting requirements, § 9601(10) specifies that the exempt emissions must be "in compliance with" or "authorized by" the applicable federal reporting scheme. For example, exempt discharges must be "in compliance with" a Federal Water Pollution Control Act permit, or releases "in compliance with a legally enforceable final permit" under the Solid Waste Disposal Act. Only in subsection (H), addressing air pollution emissions, is any reference to "compliance" or "authorization" omitted, so that the exemption applies to "any emission into the air subject to a permit or control regulation" under the Clean Air Act. Having restricted the exemption to compliant or authorized emissions elsewhere in the same provision, Congress is presumed to have "included it in one place and excluded it from the other intentionally." *Russello v. United States*, 464 U.S. 16, 23 (1983):

> "If Congress had meant to condition the exemption on compliance with a permit, it would have used that phrase again. It did not."

Further, the court found confirmation elsewhere in both CERCLA and the Clean Air Act that Congress:

> . . .often distinguish[ed] 'subject to' from 'compliance with.' So 'subject to' cannot mean 'obedient to.' It must mean 'governed or affected by.'

For example, under CERCLA grant recipients must be "subject to an agreement that requires the

recipient to comply with all applicable Federal and State laws." § 9604(k)(10)(B) (emphasis added by the Court). Ascribing the same meaning to both "subject to" and "in compliance with" in this provision would render the phrases redundant. Similar usages of the two phrases runs through the Clean Air Act. *See, e.g.*, 42 U.S.C. § 7418(a), § 7503(a)(3).

Further, U.S. Steel's reading of CERCLA is consistent with Congress' intent to establish local implementation of the Clean Air Act's permitting program, by "let[ting] local regulators handle violations." And as the local regulator is also charged with enforcement under the Clean Air Act, the court noted that reporting the emissions to the Coast Guard would have been duplicative and futile.

The court rejected a reference to CERCLA reporting in a Senate report, as that isolated fragment of legislative history did not address the meaning of "subject to." And likewise, the court was not persuaded to extend deference to an administrative decision from "the early 1990s" in which the U.S. Environmental Protection Agency read "subject to" as excluding from the reporting exemption emissions that violate Clean Air Act permits.

Having employed standard methods of statutory construction, the Court of Appeals had eliminated any ambiguity, so that deference was unwarranted. Further, the EPA's decision had not "grapple[d] with the many similar provisions discussed above, which leave no ambiguity for the agency to resolve."

Conclusion and Implications

As the Third Circuit Court of Appeals noted, with enforcement of the Title V program consigned to Pennsylvania's local regulators, reporting these permit violations to the Coast Guard would have been duplicative and futile—except that it would have potentially triggered a large fine under CERCLA. This precedential decision clarifies Title V permit holders' duties when reporting permit violations, providing certainty to those within the Third Circuit. The court's opinion is available online at: https://www2.ca3.uscourts.gov/opinarch/202215pa.pdf.
(Deborah Quick)

FOURTH CIRCUIT FINDS STATE AGENCY DID NOT WAIVE CLEAN WATER ACT SECTION 401 CERTIFICATION

North Carolina Department of Environmental Quality v. Federal Energy Regulatory Commission, 3 F.4th 655 (4th Cir. 2021).

The U.S. Court of Appeals for the Fourth Circuit recently vacated a Federal Energy Regulatory Commission (FERC) order issuing a license for a hydroelectric project. The Fourth Circuit vacated FERC's finding that the North Carolina Department of Environmental Quality waived its federal Clean Water Act § 401 authority to issue water quality certification.

Factual and Procedural Background

The Federal Power Act (FPA) is a comprehensive regulatory scheme governing national water resources including hydroelectric power. Under the FPA, the construction, maintenance, or operation of any hydroelectric project located on navigable waters of the U.S. requires a license issued by the Federal Energy Regulatory Commission.

In addition, under § 401 of the federal Clean Water Act (CWA), applicants seeking federal licensing of projects that would result in a discharge to navigable waters must obtain state water quality certification verifying the project complies with state water quality requirements. If the state denies 401 certification, the federal license or project may not be granted. If a state deems additional conditions are necessary to ensure compliance with state water quality standards, the conditions must be set forth in the 401 certification and the federal licensing agency must incorporate the conditions into the federal license. A state waives water quality certification if the state "fails or refuses to act on a request for certification, within a reasonable period of time (*which shall not exceed one year*)" after receipt of the request.

