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ENVIRONMENTAL, ENERGY, & CLIMATE CHANGE

LAW AND REGULATION REPORTER

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ENVIRONMENTAL NEWS

LOWER COLORADO RIVER BASIN REPRESENTATIVES COME TO AGREEMENT ON CONSENSUS-BASED SYSTEM CONSERVATION PROPOSAL FOR NEAR-TERM RIVER OPERATIONS

With just over a week remaining until the original deadline to submit comments on the draft Supplemental Environment Impact Statement for Near-term Colorado River Operations (Draft SEIS) the Department of the Interior announced that a significant development would be putting the review process on hold. In furtherance of the continued efforts to curb the effects of the persistent drought being experienced in the southwestern United States, representatives from the Lower Colorado River Basin States have come together in submitting a proposal for what they are now calling the Lower Basin Plan (Plan). The Plan, as outlined by the representatives in a letter to the US Bureau of Reclamation, would utilize a consensus-based approach to increase voluntary conservation measures throughout the Colorado River Basin.

A Consensus-Based System for Conservation

The consensus-based conservation proposal, agreed upon by the Lower Colorado River Basin States of California, Arizona, and Nevada, establishes a minimum system conservation requirement of at least 3 million acre-feet (MAF) by the end of calendar year 2026. The Lower Basin Plan further demands that at least half of that total be met by the end of 2024.

As for how exactly this will be done, the Lower Basin Plan outlines that up to 2.3 MAF of system conservation will be federally compensated under the Inflation Reduction Act's funding provisions for Drought Mitigation in the Reclamation states. The remaining 0.7 MAF of system conservation would then be left open to compensated reductions funded by state or local entities or simply left up to voluntary, uncompensated reductions by the Lower Basin States. If any system conservation is federally funded with "non-Bucket 1" funding under the Inflation Reduction Act—*e.g.* through "Bucket 2" funding or funding under the Bipartisan Infrastructure Law—the Plan would allow for that system conservation to offset up to 0.2 MAF of the remaining 0.7 MAF in required system conservation. The Lower Basin Plan would also allow for any portion of the remaining required system conservation beyond that offset to be further offset with ICS created in 2023-2026 *and* for any such ICS that the creator cannot order delivery of, transfer, or assign by the end of 2026.

Contingency Plan

As a contingency in the event that Lake Mead water levels fall to critically low elevations, the Lower Basin Plan also outlines a process for the Lower Basin States to take responsive action. Under this contingency, if the April 24-month Study "Minimum Probable" model indicates that the end of year elevation of Lake Mead will fall below 1,025 feet, the Lower Division States will have 45 days to come up with a proposal for the Bureau of Reclamation to protect Lake Mead from reaching an elevation of 1,000 feet. If the Lower Basin States cannot come up with an acceptable proposal, the Bureau of Reclamation would then be able to take independent action to maintain Lake Mead's water levels above 1,000 feet.

DOI Withdraws Its Draft SEIS

In response to the Lower Basin States' submission of the Plan, the Department of the Interior withdrew the Draft SEIS that was published in April so that it can fully analyze the potential impacts of the Plan under the National Environmental Policy Act. From there, an updated version of the Draft SEIS can be published to reflect the inclusion of the consensus-based system conservation as an action alternative, which is expected to occur later this year.

Conclusion and Implications

With the purpose of the Draft SEIS being to modify the guidelines for the operation of the Glen Canyon and Hoover dams in order to address historic drought conditions, low reservoirs, and low runoff conditions throughout the Colorado River Basin,

it is looking like the Lower Basin States have come together with an approach that may yet fulfill that purpose. Utilizing a combination of compensated and voluntary reductions to reach the prescribed three MAF in system conservation over the next three years, the Lower Basin Plan would not require the exercise of authority by the Department of the Interior to implement the reductions and does so without the waiver such authority to protect the Colorado River system in the future if worsened drought conditions require such action.

Looking forward to the future of Colorado River operations, the Department has also formally initiated the process for the development of new operating guidelines to replace the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead at the end of 2026.

As of June 15, the Bureau of Reclamation published its Notice of Intent for the Environmental Impact Statement related to the post-2026 guidelines. The public comment period on the Notice of Intent is currently set to run through August 15, 2023. The Bureau of Reclamation will also be hosting three virtual public meetings to provide information and receive oral comments on the post-2026 guidelines with those dates currently set for Monday, July 17, Tuesday, July 18, and Monday, July 24.
(Wesley A. Miliband, Kristopher T. Strouse)

CAISO 2022–2023 TRANSMISSION PLAN SHIFTS TO PROGRESSIVE TRANSMISSION PLANNING

On May 18, 2023, the California Independent System Operator (CAISO) Board of Governors approved the 2022–2023 Transmission Plan by a unanimous vote. The Transmission Plan involves a total infrastructure investment of an estimated $7.3 billion and 45 transmission projects, most of which would be built in California. The Plan is based on the state's projections that it needs to add more than 40 gigawatts (GW) of new resources over the next ten years, along with a sensitivity study projection estimating a need of 70 GW by 2032. The transition to a carbon-free electrical grid, as required by California's clean-energy policies, has been propelling new transmission development in current and future planning cycles. The Transmission Plan will help California meet its goals.

Overview of the Transmission Plan

The Executive Summary of the Transmission Plan states:

> CAISO's 2022–2023 Transmission Plan reflects a much more strategic and proactive approach to better synchronize power and transmission planning, interconnection queuing and resource procurement and is put forward in close coordination with the state's primary energy planning and regulatory entities, the California Public Utilities Commission (CPUC) and the California Energy Commission (CEC).

This new approach helps to ensure California is prepared to meet the clean-energy policy objectives and reliability needs required by Senate Bill 100. The bill, signed into law in 2018, established a state policy that eligible zero-carbon and renewable energy resources will supply all retail electricity sales to California end-use customers and all electricity used to serve every state agency by the end of 2045.

A Memorandum of Understanding signed by CAISO, CPUC, and CEC in December 2022 establishes an inter-agency coordination framework that will support the new forward-looking transmission planning process. Under the MOU, CPUC will continue to provide resource planning information to CAISO. CAISO will develop a final transmission plan, initiate transmission projects, and inform the electric industry of specific geographic zones targeted for transmission projects and the capacity being made available in those zones. CAISO will give priority to interconnection requests within those same zones. In turn, the CPUC will direct load-serving entities to focus their energy procurement in those transmission zones in harmony with the Transmission Plan.

While a significant investment will be needed to complete the Transmission Plan's recommended transmission projects, actual build-out of the plan will be phased in over lead times of up to eight to ten years. Costs to consumers would translate to approximately 0.5 cents per kilowatt-hour (kWh) over the life of the projects, phased in through the rate-design process between utilities and their regulatory authorities as the new facilities come online:

> This 2022–2023 transmission plan represents the next major installment of infrastructure investment required to meet California's long-term clean energy goals," said Elliot Mainzer, the CAISO's president and CEO. "In close coordination with regulatory agencies, load-serving entities and other key stakeholders, we endeavored to address the state's reliability and policy needs in the most cost-effective and efficient way possible.

The Transmission Plan's Development Projects

The Transmission Plan makes clear that:

> . . .[t]ransmission projects are categorized as reliability-driven projects—those needed to serve load reliably meeting NERC [North American Electric Reliability Corporation] national standards; policy driven projects needed to deliver renewable generation to load centers to meet state clean energy goals, and economic-driven projects that will reduce the cost of energy to ratepayers by, for example, reducing grid congestion costs.

CAISO found it would need 45 transmission projects, most of which would be built in California, for a total infrastructure investment of an estimated $7.3 billion, to accommodate over 40 GW of new critical generation resources comprised of: over 17 GW of solar generation; over 3.5 GW of in-state wind generation; over 1 GW of geothermal development; access for battery storage projects co-located throughout California with renewable generation projects; the importation of over 4.5 GW of out-of-state wind generation by enhancing corridors from the CAISO border in southeastern Nevada and from western Arizona into California load centers; and up to 3 GW of central coast offshore wind generation prior to the retirement of the Diablo Canyon Power Plant, and up to 5 GW after the retirement. The recommended transmission projects include multiple new 500 kV transmission lines and upgrades to existing lines to provide access to east Riverside County, Imperial County and Arizona solar generation, Imperial Valley geothermal, and New Mexico wind generation; upgrades to the Lugo–Victor–Kramer 230 kV transmission system; and various smaller upgrades to improve access to smaller resource zones. The CAISO's comprehensive analysis included screening hundreds of options and evaluating in detail the recommended projects, as well as over 60 alternatives.

To ensure that new transmission projects are sited to maximize grid reliability, the Plan identifies 14 specific geographic zones where it makes operational and economic sense to add transmission facilities and upgrades. The locations and capabilities of these geographic zones will be shared with developers of storage and generation projects, and the CPUC will encourage load-serving entities to procure generation from new resources located in the identified zones. The CAISO will also give priority to interconnection requests for storage and generation resources located in the zones.

Three of the largest transmission projects out of the 45 will be open to bidding from independent developers with an aim to fill the gap in Southern California grid capacity stemming from the 2013 San Onofre nuclear power plant closure. Most of the remaining transmission projects will be built by Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company. The costs of these projects will be taken on by their customers. While there is some opposition to utility-owned transmission projects, as many California utility customers already face some of the highest electricity bills in the U.S., others argue the projects will bring cheaper clean energy from expanded grid capacity and that not building the new power lines will be much more expensive in the long run due to rising costs and extreme weather incidents resulting from climate change.

Conclusion and Implications

The 2022–2023 Transmission Plan has garnered broad stakeholder support. The Transmission Plan will bring clean energy developers and transmission-planning policies together, and the zone-focused ap-

proach should provide clarity, increased cost-efficiency, and a more streamlined process. While the Transmission Plan will not fix all of the state's challenges, such as permitting and other practical roadblocks, it is a big step towards a carbon-free electrical grid and heightened collaboration among those working to see this grid come to fruition. For more information, *see: 2022–2023 Transmission Plan*, CAISO (May 18, 2023), http://www.caiso.com/InitiativeDocuments/ISO-Board-Approved-2022-2023-Transmission-Plan.pdf.

(Megan V. Unger, Megan J. Somogyi, Hina Gupta)

CALIFORNIA GOVERNOR NEWSOM SIGNS EXECUTIVE ORDER THAT MAY BENEFIT WATER STORAGE AND INFRASTRUCTURE PROJECTS

In May 2023, Governor Newsom signed Executive Order N-8-23 (Order), which calls for the streamlining and expediting of administrative processes related to various infrastructure projects in California, including water projects. The Order creates a Strike Team to identify projects that could benefit from the Executive Order's directives and helps prioritize important infrastructure projects for streamlining purposes. Executive Department State of California, *Executive Order N-8-23* (May, 19, 2023).

