33rd Annual Land Use & Development Law Briefing

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Land Use and Development Case Summaries (Short Form)

Land Use and Development Case Summaries 2023 Land Use and Development Law Briefing (Short Form)

1. Planning And Zoning

Old East Davis Neighborhood Association v. City of Davis
73 Cal. App. 5th 895 (2022)

The court of appeal upheld the City's determination that a mixed-use development was consistent with general plan policies requiring new buildings to maintain scale transition and provide an architectural fit with the neighborhood. The court observed that the applicable policies did not provide a formulistic method for determining whether a proposed structure met the transition requirements. Rather, this determination relied on subjective measures and the dispute was over conflicting evidence on matters such as whether step-backs, extra-wide alleys and other factors created a scale that was consistent with the area's traditional scale and character. Reviewing each of the City's consistency determinations, the court found that a reasonable person could have reached the same conclusion based on the record, and the City's decision was therefore supported by substantial evidence.

Bankers Hill 150 v. City of San Diego
74 Cal. App. 5th 755 (2022)

Relying on the Density Bonus Law, a developer proposed a 20-story mixed-use project with affordable units that would exceed the maximum zoned capacity by 57 units. The developer also sought development incentives, including avoiding a setback restriction and eliminating on-site truck loading spaces. The court rejected petitioner's claim that the project approval conflicted with several General Plan policies. It ruled that the City did not abuse its discretion in finding that several cited policies were inapplicable and that the project did not conflict with the policies that were applicable. It also found that if the City had denied the requested incentives or failed to waive inconsistent design standards, it would have physically precluded construction of the project and the affordable units, which would defeat the goals of the Density Bonus Law.

AIDS Healthcare Foundation v. City of Los Angeles
78 Cal. App. 5th 167 (2022)

The court rejected a claim that the City's approval of a mixed-use project violated provisions enacted by the former Community Redevelopment Agency requiring 15 percent of units to be reserved for low-income housing. The court held that the 2011 Redevelopment Dissolution Law rendered the 15 percent requirement inoperative.

TIBURON OPEN SPACE COMMITTEE V. COUNTY OF MARIN
78 Cal. App. 5th 700 (2022)

Under stipulated judgments in federal court, the County agreed to approve development of a minimum of 43 residential units on 110 acres of land, subject to compliance with applicable land use laws, including CEQA. The court dismissed petitioner's claims that the County had effectively contracted away its police powers in the stipulated judgments and abdicated its duties under CEQA by approving the project. The court observed that the project EIR was over 800 pages and went through extensive redrafts, and that the lengthy administrative approval process provided ample opportunities for public input. The County Board would not have gone through such a "protracted charade" had it intended to bypass CEQA. The court also upheld the County's determination that a less dense project alternative was legally infeasible under CEQA, stating that "no reason in law or logic prevents a final federal court judgment from having [that] impact."

2. Housing Accountability Act

REZNITSKIY V. COUNTY OF MARIN
79 Cal. App. 5th 1016 (2022)

Plaintiff claimed the County's denial of a permit to build a single-family home on his property violated the Housing Accountability Act. The court found that neither the language of the HAA nor its legislative history supported an interpretation of "housing development project" to include one single-family home. Terminology in the statute reflected legislative intent that it should apply to a project to construct a "housing development," not to any project to "develop housing." Among the core purposes of the HAA is providing for the housing needs of lower-income populations by reducing local agencies' ability to deny higher-density projects, a scenario that would never apply to a single home. It was therefore improbable that the intent of HAA was to give those who could afford to build their own home enhanced protection against rejection of development application based on subjective criteria.

SAVE LAFAYETTE V. CITY OF LAFAYETTE
85 Cal. App. 5th 842 (2022)

A developer sought approval of a 315-unit residential development project but agreed to suspend processing while it pursued an alternative, 45-unit project. It later abandoned the alternative project and the City resumed processing of and approved the original project. Petitioners claimed the approval was invalid because the original project no longer conformed to the City's General Plan at the time it was approved. The court held that, under the Housing Accountability Act, a project must be evaluated under the planning and zoning standards in effect when the application is deemed complete, not under standards that exist at the time of project approval. The court rejected petitioner's argument that the developer's request to resume processing should be treated as a "resubmittal" and hence be subject to the then-current land-use standards. The court also dismissed the claim that the Permit Streamlining Act's time limits had deprived the City of the power to act on the application, ruling that the consequence under that statute of any failure by city to timely act was project being deemed approved, not disapproved.

3. Coastal Act

COASTAL ACT PROTECTORS V. CITY OF LOS ANGELES
75 Cal. App. 5th 526 (2022)

The City of Los Angeles adopted an ordinance restricting short-term vacation rentals. Over a year later, petitioner sued to enjoin enforcement of the ordinance until the City obtained a Coastal Development Permit from the Coastal Commission. Petitioner argued the action was not subject to the 90-day statute of limitations in Government Code § 65009, but rather was timely under the three-year statute of limitations in Code of Civil Procedure § 338(a) for actions "upon a liability created by statute." The court disagreed, pointing out that if the City had a mandatory duty to obtain a CDP, that duty existed at the time the City enacted the ordinance. The action, therefore, was one to "attack, review, set aside, void, or annul" the City's decision to adopt a zoning ordinance without first obtaining a CDP and was subject to section 65009's 90-day deadline.

DARBY T. KEEN V. CITY OF MANHATTAN BEACH
77 Cal. App. 5th 142 (2022)

In 2015, without obtaining Coastal Commission approval, the City enacted zoning ordinances banning short-term rentals in the coastal zone. The City justified not seeking that approval by claiming that its existing zoning ordinance from 1994 already banned short-term rentals. The court disagreed, finding that the City's zoning ordinances prior to 2015 did not specify any limitation on the term of rentals and therefore allowed the short-term rentals the City now sought to ban. The court was also unpersuaded by the City's argument that short-term rentals should be treated as regulated hotels under the City code, concluding that homes that are typically rented out as short-term rentals did not meet the code's definition of a hotel.

4. Clean Water Act

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD V. FEDERAL ENERGY REGULATORY COMMISSION
43 F.4th 920 (9th Cir., 2022)

Section 401 of the Clean Water Act authorizes states to impose conditions on federal licenses for hydroelectric projects to ensure compliance with state water quality standards. The Federal Energy Regulatory Commission found that the California State Water Resources Control Board had waived that authority for certain hydroelectric projects by engaging in coordinated schemes with project applicants to delay certification. The Ninth Circuit upheld the agencies' challenge to that determination, holding that FERC's findings of coordination were unsupported by substantial evidence. The evidence showed only acquiescence in the applicants' withdrawal and resubmittal of their requests; nothing in record suggested the agencies' decisions were motivated by a desire to deliberately delay certification.

MONTEREY COASTKEEPER V. CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD
76 Cal. App. 5th 1 (2022)

Petitioners asserted that, in issuing water quality permits, the State Board and regional water boards had violated the Board's Nonpoint Source (NPS) Policy by failing to protect against water pollution from crop

irrigation. The court held that neither declaratory nor mandamus relief was available for petitioners' claims. Declaratory relief was not appropriate because an issue as complex as water pollution from agricultural runoff could not be solved by a court decree. Mandamus was likewise unavailable because petitioners attacked respondents' exercise of discretion rather than its performance of a ministerial duty or quasi-legislative action. Application of the NPS Policy was a "quintessentially discretionary task" because the agencies had broad flexibility to fashion NPS management programs to protect water quality according to the dictates of their own judgment.

CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER V. STANISLAUS NATIONAL FOREST

30 F. 4th 929 (9th Cir., 2022)

Livestock grazing permits issued by the U.S. Forest Service did not violate state water quality permitting requirements. The Forest Service complied with Management Agency Agreements between the Service and the State Water Resources Control Board, which governed non-point source pollution control measures for the area and expressly superseded statutory permit requirements. Although levels of fecal matter exceeded established water quality objectives set forth in the basin plan, the court ruled that these objectives did not apply to individual dischargers and could not be enforced in isolation.

5. Land Use Litigation

MEINHARDT V. CITY OF SUNNYVALE

76 Cal. App. 5th 43 (2022)

The trial court issued an order denying petitioner's administrative mandamus claim and, over a month later, entered judgment against petitioner. Within 60 days of entry of the judgment but more than 60 days after issuance of the order, petitioner filed a notice of appeal. The Court of Appeal dismissed the appeal because it had not been filed within 60 days of issuance of the order. In response to the argument that an appeal is timely under the Code of Civil Procedure if filed within 60 days of the "judgment," the court relied on prior caselaw holding that an order granting or denying a petition for a writ of mandate is "in effect" a judgment because it finally determines the rights of the parties.

SCHMIER V. CITY OF BERKELEY

76 Cal. App. 5th 549 (2022)

As a condition to approving plaintiff's condominium conversion, the City required plaintiff to sign an agreement and record a lien on the property securing payment of an affordable housing fee upon sale of the unit. Twenty years later, when plaintiff sought to sell the condominium, the City requested payment of an affordable housing fee of $147,000. Plaintiff sued, arguing that the ordinance authorizing the fee had since been repealed and language in the lien agreement provided if the fee was rescinded, the lien would be void. The court rejected the City's claim that the suit was time-barred under the 90-day limitations period in the Subdivision Map Act, reasoning that the suit did not challenge the validity of the fee requirement originally imposed; it alleged that the City misinterpreted language in the lien agreement. Plaintiff's suit was filed within 90 days after he became aware of the challenged misinterpretation and was therefore timely.

CITY OF CORONADO V. SAN DIEGO ASSOCIATION OF GOVERNMENTS
80 Cal. App. 5th 21 (2022)

Three cities challenged their RHNA housing allocations, contending that the San Diego Association of Government denied them a fair hearing by using a weighted vote and "predetermin[ing]" the denial of their appeals of the allocations. The court held that the administrative procedures established under the statute governing RHNA allocations, including appeals of allocations and review by the Department of Housing and Community Development, were intended by the legislature to be the exclusive remedy for the municipality to challenge those determinations. The court therefore lacked jurisdiction to adjudicate the cities' claims.

AIDS HEALTHCARE FOUNDATION V. CITY OF LOS ANGELES
86 Cal. App. 5th 322 (2022)

Petitioner sued under the Political Reform Act, seeking to set aside building permits issued during multiple years while two Councilmembers allegedly were the beneficiaries of an ongoing bribery scheme. Petitioner contended that its PRA claims were subject to a three-year statute of limitations. The court held that the more specific 90-day statute of limitations in Government Code § 65009 applied, as it clearly encompassed the building permits petitioner sought to set aside. The court rejected petitioner's argument that the gravamen of its action was not principally a challenge to the permit decisions, but instead was "a challenge to the corruption." While petitioner relied on the PRA as the basis for its claims, the gravamen of its suit was an attack on, or review of, the Council's decisions related to permitting and real estate project approvals, and section 65009 directly governed that challenge.