On March 30, 2015, McMahan Hydroelectric applied to FERC for a license to operate the Bynum

Hydroelectric Project (Project) on the Haw River in North Carolina. On March 3, 2017, McMahan applied for § 401 certification from the North Carolina Department of Environmental Quality (NCDEQ). After the initial application in March 2017, McMahan withdrew and resubmitted its application twice. NCDEQ ultimately issued 401 certification on September 20, 2019. The first withdrawal and resubmission was due, in part, to FERC's failure to complete an Environmental Assessment of the Project. The second withdrawal and resubmission was due in part, to NCDEQ's inability to issue the 401 certification by the one-year deadline because of time frames imposed by the public notice-and-comment process.

On the same day that NCDEQ issued 401 certification, FERC issued an Order granting McMahan a license to operate the Project. FERC concluded that NCDEQ had waived its authority to issue § 401 certification, determining that the statutory one-year period began on March 3, 2017 and was not restarted by the withdrawals and resubmissions. FERC argued that NCDEQ and McMahan coordinated on a withdrawal-and-resubmission scheme for the purpose of evading the § 401 one-year review period.

NCDEQ filed a rehearing request with FERC, seeking rescission of the waiver determination and asking FERC to incorporate the § 401 conditions into the license. FERC denied NCDEQ's rehearing request. NCDEQ petitioned the Fourth Circuit for review of FERC's Order.

The Fourth Circuit's Decision

NCDEQ argued two grounds for vacating the Order: 1) FERC's interpretation of the § 401 waiver provision was inconsistent with the plain language and purpose of the CWA; and 2) alternatively, even if FERC's interpretation of the statute was correct, the waiver finding must be set aside because FERC's key factual findings were not supported by substantial evidence. The Fourth Circuit discussed the meaning of the waiver provision extensively, but ultimately declined to rule on the first issue of statutory interpretation and decided NCDEQ's petition on the second question of substantial evidence review.

The statutory interpretation question presented is the meaning of a state's failure or refusal "to act" as provided in CWA § 401. The court characterized FERC's understanding of the waiver provision as requiring *final* agency action within the one-year period. In other words, because NCDEQ did not issue or deny certification within one year of receiving the initial request, it waived certification authority. The court expressed doubt over FERC's interpretation. According to the Court of Appeals, if Congress had intended for states to take final action within the one-year period, the statute could have clearly required states to "certify or deny" the request. The language of the statute, however, hinges on a state's failure to "act," which plainly means something other than failing to certify or deny. Based on this reading, the court found that a state would not waive its authority if it took "significant and meaningful action" on a certification request within a year of filing.

The court reasoned that the legislative history and purpose of the CWA supported this reading of the waiver provision. The Conference Report on § 401 stated that the time limitation was meant to ensure that "sheer inactivity by the State . . . will not frustrate the Federal application." Given that the CWA carefully allocated authority between federal government and states, the purpose of § 401 was "to assure that Federal licensing or permitting agencies cannot override state water quality requirements."

Circuit Court Precedent on the One Year Rule

The Fourth Circuit acknowledged its understanding of the one-year requirement diverges from decisions in the D.C. Circuit and the Second Circuit. The D.C. Circuit considered a case where a license applicant entered into written agreement with Oregon and California to withdraw and resubmit its 401 certification application in order to avoid waiver. The state agencies failed to grant or deny the application for over ten years. The D.C. Circuit found Oregon and California's "deliberate and contractual idleness" defied the one-year requirement. The Second Circuit adopted a straightforward reading of the one-year period, finding the New York agency waived certification by failing to grant or deny certification within one year after the initial request.

The Fourth Circuit maintained that its interpretation is consistent with the D.C. Circuit Court's decision, reasoning that decision should apply in narrow circumstances, where a withdrawal-and-resubmission scheme coordinated by the license applicant and state deliberately stalled action. In NCDEQ's case, however, there was no "contractual agreement for agency idleness," and overall no idleness on the part

of the agency. NCDEQ consistently took "significant action" on the certification application, including after each withdrawal and resubmission. For example, NCDEQ continued to meet with McMahan to develop the water-quality monitoring plan and moved forward with the notice-and-comment process after FERC issued its Environmental Assessment. Ultimately, NCDEQ granted 401 certification.