Background

California Governor Gavin Newsom signed Executive Order N-8-23 on May 19, 2023 in an effort to streamline and expedite permitting, construction, and ultimately operation of a variety of critical infrastructure projects throughout the state. Specifically, by facilitating and streamlining project approvals and completions, the Order is intended to maximize California's share of federal infrastructure funds and implement projects intended to advance the state's various clean energy and other large infrastructure goals in the future. California intends to invest up to $180 billion over the coming decade to advance clean energy projects.

Areas for improvements to California's ability to meet its infrastructure goals targeted by the Order include the following: (1) construction, (2) judicial review, (3) permitting, (4) CEQA procedures, and (5) the maximizing of federal funds. The Order directs the Senior Counselor on Infrastructure to convene an Infrastructure Strike Team (Strike Team), and directs the Strike Team to identify projects on which to focus streamlining efforts, to support coordination between agencies and governments, and to support infrastructure. The Order further directs working groups created by the Strike Team, one of which focuses on water, to prioritize funding projects that achieve multiple benefits. This funding is identified in the Order as coming from both the state of California and the federal government through the Infrastructure Investment and Jobs Act (IIJA)and the Inflation Reduction Act (IRA).

With respect to water, the Order specifically calls for adaption and innovation to diversity water supplies, expand water resources, efficiently use existing water resources, strengthen California's water resiliency, and modernize our water infrastructure.

Streamlining Projects

In tandem with the Order, Governor Newsom's office identified several examples of projects that could be streamlined. These included water storage projects funded by Proposition 1 and the Delta Conveyance Project. Notably, many of these such projects are identified in California's Water Resilience Portfolio. In 2020, state agencies developed the Water Resilience Portfolio in response to the Executive Order N-19-20, which directed state agencies to develop recommendations to meet California's challenges of rising temperatures, over drafted groundwater, aging infrastructure, and water security. In particular, the Water Resilience Portfolio identifies four broad approaches to support water systems in California, which are: (1) maintain and diversify water supplies; (2) protect and enhance natural systems; (3) build connections; and (4) be prepared. Each of these then have detailed recommendations and actions that fall underneath one of the approaches. Furthermore, the portfolio also breaks down each action by the agency that should pursue or perform the action. In sum, the Water Resilience Portfolio contains more than

100 separate detailed actions to be implemented to the extent resources are available. The 2023 Order presents an opportunity for more resources to be made available to implement these identified actions.

Proposition 1—Six New Water Storage Projects

For instance, under Proposition 1, six new water storage projects eligible for $2.7 billion in state water bond funding advancing their projects. This includes the Sites Reservoir, Harvest Water Program, the Kern Fan Project, Los Vaqueros Reservoir Expansion Project, Pacheco Reservoir Expansion Project, and the Willow Springs Water Bank Conjunctive Use Project. Since the publication of the Water Resilience Portfolio, all the projects were deemed feasible and if completed they would together expand the state storage capacity of water by nearly 2.8 million acre-feet. Such storage could address the concerns of rising temperatures, drought, aging infrastructure, and water security —all of which are challenges that need to be met according to the Order. Thus, these projects could benefit from the streamlining that the Order calls for as well as the funding and could likely be projects that the Strike Team identifies and focuses on.

Strike Team to Identify Changes to Facilitate Streamline Project Approval

In addition to Proposition 1 projects, the working groups created by the Strike Team are also directed to:

> . . .[i]dentify potential statutory and regulatory changes to facilitate and streamline project approval and completion, and elevate propose changes to the Strike Team for consideration.

Proposals for such changes include authorizing expedited judicial review to avoid delays on the back end of projects without reducing environmental and governmental transparency provided for under the California Environmental Quality Act. Similarly, changes to accelerate permitting for certain projects, reduce delays, and reduce project costs are also being proposed. If implemented, such statutory and regulatory changes could facilitate completion of water-related projects that are delayed by administrative obstacles or legal challenges.

Conclusion and Implications

Projects for water storage and groundwater storage, such as those funded by Proposition 1, will likely be identified by the Strike Team as projects where federal and state funding opportunities can be maximized to increase water infrastructure and resiliency. Thus, they may benefit from not only additional funding, but from processes to streamline and expedite the projects. It remains to be seen what regulatory or other changes will be made to streamline and expedite proper review of such projects and whether those projects will move forward.
(Miles Krieger, Steve Anderson)

LEGISLATIVE DEVELOPMENTS

PROPOSED U.S. SENATE BILLS WOULD EXPAND FUNDING AND ELIGIBILITY FOR ENVIRONMENTAL PROTECTION PROGRAMS

In anticipation of the upcoming 2023 Farm Bill, two bipartisan groups of U.S. Senators have set forth two significant proposals: the Headwaters Protection Act and the Conservation Reserve Program Improvement Act. These bills take aim at fixing and modernizing outdated conservation programs that were established in previous Farm Bills. If adopted, these bills would greatly increase the amount of federal funding and the number of eligible participants for the Water Source Protection Program and the Conservation Reserve Program.

The Headwaters Protection Act

On June 7, 2023, U.S. Senators Michael Bennet (D – Colorado) and Mike Crapo (R – Idaho), along with their colleagues, introduced a bipartisan bill dubbed the Headwaters Protection Act of 2023 (HPA). This bill would reauthorize and expand the purpose, eligibility, and funding of the Water Source Protection Program (WSPP) adopted in the 2018 Farm Bill.

The WSPP was established with the goal of rehabilitating and protecting watersheds through a partnership between the Secretary of Agriculture (Secretary) and public and private entities. This program was, and is, designed to maintain the watersheds in the National Forest System, which provide water to "end water users," such as a state, a municipal water system, a nonprofit organization, or a corporation. The WSPP enables the Secretary to enter into "water source investment partnership agreements" with the end water users and provide them with federal funds to repair and protect the watershed. To participate, the end water users are required to match the amount of federal funding they received with their own investment. In addition, the WSPP also allows the Secretary to conduct forest management activities within National Forest System land if it is necessary to protect or enhance the water quality of the watersheds. This maintenance activity must have the primary purpose of protecting the municipal water system and restoring the health of the forest from insect infestation and diseases. Lastly, the WSPP authorizes the Secretary to annually spend $10,000,000 from 2019 to 2023 for the purpose of this program.

Regardless of its innovative approach to foster collaboration between the federal government and other entities for the conservation of national watersheds, the WSPP was not all that effective and was never fully appropriated; hence, the HPA was introduced. One of the key improvements of the HPA is the expansion of the program's purpose. Unlike the WSPP, which focused solely on maintaining watersheds in the National Forest System and the federal forest surrounding them, the HPA would also extend its conservation effort to any non-federal lands that are adjacent to the watersheds and National Forest System land. Under the HPA, the Secretary and the end water users could conduct activities even on certain private lands. Furthermore, the HPA would recognize the protection of forests from insect infestation, diseases, and forest fires as standalone objectives of the program. As a result, forest maintenance activities need not be exclusively linked to ensuring the water quality of watersheds as was required by the WSPP. Also, the HPA proposes some minor procedural changes, such as adopting funding priorities that favor historically disadvantaged communities and expanding the definition of eligible end water users.

Another key change proposed by the HPA is the overall expansion of funding. Under the HPA, the annual budget of the program would be $30,000,000, a $20,000,000 increase from the WSPP's annual budget. Moreover, the HPA would no longer require the end water users to equally match the federal contribution with their own investment. Instead, they would only need to invest an amount of at least 20 percent of the federal funding to be eligible for the program. The Secretary can also waive this 20 percent contribution requirement based on the Secretary's discretion.

The Conservation Reserve Program Improvement Act

Since its implementation in the 1985 Farm Bill, the Conservation Reserve Program (CRP) has been a crucial initiative for environmental conservation in the United States. Under the CRP, private landowners may enter into a contract with the Department of Agriculture (Department) to cease agricultural use of their lands deemed environmentally sensitive for ten to 15 years. Such a practice allows the restoration of soil, water, and wildlife resources on these lands. The participating landowners are required to perform "management activities," such as tilling, grazing, and prescribed burning, which ensure the biodiversity of these lands. As compensation, the landowners receive a rental payment of up to $50,000 per year.

Currently, the CRP protects about 22 million acres of environmentally sensitive land, successfully creating many wild life habitats with healthy water and soil. However, the program has not been significantly updated since its adoption in 1985. As a result, the total acreage of CRP-enrolled land has dropped by 37 percent since its peak in 2007.

The recently proposed Conservation Reserve Program Improvement Act (Improvement Act) by U.S. Senators Klobuchar (D – Minnesota) and Rounds (R – South Dakota) aims to remedy the problem of aging CRP provisions. First and foremost, the Improvement Act increases the maximum annual rental payment from $50,000 to $125,000. If adopted, this would be the first time the maximum annual rent amount would be updated since the adoption of the CRP almost forty years ago. In addition, the Improvement Act would also subsidize 50 percent of the cost of installing fencing and water infrastructure for grazing if the land meets certain qualifications. Similarly, the Improvement Act would also share the cost of performing some management activities other than haying and grazing.

Conclusion and Implications

Many conservation groups, such as Trout Unlimited and the Nature Conservancy, supported the introduction of HPA as a way of reducing the financial and procedural hurdles to participating in the program established by the WSPP. The provisions in the HPA are certainly more concrete and extensive than the provisions in the WSPP, but it is still uncertain whether the federal government could create the unique environmental partnership it envisioned in the WSPP through this new program. As for the CRP, it has existed as a popular program for many farmers and ranchers who want to retire some of their lands for additional income while protecting the environment and wildlife. Despite the gradual decrease in participating agricultural lands, the CRP is still one of the largest single conservation programs. If this proposed bill is adopted, there will be significant financial and environmental incentives for the landowners to participate in the CRP again, which may restore the program to its former glory.

Although these two bills offer vastly different approaches for protecting our water resources, they both present unique and practical ways in which we can make an impact on the overall strain our system has experienced in the ongoing drought and otherwise. The Improvement Act takes a more traditional approach to conservation, cutting back on irrigation and other agricultural related water uses. By contrast, the HPA takes a more indirect approach by emphasizing the need for healthy watersheds to meet the needs of downstream water users. As the 2023 Farm Bill nears in time we may yet see more initiatives looking to enhance and protect our water supplies, but the HPA and Improvement Act represent worthwhile efforts towards this goal.

For more information on the Headwaters Protection Act, *see:* https://www.congress.gov/bill/118th-congress/house-bill/4018/text?s=1&r=13. For more information on the Conservation Reserve Program Improvement Act, *see:* https://www.congress.gov/bill/118th-congress/senate-bill/174?q=%7B%22search%22%3A%5B%22Conservation+Reserve+Program+Improvement+Act%22%5D%7D&s=1&r=1.