JENKINS V. BRANDT-HAWLEY
No. A162852 (1st Dist., Dec. 28, 2022)

An attorney's actions in filing and prosecuting a CEQA and general plan challenge to construction of a single-family home supported a claim for malicious prosecution. The record showed that the attorney, who held herself out as a CEQA and land use expert, knew the claims in the petition were untenable. As to the required element of malice, there were numerous statements in the attorney's pleadings that the court found to be "misleading as to material facts." This, coupled with the attorney's continued prosecution of a meritless writ petition, gave rise to a viable inference of malice.

6. Takings

TODAY'S IV, INC., V. LOS ANGELES COUNTY METROPOLITAN TRANSPORTATION AUTHORITY
83 Cal. App. 5th 1137 (2022)

The court held that construction of a subway line did not result in inverse condemnation of plaintiff's hotel property or creation of nuisance. Plaintiff failed to show any burden on its property that was "direct, substantial, and peculiar to the property itself." The temporary interference with its right of access caused by construction was not unreasonable, and personal inconvenience, annoyance, or discomfort could not support a condemnation claim. Plaintiff's claim of excessive noise and dust did not show an intrusion that was "unique, special or peculiar" in comparison with other stakeholders in the area. As to the nuisance claim, the court ruled that plaintiff failed adequately to allege that the harm to

its hotel operation outweighed the social utility of the subway project, which included reducing travel times and traffic congestion and improving air quality.

7. Development Fees

SHEETZ V. COUNTY OF EL DORADO

84 Cal.App.5th 394 (2022)

A traffic mitigation fee required for construction of a single-family home did not violate the Mitigation Fee Act or amount to an "unconstitutional condition" in violation of the takings clause of the Fifth Amendment. The fee was imposed under a legislatively authorized fee program and hence was not subject to the heightened scrutiny applicable to *ad hoc* fees under U.S. Supreme Court caselaw. The County also complied with the Mitigation Fee Act in adopting the fee as part of its 2004 General Plan to ensure that roadway improvements were developed concurrently with new development. The record reflected that the County considered the relevant factors and demonstrated a rational connection between those factors and the fee imposed.

8. Endangered Species

SAN LUIS OBISPO COASTKEEPER V. SANTA MARIA VALLEY WATER CONSERVATION DISTRICT

49 F.4th 1242 (9th Cir., 2022)

Environmental groups sued the agencies that operate the Twitchell Dam in San Luis Obispo County, arguing that releases of water designed to maximize percolation in the riverbed provided insufficient flow to the river to sustain steelhead migration and reproduction. The Ninth Circuit rejected the agencies' claim that they lacked statutory authority to release water for any purpose other than water conservation and flood control. The governing statute expressly gave the agencies discretion to operate Twitchell Dam for "other purposes," which potentially included adjusting water discharges to support steelhead migration.

9. Real Estate

ROMERO V. SHIH

78 Cal. App. 5th 326 (2022)

The court held that grant of an equitable easement was appropriate where (1) through no fault of either party, a homeowner's fence encroached on about 1,300 feet of the neighbor's property; (2) the neighbor had no concrete plans to use the land and there would be no undue tax burden or likelihood of premises liability on the encroachment area; (3) not granting an easement would result in disproportionate hardship on the homeowner through reduction of their driveway width that would preclude use by most vehicles; and (4) the scope and duration of the easement were narrowly tailored, providing that the easement would terminate if the homeowner ceased to use the land for the limited and necessary purposes for which it was granted.

10. Brown Act

G.I. Industries v. City of Thousand Oaks

84 Cal. App. 5th 814 (2022).

The City posted an agenda that included consideration of a proposed franchise agreement but made no mention of CEQA. On the day of the City Council meeting. a supplemental item was posted giving notice of the staff's recommendation that the City find the agreement to be categorically exempt from CEQA. The court held that the Brown Act applied to the City's determination that the franchise agreement was categorically exempt under CEQA, and that 72 hours' prior notice of that decision was accordingly required. The court reasoned that the City's CEQA determination was an item of business at a regular meeting of a local legislative body and failure to provide the required notice of this agenda item deprived the public of a meaningful opportunity to be heard. The court rejected the City's claim that its adoption of the CEQA exemption was a component of the agenda item awarding the franchise agreement, ruling that approval of the CEQA exemption involved a separate action by the City concerning the discrete, significant issue of CEQA compliance.

Land Use and Development Case Summaries (Long Form)

Land Use and Development Case Summaries 2023 Land Use and Development Law Briefing (Long Form)

1. Planning And Zoning

OLD EAST DAVIS NEIGHBORHOOD ASSOCIATION V. CITY OF DAVIS

73 Cal. App. 5th 895 (2022)

Petitioners challenged the City's approval of a four-story, 48,000-square-foot mixed-use building claiming the project conflicted with General Plan policies requiring new buildings to maintain scale transition and provide an architectural fit with existing scale in the surrounding neighborhood.

Reviewing the applicable policies for promoting, guiding, and regulating growth in the project area, the court determined that they did not provide a formulistic method for evaluating whether a proposed structure constituted a transition. Rather, this conclusion relied on subjective measures such as the "fit" with surrounding buildings, "appropriate scale and character," and "sensitiv[ity] to the area's traditional scale and character."

The key policy at issue — transition — was thus "largely amorphous," and the dispute was over conflicting evidence on matters such as whether step-backs, mass shifting, extra wide alley, and other factors created an "appropriate scale" that was "sensitive to the area's traditional scale and character." Under the governing standard of review, the City's determinations of consistency with the relevant plans could be set aside only if a reasonable person could not have reached the same conclusion based on the evidence before the City. Reviewing each of the City's determinations, the court found no instances in which a reasonable person could not have reached the same conclusion. Accordingly, the City's decision was supported by substantial evidence.

BANKERS HILL 150 V. CITY OF SAN DIEGO

74 Cal. App. 5th 755 (2022)

Petitioner, a community association, challenged a decision by the City of San Diego to approve a development application for a 20-story mixed-use building project with a total of 204 dwelling units in the Bankers Hill neighborhood near downtown San Diego.

Petitioner claimed the project was inconsistent with development standards and policies in the City's General Plan and the Uptown Community Plan, arguing that the project's design improperly obstructed views, failed to complement neighboring Balboa Park, and "towered" over adjacent smaller-scale buildings.

The court found that petitioner's claims "sidestep[ped] a critical factor in the City's decision-making process: the application of . . . the Density Bonus Law" (Govt. Code §§ 65915 et seq.), which is designed to encourage the construction of affordable housing. Under the Density Bonus Law, a developer may add

additional housing units beyond the zoned capacity and take advantage of other incentives in exchange for including deed-restricted affordable units in a project. If a developer meets the requirements of the Density Bonus Law, the City must permit the increased density and waive any conflicting local development standards, unless certain limited exceptions apply.

Here, the developer included 18 units with deed restrictions to make them affordable to low-income households. With the density bonus, the developer sought to exceed the maximum zoned capacity of 147 units by 57 units. With the development incentives, the developer sought to avoid a setback on one street, eliminate two on-site loading spaces for trucks, and reduce the number of private storage areas for residents. Under the Density Bonus Law, the City could deny the project as inconsistent with these development standards only if it made specific findings that their waiver would not (1) result in any actual cost reductions; (2) adversely affect public health or safety; or (3) be contrary to state or federal law. The City Council found there was no substantial evidence to support the denial of the requested incentives.

The court ruled that the City did not abuse its discretion in finding that several policies cited by the petitioner did not apply to the project and the record supported the City's conclusion that the project did not conflict with the policies that were applicable. The record also demonstrated that including the affordable units in the project was only possible if the building was designed as proposed. If the City had denied the requested incentives or failed to waive the inconsistent design standards, it would have physically precluded construction of the project, including the affordable units–which would defeat the Density Bonus Law's goal of increasing affordable housing.

The City Council properly concluded that the project qualified for the benefits of the Density Bonus Law and that the evidence did not justify refusal to waive the local development standards.

TIBURON OPEN SPACE COMMITTEE V. COUNTY OF MARIN

78 Cal. App. 5th 700 (2022)

The dispute in this case surrounded the potential development of a 110-acre parcel on an undeveloped hilltop in Tiburon owned by The Martha Company. Beginning in 1975, Martha faced opposition to its development plans. This opposition resulted in two stipulated federal court judgments: most recently in 2007 and most significantly when the County of Marin agreed to approve Martha for the development of a minimum of 43 residential units on the disputed parcel. In 2017 the County certified the EIR and conditionally approved Martha's 43-unit development.

In response to the conditional project approval, the Town of Tiburon and some of its residents sued, claiming that by agreeing to comply with the 2007 stipulated judgment, the County had effectively stipulated not to apply CEQA or other state laws to prevent the Martha development. They claimed the County ignored CEQA when it approved the project despite the environmental impacts shown in the EIR and that it was an abuse of discretion to approve the 43-unit project rather than a smaller, less environmentally harmful option. The court found no merit in these claims.

The court ruled that the County did not abdicate its CEQA duties by signing the stipulated judgments because the judgments did not excuse the County from complying with CEQA. Moreover, land use laws – including CEQA – were police powers that could not lawfully be contracted away. EIRs were implicitly or explicitly required in the 1976- and 2007-stipulated judgments and bypassing the CEQA process was not an element of the judgments.

The court also found that the County did not, in fact, use the stipulated judgment to bypass the CEQA process. The EIR was over 800 pages and went through three drafts with extensive revisions. The

administrative process for the project included planning commission meetings, public input, public hearings, and consultation with outside agencies (such as the fire department), all of which occurred before the Board of Supervisors made its required findings and confirmed that it had used independent judgment in approving the project.

The court concluded that, had the Board felt free to ignore CEQA as a result of the stipulated judgment, it would not have gone through such a "protracted charade." The court also found that the County's acknowledgement in the 2007-stipulated judgment that "any development alternative, or any proposed mitigation measure, which does not accord Martha all rights to which it is entitled under the 1976 judgment is legally infeasible" did not change the essence of the County's CEQA responsibilities. Under CEQA, agencies must avoid or mitigate significant environmental impacts in project approvals to the extent feasible, but any mitigation measure that is at odds with a legal obligation is legally infeasible. Relying on caselaw affirming that a state statute can render less dense project alternatives legally infeasible, the court found that "no reason in law or logic prevents a final federal court judgment from having the same impact."