The court did not decide the statutory interpretation question, leaving it for resolution in a future case where the outcome depends on the precise meaning of the statute. Even assuming FERC's interpretation of the waiver provision was correct, the court nevertheless concluded that FERC's factual findings—that NCDEQ and McMahan engaged in improper coordination—were not supported by substantial evidence. The court vacated FERC's Order and remanded to FERC to incorporate NCDEQ's 401 certification conditions into the license.

Conclusion and Implications

In this case, the Fourth Circuit Court of Appeals opined that state authority under Clean Water Act § 401 is not waived when the state has failed to take *final* action on a certification request within the statutory one-year period. If the state has taken "significant action" on the certification request, it is deemed to have "acted" on the request. The Fourth Circuit's statutory interpretation of state action under the § 401 waiver provision diverges from decisions in the D.C. and Second circuits. The court's opinion is available online at: https://www.ca4.uscourts.gov/opinions/201655.P.pdf.
(Julia Li, Rebecca Andrews)

DISTRICT COURT PULLS THE PLUG ON CALIFORNIA RESTAURANT ASSOCIATION'S CHALLENGE TO CITY'S BAN ON NATURAL GAS INFRASTRUCTURE IN NEW CONSTRUCTION

California *Restaurant Association v. City of Berkeley*,
___F.4th___, Case No. 4:19-cv-07668-YGR (N.D. Cal. July 6, 2021).

On July 6, 2021, the City of Berkeley's (City) ordinance banning natural gas infrastructure on new construction (Ordinance) survived a federal court challenge by the California Restaurant Association (CRA). While the U.S. District Court held that the CRA had standing to pursue its claim, and that the case was ripe for adjudication, it ultimately granted the City's motion to dismiss all causes of action. The court held that the Ordinance was not preempted by the Federal Energy Policy and Conservation Act (EPCA) and that CRA's claims of state law preemption are appropriately decided by California state courts in the absence of any federal causes of action. In so holding, the court left the kitchen door open for a state court challenge.

Background

In July 2019, the City of Berkeley passed an ordinance prohibiting natural gas infrastructure in newly constructed buildings that effectively prohibited the use of gas appliances. The Ordinance provided an exception if: 1) "it is not physically feasible to construct the building without Natural Gas Infrastructure" and 2) when natural gas "serves the public interest." CRA, an association of members, some of whom sought to open or relocate a restaurant in Berkeley, filed a facial challenge to the Ordinance, *i.e.*, challenging the Ordinance itself rather than applying it to a specific set of facts, alleging that it is preempted by EPCA. It also alleged that the Ordinance was preempted by California law as a void and unenforceable exercise of police power, in conflict with California's Building Standards Code and the Energy Code. In response, the City filed a motion to dismiss the complaint on the grounds that: 1) CRA lacked standing under federal rule of procedure 12(b)(1); 2) EPCA did not preempt the Ordinance; 3) California state law did not preempt the Ordinance; and 4) if the EPCA claim were dismissed, the federal court should not exercise jurisdiction over the state law claims.

The District Court's Decision

The CRA Had Standing to Challenge the Ordinance

The City moved to dismiss the case on the grounds that CRA could not show it had standing to challenge the Ordinance for a federal court to maintain jurisdiction over the case. (*See*, U.S. Const. art. III, § 2.) A plaintiff has standing if it has:

> (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." (*Spokeo, Inc. v. Robins*, 578 U.S. ___, 136 S.Ct. 1540, 1547 (2016).) The injury in fact must be "actual and imminent" and not "conjectural or hypothetical." (*Id.*)

And when an organization is a plaintiff, at least one member must have standing to sue in its own right.

Here, the court dismissed the City's motion to dismiss because CRA showed standing when it alleged that, if it were not for the Ordinance, at least one member of the CRA "would operate a new restaurant in a new construction in Berkeley using natural gas appliances." Additionally, CRA was not required to demonstrate an application for exemption to the Ordinance in order to maintain standing.