(Wesley A. Miliband, Kristopher T. Strouse, Andrew J. Hyun)

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CALIFORNIA DROUGHT AND FLOOD STREAMLINING TRAILER BILL: FLOODWATER DIVERSION EXCEPTION AND DROUGHT CONTROL MEASURES

As California reckons with the likelihood of ongoing issues relating to flooding and drought, Governor Newson has put forward a trailer bill attached to the 2024 budget that would amend existing sections of the Fish and Game Code and the Water Code to streamline flood and drought responses. One of the central facets of the bill is an amendment to the Water Code that seeks to streamline water projects with an eye toward helping the state meet its climate goals.

Background

The Drought and Flood Streamlining Trailer Bill (Drought and Flood Bill) was included as an amendment to the state budget. Such "trailer bills" are passed as part of the adoption of the state's budget in June without going through the typical committee process. A number of other measures aimed at advancing water policy have been included as trailer bills as part of the 2023-2024 budget process, including an infrastructure bill that would overhaul permitting and litigation for the Delta Conveyance Project. The use of trailer bills to implement substantive policy is controversial because such bills give lawmakers less opportunity to consider, amend, or challenge proposed policy.

Floodwater Diversion and Drought Control Measures

The Drought and Flood Bill includes a number of amendments aimed at streamlining floodwater diversion measures by excluding such activities from the usual restrictions included in Chapter 6 of the Fish and Game Code. The chapter provides for fish and wildlife protection and conservation by implementing the Lake and Streambed Alteration Program. The program requires that the Department of Fish and Wildlife review whether a proposed activity will substantially adversely affect an existing fish and wildlife resource and provides for steps an entity must take to proceed with the project while protecting those resources. Section 1610 includes an exemption for emergency work or projects. The Drought and Flood Bill would expand Section 1610's exemptions to include activities undertaken pursuant to Section 1242.2 of the Water Code, which concerns the diversion of flood flows for groundwater recharge. This amendment would therefore classify such diversions as emergency actions under Section 1610 that are exempt from the review and mitigation procedures otherwise required under Chapter 6. By exempting qualifying projects from California Department of Fish and Wildlife review, the Drought and Flood Bill is intended provide for faster project approval and implementation.

The Drought and Flood Bill would also amend Water Code section 1242 to clarify existing law to state that the diversion of flood flows for groundwater recharge is a beneficial use. The amendments to Water Code section 1242 would further provide that the beneficial use of such groundwater is not limited to only uses requiring subsequent extraction of the recharged water; protection of water quality may also be a beneficial use.

The Drought and Flood Bill would add section 1242.2 to the Water Code. If adopted, Water Codes section 1242.2, subdivision (a), would provide that the diversion of flood flows for groundwater recharge would not require an appropriative water right if a local or regional flood control agency, city, or county has alerted the public that flows downstream of the point of diversion are at immediate risk of flooding. To ensure that the diversion's purpose is confined to flood control, section 1242.2, subdivision (b) would provide that the diversions must cease when the flood conditions have abated. Section 1242.2, subdivision (c) would forbid the diversion of water to the following areas: (1) animal waste generating facilities, (2) agricultural fields where pesticides have been applied within 30 days, (3) areas where the release of water could cause infrastructure damage, and (4) areas that have not been actively irrigated for agricultural cultivation within the past three years, unless there is an existing facility on the land for groundwater recharge or managed wetlands. Section 1242.2, subdivision (c) would also forbid diversions to the Sacramento-San Joaquin Delta for the purposes of meeting flow requirements for achieving water quality or protecting endangered species in the Delta. Section 1242.2, subdivision (e) would address the use of existing

infrastructure to facilitate diversions by requiring the use of existing facilities or temporary infrastructure where none is available. Section 1242.2, subdivision (e) would also emphasizes the temporary nature of the diversion by forbidding the person or entity making the diversion from claiming any water right based on that diversion. Last, section 1242.2, subdivision (g) would provide that preliminary and final reports must be filed by the party making the diversion. The ostensible purpose of exempting such diversions of floodwaters from the requirements for establishing or exercising appropriative water rights is to allow parties to capture floodwaters for recharge (perhaps with little warning) without first having to undertake the time-consuming permit application process otherwise required by the State Water Resources Control Board (SWRCB).

The Drought and Flood Streamlining Trailer Bill also amends a number of other Water Code provisions to include references to Section 1242.2. Specifically, Water Code section 1831d, subdivision (7) would provide that the SWRCB may issue a cease and desist order in response to a violation or threatened violation of a condition or reporting requirement for the diversion of floodwaters for groundwater recharge under Section 1242.2. Likewise, Water Code section 1846 would be amended to read that a person or entity may be subject to a maximum $500 fine for violating a condition or reporting requirement under Section 1242.2.

The Drought and Flood Bill would also amend Water Code section 13198 to provide the definitions for the provisions relating to drought relief in Article 6 of the Water Code. The amendment would add the phrase "water use reduction and efficiency equipment" to Water Code section 13198, subdivision (c)(1)(G) to define "interim or immediate relief" to include construction or installation of water use and efficiency equipment. The amendment would also add Section 13198, subdivision (c)(1)(K) to include groundwater recharge projects pursuant to the proposed Section 1242.2 as additional tools for drought relief.

Last, the Drought and Flood Control Bill would amend Water Code section 1398.2 to exempt information related to drought emergency activities from the public posting and notice requirements of Government Code sections 7405 and 11546.7. State agencies would alternatively be required to post an accessible version of any materials related to the emergency response as soon as practicable.

Conclusion and Implications

If adopted as currently drafted, the Drought and Flood Bill will have potentially broad implications for the capture and use of floodwaters for groundwater recharge and for drought response more generally. The use of a trailer bill to bring this measure before the Legislature as part of the budget process remains controversial, and the nature of the trailer bill may obscure a careful analysis of the bill's impacts or the extent of opposition to the substance of the bill. For example, it remains to be seen whether the bill will affect pending water rights petitions for flood flows pursuant to existing rules for appropriating water. The full text of the Drought and Flood Bill is available online at: https://esd.dof.ca.gov/trailer-bill/public/trailerBill/pdf/910.
(Brian Hamilton, Sam Bivins)

REGULATORY DEVELOPMENTS

EPA PROPOSES NEW RULES FOR GREENHOUSE GASES FOR NEW SOURCE PERFORMANCE STANDARDS FROM FOSSIL FUEL-FIRED ELECTRIC GENERATING UNITS

On May 23, 2023, the United States Environmental Protection Agency's (EPA) proposed rule setting new greenhouse gas (GHG) emissions standards for coal- and gas-fired power plants (Proposed Rule) was published in the Federal Register. The new proposed GHG emissions standards aim to fulfill EPA's obligation under the federal Clean Air Act (CAA) to control carbon dioxide emissions at new and existing power plants through a variety of control methods like carbon capture and storage, low GHG-hydrogen co-firing, and natural gas co-firing. More specifically, EPA is proposing (1) revised New Source Performance Standards (NSPS) for GHG emissions from new fossil fuel-fired stationary combustion turbine electric generating units (EGUs) and fossil fuel-fired steam generating units that undertake a large modification, based upon the eight-year review that the CAA requires; (2) emission guidelines for GHG emissions from existing fossil fuel-fired steam generating EGUs, which include both coal-fired and oil/gas-fired steam generating EGUs; and (3) emission guidelines for GHG emissions from the largest, most frequently operated existing stationary combustion turbines. As part of this Proposed Rule. the EPA is also proposing to formally repeal the Affordable Clean Energy (ACE) Rule.

Background and Legal Authority

The CAA gives EPA the legal authority to adopt these new standards nationwide. Specifically, CAA section 111 directs the EPA Administrator to establish new NSPS and emission guidelines that are based on available and cost-effective technologies that directly reduce GHG emissions from new and existing fossil fuel-fired EGUs. The United States Supreme Court's ruling in *Massachusetts v. E.P.A.* also mandates that EPA create power plant GHG emissions regulations since carbon dioxide is an air pollutant under the CAA. (*See Massachusetts v. E.P.A.*, 549 U.S. 497, 528-529 (2007) ["The Clean Air Act's sweeping definition of 'air pollutant' includes 'any air pollution agent or combination of such agents, including any physical, chemical…substance or matter which is emitted into or otherwise enters the ambient air'….Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt 'physical [and] chemical… substance[s] which [are] emitted into…the ambient air'"].) Last year, the United States Supreme Court further outlined the scope of EPA's power under the CAA to regulate emissions of certain air pollutants from existing sources, ruling:

> . . .[t]he statute directs EPA to (1) 'determine[],' taking into account various factors, the 'best system of emission reduction which…has been adequately demonstrated,' (2) ascertain the 'degree of emission limitation achievable through the application' of that system, and (3) impose an emissions limit on new stationary sources that 'reflects' that amount. (*See West Virginia v. EPA*, 142 S. Ct. 2587, 2601 (2022) [quoting 42 U.S.C. 7411(d)].)

Further, the court found that:

> [a]lthough the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d)… [and] decides the amount of pollution reduction that must ultimately be achieved. (*Id.* at 2602.)

Although the United States Supreme Court in *West Virginia v. EPA* ruled last year that EPA cannot force power plants to switch from coal to cleaner energy sources, the EPA Administrator determined that the control methods and systems of emissions reduction proposed in the rule such as fuel switching, add-on controls, and efficiency improvements fall within the scope of EPA's powers.

Previous administrations have struggled to establish emission standards for power plants. In 2015, the

Obama Administration promulgated the Clean Power Plan (CPP), which enabled states to force power plants to switch from coal to other energy sources. The Trump Administration rescinded the CPP in 2019 and promulgated the ACE rule in its place. Neither the CPP nor the ACE ever went into effect due to legal challenges.

The Proposed Rule

The Proposed Rule sets new carbon dioxide emissions standards for coal- and gas-fired power plants. New gas-fired combustion turbines, existing coal-, oil-, and gas-fired steam generating units, and certain existing gas-fired combustion turbines would be subject to the new rule. Rather than setting one standard for all proposed plants, EPA will base emissions standards on whether a facility is new or existing, combustion turbine or utility boiler, coal-fired or natural gas-fired, how frequently it operates, and how long it is expected to be in use. These are summarized below.

Best System of Emissions Reduction

When regulating a pollution source such as carbon dioxide under section 111, the CAA requires EPA to apply the "best system of emissions reduction" (BSER) that has been "adequately demonstrated" for emissions standards. EPA must also assess costs and health and environmental impacts of utilizing relevant pollution control technology.