2. Housing Accountability Act

REZNITSKIY V. COUNTY OF MARIN

79 Cal. App. 5th 1016 (2022)

The plaintiff applied to the Marin County Planning Commission to build a 4,000-square-foot single-family home on a plot of land in San Anselmo. The Commission denied the application on the grounds that the proposed project would adversely affect the existing neighborhood through its relatively large size and environmental effects. The plaintiff sued, arguing that the project was wrongly denied under the Housing Accountability Act.

On review, the court looked to the structure and purpose of the HAA, observing that the phrase "housing development project" has appeared in the HAA since its inception but has never been fully defined. It found that other references in the statute reflected legislative intent that the statute should apply to a project to construct a "housing development," not to any project to "develop housing." Additionally, the stated purpose of the HAA is "to significantly increase the approval and construction of new housing for all economic segments of California's communities by meaningfully and effectively curbing the capability of local governments to deny, reduce the density for, or render infeasible housing development projects and emergency shelters."

Neither the language of the HAA nor its legislative history supported an interpretation of "housing development project" to include one single-family home. Among the core purposes of the HAA is providing for the housing needs of lower income populations by reducing local agencies' ability to deny higher-density projects — "a scenario that would never apply to a single-unit project." The court reasoned it was therefore unlikely that the intent of HAA was to give those who could afford to build their own home enhanced protection against rejection of development applications based on subjective criteria.

SAVE LAFAYETTE V. CITY OF LAFAYETTE

85 Cal. App. 5th 842 (2022)

A developer sought approval of a 315-unit residential development project but agreed to suspend processing while it pursued an alternative, 45-unit project. It later abandoned the alternative project and

the City resumed processing of and approved the original project. Petitioners claimed the approval was invalid because the original project no longer conformed to the City's General Plan at the time it was approved. The court held that, under the Housing Accountability Act, a project must be evaluated under the planning and zoning standards in effect when the application is deemed complete, not under standards that exist at the time of project approval. The court rejected petitioner's argument that the developer's request to resume processing should be treated as a "resubmittal" and hence be subject to the then-current land-use standards. The court also dismissed the claim that the Permit Streamlining Act's time limits had deprived the City of the power to act on the application, ruling that the consequence under that statute of any failure by city to timely act was project being deemed approved, not disapproved.

3. Coastal Act

COASTAL ACT PROTECTORS V. CITY OF LOS ANGELES

75 Cal. App. 5th 526 (2022)

The City of Los Angeles adopted an ordinance placing restrictions on short-term vacation rentals. Over a year later, petitioner filed suit to enjoin enforcement of the ordinance until the City obtained a Coastal Development Permit, claiming the ordinance constituted a "development" under the Coastal Act. The trial court dismissed the action as untimely under the 90-day statute of limitations in Government Code section 65009(c)(1), which applies to actions to "attack, review, set aside, void, or annul" a decision to adopt a zoning ordinance.

On appeal, petitioner argued that the trial court erred in concluding its action was barred under section 65009(c)(1), because the City's failure to comply with the Coastal Act was "not an 'action' or decision contemplated by [section 65009]." Petitioner contended the action was instead subject to the three-year statute of limitations in the Code of Civil Procedure section 338(a) for actions "upon a liability created by statute."

The court disagreed: It pointed out that the Coastal Act, including the CDP requirement, predated adoption of the ordinance. Thus, assuming the City had a mandatory duty to obtain a CDP in order to impose the rental restrictions, that duty existed at the time the City enacted the ordinance. The action, therefore, was one to "attack, review, set aside, void, or annul" the City's decision to adopt a zoning ordinance without first obtaining a CDP. Petitioner waited longer than a year, however, to file its suit. Thus, the action was time-barred under section 65009's 90-day deadline.

The court added that its conclusion was consistent with the Legislature's stated intent to "provide certainty for property owners and local governments regarding local zoning and planning decisions" (§ 65009(a)). The court noted that, after allowing the 90-day period for challenges to the ordinance to expire, the City had expended significant resources to implement and enforce the ordinance, including $485,609 to build an online registration system and approximately $1.4 million for a one-year monitoring of the system.

DARBY T. KEEN V. CITY OF MANHATTAN BEACH

77 Cal. App. 5th 142 (2022)

The appellate court held that absent a distinction between short- and long-term rentals, both are permitted under City zoning ordinances, and any ban on short-term rentals that changes the status quo is an amendment that requires Coastal Commission approval. Darby T. Keen v. City of Manhattan Beach 77 Cal. App. 5th 142 (2022).

The City of Manhattan Beach enacted zoning ordinances banning short-term rentals in 2015 and instituting an enforcement mechanism in 2019 without seeking the Coastal Commission's approval. The City had originally intended to seek Coastal Commission approval but withdrew its application after the Coastal Commission expressed that it did not support a full ban on short-term rentals in the Coastal Zone. The City justified not seeking Coastal Commission approval by claiming that the existing zoning ordinance from 1994 already banned short-term rentals.

A property owner petitioned for a writ of mandate to enjoin the City from enforcing the 2015 and 2019 ordinances after the City tried to enforce the ban on his property. He claimed that the City should have sought Coastal Commission approval.

The court held that the City ordinance banning short-term rentals was invalid because the City failed to obtain the Coastal Commission's approval. The court reasoned that the City's zoning ordinances prior to 2015 allowed short-term rentals because the code did not distinguish between short- and long-term rentals. This meant that rentals of residential properties for any time period were allowed. The court also rejected the City's argument that short-term rentals should be treated as hotels under the City code, concluding that the homes that are typically rented out as short-term rentals did not fall under the code's definition of a hotel.

The court also dismissed the other arguments the City relied on to justify the ban. The court rejected the claim that the concept of permissive zoning applied, under which zoning ordinances prohibit any use they do not expressly permit, noting that the City's pre-2015 ordinances did permit short-term rentals. The court likewise rejected the argument that it should defer to the City's interpretation of its own ordinances, finding that their plain language did not support that interpretation. The City's 2015 ban on short-term rentals amounted to an amendment of the City's existing ordinances to ban short-term rentals, which required Coastal Commission approval.

4. Clean Water Act

MONTEREY COASTKEEPER V. CENTRAL COAST REGIONAL WATER QUALITY CONTROL BOARD

76 Cal. App. 5th 1 (2022)

Monterey Coastkeeper and others filed an action against the State Board and regional water quality control boards regarding Nonpoint Source (NPS) water discharge permits issued by the regional boards under the Porter-Cologne Water Quality Control Act (Wat. Code § 13000 et seq.). They alleged that the regional boards and State Board had violated the State Board's NPS Policy by failing to take measures to address agricultural water pollution. Plaintiffs claimed the regional boards had failed to issue certain general agricultural orders and individual waste discharge requirements for agricultural discharge and the State Board had failed to take appropriate action when regional boards either adopted or failed to adopt general agricultural orders.

Plaintiffs further argued that the State Board violated the public trust doctrine by failing to avoid or minimize harm associated with agricultural discharges. Plaintiffs sought declaratory relief that the State Board and regional boards must act in accordance with their legal obligations to protect public health and the environment and a writ of mandamus directing the State Board and regional boards to comply with their legal obligations under the NPS Policy and the public trust doctrine.

The court held that neither declaratory nor mandamus relief was available for plaintiffs' claims. In response to plaintiffs' request for declaratory relief, the court concluded that such relief was not

available because an issue like water pollution from agricultural runoff "cannot be 'solved' by a court decree in a declaratory relief action."

The court held that mandamus relief was likewise unavailable because plaintiffs attacked the State Board and regional water boards' exercise of discretion rather than a failure to perform a ministerial duty or a quasi-legislative action. Application of the NPS Policy was a "quintessentially discretionary task" because the regional boards had broad flexibility and discretion in using their administrative tools to fashion NPS management programs. The public trust doctrine was also an "inherently discretionary doctrine" that was "ill-suited" to traditional mandamus relief, since simply ordering the State Board to apply the doctrine would be an empty judgment and actually determining whether the State Board is applying the doctrine would require technical expertise.

CENTRAL SIERRA ENVIRONMENTAL RESOURCE CENTER V. STANISLAUS NATIONAL FOREST
30 F. 4th 929 (2022)

As part of its authority to manage federal lands, the U.S. Forest Service may issue permits for livestock grazing. The Forest Service issued three such permits in Stanislaus National Forest subject to a Management Agency Agreement with the State Board to limit pollution from livestock grazing activities. In 2017, after years of water quality testing, plaintiffs filed suit alleging fecal matter runoff from the three grazing allotments polluted local streams in excess of allowable thresholds. Specifically, plaintiffs alleged the Forest Service violated the Porter-Cologne Water Quality Control Act—the principal law governing water quality in California, which applies to federal lands via Section 313 of the Clean Water Act—by authorizing discharges: (1) without proper permits or waivers and (2) in excess of water quality objectives set forth in the regional water quality board's basin plan.

First, on the issue of proper permits or waivers, the court held that compliance with an operative MAA supersedes standard Porter-Cologne permitting requirements. MAAs are a recognized tool under which the State Board designates another agency to take the lead on pollution control, with the goal of more efficiently regulating pollution from nonpoint sources. In 1981, the Forest Service and the State Water Board entered into an MAA for the area in question that expressly waived state law requirements for permits or waivers so long as the Forest Service complied with agreed-upon best management practices. Because the MAA remained operative, it controlled. If the State Board became dissatisfied with the terms of the MAA, it was required affirmatively to exercise its authority to abandon or amend the agreement. Until then, the terms applied, and the Forest Service remained in compliance.

Second, levels of pollution in excess of local water quality objectives—without a specific regulatory violation—do not run afoul of Porter-Cologne. Although the levels of fecal matter exceeded the established water quality objectives set forth in the regional water board's basin plan, the court held that these objectives "do not directly apply, of their own force, to individual dischargers." Instead, the objectives reflect general standards that regulators must take into account in establishing requirements that do apply to individual dischargers (such as permits, waivers, or basin plan prohibitions), but they cannot be enforced in isolation. Once the regional water board translates the water quality objectives into specific prohibitions, such prohibitions may be enforced. Because the Forest Service was not in violation of the MAA or any specific prohibition, it remained in compliance with Porter-Cologne.

5. Land Use Litigation

MEINHARDT V. CITY OF SUNNYVALE

76 Cal. App. 5th 43 (2022)

Plaintiff sought a writ of administrative mandamus challenging his suspension for engaging in speech critical of policies implemented by a City of Sunnyvale official. After a telephonic hearing, on August 6, 2020, the trial court issued an order denying plaintiff's petition. On August 14, the City electronically served plaintiff with a document titled "Notice of Entry of Judgment or Order" together with a copy of the August 6 order.