The Case Was Ripe for Adjudication

The City also moved to dismiss the case on ripeness grounds, alleging "the harm asserted has [not] matured sufficiently to warrant judicial intervention." (*See Pac. Legal Found. v. State Energy Res. Conservation & Dev. Comm'n*, 659 F.2d 903, 915 (9th Cir. 1981) (citing *Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975).) A case is not ripe if further development of facts would facilitate a court's determination of the issue raised. (*Pac. Legal Found.*, 659 F.2d at 915 (citations omitted).) The court dismissed the City's motion to dismiss on ripeness ground because it held that this case was ripe because the challenge is based on preemption and the facial challenge does not depend on the application of the Ordinance.

Federal Law Did Not Preempt the Ordinance

Next, CRA claimed that the Ordinance was expressly preempted by EPCA. EPCA regulates energy efficiency of certain consumer products including products such as air conditioners, water heaters, and stoves. (42 U.S.C. §§ 6292, 6295.) It explicitly preempts state and local regulations on the energy efficiency and energy use of products covered by EPCA. However, it does not preempt the state and local building codes for new constructions if specific explicit requirements are met. (*Id.* §§ 6297(c)(3), (f)(3).) Further, EPCA also covers certain commercial appliances but excludes ovens for commercial kitchens. (*Id.* §§ 6297(c)(3), (f)(3).) While EPCA also supersedes local and state regulations governing the energy efficiency or energy use of covered products, there are exemptions for the applicability of the provisions related to commercial appliances as well. (*Id.* §§ 6297(c)(3), (f)(3).) Specifically, there is no preemption if the regulation is more protective of the federal standard by exceeding "the applicable minimum energy efficiency requirement." (*Id.* § 6316(b)(2)(B).)

Federal law preempts state or local law when: 1) the federal law explicitly preempts state law; 2) the state or local law conflicts with the federal statute, or 3) the federal law fully occupies a legislative field. (*Hendricks v. StarKist Co.*, 30 F.Supp.3d 917, 925 (N.D. Cal. 2014) (quoting *Chae v. SLM Corp.*, 593 F.3d 936, 941 (9th Cir. 2010)).) CRA's preemption challenge to the Ordinance alleged that EPCA preemption provisions are broad and that the statute's language preempting state and local regulations concerning energy use covers quantity of electricity and fossil fuels. The court disagreed with CRA and dismissed CRA's challenge of the Ordinance because a ban on natural gas in new buildings "does not directly regulate either the energy use or energy efficiency of covered appliances."

The court admonished CRA's sweeping interpretation of the Ordinance because such an interpretation would effectively require localities to continue maintaining natural gas connections. Nothing in the EPCA required states and localities to provide natural gas connections and, even more so, "Congress has historically and explicitly deferred local natural gas infrastructure to states and localities." Because local natural gas infrastructure has traditionally been left to state regulation, there is a strong presumption that

the federal statute should not supersede state law. (*See*, *Hendricks*, 30 F.Supp.3d at 925 (citing *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).) Indeed, in evaluating the legislative history the court concluded "the Ordinance is exercising authority expressly deferred to states and localities."

The State Preemption Causes of Action Are Appropriate for State Court

Upon dismissing the only federal cause of action, the court declined to exercise supplemental jurisdiction over the remaining state law claims, acknowledging that the remaining claims implicate questions of state law, best decided by the California state courts.

Conclusion and Implications

Although the federal court dismissed this case, the pilot light is not out for CRA. The court did not address the state court claims, leaving the door open for CRA to bring a challenge to the Ordinance in the state court. But the implications of this decision extend far beyond the City of Berkeley, as local governments nationwide may now rely on this decision to support adoption of their own limitations or bans on natural gas in the interest of meeting climate change goals.
(Natalie Kirkish, Hina Gupta)

DISTRICT COURT APPLIES CLEAN WATER ACT 'FUNCTIONAL EQUIVALENT' STANDARD SET FORTH BY THE U.S. SUPREME COURT

Hawai'i Wildlife Fund v. County of Maui, ___F.Supp.3d___, Case No. 12-00198 (D. HI July 26, 2021).