In the Proposed Rule, EPA proposes that carbon capture and sequestration/storage (CCS) at a capture rate of 90 percent is the BSER for long-term coal-fired steam generating units because CCS is now widely applicable to sources and there are vast sequestration opportunities across the United States. The costs for CCS are also reasonable. EPA believes that long-lived coal-fired power plants will generally be able to implement and operate CCS within the cost parameters calculated as part of the BSER analysis, and therefore that they would be able to meet a standard of performance based on CCS with 90 percent capture.

New Source Performance Standards

New and reconstructed natural gas turbine generators would be required to meet the following phased standards:

- For peaking units, with a capacity factor of less than 20 percent, EPA proposes that the BSER consist of using fuels with low carbon intensity and high-efficiency generation, which results in specific limits on carbon emissions based on pounds of GHG emissions per megawatt-hour of electricity produced.

- For intermediate load units with a capacity factor above 20 percent but below the capacity factor for baseload units, the BSER would be a combination of highly efficient generation and co-firing with low-GHG hydrogen.

- For baseload units, the best system of emission reduction would comprise highly efficient generation systems combined with either CCS or hydrogen co-firing. If the baseload generator chooses the CCS path, it would be required to install CCS capturing 90 percent of GHG emissions by 2035. If the operator chooses the co-firing option, they would need to co-fire with 30 percent hydrogen by 2032 and ramp up to 96 percent hydrogen by 2038.

GHG Limits on Existing Coal-Fired Generation

For existing coal-fired generators, the EPA proposes three different subcategories based on the anticipated retirement date of the unit:

- For imminent-term units that are committed to retire no later than January 1, 2023, the BSER will be limited to improved operations and maintenance to minimize GHG emissions.
For medium-term units that will operate beyond 2032, but will commit to retire before January 1, 2040, EPA would impose the same operations and maintenance requirements as imminent-term units and also require that medium-term units co-fire with 40 percent natural gas to attain a 16 percent reduction in GHG emissions.

- For long-term units operating past 2040, EPA would require installation of CCS that would capture 90 percent of the plant's carbon dioxide emissions.
For existing sources, standards are implemented by states and tribes, which are tasked with developing state implementation plans.

GHG Limits on Existing Gas-Fired Generation

For existing natural gas combustion turbines, EPA proposes an approach similar to its NSPS proposal, which is based on the capacity factor of particular generating units:

- For peaking units, with a capacity factor of 20 percent or less, the performance standard would be limited to the use of low-emitting fuels with an emissions rate of 160 pounds of CO2 per metric million British thermal units or less.

- For intermediate units, with a capacity factor above 20 percent, but below the capacity factor for baseload units, the EPA would require a combination of highly efficient generation plus a requirement that the units be co-fired by low-GHG hydrogen, with at least 30 percent of their fuel supplied by hydrogen by 2032.

- For baseload gas-fired generators, EPA proposes that they incorporate highly efficient generation technology combined with either CCS — which must capture 90 percent of the unit's GHG emissions by 2035—or co-fire with low-GHG hydrogen, with 30 percent co-firing by 2032 and 96 percent co-firing by 2038.

Conclusion and Implications

Once finalized, the Proposed Rule is very likely to face legal challenges similar to the legal challenges that the Obama and Trump administrations have faced on this subject for over a decade. But EPA's decision to regulate this space despite previous challenges will ultimately have long-term impacts for industry and the environment. Based on its research and analysis, EPA believes that CCS is one of the BSERs that industry should implement. EPA is therefore soliciting comments on the Proposed Rule to hear from industry if particular plants would be unable to implement CCS, including details of the circumstances that might make retrofitting with CCS unreasonable or infeasible. The comment period on the proposed rule ends on August 8, 2023.
(Lauren Murvihill, Hina Gupta)

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD TO TAKE CRITICAL STEPS TOWARD PLACING GROUNDWATER BASINS ON PROBATION AND ON PATH TO INTERVENTION

Following multiple attempts to submit and revise Groundwater Sustainability Plans (GSPs), Groundwater Sustainability Agencies (GSAs) responsible for managing six large basins may soon be placed in probationary status and potentially subject to intervention from the California State Water Resources Control Board (State Water Board). Such intervention would be costly in many respects. The State Water Board is beginning the intervention process now, beginning with probationary hearings.

Background

California's Sustainable Groundwater Management Act of 2014 (SGMA) prioritizes local groundwater management. The law requires formation of groundwater sustainability agencies to develop and implement groundwater sustainability plans and to take related actions to avoid long-term "undesirable results." GSPs musts be submitted to the Department of Water Resources (DWR) for review. GSPs that do not substantially comply with statutory requirements and DWR emergency regulations must be corrected until they achieve compliance.

A failure of compliance may result in the loss of local control, through which the State Water Board intervenes and imposes direct basin management. Such management would likely comprise blunt pumping reductions and imposition of hefty groundwater pumping fees. SGMA provides that even after State Water Board intervention, local GSAs must prioritize achieving compliance in order to achieve and regain local management responsibilities. In other words, intervention is intended to be a temporary rather than permanent status.

GSPs Deemed Inadequate

In March 2023, DWR deemed six groundwater sustainability plans to be inadequate, placing those plans on a pathway toward potential intervention by the State Water Board. The six basins include: (1) Delta Mendota, (2) Chowchilla, (3) Kaweah, (4) Tulare Lake (5) Tule and (6) Kern County.

The inadequate designation follows prior attempts to remedy previously incomplete GSPs. Basins designated by the DWR as being subject to conditions of critical overdraft were required to adopt and submit GSPs by January 2020. DWR is statutorily required to review submitted plans within two years. GSPs for these basins were deemed incomplete in January 2022, and given six months to submit revisions. Revised plans were submitted in the summer of 2022 but ultimately found inadequate by DWR, citing primarily failures to sufficiently address chronic and continuing overdraft, accelerating land subsidence and impacts on domestic wells.

Probationary Status

When a GSP is deemed inadequate by DWR, the State Water Board considers whether to place the basin into probation. During the probationary period, GSAs may be allowed time to address and correct issues. If they remain uncorrected, the State Water Board may proceed with developing and implementing an Interim Plan, which is most likely to be characterized by significant reductions in pumping and the imposition of expensive fees. Probationary basins are generally provided one year to attempt to make necessary corrections. The process of entering and exiting probation must be open and transparent, including through public State Water Board meetings.

State Water Board Prioritization for Probationary Basins

At a recent board meeting, the State Water Board received a staff presentation outlining factors to consider in determining a potential probationary status. Staff identified and recommended prioritizing the six basins into two groups. The "first priority basins" include Kaweah, Tulare Lake, Tule and Kern County. These basins were described by State Water Board staff as continuing to see groundwater declines without a clear or reliable path to correction.

The "second priority basins" include Delta Mendota and Chowchilla, which State Water Board staff describe as basins that, though experiencing severe challenges, may be correctable in a shorter timeframe.

Based upon those priority levels, probationary hearings could begin as early as December 2023 and continue through October 2024. This timeline is subject to change.

Basin probationary hearings before the State Water Board must be publicly noticed. Cities and counties must receive at least 90 days' notice. Known pumpers must be notified at least 60 days in advance. State Water Board staff must present, prior to the hearing, a list of deficiencies in a public report. Local stakeholders and others may comment on the report. Staff then consider public comments and must issue a revised report, if needed, and a proposed probationary order for consideration at the public hearing.

In the interim, GSAs are expected to continue working hard to avoid and/or exit probationary status.

Conclusion and Implications

SGMA implementation has presented significant challenges throughout much of the State. A significant number of basins with GSPs that DWR deemed complete remain subject to legal challenges and comprehensive groundwater basin adjudications to determine water rights under the "streamlined groundwater adjudication" law. The six basins now facing potential probation and intervention may still, technically, avoid that status and retain local management responsibilities. However, the timeline and effort to do so becomes more complicated and intensive as the State Water Board contemplates assuming that control. State Water Board intervention and an interim plan directed and implemented from Sacramento would likely see dramatic pumping reductions and hefty groundwater management fees—not including creative and tailored solutions that local stakeholders could otherwise potentially advance. (Derek Hoffman)

PENALTIES & SANCTIONS

RECENT INVESTIGATIONS, SETTLEMENTS, PENALTIES, AND SANCTIONS

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

Civil Enforcement Actions and Settlements—Air Quality

•June 28, 2023—The U.S. Environmental Protection Agency announced a settlement with Didion Ethanol LLC for alleged violations of the federal Clean Air Act in Cambria, Wisconsin.

EPA alleged Didion's ethanol production facility violated its 2014 and 2018 permits by failing to consistently direct all emissions from the fermentation process to the ethanol recovery system and failing to develop a sufficient malfunction prevention and abatement plan. EPA also alleged that the facility failed to operate its flare with no visible emissions and complete required pump monitoring.

Didion will pay a civil penalty of $170,000 and agreed to:

- •Conduct monthly or quarterly monitoring.
- •Install equipment to continuously detect and prevent excess emissions from the fermentation process.
- •Implement visual emission monitoring at the flare.
- •Improve recordkeeping, inspection and corrective action throughout the facility.
- •Update and submit a modified malfunction prevention and abatement plan.
- •Submit a permit application to the state to make requirements from this settlement last beyond the end of the order.

EPA estimates Didion will be in compliance within a year.

•June 22, 2023—Kansas City, Kansas, diesel service and auto repair shop KC Performance Diesel LLC agreed to settle an enforcement action with the U.S. Environmental Protection Agency (EPA) for allegedly tampering with car engines to render emissions controls inoperative and for failing to permit EPA access to inspect and copy records. These actions were violations of the federal Clean Air Act, according to EPA.

The settlement documents allege that KC Performance Diesel sold or installed so-called "defeat devices" on at least 96 occasions and refused to grant EPA access to records as part of a compliance evaluation conducted by the Agency. As part of the settlement, the company agreed to destroy its defeat device inventory and certify that it will not sell or install defeat device components in the future.

KC Performance Diesel is in an area identified by EPA as already having high levels of air pollution, including higher than average levels of diesel particulate matter, and socioeconomic burdens. EPA is strengthening enforcement in such communities to address disproportionately high effects of pollution on vulnerable populations.

Civil Enforcement Actions and Settlements—Water Quality

•June 29, 2023—The U.S. Environmental Protection Agency announced a settlement with the City of Las Vegas to address deficiencies and non-compliance with its federal Clean Water Act (CWA) pretreatment program. The City of Las Vegas operates the Las Vegas Water Pollution Control Facility (WPCF) and the Durango Hills Water Resource Center (WRC), which discharge treated wastewater into the Las Vegas Wash, which feeds into Lake Mead.

During an October 2022 pretreatment compliance inspection, EPA found that the City of Las Vegas' pretreatment program was not as stringent as the federal regulations of the Clean Water Act. The City has agreed to rectify non-compliance with federal regulations, including submitting a new Local Limits study and a revised sewer use ordinance to EPA for review by December 31, 2023.