On September 25, 2020, the court clerk filed a document signed by the trial court entitled "Judgment," which stated that judgment was issued for the City pursuant to the court's August 6th order. On October 15, 2020, plaintiff filed a notice of appeal from the September 25 judgment.

The appellate court held that the appeal was untimely because it had not been filed within 60 days of service of the August 6th order. Plaintiff argued that his appeal was timely because it was filed within 60 days of entry of judgment, and Code of Civil Procedure section 904.1 provides that an appeal may be taken from "a judgment." The court, however, relied on prior caselaw holding that a ruling granting or denying a petition for a writ of mandate is "in effect" a final judgment because it finally determines the rights of the parties and is therefore appealable, even if in the form of an order.

The trial court's August 6th ruling denied the petition for writ of administrative mandate in its entirety and did not contemplate any further action in the case. The ruling was entitled "order," not "judgment," but the court noted that it is "not the form of the decree but the substance and effect of the adjudication which is determinative." The August 6 ruling was "properly treated as a final judgment because it contemplated no further action, such as the preparation of another order or judgment, and disposed of all issues between all parties." Because the notice of appeal was filed more than 60 days after service of the order, it was untimely, and the court therefore lacked jurisdiction to consider the appeal.

SCHMIER V. CITY OF BERKELEY

76 Cal. App. 5th 549 (2022)

In 1996, Kenneth Schmier converted an apartment in the City of Berkeley into a condominium. At the time, the City code required that an owner converting a unit into a condominium sign an agreement and record a lien on the property securing payment of an affordable housing fee upon sale of the unit. The lien agreement provided that its execution did not prejudice the right of the owner to challenge the validity of the affordable housing fee ultimately imposed. Schmier signed the agreement and recorded the lien.

Twenty years later, Schmier opened an escrow for sale of the condominium for $539,000. The City responded with a request for payment of an affordable housing fee of $147,202.66. Schmier protested and filed suit challenging the fee on multiple grounds, including that the code provision under which the fee was imposed had been repealed ten years earlier. Schmier pointed to language in the lien agreement stating that "[i]n the event that the affordable housing fee is … rescinded by the City of Berkeley, this lien shall be void and have no effect."

The City contended that Schmier's suit was time-barred under the 90-day statute of limitations in the Subdivision Map Act—which applied because a condominium conversion is a subdivision — as the suit was not filed within 90 days after execution of the lien agreement.

The appellate court rejected the City's argument. It relied on Honchariw v. County of Stanislaus, 51 Cal.App.5th 243 (2020), which held that a suit challenging a map condition imposed years earlier was still timely because the dispute did not concern the validity of the condition originally imposed but rather the City's later interpretation of that condition. The statute of limitations did not begin to run until plaintiff became aware of the City's interpretation being challenged in the case.

The analysis in Honchariw, the appellate court found, was equally applicable to this case—the 90-day limitations period was not triggered until the City effectively rejected Schmier's interpretation of language in the lien agreement that appeared to preclude imposition of the fee based on rescission of the code provision. Like the plaintiff in Honchariw, Schmier's suit did not challenge the reasonableness, legality or validity of conditions originally imposed on the condominium conversion. Rather, it alleged that the City misinterpreted language in the lien agreement providing that "this lien shall be void and have no effect" if the affordable housing fee is "rescinded by the City of Berkeley." Schmier's suit was filed within 90 days after he became aware of the challenged misinterpretation and was therefore timely.

CITY OF CORONADO V. SAN DIEGO ASSOCIATION OF GOVERNMENTS

80 Cal. App. 5th 21 (2022)

The City of Coronado along with three other cities sued the San Diego Association of Governments and its board of directors contending that (SANDAG) denied the cities a fair hearing when deciding the cities' administrative appeals of SANDAG's Regional Housing Needs Allocations. Because SANDAG approved the cities' final RHNA allocations using a weighted vote rather than a tally vote, the cities claimed the vote was improper and the final RHNA allocation approvals should be deemed invalid. The cities also alleged that certain board members were biased against the cities and that the denial of the cities' appeals was improperly "predetermined."

The appellate court, relying on Government Code section 65584.04 and City of Irvine v. Southern California Assn. of Governments, held that the court lacked jurisdiction over the claim. Section 65584.04 states that a council of governments is responsible for developing "a proposed methodology for distributing the existing and projected reasonable housing needs to cities, counties, and cities and counties within in the region." The court in *City of Irvine* held that "the administrative procedure established under Government Code section 65584 et seq. … to calculate a local government's [RHNA] allocation [was] intended to be the exclusive remedy for the municipality to challenge that determination and thereby precluded judicial review of the decision."

The court rejected the cities' argument that *City of Irvine* was not controlling because it did not involve the types of procedural issues raised in this case.

First, the distinction between substantive and procedural challenges was not drawn in *City of Irvine*. Rather, *City of Irvine* broadly held that "the statutes governing the RHNA allocation procedure . . . reflect a clear intent to preclude judicial intervention in the process," with no suggestion that procedural claims were outside the scope of this holding. While the cities argued that they were not challenging the RHNA allocation itself, but only the procedures that resulted in the allocation, the ultimate relief they sought was that the RHNA allocation be rescinded. But *City of Irvine* established that a judicial challenge seeking an alternative RHNA allocation was barred, and the court was

confident that "the Legislature would not have intended to authorize judicial review that would delay the allocation and yet result in the same allocation."

Second, *City of Irvine* reasoned that given the intergovernmental nature of the RHNA statutory scheme, a municipality has no enforceable right against a council of governments in its determination of a RHNA allocation. This rationale was not dependent on the purportedly substantive nature of the claim in *City of Irvine*.

Third, *City of Irvine* cited the availability of other potential remedies outside of the judicial system as a reason for concluding that judicial review was barred. The RHNA administrative appeals process itself provides a potential remedy for a municipality to raise objections to its allocation, and the cities raised their procedural objections in the course of their administrative appeal. In addition, the Department of Housing and Community Development is required to approve both the methodology used in developing an RHNA allocation and the final RHNA allocation. These additional administrative procedures made it clear that municipalities are not without recourse in challenging an RHNA allocation. Rather, under *City of Irvine*, by legislative design, municipalities "have no recourse with the courts."

Finally, the court noted that the Legislature expressly removed a prior statutory provision authorizing judicial review of RHNA allocations. This signaled to the court that all challenges, whether "substantive" or "procedural," were precluded from judicial review. In short, none of the rationales for the holding in *City of Irvine* depended on whether the basis for the judicial challenge was procedural or substantive. The court therefore declined to limit that holding to substantive claims, because doing so would "evade the legislatively imposed limits on judicial review that the [City of Irvine] court sought to enforce."

AIDS Healthcare Foundation v. City of Los Angeles

No. B311144 (2nd Dist., Dec. 14, 2022)

A federal criminal investigation revealed that two former Los Angeles City Councilmembers engaged in bribery and other corruption in connection with their work on the City Council's Planning and Land Use Management Committee, which makes recommendations to the Council concerning land use decisions.

Petitioner sued under the Political Reform Act, seeking to set aside building permits issued during multiple years while the two Councilmembers allegedly were benefiting from an ongoing bribery scheme. Petitioner contended that its PRA claims were subject to the three-year catch-all statute of limitations (CCP § 338(a)). The City countered that the more specific 90-day statute of limitations in Government Code § 65009 applied.

The court agreed with the City, finding that section 65009's 90-day limitations period clearly encompassed the building permits petitioner sought to set aside. Section 65009 "contains no exceptions," and uses "unqualified language manifesting a plain intent on the part of the Legislature to limit the time to seek review of an agency decision." There was no exception for actions filed under the PRA.

The court rejected petitioner's argument that the gravamen of its action was not principally a challenge to the permit decisions, and instead was "a challenge to the corruption." The court reasoned that while petitioner relied on the PRA as the basis for its claims, the gravamen of its suit was an attack on, or review of, the committee's decisions related to permitting and real estate project approvals. Section 65009 applied directly to that challenge.

JENKINS V. BRANDT HAWLEY
No. A162852 (1st Dist., Dec 28, 2022)

The appellate court held that an attorney's actions in filing and prosecuting a CEQA and general plan challenge to construction of a single-family home supported a claim for malicious prosecution.

The underlying lawsuit challenged permits issued by the Town of San Anselmo allowing the Jenkins family to demolish a small home and accessory cottage and to build a new home and detached studio on their property. The petition for writ of mandate alleged that the Town had violated CEQA, the Town Municipal Code, and the Town's general plan. After a hearing on the petition, the trial court upheld the Town's actions. The petitioners' attorney filed an appeal but dismissed the appeal a few months later. The Jenkins family then filed a complaint for malicious prosecution against petitioners' attorney and her law firm.

To prevail in a malicious prosecution action, the plaintiff must prove that the underlying lawsuit was decided in its favor, it was brought without probable cause, and it was initiated with malice. There was no dispute that the underlying lawsuit had been decided in the Jenkins's favor.

There was also no dispute about probable cause. The court found this test was easily met. There was no support in the language of the Municipal Code or the record for the petitioners' argument that the City had violated the Code. As for the CEQA claim, no showing was made that the petitioners had exhausted administrative remedies, and the argument that the project was not exempt under the categorical exemption for single-family residences found "untenable."

Malice. The court concluded that the record contained "abundant other evidence" of malice, including numerous misleading or incorrect statements of fact in the petition, arguments that failed to fairly characterize evidence in the administrative record, and apparent "indifference" to detailed information provided by the Jenkins's attorney. The record also showed that the attorney, who held herself out as a CEQA and land use expert, knew the claims in the petition were untenable.

In its concluding observations, the court rejected suggestions in several amicus briefs that CEQA litigation should be essentially insulated from malicious prosecution claims because CEQA is too uncertain and complicated, finding no basis for such a "carve out." The court also pointed to its opinion in Tiburon Open Space Committee v. County of Marin, 78 Cal.App.5th 700 (2022), in which it described the possible misuse of CEQA actions and the harm it could cause as "a formidable tool of obstruction." This suit, it concluded, had "nothing to do with environmental protection and everything to do with the privacy and aesthetic design concerns of several of the Jenkins's neighbors."

6. Development Fees

SHEETZ V. COUNTY OF EL DORADO
84 Cal.App.5th 394 (2022)

George Sheetz challenged a traffic mitigation fee imposed as a condition to a building permit for a new home on his property. He argued that the fee violated the unconstitutional conditions doctrine applied in the land use context by the U.S. Supreme Court in Nollan and Dolan and that the County violated the Mitigation Fee Act in adopting and imposing the fee.