To determine if the County of Maui required a federal Clean Water Act permit, the U.S. District Court for the District of Hawai'i applied the "functional equivalent" standard set forth by the U.S. Supreme Court in *County of Maui v. Hawai'i Wildlife Fund*, 140 S.Ct. 1462 (2020). The standard includes criteria for courts to utilize when determining whether or not a discharge into navigable waters requires a National Pollutant Discharge Elimination System (NPDES) permit, as prescribed in the Clean Water Act (CWA).

Factual and Procedural Background

The County of Maui operates a wastewater reclamation facility on the island of Maui, Hawai'i. The facility collects sewage, treats it, and disposes of the treated water underground in four wells. This effluent then travels a further half mile or so, through groundwater, to the Pacific Ocean, although with certain components, like nitrogen, being reduced before the wastewater reaches the ocean.

Monitors at a handful of locations near the shoreline detected less than 2 percent of the wastewater from two of the four wells. No scientific study conclusively established the path of the other 98 percent of the wastewater. The 2-percent of treated wastewater reaching the ocean amounts to tens of thousands of gallons every day. While the parties and court could not point to the exact path of the rest of the 98 percent of wastewater, it is likely that that remainder enters the Pacific Ocean within a few miles of the facility.

With a few exceptions, the Clean Water Act requires a permit when there is the discharge of any pollutant to a navigable water. The Ninth Circuit previously heard this case and ruled that the County of Maui's discharges required an NPDES permit as the pollution and pollutants were "fairly traceable" to their injection wells. On *certiorari*, the U.S. Supreme Court ruled that the fairly traceable standard was too broad and replaced the standard with the functional equivalent standard. With the new standard, the Court provided a non-exclusive framework for other courts to utilize when reviewing this question:

> (1) transit time, (2) distance traveled, (3) the nature of the material through which the pollutant travels, (4) the extent to which the pollutant is diluted or chemically changed as it travels, (5) the amount of pollutant entering the navigable waters relative to the amount of the pollutant that leaves the point sources, (6) the

manner by or the area in which the pollutant enters the navigable waters, [and] (7) the degree to which the pollution (at that point) has maintained its specific identify. Time and distance will be the most important factors in most cases, but not necessarily every case.

The District Court's Decision

On remand, the U.S. District Court applied the functional equivalent standard articulated by the Supreme Court to determine whether the discharges from the County of Maui's injection wells were the functional equivalent to a discharge from a point source. The court applied seven factors identified by the Supreme Court, one factor from U.S. Environmental Protection Agency (EPA) Guidance, and *added* its own factor as follows:

•*Time*—The court found that the time between the effluent leaving the injection wells and reaching the ocean was less than "many years." The court concluded the amount of time was within the window that the Supreme Court expected to require a permit, reasoning that "even if the court double[d] the longest time measured at the seeps" it would still be less time than the ceiling of this factor set forth.

•*Distance*—The court found that the distance from the injection wells to the ocean, when calculated both horizontally and vertically, was a "relatively short distance." Further the court found that even when the pollutant arrived diluted, its journey to the ocean was short enough and less than the "50-mile extreme" set forth by the Supreme Court.

•*Nature of the Material the Pollutant Travels*—The court quickly found that this factor weighed in favor of no permit being required. The court found that the effluent travels and mixes with "other waters flowing through rock and other substances."

•*Extent to Which the Pollutant is Diluted or Chemically Changed as it Travels*—Similar to factor three, the court here found that while there is a pollutant entering the navigable waters, the pollutant is significantly diluted or otherwise removed. Despite the presence of pollutants, this factor weighed in favor of no permit being required as it was significantly diluted or otherwise removed.

•*Amount of the Pollutant Entering the Navigable Waters Relative to the Amount of the Pollutant that Leaves the Point Source*—The court found that this factor weighed in favor of requiring a permit. It reasoned that whether or not some of the pollutant is removed, pollutants still reach the ocean.

•*Manner By or Area in Which the Pollutant Enters the Navigable Waters*—The court reasoned that the manner by which the pollutant enters the ocean is partially known but not completely known. The court reasoned that the lack of complete information in this factor did not weigh in favor or against a permit.

•*Degree to Which the Pollution Maintains its Specific Identity*—The court weighted this factor in favor of needing a permit. Its reasoning being that, even if some of the pollutants are diluted or otherwise removed, the "wastewater maintains its specific identity as polluted water emanating from the wells."