In an administrative order on consent (AOC) issued June 9, 2023, EPA states that this facility did not rectify legal authority violations of CWA pretreatment regulations, that were first identified in a 2017 pretreatment compliance audit. Further, the City is required to revise its local limits and industrial user wastewater discharge permits.

•June 28, 2023—The U.S. Environmental Protection Agency (EPA) has settled with two shipping companies over claims of violations of EPA's Vessel General Permit issued under the Clean Water Act. Under the terms of the settlements, Swire Shipping Pte. Ltd. will pay $137,000 in penalties and MMS Co. Ltd. will pay $200,000 in penalties for claims of ballast water discharge, inspection, monitoring, and reporting violations.

Swire Shipping is a privately-owned company headquartered in Singapore. Two of Swire Shipping's vessels cited, the Papuan Chief and the New Guinea Chief, exclusively visited the Port of Pago Pago in American Samoa. The third vessel, Lintan, has visited the Ports of San Francisco and Long Beach in California as well as other U.S. ports. Swire Shipping failed to: treat ballast water prior to discharging it into the ocean in a manner consistent with the compliance deadline; conduct annual comprehensive inspections; conduct annual calibrations of a ballast water treatment system; monitor and sample discharges from ballast water treatment systems; and report complete and accurate information in annual reports. The settlement includes penalties of $67,075 for the Papuan Chief, $19,906 for the New Guinea Chief, and $50,019 for the Lintan.

MMS Co. is a privately-owned company headquartered in Tokyo, Japan. MMS Co. failed to: meet ballast water limitations for biological indicators and biocide residuals in discharges at U.S. ports, including the Port of Richmond in California; conduct annual calibrations of ballast water treatment systems; monitor and sample discharges from ballast water treatment systems; and report complete and accurate information in annual reports. The settlement includes penalties of $110,509 for the St. Pauli and $89,491 for the Centennial Misumi.

In addition, it is important that such discharges by ships be monitored to ensure that aquatic ecosystems are protected from discharges that contain pollutants. Invasive species are a persistent problem in U.S. coastal and inland waters. Improper management of ballast water can introduce invasive species or damage local species by disrupting habitats and increasing competitive pressure. Discharges of other waste streams regulated by the Vessel General Permit (e.g., graywater, exhaust gas scrubber water, lubricants, etc.) can cause toxic impacts to local species or contain pathogenic organisms.

EPA's settlement with the two shipping companies resolves claims of Clean Water Act violations and are subject to a 30-day public comment period prior to final approval.

•June 23, 2023—The U.S. Environmental Protection Agency (EPA) announced that Messer LLC has agreed to pay a $1.9 million civil penalty for federal Clean Water Act permit violations at its air products manufacturing facility in New Cumberland, West Virginia.

Along with the financial penalty, Messer has agreed to take actions to eliminate ongoing National Pollutant Discharge Elimination System (NPDES) permit violations and prevent future violations. This includes constructing a new treatment system at the facility and conducting enhanced stormwater discharge inspections to ensure compliance with the Clean Water Act and parallel West Virginia laws. The facility exceeded permit limits for copper, aluminum, residual chlorine, phenolics and iron.

The penalty will be divided equally between the United States and West Virginia, who are co-plaintiffs in this consent decree. The West Virginia Department of Environmental Protection assisted EPA in the investigation, litigation and settlement. The settlement addresses alleged federal and state environmental law violations, which threaten to degrade receiving streams and impact public health and harm aquatic life and the environment.

The facility is bordered by the Ohio River and discharges into the river.

The proposed consent decree, filed in the federal district court for the Northern District of West Virginia, is subject to a 30-day public comment period and approval by the federal District court.

•June 20, 2023—The U.S. Environmental Protection Agency (EPA) has entered into Expedited Settlement Agreements with Hawaii Gas, Sunbelt Rentals, and Pacific Biodiesel Technologies for failing

to comply with Spill Prevention, Control, and Countermeasure (SPCC) requirements at their Honolulu facilities. The SPCC requirements prevent oil from reaching navigable waters, shorelines, and requires plans to contain oil spills.

EPA found that:

- Hawaii Gas failed to conduct regular inspections of their tanks and containment;
- Sunbelt Rentals did not have an SPCC plan in place;
- Pacific Biodiesel Technologies did not have a fully compliant SPCC Plan (certified by a professional engineer).

Failure to implement measures required by the SPCC Rule can threaten public health or the welfare of fish and other wildlife, public and private property, shorelines, habitat, and other living and nonliving natural resources. Specific prevention measures include developing and implementing spill prevention plans, training staff, and installing physical controls to contain and clean up oil spills.

Civil Enforcement Actions and Settlements—Hazardous Chemicals

•June 30, 2023—The U.S. Environmental Protection Agency announced a settlement with Heritage-Crystal Clean LLC over alleged violations of the Emergency Planning and Community Right-to-Know Act at the company's facility located at 3970 West 10th Street, Indianapolis, Indiana. The company has paid a penalty of $38,221 and conducted a supplemental environmental project to replace lead-contaminated windows at residential homes in Indianapolis.

EPA alleges Heritage-Crystal Clean a petroleum lubricating oil and grease manufacturer, violated the Emergency Planning and Community Right-to-Know Act by failing to submit required annual reports for toxic chemicals it manufactured, processed, or otherwise used in quantities above reporting thresholds. Specifically, the company failed to submit timely reports for 1,2,4-trimethylbenzene, ethylbenzene, toluene, xylene, naphthalene, chlorobenzene, lead, polychorinated biphenyls, molybdenum trioxide, and nickel compounds and to retain documentation for three years.

As part of the 2019 settlement with EPA, the company also replaced 129 windows suspected to present lead-based paint hazards in Indianapolis neighborhoods with environmental justice concerns. Heritage-Crystal Clean spent approximately $191,000 to complete the project.

Heritage-Crystal Clean's facility is in an industrial area EPA identified as potentially having high pollution and socioeconomic burdens. EPA is strengthening enforcement in such communities to address disproportionately high human health or environmental effects of industrial operations on vulnerable populations.

•June 14, 2023—The U.S. Environmental Protection Agency (EPA) announced that Hecla Mining Company's Greens Creek Mine, located on Admiralty Island near Juneau, Alaska, was fined $143,124 for violating hazardous waste management and disposal requirements under the Resource Conservation and Recovery Act (RCRA).

Following an August 2019 inspection, EPA cited the mining company for the following violations:

- disposal of hazardous waste containing lead without a permit;
- failure to conduct a weekly inspection of a hazardous waste storage area;
- failure to determine if waste from mining operations was hazardous;
- failure to properly label a used oil container.

The settlement agreement acknowledges that the company will continue to clean up lead contaminated soil.

RCRA was enacted to protect public health and the environment and help prevent long and expensive cleanups by requiring the safe and environmentally sound management and disposal of hazardous waste.

(Robert Schuster)

RECENT FEDERAL DECISIONS

U.S. SUPREME COURT DENIES NAVAJO NATION A COURT-MANDATED SOLUTION TO WATER ACCESS

Arizona et al. v. Navajo Nation, et al, ___U.S.___, Case No. 21-1484 (June 22, 2023).

The Supreme Court has issued its decision, in a 5 to 4 vote, in which the majority found the 1868 Treaty and under the *Winters* doctrine:

> do not support the claim that in 1868 the Navajos would have understood the Treaty to mean that the United States must take affirmative steps to secure [already scarce] water for the Tribe.

The majority opinion was penned by Justice Kavanaugh and joined by Justices Roberts, Thomas, Alito and Barrett. Justice Gorsuch issued a dissenting opinion joined by Justices Sotomayor, Kagan and Jackson which would have had the Court allow the Navajo Nation's claims to move forward—akin to the decision of the Ninth Circuit Court of Appeals.

Background

The Navajo Tribe is one of the largest in the United States, with more than 300,000 enrolled members, roughly 170,000 of whom live on the Navajo Reservation. The Navajo Reservation is the geographically largest in the United States, spanning more than 17 million acres across the States of Arizona, New Mexico, and Utah. To put it in perspective, the Navajo Reservation is about the size of West Virginia.

In 1849, the United States entered into a Treaty with the Navajos. *See* Treaty Between the United States of America and the Navajo Tribe of Indians, Sept. 9, 1849, 9 Stat. 974 (ratified Sept. 24, 1850). In that 1849 Treaty, the Navajo Tribe recognized that the Navajos were now within the jurisdiction of the United States, and the Navajos agreed to cease hostilities and to maintain "perpetual peace" with the United States. *Ibid.* In return, the United States agreed to "designate, settle, and adjust" the "boundaries" of the Navajo territory.

Two treaties between the United States and the Navajo Tribe led to the establishment of the Navajo Reservation.

For the next two decades, however, the United States and the Navajos periodically waged war against one another. In 1868, the United States and the Navajos agreed to a peace treaty. In exchange for the Navajos' promise not to engage in further war, the United States established a large reservation for the Navajos in their original homeland in the western United States. Under the 1868 Treaty, the Navajo Reservation includes (among other things) the land, the minerals below the land's surface, and the timber on the land, as well as the right to use needed water on the reservation. [Majority Opinion]

The 1868 Treaty was to put an end to "all war between the parties." The United States "set apart" a large reservation "for the use and occupation of the Navajo tribe" within the new American territory in the western United States. Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, 15 Stat. 667–668 (ratified Aug. 12, 1868). Importantly, the reservation would be on the Navajos' original homeland, not the Bosque Redondo Reservation. The new reservation would enable the Navajos to once again become self- sufficient, a substantial improvement from the situation at Bosque Redondo. The United States also agreed (among other things) to build schools, a chapel, and other buildings; to provide teachers for at least ten years; to supply seeds and agricultural implements for up to three years; and to provide funding for the purchase of sheep, goats, cattle, and corn. [Ibid]

Under the 1868 Treaty, the Navajo Reservation includes not only the land within the boundaries of the reservation, but also water rights. Under this Court's longstanding reserved water rights doctrine, sometimes referred to as the *Winters* doctrine, the Federal Government's reservation of land for an Indian tribe also implicitly reserves the right to use

needed water from various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation. [Ibid]

The Navajo Reservation lies almost entirely within the Colorado River Basin, and three vital rivers—the Colorado, the Little Colorado, and the San Juan—border the reservation. To meet their water needs for household, agricultural, industrial, and commercial purposes, the Navajos obtain water from rivers, tributaries, springs, lakes, and aquifers on the reservation. [Ibid]

Over the decades, the Federal Government has taken various steps to assist tribes in the western States with their water needs. The Solicitor General explained that, for the Navajo Tribe in particular, the Federal Government has secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo Reservation.