Under the unconstitutional conditions doctrine, the government may not ask a person to give up a constitutional right — such as the right to receive just compensation for a taking — in exchange for a development permit where the condition has little or no relationship to the development. Under Nollan and Dolan, there must be an essential nexus between the exaction and the governmental interest sought to be advanced, and the government must make an individualized determination that the exaction is related both in nature and extent to the project's impact. In Koontz v. St. John's River Management Dist., 570 U.S. 595 (2013), the Court held that the doctrine applies to development fees, which it found to be "functionally equivalent" to the property dedications involved in Nollan and Dolan.

The California Supreme Court has held that the requirements of Nolan and Dolan apply only to fees imposed on an individualized or ad hoc basis, not to fees that are generally applicable to a broad class of property owners through legislative action. Relying on this authority, the appellate court concluded that the unconstitutional conditions doctrine did not apply in this case because the traffic fee was imposed under a legislatively authorized fee program that generally applied to all new residential development within the County.

In support of his Mitigation Fee Act claim, Sheetz argued that the County had failed to properly evaluate the traffic impacts attributable to his specific project, which he argued was in violation of section 66001(b) of the Act, which provides that the "local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion [thereof] attributable to the development on which the fee is imposed." Relying again on prior caselaw, the appellate court held that section 66001(b) applies only to adjudicatory, case-by-case decisions to impose a fee on a particular project, and does not apply to legislatively adopted fees like the traffic fee in question.

As to Sheetz's broader claim that the County did not comply with the Mitigation Fee Act traffic in adopting and calculating the fee, the court found no error. The fee was adopted as part of the County's 2004 general plan, guided by policies designed to limit traffic congestion, including provisions to ensure roadway improvements are developed concurrently with new development. The fee was based on a transportation study that evaluated a range of factors, including the expected increase in traffic volumes (by average daily vehicle trips) from each type of new development based on data published by the Institute of Transportation Engineers Trip Generation Manual, 7th Edition. The record reflected that the County considered the relevant factors and demonstrated a rational connection between those factors and the fee imposed. The limited portions of the record relied upon by Sheetz did not demonstrate that the fee was arbitrary, entirely lacking in evidentiary support, or otherwise invalid under the deferential standard applied to legislatively adopted fees.

7. Endangered Species

SAN LUIS OBISPO COASTKEEPER V. SANTA MARIA VALLEY WATER CONSERVATION DISTRICT

49 F.4th 1242 (2022)

Environmental groups sued the agencies that operate the Twitchell Dam in San Luis Obispo County arguing that its operation interfered with endangered Southern California Steelhead migration and constituted an unlawful take under the Endangered Species Act. The groups contended that releases of water from the dam designed to maximize percolation in the riverbed resulted in insufficient flow to the Santa Maria River to sustain Southern California Steelhead Trout migration to the ocean, preventing

the fish from completing their reproductive cycle. The groups an order requiring properly timed releases to support Steelhead migration and reproduction.

Twitchell Dam was constructed in 1958 as authorized by Public Law 774 (PL 774) for the principal purpose of recharging the Santa Maria River Valley's groundwater aquifer and minimizing the threat of flood damage. The District Court granted summary judgment to the agencies on the ground that PL 774 did not give them discretion to release water from Twitchell Dam for protection of endangered species,

The Ninth Circuit reversed, observing that PL 774 authorized Twitchell Dam to be operated for "other purposes" in addition to the enumerated purposes of "irrigation and the conservation of water, [and] flood control." This expansive language, the court said, reflected congressional intent to grant the agencies authority to use the dam for a variety of purposes, including adjusting operations to accommodate changing circumstances such as the enactment of new laws. The court cited other instances in which Congress had used limiting rather than broad language in defining permissible dam operations. In the case of Twitchell Dam, Congress expressly provided that the dam could be used for purposes other than those specified in the statute.

The court acknowledged that PL 774 also required the agencies to operate the dam "substantially in accordance with" the plans and recommendations in the Secretary of the Interior's Report, which contained a recommended flow rate for water releases. To avoid take of Southern California Steelhead, the dam's flow rate would need to deviate slightly from the recommended flow rate at certain times during the year. But this, the court concluded, was consistent with the text of the statute, which required only substantial compliance rather than strict compliance with the Secretary's Report.

Because PL 774 gave the agencies discretion to operate Twitchell Dam for purposes other than irrigation, conservation, and flood control, it was erroneous for the District Court to grant summary judgment on the ground that the law did not provide that authority. However, the Ninth Circuit did not decide whether those purposes included adjusting water discharges to support Southern California Steelhead migration, leaving that issue to be considered by the District Court in the first instance.

8. Real Estate

ROMERO V. SHIH

78 Cal. App. 5th 326 (2022)

The court reversed a decision to grant an implied easement between two homeowners but upheld granting an equitable easement.

The two parcels in question were owned originally by the Cutlers, who initiated a boundary line adjustment in 1985 and built a fence along the new property line. However, there was no evidence the City ever approved the lot line adjustment or issued a certificate of compliance. Decades later, a dispute arose when new homeowners (appellants) discovered that the fence did not sit upon the City-certified property lines but encroached on 1,296 square feet of their lot. After a five-day trial, the trial court granted respondents an exclusive implied easement and, alternatively, an equitable easement over the entire 1,296-square-foot encroachment.

Appellants argued that the court erred in granting an exclusive implied easement and abused its discretion by creating an equitable easement that was not narrowly tailored to promote justice and was "significantly greater in scope and duration than what is necessary to protect [respondents'] needs."

The appellate court reversed the exclusive implied easement as the facts of the case did not follow precedent for granting such an easement. The court observed that an exclusive implied easement generally cannot be granted unless the encroachment is de minimis or is necessary to protect the health and safety of the public or for essential utility purposes. Here, the encroachment, totaling 1,296 square feet of appellants' 9,815-square-foot property, could not reasonably be qualified as de minimis and nothing in the record suggested the encroachment was necessary for essential utility purposes or to protect general public health or safety. The court rejected respondents' argument that the implied easement would be non-exclusive since both parties and the trial court agreed that the easement would be "essentially for exclusive use." The court found no evidence that the subsurface of the 1296 square feet was usable for any "practical purpose" for the appellants; therefore, the easement could not be understood as a non-exclusive.

The court affirmed the creation of an equitable easement in favor of the respondents because the ruling adhered to all required elements for an equitable easement. First, there was substantial evidence that neither respondents nor their real estate agent had prior knowledge of the encroachment. Second, appellants were not irreparably injured by the easement as there was no evidence of any concrete plans to utilize the land, undue tax burden, or likelihood of "premises liability within connection with the encroachment area." Third, not granting an equitable easement would result in disproportionate hardship on respondents, evidenced by the diminution in their property value of more than $130,000 and the reduction of their driveway width that would severely limit most vehicles from using the driveway and preclude individuals from opening car doors to exit or enter a vehicle. Finally, the court ruled that the scope and duration of the equitable easement were narrowly tailored, providing that the easement would terminate if respondents "were to cease [their] continued use of that land for a driveway, planter, and wall/fence." The court noted that appellants were given multiple chances at trial to narrow the scope further yet chose not to do so and "opted for an all-or-nothing approach."

9. Brown Act

G.I. Industries v. City of Thousand Oaks

84 Cal. App. 5th 814 (2022)

Petitioner challenged a decision by the City to approve an exclusive solid waste franchise agreement with a competitor, asserting that the City violated the Brown Act by approving a Notice of Exemption under CEQA without adequate notice to the public.

The City posted an agenda that included consideration of the proposed franchise agreement, but the agenda made no mention of CEQA. On the day of the City Council meeting, a supplemental item was posted giving notice of the staff's recommendation that the City find the agreement to be categorically exempt from CEQA. At the meeting, the City Council approved the franchise agreement and the CEQA exemption.

The court held that the Brown Act applied to the City's determination that the franchise agreement was categorically exempt under CEQA, and that 72 hours' prior notice was accordingly required. The court reasoned that the City's CEQA determination was an item of business at a regular meeting of a local legislative body and the failure to provide the required notice of this agenda item deprived the public of a meaningful opportunity to be heard. The court rejected the City's claim that its adoption of the CEQA exemption was a component of the agenda item awarding the franchise agreement, finding that the CEQA exemption involved a separate action by the City and concerned discrete, significant issues of CEQA compliance.

The court also rejected the City's contention that the Brown Act was inapplicable because CEQA does not require a public hearing for a determination that a project is exempt. The Brown Act is not limited to actions that require a public hearing. The court observed that a finding that a project is exempt from CEQA is not a minor matter, as such findings foreclose any analysis of the project's environmental impact. The City's determination regarding the CEQA exemption was "an aspect of the People's business" and had to be appropriately included as an item on the City Council agenda.

The City also argued that applying the Brown Act to a CEQA exemption would place an intolerable burden on local agencies, requiring basic administrative decisions such as the purchase of paperclips to be "agendized." The court dismissed this claim, pointing out that the specific section of the Brown Act at issue applies only to an item of business to be discussed at a regular meeting of the legislative body, and that "the vast majority of the City's day-to-day business is not transacted or discussed at a regular meeting of the legislative body." Moreover, for a categorical exemption to apply, the activity must qualify as a "project" under CEQA and "[m]ost of the City's activities would not qualify as a project because they have no potential environmental effect."

CEQA Year in Review

PERKINSCOIE
COUNSEL TO GREAT COMPANIES

CEQA YEAR IN REVIEW 2023

A SUMMARY OF PUBLISHED APPELLATE OPINIONS INVOLVING THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

TABLE OF CONTENTS

INTRODUCTION

The courts issued 16 published CEQA decisions in 2022, continuing a trend of fewer published opinions than the pattern established in earlier years. The only California Supreme Court opinion, *County of Butte v. Department of Water Resources*, addressed federal preemption of CEQA, a rarely litigated issue.

The most important cases of the year centered on the adequacy of EIRs. The court in *League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer* addressed three hot CEQA topics, finding an EIR's greenhouse gas mitigation measures and energy analysis inadequate, but upholding the EIR's wildfire evacuation analysis.

Several important EIR cases focused on project alternatives. A decision that attracted significant notice - *Save the Hill Group v. City of Livermore* - held that an EIR's discussion of project alternatives was inadequate because it did not explore the possibility of a public purchase of the project site for open space rather than its development for residential use.