•*System Design and Performance*—Following the Supreme Court decision, the EPA issued guidance on the application of the functional equivalent test. In its guidance, the EPA urged courts to review the design and performance of facilities as it pertains to the factors put forth by the Supreme Court. Ultimately, the District Court found that this factor did not weigh in favor or against the permit in this matter. The reason being is that the Supreme Court and all parties concur on the purpose of the treatment plants and from there to flow to the ocean.

•*Volume of Wastewater Reaching Navigable Waters*—The court added this factor to those provided by the Supreme Court and the EPA. The court stated that it was necessary to separately consider the volume of wastewater reaching the ocean as the other factors had not considered the "immensity of the wastewater volume." The court reasoned that the "raw volume [f wastewater] is so high that it is difficult to imagine why it should be allowed to continue without an NPDES permit."

The court ultimately found that even if the ninth factor were not considered, the balancing of all the other factors weighted heavily towards the County being required to have a NPDES permit.

Conclusion and Implications

This case is the first published case in which a court has applied the "functional equivalent" standard created by the U.S. Supreme Court. The fact-specific nature of the standard means this case will likely be the first of many to come. The District Court's opinion is available online at: https://casetext.com/case/haw-wildlife-fund-v-cnty-of-maui-5.
(Ana Schwab, Rebecca Andrews)

RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL AFFIRMS STATE COASTAL COMMISSION'S COASTAL BLUFF SETBACK REQUIREMENT CONSIDERING FACTORS OF SAFETY AND LIFE OF THE PROJECT

Martin v. California Coastal Commission, ___Cal.App.5th___, Case No. D076956 (4th Dist. June 13, 2021).

The Fourth District Court of Appeal in *Gary Martin v. California Coastal Commission* reaffirmed its determination in *Lindstrom v. California Coastal Commission*, 40 Cal.App.5th 73 (2019) (*Lindstrom*), holding that the City of Encinitas' Local Coastal Program (LCP) and Municipal Code require a development setback from coastal bluffs that takes into account the required factor of safety for the entire life of the project.

Factual and Procedural Background

The Martins own a blufftop vacant lot in Encinitas. They applied to the City of Encinitas (City) for a Coastal Development Permit (CDP) to build a two-story, 3,110 square-foot house with an additional 969 square-foot basement and 644 square-foot garage.

The proposed design set the first story of the home back 40 feet from the 93-foot-high bluff edge and set back the second story cantilevered deck 32 feet. The Martins submitted geotechnical reports certifying the home satisfied the requirements of the LCP contained in the City's Municipal Code § 30.34.020.

The City's third-party geotechnical consultant reviewed those reports and agreed with the analysis. On April 21, 2016, the city planning commission adopted a resolution approving the CDP for their home.

On May 25, 2016, two planning commissioners appealed the City's approval to the Coastal Commission. At the Commission's August 8, 2018 hearing on the appeal, Commission staff presented a report recommending approval of the home but with additional conditions that the home be set back 79 feet from the bluff's edge and barring the design from including a basement. The Commission adopted the staff's recommendation with the conditions.

The Commission found that the City's approval was inadequate because it failed to account for the LCP's requirement that new development be set back far enough to provide for a safety factor of 1.5 at the end of the 75-year life of the project. The safety factor is a calculation that addresses bluff stability, *i.e.*, the risk of landslides or bluff failure, while the time period of 75 years addresses bluff erosion over time during the project's existence.

In determining the 79-foot setback, the Commission relied on the analyses of its staff geologist and its staff engineer, after considering the geotechnical reports provided by the Martins, which certified that the home would be safe from coastal bluff retreat over its 75-year design life without the need for shoreline protection.

The Commission's staff arrived at 79 feet by adding the setback required to achieve a 1.5 factor of safety (40 feet) and the anticipated climate induced erosion over 75 years (39 feet). The 40 feet 1.5 factor of safety was not in dispute. However, the Commission staff disagreed with the Martin's engineer's estimate of a long-term future rate of erosion of 0.27 feet per year, calculating the future erosion rate to be 0.52 feet per year (39 feet over 75 years). Commission staff determined this rate using the SCAPE method, a scientifically supported methodology that incorporates site-specific information and sea level rise estimates.