Nature of the Legal Dispute

In the Navajos' view, however, those efforts did not fully satisfy the United States' obligations under the 1868 Treaty. The Navajo Nation sued the U. S. Department of the Interior, the Bureau of Indian Affairs, and other federal parties. As relevant here, the Navajos asserted a breach-of-trust claim arising out of the 1868 Treaty and sought to "compel the Federal Defendants to determine the water required to meet the needs" of the Navajos in Arizona and to "devise a plan to meet those needs." App. 86. The States of Arizona, Nevada, and Colorado intervened against the Tribe to protect those States' interests in water from the Colorado River.

According to the Navajos, the United States must do more than simply not *interfere* with the reserved water rights. The Tribe argued that the United States also must *take affirmative steps* to secure water for the Tribe— including by assessing the Tribe's water needs, developing a plan to secure the needed water, and potentially building pipelines, pumps, wells, or other water infrastructure. [Ibid]

At the District Court and Ninth Circuit Court of Appeals

The U. S. District Court for the District of Arizona dismissed the Navajo Tribe's complaint. In relevant part, the District Court determined that the 1868 Treaty did not impose a duty on the United States to take affirmative steps to secure water for the Tribe.

The U. S. Court of Appeals for the Ninth Circuit reversed, holding in relevant part that the United States has a duty under the 1868 Treaty to take affirmative steps to secure water for the Navajos. *Navajo Nation* v. *United States Dept. of Interior*, 26 F.4th 794, 809–814 (2022). The Supreme Court granted *certiorari*. 598 U. S. ___ (2022) [Ibid]

The Majority Opinion

With this backdrop of the history of the formation of the Navajo Nation's Reservation land, the Treaties, and the *Winters* doctrine, in an arid West, the Court found that the United State's obligations did not go so far as to include the duty to take affirmative steps to secure water supply:

> Of course, it is not surprising that a treaty ratified in 1868 did not envision and provide for all of the Navajos' current water needs 155 years later, in 2023. Under the Constitution's separation of powers, Congress and the President may update the law to meet modern policy priorities and needs. To that end, Congress may enact—and often has enacted—legislation to address the modern water needs of Americans, including the Navajos, in the West. Indeed, Congress has authorized billions of dollars for water infrastructure for the Navajos. . .But it is not the Judiciary's role to update the law. And on this issue, it is particularly important that federal courts not do so. Allocating water in the arid regions of the American West is often a zero-sum gain situation. . . And the zero-sum reality of water in the West underscores that courts must stay in their proper constitutional lane and interpret the law (here, the Treaty) according to its text and history, leaving to Congress and the President the responsibility to enact appropriations laws and to otherwise update federal law as they see fit in light of the competing contemporary needs for water.

The Court went on the emphasize its interpretation of the Treaty and in the end, it's conclusion as to implications of a duty on the part of the United States to supply water to the Tribe:

> The 1868 treaty granted a reservation to the Navajos and imposed a variety of specific obligations on the United States—for example, building schools and a chapel, providing teachers, and supplying seeds and agricultural implements. The reservation contains a number of water sources that the Navajos have used and continue to rely on. But as explained above, the 1868 treaty imposed no duty on the United States to take affirmative steps to secure water for the Tribe.

The Dissenting Opinion

In the Dissent, Justice Gorsuch, along with Justices Sotomayor, Kagan and Jackson found that the Navajo Nation's claims should move forward, along the lines of the Ninth Circuit's decision:

> This case is not about compelling the federal government to take "*affirmative steps* to secure water for the Navajos." *Ante*, at 2. Respectfully, the relief the Tribe seeks is far more modest. Everyone agrees the Navajo received enforceable water rights by treaty. Everyone agrees the United States holds some of those water rights in trust on the Tribe's behalf. And everyone agrees the extent of those rights has never been assessed. Adding those pieces together, the Navajo have a simple ask: They want the United States to identify the water rights it holds for them. And if the United States has misappropriated the Navajo's water rights, the Tribe asks it to formulate a plan to stop doing so prospectively. Because there is nothing remarkable about any of this, I would affirm the Ninth Circuit's judgment and allow the Navajo's case to proceed.

Looking to the "promises" made pursuant to the Treaty and establishment of a "homeland," Justice Gorsuch went on to state:

> The Treaty of 1868 promises the Navajo a "permanent home." Treaty Between the United States of America and the Navajo Tribe of Indians, June 1, 1868, Art. XIII, 15 Stat. 671 (ratified Aug. 12, 1868) (Treaty of 1868). That promise—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.

But Justice Gorsuch opined why quantifying those water rights by this Court was repugnant to the Majority, especially in light of the *Winters* and *McGirt* decisions

> Yet even today the extent of those water rights remains unadjudicated and therefore unknown. What is known is that the United States holds some of the Tribe's water rights in trust. And it exercises control over many possible sources of water in which the Tribe may have rights, including the mainstream of the Colorado River. Accordingly, the government owes the Tribe a duty to manage the water it holds for the Tribe in a legally responsible manner. . . . It is easy to see the purchase these rules have for reservation-creating treaties like the one at issue in this case. Treaties like that almost invariably designate property as a permanent home for the relevant Tribe. See *McGirt* v. *Oklahoma*, 591 U. S. ___, ___ (2020) (slip op., at 5). And the promise of a permanent home necessarily implies certain benefits for the Tribe (and certain responsibilities for the United States). One set of those benefits and responsibilities concerns water. This Court long ago recognized as much in *Winters* v. *United States*, 207 U. S. 564 (1908). . . . For these reasons, the agreement's provisions designating the land as a permanent home for the Tribes necessarily implied that the Tribes would enjoy continued access to nearby sources of water. . . because the Treaty of 1868 must be read as the Navajo "themselves would have understood" it, *Mille Lacs Band*, 526 U. S., at 196, it is impossible to conclude that water rights were not included. Really, few points appear to have been *more* central to both parties' dealings. What water rights does the Treaty of 1868 secure to the Tribe? Remarkably, even today no one knows the answer. But at least we know the right question to ask: How much is required to fulfill the purposes of the reservation that the Treaty of 1868 established?

Conclusion and Implications

In the West and especially amongst the Lower Basin States, competition for Colorado River water is fully in play with scarcity forming the basis for a voluntary agreement for water sharing [and conservation efforts]. With this as a backdrop, the Navajo Nation claims water rights and ongoing water *supply*, with a duty imposed on the U.S. to assist in this, pursuant to trust theory, the 1868 Treaty and the Supreme Court's *Winters* decision. The Supreme Court, while recognizing the Treaty's obligations, including water, found duties on the part of the United States only extended so far—that those obligations did *not* apply to affirmative actions to secure ongoing water supply in an arid West with, as the Court states, classifies as a "zero-sum gain." The Court looked to the four-corners of the Treaty and found no affirmative duty to provide water supply and further, found that under the U.S. Constitution's, only the President and Congress may change the U.S. obligations relating to water—but the courts are not the vehicle to achieve this result. The Court's opinion is available online at: https://www.supremecourt.gov/opinions/22pdf/21-1484_aplc.pdf.
(Robert Schuster)

FIFTH CIRCUIT DETERMINES CITY STORMWATER MANAGEMENT FEES ARE NOT 'REASONABLE SERVICE CHARGES' ON FEDERAL FACILITIES

City of Wilmington v. United States, 68 F.4th 1365 (5th Cir. 2023).

The Fifth Circuit Court of Appeals, on May 31, 2023, denied the assessment of stormwater management fees by the City of Wilmington, Delaware against the U.S. Army Corps of Engineers (Corps) because the fees were not a "reasonable service charge" under Clean Water Act section 313.

Factual and Procedural Background

The Corps owns five properties in Wilmington, Delaware, which occupy nearly 11,888,000 square feet. The properties are used for dredge material disposal in support of Corps' work dredging waterways near Wilmington. Stormwater runs off the properties into a nearby river, but none of the properties discharges into the city's stormwater system.

As part of its water pollution management program, Wilmington charges its residential and non-residential property owners a stormwater management fee. The fee is based on a formula comprised of four variables: (1) gross parcel area; (2) the runoff coefficient between 0 and 1 based on a property's approximate imperviousness; (3) impervious area, calculated by multiplying the property's total area by the assigned runoff coefficient; and (4) an equivalency stormwater unit, derived from the size of the median single-family home.

For the runoff coefficient, the city relied on the county tax assessment categorization of properties into 200 sub-categories. Then, the city grouped several types of sub-categories into broader categories and designated runoff coefficients for the categories. The runoff coefficients were assigned based on a 1962 study, which specified the runoff coefficients for various types of land uses and the work of an engineering firm, Black Veatch. The city did not provide further evidence on how the land use categories from the 1962 study and the county's tax assessment categories were similar or related. The city's code established a process for appealing determinations of the four factors.

Wilmington designated all five Corps properties as "vacant," which had a runoff coefficient of 0.3, meaning that nearly 30 percent of rainwater would runoff and carry any contaminants into the stormwater system. Based on the 0.30 runoff coefficient and Wilmington's methodology for calculating fees, the city assessed the Corps $2,577,686.82 in fees for the properties between January 4, 2011, and April 16, 2021. The Corps never paid the assessed service charges or pursued the city's appeal process.

Section 313 of the Clean Water Act (CWA) requires federal facilities to adhere to federal, state, local, and interstate requirements related to water

pollution abatement, including payment of "reasonable service charges." In the absence of this provision, federal facilities would have sovereign immunity from the local fees. Congress thus provided a broad waiver of this federal sovereign immunity under the CWA to ensure federal facilities comply with local pollution requirements.

In 2016, Wilmington sued the Corps to recover $2,577,686.82 in unpaid stormwater management fees and $3,360,441.32 in accrued interest between January 4, 2011, and April 16, 2021. The Corps moved for judgment on partial findings, which the trial court granted. Wilmington appealed.

The Fifth Circuit's Decision

On appeal, the Fifth Circuit considered whether the storm management fees assessment process met the "reasonable service charge" requirements of the CWA to waive sovereign immunity for federal facilities. The court began by clarifying that the general approach used by the city is allowed. At least three-quarters of cities use a similar category and runoff coefficient approach when assessing similar fees. However, it was the specific manner of application by the city which the court determined did not adhere to the statutory definition of "reasonable service charges."

First, the court pointed to the lack of evidence connecting the runoff coefficient from the 1962 study to the county tax assessor property categories. The court reasoned that while the county definitions and categories of property may accurately reflect the nature of the properties for tax purposes, there was no further evidence that those definitions accurately reflected the nature of the properties for stormwater runoff. The city assumed that definitions used in the 1962 stormwater study correlated to similar meanings as the tax assessor categories without providing evidence of such a connection.