In *We Advocate Through Environmental Review v. County of Siskiyou*, the court found the EIR's list of project objectives so closely mirrored the proposed project that it foreclosed identification of a reasonable range of project alternatives. And in *Tiburon Open Space Committee v. County of Marin*, the county had settled federal litigation over a development site, promising to approve at least 43 residential units. In subsequent CEQA litigation, the court upheld the county's rejection of an alternative allowing fewer than 43 units, concluding that the stipulated judgment in the federal litigation rendered the reduced alternative legally infeasible. Another EIR case answers the question whether an agency may approve a revised project that is a variation on the proposed project and alternatives considered in the EIR. The court held the city did not have to recirculate the EIR because the revised project was simply another permutation of the options that were fully covered by the EIR. *Southwest Regional Council of Carpenters v. City of Los Angeles*.

Finally, in an unusual case, a court held that a landowner could pursue a malicious prosecution action against counsel for unsuccessful CEQA plaintiffs. *Jenkins v. Brandt-Hawley.*

Perkins Coie LLP | January 2020

LIST OF CASES

A. Exemptions From CEQA

Athletic Field Lighting Project Not Categorically Exempt From CEQA

Saint Ignatius Neighborhood Association v. City and County of San Francisco,
85 Cal. App. 5th 1063 (2022)

The First District Court of Appeal overturned the City of San Francisco's decision that a project to install four permanent 90-foot-tall athletic field lights was exempt from CEQA. The city approved the lighting project deciding it was subject to Class 1 (existing facilities involving negligible expansion) and Class 3 (new construction of small structures) categorical exemptions from CEQA. The city found the project qualified for a Class 1 exemption because it involved negligible or no expansion of the existing use of the facility. The court disagreed, finding the lights would significantly expand the High School's nighttime use of the facility from 40-50 to 150 nights per year. The court also ruled the project was not the kind of small improvement that fell under the Class 3 exemption, explaining the project resulted in the construction of 90-foot structures significantly taller that the built environment in the area and would, absent mitigation, likely result in significant impacts on light, sound and traffic.

B. Environmental Impact Reports

EIR For Martis Valley Project Near Lake Tahoe Rejected on Several Grounds But Air Quality Significance Threshold and Wildfire Evacuation Analysis Complied with CEQA

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer,
75 Cal. App. 5th 63 (2022)

The court of appeal rejected the EIR for the Martis Valley West specific plan, finding it deficient in several respects, but upheld other EIR analyses – including its air quality significance threshold and its analysis of wildfire evacuation.

The court agreed with plaintiffs that the EIR did not adequately describe Lake Tahoe's existing water quality or analyze an impact of project-induced VMT: roadway abrasives and sediments sent airborne by vehicle tires and then settling into Lake Tahoe. It found the analysis of greenhouse gas mitigation deficient because it required future developers to show their projects would be consistent with future GHG emission targets adopted by the state because the targets might never exist, and the EIR did not explain how the measure would apply if targets were never adopted. The court also held that an EIR's analysis of energy impacts was inadequate because it failed to discuss whether the project could increase reliance on renewable energy sources.

In contrast, the court upheld the EIR's analysis of the project's impact on emergency response and evacuation plans during a wildfire citing the project's creation of multiple evacuation and emergency access routes, a shelter-in-place location, and a detailed project-specific emergency plan. It also upheld the EIR's analysis of cumulative impacts to forest resources, finding the projected tree loss due to the specific plan was consistent with the county's 1994 projection of regional forest loss, which the county had found to be less-than-significant. In finding the analysis adequate, the court also rejected the argument that future tree loss from climate change was a cumulative "project." And, in a particularly significant ruling, the court determined the EIR was not required to use the Tahoe Regional Planning Agency's

significance threshold to analyze the impact of project-induced VMT on Lake Tahoe Basin air quality. The court concluded that while TRPA was a trustee agency under CEQA, the county was entitled to rely on the air pollution control district's significance threshold instead of TRPA's given that the air district's threshold was supported by substantial evidence.

CEQA Challenges to EIR's Biological and Emergency Evacuation Analyses Rejected.

Save North Petaluma River and Wetlands v. City of Petaluma,

(1st Dist. Case No. A163192 (Nov. 14, 2022, publication order Dec. 13, 2022)

The court of appeal denied CEQA challenges to the EIR for an apartment project, holding that analysis of biological impacts need not be based on surveys conducted in the same year the city issued its notice of preparation of the EIR. Plaintiffs asserted that an EIR must describe site conditions as they existed in the year of the notice of preparation of the EIR and challenged the EIR's baseline for analysis of impacts to biological resources because no studies had been conducted in the year the notice of preparation for the EIR was circulated. The court rejected this claim, citing cases holding that CEQA does not mandate a uniform, inflexible rule for determination of the existing conditions baseline. The EIR's description of existing biological conditions was drawn from site visits, studies, and habitat evaluations over a seven-year period and nothing in either the record or in plaintiffs' briefs suggested that on-site biological conditions had changed during this period. The court also upheld the EIR's analysis of potential impacts to emergency evacuation during flood or wildfire finding the EIR's analysis of this issue was amply supported by evidence in the record relating to the project's siting in relation to flood or wildlife hazard areas, the location of evacuation routes, and the fire department's confirmation that it did not have significant concerns about flood or fire access and egress.

EIR Invalidated for Failure to Analyze Potential Public Acquisition of Residentially Zoned Land

Save the Hill Group v. City of Livermore,

76 Cal. App. 5th 1092 (2022)

The EIR for a residential project was found legally inadequate because its discussion of project alternatives did not analyze the possibility that public funds might be used to acquire the land for open space. The project site was zoned residential and was the last remaining undeveloped area in that section of the city. The 32-acre site housed numerous special-status plant and animal species; was adjacent to a wetlands preserve; and was hydrologically connected to a unique alkali sink. Project opponents commented that the site should be preserved as open space rather than developed for housing. In response to the opponent's CEQA suit, the city argued that, as a threshold matter, the plaintiffs had not linked their request for site preservation to the EIR or its alternatives analysis during the city's approval process. They had not, the city argued, presented to the city the "exact issue" they raised in court, and therefore had failed to exhaust available administrative remedies. The court concluded the city was adequately alerted that project alternatives were at issue, largely based on exchanges between city council members and the city attorneys, and that it was clear from the record that specific comments by the opponents would not have affected the city's decision.

On the merits of the claim, the court held that the EIR's analysis of the No Project Alternative was inadequate because it did not explore the possibility of public acquisition - even though the site was eligible for such acquisition through two settlement funds specifically earmarked for acquisition of environmentally sensitive lands in the project vicinity. In addition, the court noted, the city had previously acquired other property to preserve habitat and avoid residential development, using these same funding

sources. The EIR was fatally flawed, the court concluded, because the existence of these funding sources was "just the sort of information CEQA intended to provide those charged with making important, often irreversible, environmental choices on the public's behalf." The court also addressed claims relating to mitigation measures, and in one ruling upheld a measure requiring compensatory mitigation for species impacts at another location even though the city's general plan already called for preservation of the entire area, because the mitigation measure required a permanent easement along with an endowment for restoration and management.

EIR for Water Ditch to Pipeline Conversion Adequately Described Project and Impacts to Resources

Save the El Dorado Canal v. El Dorado Irrigation District,

75 Cal. App. 5th 239 (2022)

The EIR for a water ditch to underground pipeline conversion project withstood challenges to the project description and impacts analysis. The court of appeal held that the project description sufficiently disclosed the importance of the existing ditch to stormwater runoff and the EIR adequately analyzed impacts to hydrology, biological resources, and wildfire risks. The project involved replacing a three-mile portion of a ditch with a pipeline to prevent water loss and improve water quality. The District approved an alternative that would abandon its easements for maintenance, but the ditch would remain intact to convey stormwater runoff consistent with its current flow capacity. Appellants challenged the approval, contending that the EIR's project description omitted the crucial fact that the existing ditch was the "only drainage system" for the watershed and that the EIR failed to properly analyze impacts to hydrology, biological resources, and wildfire risks.

The court held that the project description adequately described the importance of the existing ditch to the local watershed and clearly disclosed that the approved alternative would result in abandonment of the maintenance easement along the existing ditch. The court also held that the EIR adequately analyzed the project's environmental impacts. First, regarding hydrology, the court held that speculation that a property owner might intentionally fill the ditch and the purported risk the ditch would become clogged due to lack of maintenance was adequately addressed in the EIR which explained that property owners had an incentive to monitor the ditch to prevent flooding and avoid potential civil liability. Likewise, the court found that a disagreement between the irrigation district and CDFW regarding the impact to riparian habitat was fully disclosed and reasonably addressed. Finally, the court ruled that the EIR more than adequately addressed claims the ditch had been used as a water source for firefighting with evidence to the contrary and reasonably concluded that minor infrastructure like the ditch would have little to no impact during major wildfires.

Court Upholds EIR for Kern River Diversion and Storage Project

Buena Vista Water Storage District v. Kern Water Bank Authority,

76 Cal. App. 5th 576 (2022)

The court of appeal held that the EIR for a public water authority's river diversion and water storage project adequately described the unadjudicated waters to be diverted from the Kern River and adequately analyzed impacts to water rights and groundwater supply. The Kern Water Bank Authority applied to the State Water Resources Control Board for a new appropriative right to divert and store 500,000 acre-feet per year in wet years and prepared and certified an EIR for a water supply reliability project using existing infrastructure. The Buena Vista Water Storage District, a senior water rights holder, sought a writ of mandate to set aside the EIR and diversion permit. The court first held that the EIR's description of the

hydrologic conditions under which diversions would occur satisfied CEQA's requirement that environmental analysis be based upon a clear, stable and finite project description. For similar reasons, the court rejected the argument the EIR was required to quantify the amount of water existing senior water right holders are entitled to divert reasoning that nothing in CEQA required that the project description include an inventory of existing appropriated water rights in the water source. Last, the court of appeal ruled that the EIR's analysis of water supply impacts was sufficient notwithstanding the absence of a quantification of existing water rights. The EIR had properly used historical measurements of actual diversions as the baseline against which to evaluate impacts on water supply and concluded based on this evidence that water would be available for the project about 18 percent of the time. The EIR's conclusion that no mitigation would be required because diversions would only occur when surplus water was available was thus adequately supported by evidence in the record. The project' impacts associated with groundwater storage and recovery was also found adequate; the EIR analyzed effects upon groundwater withdrawals compared to baseline conditions and concluded that there would be no increased withdrawals or lowering of the water table and disclosed that maximum groundwater recovery volumes in dry years would not exceed the quantities of water diverted and banked when surplus water was available for storage.