Commission staff also noted this rate was generally consistent with the 0.49 feet per year erosion rate used by the Commission for the prior five new blufftop home approvals in Encinitas.

As for the proposed basement, the Commission staff found that the Encinitas bluffs are hazardous and unpredictable, and bluff retreat may eventually cause the basement to be exposed, even with a 79-foot setback. The Commission staff also found that removing or relocating the basement, if feasible, would significantly alter the bluff and could threaten its stability.

The Martins submitted a plan for removing the basement, along with their engineer's certification of the plan. The Commission, however, found the

removal plan was insufficient because it failed to provide any detail related to geologic stability risks of removing a basement on an eroding blufftop site, did not detail how removal of the basement would impact stability of neighboring structures, and did not detail how the basement void could be filled upon removal. Thus, the Commission concluded the proposed basement was inconsistent with the LCP's requirement that all blufftop structures be removable.

The Martins filed a petition for writ of administrative mandate and complaint for declaratory and injunctive relief challenging special conditions 1(a) (the 79-foot setback), 1(c) (the basement prohibition).

In addition to seeking a writ of mandate reversing the Commission's conditional approval, the Martins also sought a declaration that the Commission's bluff-edge setback methodology is unlawful and an injunction to preclude the Commission's future use of the methodology.

The trial court's judgment found that special condition 1(a) was inconsistent with the LCP and that the Commission's imposition of the condition was an abuse of discretion. The trial court rejected the Martins' challenge to special condition 1(c). Both parties appealed.

The Court of Appeal's Decision

The Court of Appeal applied the substantial evidence standard of review and reversed the trial court's determination that the Commission's 79-foot setback condition was an abuse of discretion.

The *Lindstrom* Case

In *Lindstrom v. California Coastal Commission*, 40 Cal.App.5th 73 (2019), the Court of Appeal noted that, while the Commission's jurisdiction on appeal is limited to the standards set forth in the LCP, the Commission's jurisdiction on appeal includes imposing reasonable conditions on the CDP that embody state policy. In *Lindstrom*, the Court of Appeal explicitly resolved the same setback question as in this case in favor of the Commission's additive interpretation of the LCP setback requirement. In both *Lindstrom* and this case, the Court of Appeal held that Encinitas Municipal Code § 30.34.020D explicitly requires a structure to be reasonably safe from failure and erosion over its lifetime, which means that the geotechnical report must demonstrate a safety factor of 1.5 at the end of 75 years.

No Error in Commission Setback Interpretation

The Martins argued that the Commission additive interpretation of the LCP contravenes the City's prior interpretation of the LCP. The Court of Appeal held that Municipal Code § 30.34.020D expressly requires that the geotechnical report must demonstrate the factor of safety for the entire 75 years and requires analysis of future structural support. The plain meaning of those provisions dictates the Commission's additive approach. The fact that various lesser setbacks have been accepted by the Commission since the adoption of the LCP in 1995 does not lead to the conclusion that the Commission's interpretation of § 30.34.020D is incorrect.

No Error in Commission Requirement for Removable Structures

The Martins argued that the condition prohibiting a basement should not have been imposed beyond the setback. Policy 1.6 of the LCP lists specific actions that the City must undertake to prevent unnatural coastal bluff erosion, including setbacks and removable construction. Because the paragraph concerning removable construction follows the paragraph concerning setbacks, Martin contended that removable construction was not required beyond the setback. The Court of Appeal disagreed, reading the paragraph regarding removable structures as standing alone.

Substantial evidence supported the Commission's determination that the basement would not qualify as a movable structure. There was evidence that the bluff is highly susceptible to landslides and actively eroding. There was evidence that the basement would be placed into terrace materials consisting of consolidated sand.

Conclusion and Implications

This opinion by the Fourth District Court of Appeal reaffirms the prior decision in *Lindstrom* that coastal bluff setbacks under the Coastal Act as ultimately determined by Coastal Commission standards must take into account both current and future factor of safety, depending on the life of the project,

as determined by the LCP or otherwise. There may be room to negotiate for a shorter project lifetime, but the Encinitas LCP had a fixed 75-year time period.

The Court of Appeal's opinion is available online at: https://www.courts.ca.gov/opinions/documents/D076956.PDF.
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