Second, the court highlighted the wide variance of potential runoff attributed to the "vacant" property category, which had an automatic coefficient of 0.30 and attributed to all of Corps' properties. In doing so, the court rejected the city's arguments that size differences allow charges on a class containing 'totally different properties' to remain proportional to runoff while retaining similar land use characteristics and that use of runoff units normalized each property's estimated impervious area. In rejecting these arguments, the court noted that city witnesses testified that "marshes or wetlands" could be included in the "vacant" stormwater class together with "wooded areas," "regular grass," "loose gravel," "concrete and asphalt," and "different kinds of soils." The city also agreed that "properties with completely different land covers could be included in the vacant stormwater class." Additionally, the appeal process for fees also implicitly admits that it subjects property owners to unfair fees, where due to "site specific variances," "in some situations, the resulting measure of imperviousness may differ from the actual imperviousness that exists in a specific property." Taken together, the court stated that the vacancy designation "says nothing about the other physical characteristics of the land that would impact stormwater runoff."

Finally, the court noted that the city's appeal process is permissive, not mandatory, and is solely forward looking. As a result, the appeal would not provide the retroactive relief sought by the Corps. The Corps was not required to exhaust the appeal process before refusing to pay the assessed fees.

Conclusion and Implications

The court emphasized that the holding in this case is limited to the specific facts of the case. The court even reiterated that there was "nothing necessarily problematic about a stormwater fee methodology that uses a multifactor formula, or a formula that includes impervious area or runoff coefficients as variables." However, the case emphasizes the need to provide evidence regarding how a methodology that relies on land use codes or classes of property, which is used by three-quarters of cities, fairly captures variability within the land use code or property class. The court's opinion is available online at: https://law.justia.com/cases/federal/appellate-courts/cafc/22-1581/22-1581-2023-05-31.html.

(Uriel Saldivar, Rebecca Andrews)

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ELEVENTH CIRCUIT DISMISSES CLEAN WATER ACT CITIZEN SUIT BASED ON DILIGENT PROSECUTION BAR

South River Watershed Alliance, Inc. v. Dekalb County, Georgia, 69 F.4th 809 (11th Cir. May 31, 2023).

The United States Court of Appeals for the Eleventh Circuit, on May 31, 2023, dismissed a federal Clean Water Act (CWA) citizen suit because the government was already diligently prosecuting the party allegedly in violation.

Factual and Procedural Background

In 2010, the United States EPA and Georgia Department of Natural Resources (GDNR) sued Dekalb County, Georgia for violating the CWA. The parties entered into a consent decree in 2011 to resolve the suit. The consent decree included the goals of full compliance with the CWA, the Georgia Water Quality Control Act, and the elimination of all sanitary sewer overflows. The consent decree included a one-time penalty, remedial measures, and large fines for failing to meet specified deadlines. Additionally, the consent decree stated that the court would retain jurisdiction over the case until the consent decree was terminated. In 2020, the EPA and GDNR moved to reopen the litigation against Dekalb County and agreed to modifications of the consent decree, including an extension of some of the original deadlines.

South River Watershed Alliance, Inc. (South River) is a non-profit that advocates for protecting the South River and Chattahoochee River watersheds. South River filed a complaint against Dekalb County in 2019, alleging discharges in violation of sections 301 and 402 of the Clean Water Act, and seeking civil penalties, fees, and costs. Dekalb County moved to dismiss the complaint arguing that suit was barred under the diligent prosecution bar by the consent decree itself and the EPA's enforcement of the consent decree.

Under the diligent prosecution bar, if the state or federal government has commenced and is diligently prosecuting a civil or criminal action in a court of the United States to require compliance with a standard, limitation, or order under the Clean Water Act, no citizen suit may be commenced. The District Court determined that South River's claims addressed the same violations that formed the basis of the 2010 government suit, which resulted in the consent decree, and held that the diligent prosecution bar precluded South River's action. The court granted Dekalb County's motion to dismiss. South River appealed.

The Eleventh Circuit's Decision

On appeal, the Circuit Court applied a two-step test for determining whether a citizen suit is precluded by the diligent prosecution. First, the court determined whether an action by the government enforced the same "standard, order, or limitation" and was pending on the date that the citizens suit commenced. Second, a court determined whether the pending action was being "diligently prosecuted" by the government at the time the citizens suit was filed.

In analyzing the first step, the court noted that South River did not argue that the EPA and GDNR were not prosecuting their action against Dekalb County. Nevertheless, the court determined South River's claims overlapped with the issues the consent decree sought to remedy.

In analyzing the second step, the court first determined that "diligence" should be analyzed with at least some deference to the EPA and GDNR. This is because citizen suits are meant to "supplement rather than supplant government action." If a court fails to defer to an agency when that agency chooses to enforce the CWA through a consent decree, the court could undermine the agency's strategy.

Next, the court looked at the terms in the consent decree itself and whether the EPA and GDNR had been diligent in overseeing the consent decree. The express goal of the consent decree was for Dekalb county to achieve "full compliance with the CWA." Furthermore, the provisions in the consent decree were calculated to reach this goal, specifically it imposed penalties on Dekalb County and requirements to implement programs to stop future overflows and rehabilitate affected areas from past overflows. When looking at the EPA and GDNR's enforcement actions, the court found that the most important factor in showing the government's diligence was the fact that "each year, from 2012 to 2018, the EPA

and GDNR have assessed penalties totaling nearly one million dollars" against Dekalb County for its reported spills. This showed that the government had been diligent in monitoring Dekalb County's progress and using fines to compel the county to comply with the consent decree.

Continuing Jurisdiction and the Consent Decree

The court also examined the terms in the consent decree that provided for the court to retain jurisdiction. South River argued that the government's modifications to the consent decree in 2020 showed a lack of diligence. However, the court came to the opposite conclusion, determining that the modification was evidence of diligence. In order to speed up the process of compliance, the EPA and GDNR made certain tradeoffs in the modified consent decree, and that is the exact type of agency decision that courts are meant to defer to in citizen suits.

The court found that the EPA and GDNR had met the diligence threshold, and upheld the District Court's decision that South Water's suit was precluded by the diligent prosecution bar.

Conclusion and Implications

This case upholds the rule that the creation and use of a consent decree between the government and a party in violation of the CWA can serve as evidence of diligent prosecution under the diligent prosecution bar of a citizen suit. The court's opinion is available online at: https://casetext.com/case/s-river-watershed-all-v-dekalb-cnty.
(Cara Vincent Williams, Rebecca Andrews)

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RECENT STATE DECISIONS

CALIFORNIA COURT OF APPEAL AFFIRMS UC BERKELEY EIR ANALYSIS OF SHADING, VIBRATION AND WILDFIRE POTENTIAL ENVIRONMENTAL IMPACTS

Berkeley Citizens for a Better Plan v. Regents of University of California, ___Cal.App.5th___, Case No. A166164 (1st Dist. May 5, 2023).

In this second appeal from the Superior Court decision upholding the Environmental Impact Report (EIR) for the University of California Berkeley's (Berkeley) long range development plan (Plan), the First District Court of Appeal in *Berkeley Citizens for a Better Plan v. Regents of University of California* upheld the trial court's decision denying a writ of mandate for alleged failure to analyze shading, wildfire, vibration and baseline conditions in the EIR. The first appeal in *Make UC a Good Neighbor v. Regents of University of California* was determined on February 24, 2023, and was previously reported in the April version of the *California Land Use Law & Policy Reporter*.

Factual and Procedural Background

The EIR concerns Berkeley's 2021 Plan and two student housing projects, Anchor House and People's Park. The EIR here is a hybrid: a program EIR that addresses the broadly defined policies and concepts in the long-range development plan, as well as more detailed, project-level analyses of the housing projects.

In this appeal, Berkeley Citizens for A Better Plan (Citizens) challenge the EIR on the grounds that it: (1) should have analyzed the impacts of shadows from the People's Park housing project on two historical buildings; (2) inadequately addressed mitigation for impacts of construction-related vibrations; (3) inadequately addressed impacts relating to wildfire; and (4) did not properly describe baseline environmental conditions.

Background on the Issue of Shade

The two neighboring historical buildings are a school and a church. The school buildings including the first brown-shingled building in Berkeley that helped launch the Arts and Crafts movement. The church is regarded as an Arts and Crafts masterpiece. The school is listed in the National Register of Historic Places; the church is a National Historic Landmark.

The church features a window wall of hammered Belgian glass that, in the spring and early summer, is infused with purple light from wisteria that blooms on the west facade.

The People's Park housing project consists of two buildings, one of which will have 17 stories. The EIR concedes that the building will dwarf the one- and two-story historical buildings. Because the size and scale of the project are incompatible with the nearby historical resources, the EIR finds that the project will have a significant and unavoidable impact on them.

The EIR did not consider whether shadow from the housing project would also negatively affect the school and the church, treating that as a policy concern, not an environmental effect under CEQA. The Regents also concluded that an exemption under the California Environmental Quality Act (CEQA) for urban infill projects bars them from considering aesthetic impacts of the People's Park project.

The Regents commissioned a shade and shadow study, which shows that the People's Park project will partially shade the church for about three and one-half hours in the late afternoon and evening at the summer solstice, and from 4:00 p.m. to 4:50 p.m. at the winter solstice. The project will shade much of the school at the winter solstice. A licensed landscape architect concluded that the wisteria will receive ample sunlight—four to six hours per day.

Background on the Issue of Vibration

The EIR disclosed that impacts from vibrations generated by construction equipment could exceed the EIR's threshold of significance for architectural damage, in part due to uncertainty about the future

projects and their construction methods. This would be a *potentially significant* impact." The EIR therefore proposed NOI-2, a three-step mitigation measure for any project tiered off the long-range development plan EIR anticipated to involve vibration-causing construction methods.

The three steps involve screening, alternative construction methods to pile driving, and, if no feasible alternatives, a vibration monitoring program, including potential corrective measures and repair to vibration-damaged buildings.

Background on the Issue of Wildfire

Most of the Plan development proposed would be urban infill in densely populated areas of Berkeley; the EIR found it is not expected to significantly exacerbate the wildfire-related risks. The EIR also concluded the Plan would not impair emergency access or interfere with adopted emergency response plans.

It did find, however, that potential development in a currently undeveloped area (called Hill Campus East), which is in a high-risk zone for wildfire and is characterized by rough terrain and heavy vegetation, may expose occupants to wildfire pollutants.

Despite adopting mitigation measures, the Regents determined the impact was significant and unavoidable at this early stage of the planning process, given the uncertainty of any development in the Hill Campus East area. Similarly, the Regents found that potential new infrastructure may exacerbate fire risk and expose people to post-fire hazards, despite mitigation, again largely due to uncertainty about such development in the Hill Campus East area.

The two site-specific projects, Anchor House and People's Park, are urban infill projects that are near (but outside the borders of) areas zoned as high fire risks. The Regents found that neither project would cause significant impacts with respect to any of the fire risks discussed in the EIR.