EIR Recirculation Not Required Although Final Version of Approved Project Was Not Specifically Evaluated in EIR

Southwest Regional Council of Carpenters v. City of Los Angeles (The Icon at Panorama, LLC),

76 Cal. App. 5th 1154 (2022)

The court of appeal held that despite revisions to a mixed-use development project, the project description in the EIR was "accurate, stable, and finite;" an opportunity for public comment on the finally approved project was not required under CEQA; and because the revised project was not significantly different from alternatives considered, recirculation of the EIR was not required. The city circulated two draft EIRs for public review and comment. After it issued the final EIR for the project, city staff recommended approval of a new alternative -- a revised project not described in the draft or final EIRs, which was a modified version of an alternative that was included in the EIR. In response to the claim the EIR's project description was inadequate, the court ruled that because the project remained a mixed-use commercial/residential project on a defined project site throughout the process, and the only changes involved its "residential to commercial footprint," the city did not violate CEQA's requirement of an "accurate, stable, and finite" project description. Further, while there had been no opportunity for public comment on the project as approved through the EIR process, CEQA does not specifically require an opportunity for public comment on the project as it is finally approved or that it be described in a revised draft EIR. The public was given five months and multiple public hearings to comment on the revised project which was sufficient to satisfy CEQA's informational requirements. Furthermore, recirculation of the EIR was not required because the revised project was not "considerably different from other alternatives previously analyzed" in the draft EIR.

EIR's Statement of Project Objectives Was Unduly Narrow

We Advocate Through Environmental Review v. County of Siskiyou,
78 Cal. App. 5th 683 (2022)

The EIR for a water bottling plant in Siskiyou County withstood challenges to the project description and impacts analysis, but the court held the EIR's stated project objectives were unreasonably narrow and the county should have recirculated the EIR in light of significant new information about project emissions.

Siskiyou County granted permits to Crystal Geyser Water Company to reopen a bottling plant that had ceased operations under prior ownership. The court first rejected plaintiffs' claim that the county's EIR provided a misleading description of the project. The county properly considered the project as a whole, disclosed its limited approval authority, offered groundwater extraction estimates based on substantial evidence, and evaluated the maximum pumping that would be allowed. The court also rejected multiple challenges to the EIR's evaluation of environmental impacts, mitigation measures, and enforcement, dismissing many of those claims as unsubstantiated.

The court agreed, however, that the county should have recirculated the EIR based on the addition of significant new information about project greenhouse gas emissions, even though the EIR's ultimate conclusions about the impact remained unchanged. It also concluded that the EIR had defined the project objectives in an impermissibly narrow manner. Although the EIR listed eight objectives, that list essentially described the project's purpose as operating the plant as proposed, a constricted description which precluded the proper consideration of project alternatives.

C. Responsible Agencies

Responsible Agency Under CEQA Must Make Express Findings as to Each Potentially Significant Impact Identified in Lead Agency's EIR

We Advocate Through Environmental Review v. City of Mt. Shasta,
78 Cal. App. 5th 629 (2022)

The court of appeal held that the City of Mount Shasta, a responsible agency, violated CEQA by approving a wastewater permit for to reopen a water bottling plant without making specific findings as to each potentially significant impact identified in the EIR as required by Pub. Res. Code section 21081. The city's determination there were "no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods" was insufficient to comply with CEQA. The County of Siskiyou served as the lead agency and prepared an EIR for the bottling plant (see discussion of We Advocate Through Environmental Review v. County of Siskiyou, above) and the city served as one of several responsible agencies. The court rejected the city's contention that a responsible agency need only make findings under section 21081 when the EIR identifies significant, unmitigated environmental impacts. Instead, to comply with section 21081 for each significant impact identified in the EIR relating to the waste water permit, the city was required to find either that significant impacts identified in the EIR had been mitigated or avoided; that measures necessary for mitigation were within the responsibility and jurisdiction of another public agency and had been, or could and should be, adopted by that other agency; or that specific economic, legal, or other considerations made mitigation infeasible.

D. Subsequent And Supplemental Environmental Review

No Further Environmental Review Needed for Subdivision That Was Consistent with Approved Specific Plan

Citizens' Committee to Complete the Refuge v. City of Newark,

74 Cal. App. 5th 460 (2022)

The Court of Appeal found that a development project that was consistent with a previously approved specific plan was not required to prepare a new EIR because no changes to the project significantly increased impacts on endangered species. The court of appeal held that a subdivision map approved nine years later was exempted from further CEQA review under Government Code section 65457 because it was consistent with the specific plan, which had a certified EIR.

The court rejected plaintiffs' claim the City's determination that none of the changes to the project, which included use of rip-rap to reduce erosion, would significantly increase the project's impacts on the harvest mouse beyond those addressed in the EIR. While plaintiffs alleged further study was needed because use of rip-rap would increase rat predation, they failed to point to any supporting evidence in the record. The court also rejected the argument that the project risked exacerbating the effects of sea level rise on the environment because of the interaction of the project with wetlands in the area, finding that these dynamics were not new in relation to the project. The time to address them, if at all, was in connection with the original EIR. Plaintiffs' argument that a hydrology report's reliance on adaptive management to address flooding of the project from sea-level rise was improper deferral of mitigation also failed. Because sea level rise was not an impact on the environment caused by the project, the proposed adaptive response was not mitigation that was required to comply with CEQA.

CEQA Review Not Required for Water Allocations That Were Part of Earlier Project

County of Mono v. City of Los Angeles,

81 Cal. App. 5th 657 (2022)

A CEQA challenge to water allocations by the City of Los Angeles and its Department of Water and Power were barred by the statute of limitations because the allocations were made under leases approved years earlier.

In 2010, the City approved a set of substantially identical leases covering about 6,100 acres of land owned by the City in Mono County. The leases specified that any water supplied by the City to the leased premises was "conditioned upon the quantity in supply at any given time," The City's determination that the leases were categorically exempt from CEQA was not challenged. Over the eight-year period following approval of the leases, the City provided varying amounts of water to lessees on an annual basis. The City then sent lessees copies of a proposed new form of lease under which the City would, from time to time, provide "excess water" for spreading on the leased land. It also notified lessees that it was performing an environmental evaluation of the proposed "dry leases" and that the 2010 leases would remain operative in holdover status until environmental review was completed. Mono County filed suit contending the City failed to conduct CEQA review before deciding upon the 2018-19 allocation, which it alleged amounted to a "new reduced water project," either on its own or as part of the proposed Dry Leases.

Based on the history of water allocations under the 2010 leases, the court of appeal found no indication that the 2018-19 allocation represented "a turning point toward a low-water policy or Proposed Dry Leases." The court also dismissed the County's claim that the City was engaging in de facto implementation of proposed new leases before completing CEQA review. The 2018-19 allocation was both within the City's authority under the 2010 leases and consistent with its prior allocation practices.

Because Mono County's suit was filed years after the approval of the 2010 leases, it was time-barred. The fact that the 2018-19 allocation was a discretionary decision did not remove it from the ambit of the project approved as part of the 2010 leases, as those leases plainly gave the City authority to make such subsequent discretionary decisions.

E. CEQA Litigation

Meritless CEQA Suit Warranted Malicious Prosecution Claim Against Attorney

Jenkins v. Brandt-Hawley,

No A162852 (1st Dist., Dec 28, 2022)

The court of appeal held that an attorney's actions in filing and prosecuting a meritless challenge to construction of a single-family home supported a claim for malicious prosecution. The underlying lawsuit challenged permits issued by the Town of San Anselmo allowing the Jenkins family to demolish a small home and accessory cottage and to build a new home and detached studio on their property. The petition for writ of mandate alleged that the Town had violated CEQA, the Town Municipal Code, and the Town's general plan. After a hearing on the petition, the trial court upheld the Town's actions. The Jenkinses subsequently filed a complaint for malicious prosecution against petitioners' attorney and her law firm. The defendants responded with a motion to strike the complaint under the "anti-SLAPP" statute on the ground the claims asserted in the underlying case amounted to protected speech on a matter of public concern. The court of appeal upheld the trial court's decision denying the motion, finding the Jenkinses had shown a probability they would prevail on their claim for malicious prosecution.

The underlying lawsuit had been decided in the Jenkinses' favor; the evidence showed that probable cause to file the underlying lawsuit was absent; and the record contained abundant evidence that the attorney for the plaintiff knew the claims in the petition were "untenable." In its concluding observations, the court rejected suggestions in several amicus briefs that CEQA litigation should be essentially insulated from malicious prosecution claims because CEQA is too uncertain and complicated to support such a claim, finding no basis for such a "carve out." The court also pointed to its opinion in another CEQA case, Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700 (summarized below), in which it described the possible misuse of CEQA actions and the harm they could cause as "a formidable tool of obstruction." The suit against the Jenkinses, the court observed, had "nothing to do with environmental protection and everything to do with the privacy and aesthetic design concerns of several of the Jenkinses neighbors."

Attorneys' Fees May Be Awarded When a CEQA Lawsuit Was a Substantial Contributing Factor or a Significant Catalyst that Motivates the Agency to Abandon the Project

Department of Water Resources Environmental Impact Cases,

79 Cal. App. 5th 556 (2022)

Several public agencies, environmental organizations and other interested parties filed multiple lawsuits challenging the Department of Water Resources' EIR and approvals for the California WaterFix project, a proposal to improve the state's water supply infrastructure by constructing two tunnels that would convey water from Sacramento River to pumping stations in the southern Sacramento–San Joaquin Delta. The cases were coordinated for trial, and while the coordinated proceeding was pending, the Governor announced he did not support the WaterFix proposal and directed DWR to consider an alternative plan. A short time later, DWR decertified the EIR and rescinded its project approvals. The plaintiffs filed motions for attorneys' fees, claiming they were successful parties in the litigation under the "catalyst" theory -- that the litigation motivated DWR to provide all of the relief they were seeking without the need for a court decision. The trial court denied a fee award, concluding that the Governor's directive was as an "external superseding cause" of DWR's decision to abandon the project. The court of appeal held, however, that the trial court had applied the wrong legal standard. Under the proper standard, to receive a fee award under the catalyst theory, the plaintiff need not show the lawsuit was the only cause of the defendant's change in policy; instead, a showing the lawsuit was a substantial contributing factor or a significant catalyst motivating the change is sufficient.

City Did Not Contract Away Its Police Power or Abdicate Its Duties Under CEQA by Approving Project as Required by Stipulated Federal Court Judgments

Tiburon Open Space Committee v. County of Marin

78 Cal. App. 5th 700 (2022)

In two stipulated federal-court judgments, one entered in 1976 and another entered in 2007, the county agreed to approve development of a minimum of 43 residential units on 110 acres in order to resolve a dispute over development of the land. The court rejected petitioner's claims that the county had contracted away its police powers by stipulating to the judgments and abdicated its duties under CEQA by approving a 43-unit project. The court upheld the county's determination that a less intense 32-unit alternative was legally infeasible under CEQA, based on the fundamental rule that "that the scope of environmental review must be commensurate with an agency's retained discretionary authority, including any limitations imposed by legal obligations." Under this rule, project alternatives that conflict with the agency's legal obligations are infeasible and need not be considered under CEQA. Finding no basis for rejecting the stipulated judgments, the court held that the county was legally bound to comply with them.