The Court of Appeal's Decision

Under the fair argument standard for requiring additional analysis of environmental impacts, the Court of Appeal affirmed the trial court's judgment regarding the EIR's analysis of Plan impacts on historical buildings, construction-related vibrations and wildfire, finding those contentions meritless and thus warranting no change from the *Good Neighbor* disposition on the EIR.

Shade

CEQA carefully limits the scope of relevant impacts to historical resources. A project may have a significant environmental impact if it may cause a substantial adverse change in the significance of an historical resource. (CEQA, § 21084.1; Guidelines, § 15064.5, subd. (b).) A:

> . . .[s]ubstantial adverse change. . .[means the]. . .physical demolition, destruction, relocation, or alteration of the resource or its immediate surroundings such that the significance of an historical resource would be materially impaired. (Guidelines, § 15064.5, subd. (b)(1))

Taken together, these provisions circumscribe the impacts on historical resources that require consideration in an EIR. It is not enough to identify evidence in the record that shading from the People's Park project will have some sort of impact on the church or school. To warrant environmental review, Citizens must identify evidence supporting a fair argument that it would materially and adversely impair a specific physical characteristic of these buildings that conveys their historical significance.

The EIR historical resources report states only that the project could adversely affect its neighbors because "its scale and proportion would likely not be compatible with those historical resources." It does not discuss shade at all, much less any aspect of the buildings' historical significance that would be diminished by shade.

Vibration

Citizens contend NOI-2 is illusory because Step 2 allows the Regents simply to list alternative construction methods (i.e., methods that would not cause vibration damage) on a project's building plans but does not actually require them to use those methods. This is not a fair reading of the EIR.

Where alternatives to vibration-causing construction methods are feasible, Step 2 requires the Regents to incorporate them in the building plans. If alternative methods are not used, the Regents would have to operate under the burdensome requirements of step 3, which includes hiring a consultant, surveying nearby sensitive properties, installing sensors, monitoring the properties for damage, halting construction if damage occurs, and repairing the damage.

Wildfire Threat

An EIR should consider significant environmental impacts caused or exacerbated by locating people and development in areas subject to wildfires. This includes impacts the project may have on residents' ability to evacuate the area according to an adopted evacuation plan. The Guidelines also advise considering whether aspects of a project, such as slope or prevailing winds, would expose people to pollutants from a wildfire; whether infrastructure such as power lines may exacerbate wildfire risks; and whether the project would expose people to downslope flooding or other risks that may follow a wildfire.

The EIR captures the relevant point—the presence of humans increases the risk of wildfires. Of course, most of the area at issue here is already densely populated. No more discussion is required.

Second, the EIR adequately discusses the risk that new development (as opposed to people) may increase fire risks. The EIR examines the increased risk of fire caused by development in the so-called wildland-urban interface—an area where development meets, or is comingled with, undeveloped wildland or vegetation. It identifies the specific areas of proposed development that would be in these areas.

The EIR also discusses factors that would exacerbate wildfire risks, such as vegetation, and features of the project that are intended to limit the risks. It concludes that some fire-related impacts must be deemed significant and unavoidable, largely due to the lack of specific development proposals at this early stage, which precludes a detailed analysis of development in hazardous areas such as Hill Campus East. Given the uncertainties and limited detail of the long-term Plan, the discussion is sufficient.

The EIR concluded that, although the additional people could add congestion during commute times, the project would not impair or physically interfere with the applicable evacuation plans or impede emergency access. The project includes features to reduce fire risks by managing vegetation, complying with street design criteria for access, identifying evacuation areas, and improving evacuation routes. It would not change circulation patterns or interfere with evacuation routes. Most of the development would be infill in an area that is already densely populated, and it proposes no changes to the existing roadway system. The two site-specific developments, Anchor House and People's Park, are designed to accommodate the relevant emergency response and evacuation plans, including protocols for access during construction activities.

Conclusion and Implications

This opinion by the First District Court of Appeal provides significant guidance on how to analyze impacts on historical resources by focusing on the aspects that make those resources historical. It also provides significant guidance on how to analyze wildfire impacts by focusing on the analysis of fire safety design and mitigation measures and maintaining existing evacuation routes. The court's opinion is available online at: https://www.courts.ca.gov/opinions/nonpub/A166164.PDF.
(Boyd Hill)

CALIFORNIA COURT OF APPEAL FINDS EIR'S WILDFIRE FUEL MANAGEMENT PROJECT DESCRIPTIONS NEED NOT INCLUDE A TREE-BY-TREE INVENTORY TO COMPLY WITH CEQA

Claremont Canyon Conservancy v. Regents of the University of California,
___Cal.App.5th___, Case No. A165012 (1st Dist. June 9, 2023).

In a *partially published* opinion, the First District Court of Appeal in *Claremont Canyon Conservancy v. Regents of the University of California*, reversed the trial court's decision, which found that the project descriptions in an Environmental Impact Report (EIR) for UC Berkeley's wildland vegetative fuel management and removal projects were not "accurate, stable and finite," rendering them inadequate under the California Environmental Quallity Act (CEQA). The court held that the EIR contained sufficient information to

analyze the projects' environmental impacts, even if it did not specify the identities or number of trees to be removed.

Factual and Procedural Background

The Wildland Vegetative Fuel Management Plan

The Regents of the University of California, Berkeley (Regents) worked with a wildland fire manager and fire ecologist to develop a Wildland Vegetative Fuel Management Plan (Plan) for an 800-acre fire-prone parcel of land on UC Berkeley's "Hill Campus." The Campus, which is heavily forested and located in a "Very High Fire Hazard Severity Zone," has experienced wildfires in the past; most recently in 2017 when the Grizzly Fire burned approximately 24 acres. The Plan proposed several vegetation removal projects, including one fuel break project and three fire hazard reduction projects, with the goal of reducing the wildfire risk on Hill Campus. In developing the Plan and selecting the project locations, the Regents relied on fuel models to predict fire behavior, which considered the different vegetation types across Hill Campus. The Plan proposed removing dead, unhealthy, or structurally unsound trees, trees that would torch or burn with high fire intensity, and certain understory shrubs.

The Regents prepared an EIR for the plan, containing both programmatic and project-level review, and certified the Final EIR in early 2021. The EIR identified objective criteria for tree removal and proposed "variable density thinning," which considers site specific conditions to create gaps in canopy cover to reduce canopy fire spread. The precise number of and specific trees to be removed would be determined by a certified arborist and registered professional forester by applying the objective criteria and the principle of variable density thinning.

At the Trial Court

Two organizations, the Claremont Canyon Conservancy and Hills Conservation Network (Petitioners), filed petitions for writ of mandate challenging the adequacy of the EIR's description of the vegetation removal projects. Despite opposition from the Regents, the trial court consolidated the cases.

The trial court ruled in favor of the plaintiffs, concluding that the EIR's project descriptions were "uncertain and ambiguous" because the EIR provided "vague conceptual criteria" but no concrete information on how the "criteria will be implemented." The court thus ordered the Regents to vacate its EIR certification as to those projects. The Regents timely appealed.

The Court of Appeal's Decision

On appeal, the Regents argued that the trial court erred in determining that the project descriptions were not "accurate, stable and finite" and that it was not reasonably feasible to conduct a tree-by-tree inventory. The First District Court of Appeal applied a *de novo* standard of review, noting that it was only determining whether CEQA's statutory criteria were satisfied and that approval of an EIR cannot be set aside merely because an opposite conclusion is equally or more reasonable.

As the court pointed out, CEQA Guidelines § 15124 requires a project description to include the precise location and boundaries of the proposed project on a detailed map, a general description of the proposed project's objectives and technical, economic, and environmental characteristics, and a brief description of the EIR's intended uses.

The Projects' Environmental Impacts Could Be Analyzed

Petitioners argued that CEQA required the EIR to identify the specific trees that would remain in the fuel break area and that the project descriptions were "unclear and unstable," preventing meaningful comparisons between the plan and the project alternatives. They also contended that because the EIR failed to specify the number of trees that would be removed, it was not possible to evaluate and review the projects' environmental impacts. The court noted, however, that CEQA does not require a project description to "supply extensive detail beyond that needed for evaluation and review of the environmental impact," and nothing in the CEQA Guidelines requires an EIR to include a tree inventory.

Instead, the court concluded that the project descriptions contained all of the information required under Guidelines § 15124—*i.e.*, a detailed map identifying boundaries and project locations; the underly-

ing purpose of the project (to "reduce the amount and continuity of vegetation that increases wildland fire hazards"); a description of project characteristics ("the vegetation in each project area... objective vegetation removal criteria...methods used to remove vegetation"); and a summary of the "purpose of the projects and the EIR's intended use. Based on this, the court concluded that the EIR provided sufficient information to understand the projects' environmental impacts, which is all that the Guidelines require.

The court explained that the absence of a tree inventory did not violate CEQA because the projects' basic characteristics were "accurate, stable, and finite" and enabled decision-makers and the public to understand the projects' environmental consequences, contrary to the trial court's determination.

The court also noted that, where, as here, "a project is subject to variable future conditions," such as "unusual rainy weather, tree growth, impact of pests and diseases, [and] changing natural resources," a project description must "be sufficiently flexible" to account for those conditions.

Tree Inventory Not Reasonably Feasible

The Regents also argued that the EIR's omission of a tree inventory did not render it deficient because it was not reasonably feasible to prepare such an inventory. The court agreed, finding that there was sufficient evidence to support this conclusion. Specifically, the steep and rugged terrain of Hill Campus created a practical impediment to conducting a tree-by-tree inventory, which would have been economically costly. And, because the project area is subject to variable environmental conditions, on-the-ground realities could significantly change between the EIR's preparation and project implementation, making it impractical to identify specific trees to remove.

The court emphasized that "technical perfection, scientific certainty, and exhaustive analysis" are not required of an EIR; rather, a court looks at whether the EIR is adequate, complete, and represents a good-faith effort at full disclosure. While the EIR here did not identify each tree that would be removed, the court held that the Regents provided meaningful information about the projects while allowing for the flexibility to respond to changing conditions.

Conclusion and Implications

The First District Court of Appeal's opinion clarifies what constitutes an adequate project description, particularly when a project contemplated by a programmatic EIR is subject to changing environmental conditions. An EIR for vegetative fuel management is legally adequate and provides the public with sufficient information to analyze a projects' environmental impacts, even if it does not identify the specific trees that will be removed. This decision suggests that the amount of flexibility that can be built into a project description is, in part, determined by potential fluctuations in baseline environmental conditions. It also confirms that an EIR must only include that which is reasonably feasible, which will be determined by on-the-ground realities. The court's *partially published* opinion is available online at: https://www.courts.ca.gov/opinions/documents/A165012.PDF. (Alina Werth, Bridget McDonald)

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