CEQA Claim Barred by Statute of Limitations Under COVID Emergency Rule

Committee for Sound Water v. City of Seaside
79 Cal. App. 5th 389 (2022)

The court of appeal held that a writ petition asserting potential CEQA violations concerning the Campus Town project, a development project approved by the City of Seaside, was untimely because it was filed after the fixed end date of the COVID 19-related tolling period established the Judicial Council's Emergency Rule 9(b). As originally adopted on April 6, 2020, Emergency Rule 9 tolled all statutes of limitation for civil causes of action until 90 days after the Governor lifted the state of emergency related to the COVID-19 pandemic. Subsequently, the Judicial Council amended Emergency Rule 9 to set a fixed end date of August 6, 2020, for all claims subject to statutes of limitations of 180 days or less. Plaintiff did not file its petition until September 1, 2020. The court of appeal rejected the plaintiff's argument that Emergency Rule 9 unconstitutionally "truncated" their time to file suit, as CEQA statutes of limitations are extremely short, and the amended rule still gave plaintiff an extension of over two months to timely file its writ petition.

F. Federal Preemption

Federal Power Act Does Not Entirely Preempt Application of CEQA to Relicensing of Hydroelectric Facilities

County of Butte v. Department of Water Resources
13 Cal. 5th 612 (2022)

Two counties challenged the sufficiency of the EIR prepared by the California Department of Water Resources for the relicensing of hydroelectric power facilities owned by the state and operated by DWR. The court of appeal concluded that the Federal Energy Regulatory Commission's exclusive licensing authority over hydroelectric plants under the Federal Power Act preempted application of CEQA to the project. The California Supreme Court held, however, that while challenges to the EIR were preempted to the extent the relief requested would interfere with FERC's licensing authority or DWR's ability to operate its facilities under the license, that did not mean that application of CEQA to the project was entirely preempted. Instead, DWR had discretion under California law to prepare an EIR for the purpose of informing its decision-making about its options relating to the proposed terms of the license and mitigation measures it might impose in response to the project's environmental impacts, as long as doing so would not hamper FERC's exercise of its jurisdiction or encroach on its licensing authority.

CEQA Case Summaries
(Long Form)

A. Exemptions from CEQA

Athletic Field Lighting Project Not Categorically Exempt from CEQA

Saint Ignatius Neighborhood Association v. City and County of San Francisco,
85 Cal. App. 5th 1063 (2022)

The First District Court of Appeal overturned the City of San Francisco's decision that Saint Ignatius High School's project to install four permanent 90-foot-tall athletic field lights was exempt from CEQA. Saint Ignatius Neighborhood Association v. City and County of San Francisco, No. A164629 (1st Dist., Dec. 5, 2022).

The City approved the lighting project without environmental review concluding the project was exempt from CEQA. Specifically, the City's Planning Commission and Board of Supervisor's decided that the project was subject to Class 1 (existing facilities involving negligible expansion) and Class 3 (new construction of small structures) CEQA categorical exemptions.

The City determined that the project qualified for a Class 1 exemption because it involved negligible or no expansion of the existing use of the facility. The court ruled that while the lights would not represent an expansion of the existing facility (the High School's athletic field) or the overall frequency of its use, the lights significantly expanded the High School's nighttime use of the facility from 40-50 to 150 nights per year. As such, this represented a significant expansion of the facility's existing use, and the City erred in finding the Class 1 categorical exemption applicable.

The court also ruled the project was not the kind of small improvement that fell under the Class 3 exemption, explaining the project resulted in the construction of 90-foot structures significantly taller that the built environment surrounding the project (where the nearby houses and streetlights did not exceed 30 feet). The project's completion would also likely result in significant (but potentially mitigable) impacts on light, sound and traffic.

The court added that "the purpose here for enforcing the environmental analysis . . . [was] not necessarily to kill the project but to require careful consideration of measures that will mitigate the environment impacts of the project."

B. Environmental Impact Reports

EIR For Martis Valley Project Near Lake Tahoe Rejected on Four Grounds But Wildfire Evacuation Analysis Complied with CEQA

League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer,
75 Cal. App. 5th 63 (2022)

In a lengthy opinion tackling several of CEQA's hot topics, a court of appeal has rejected the EIR for the Martis Valley West project, finding its Lake Tahoe water quality analysis, GHG and traffic mitigation measures, and energy analysis inadequate. *League to Save Lake Tahoe Mountain Area Preservation Foundation v. County of Placer*, 75 Cal. App. 5th 63 (2022). The court upheld other EIR analyses –

most notably the section analyzing wildfire evacuation – as well as the county's compliance with the Timberland Productivity Act.

Background

Sierra Pacific Industries owned two large undeveloped parcels bordering the Lake Tahoe Basin and spanning State Route 267. It proposed a specific plan and other approvals for 760 residential units and commercial uses on 662 acres of its west parcel, along with permanent conservation of its 6,376-acre east parcel. Placer County approved the project after certifying an EIR and rezoned the development site from Timberland Production Zone to Specific Plan.

CEQA

1. Air Quality Significance Threshold Upheld

Plaintiffs alleged that although the development site was outside the jurisdiction of the Tahoe Regional Planning Agency (TRPA), the EIR should have used TRPA's vehicle miles traveled (VMT) significance threshold, or the science behind it, to analyze the impact of project-induced VMT on Lake Tahoe Basin air quality. The county instead applied the thresholds recommended by the Placer County Air Pollution Control District. The court found that although TRPA was a trustee agency under CEQA and the county was required to consider TRPA's views, the county was also entitled to select its own significance threshold if it was supported by substantial evidence. The court held that — unlike in the 2021 case of *Sierra Watch v. Placer County* — here the county identified and applied a significance threshold that was supported by substantial evidence.

2. Lake Tahoe Water Quality Setting and Impact Analysis Rejected

The court agreed with plaintiffs that the EIR did not adequately describe Lake Tahoe's existing water quality or analyze another impact of project-induced VMT: roadway abrasives and sediments sent airborne by vehicle tires and then settling into Lake Tahoe. The court held that data on this issue provided after issuance of the final EIR was too late and that "it should not be difficult" for the county to correct this error.

3. Greenhouse Gas Mitigation Rejected

A GHG mitigation measure required future developers within the specific plan area to demonstrate that their projects would be consistent with then-current GHG emission targets adopted by the state, "where those targets, in compliance with the rule of Newhall Ranch, are based on 'a substantiated linkage' between the project and statewide emission reduction goals." Because such targets did not exist and might never exist, and the final EIR did not discuss how the mitigation measure would apply if such targets were never developed, the court agreed with plaintiffs that the mitigation measure violated CEQA.

4. Wildfire Evacuation Analysis Upheld

Plaintiffs alleged the EIR's analysis of the project's impact on emergency response and evacuation plans during a wildfire did not adequately address congestion on State Route 267 or possibilities such

as an overturned boat trailer blocking that route. The court rejected this challenge, citing the project's creation of multiple evacuation and emergency access routes, a shelter-in-place location, and a detailed project-specific emergency plan. The court noted the role of emergency responders in managing evacuation along Route 267 and CEQA's principles that an EIR cannot be expected to address every possibility and is not required to use a worst-case analysis.

5. Forest Resources Cumulative Impact Analysis Upheld

Plaintiffs alleged that, contrary to the EIR's conclusion, tree loss from project development would represent a cumulatively considerable contribution to tree loss that was already occurring in the county due to climate change. The court rejected this argument because tree loss under the specific plan was consistent with the county's 1994 projection of regional forest loss, which the county had found to be less-than-significant. The court declined to consider future tree loss from climate change a cumulative "project."

6. Traffic Congestion Mitigation Measure Rejected

The court rejected the EIR's reliance on payment of a fee toward widening of Route 267 as mitigation for the project's impacts to traffic congestion, agreeing with plaintiffs that the EIR should have considered vehicle trip reduction measures such as transit subsidies as an alternative to Route 267 widening. The court's opinion does not mention *Citizens for Positive Growth & Preservation v. City of Sacramento*, the 2019 case holding that challenges to congestion-based traffic analysis became moot under CEQA as of December 2018.

7. Discussion of Impacts of Route 267 Widening Upheld

Plaintiffs also alleged that the mitigation measure requiring payments toward State Route 267 widening violated CEQA because that widening project itself had not yet undergone full CEQA review. The court rejected this claim on the ground that the county had already analyzed the widening at a program level and that the widening would undergo full CEQA review "once Caltrans proceeds with the project."

8. Energy Analysis Rejected

The court held that an EIR's analysis of energy impacts is required to discuss whether the project could increase its reliance on renewable energy sources.

Timberland Productivity Act

Plaintiffs alleged that the county's findings supporting rezoning of the development site from Timberland Production Zone (TPZ) to "Specific Plan" did not comply with the state Timberland Productivity Act. The Act, like the Williamson Act that applies to agricultural lands, allows a property owner to designate its land for timber production and obtain tax benefits in return. To waive the Act's normal ten-year notice requirement for rezoning from TPZ and approve immediate rezoning, a jurisdiction must, among other requirements, make findings that immediate rezoning would not be inconsistent with the purposes of the Act.

The court rejected plaintiffs' two challenges to the county's findings. The first was that the county could approve immediate rezoning only if it explained why waiting ten years would be inconsistent with the purposes of the Act. The second argument was that in its consideration of rezoning 662 acres of the west parcel, the county could not consider the property owner's proposal to rezone 670 acres of its east parcel back into TPZ. The court found no support in the Act for either of these proposed requirements.

Julie Jones

CEQA Challenges to EIR's Biological and Emergency Evacuation Analyses Rejected

Save North Petaluma River and Wetlands v. City of Petaluma,

(1st Dist. Case No. A163192 (Nov. 14, 2022, publication order Dec. 13, 2022)

A court of appeal has denied CEQA challenges to the EIR for an apartment project, holding that analysis of biological impacts need not be based on surveys conducted in the same year the city issued its notice of preparation of the EIR. *Save North Petaluma River and Wetlands v. City of Petaluma* (1st Dist. Case No. A163192 (Nov. 14, 2022, publication order Dec. 13, 2022). The court also upheld the EIR's analysis of potential impacts to emergency evacuation during flood or wildfire.

The apartment project, first proposed in 2003 at 312 units, underwent numerous revisions before the city approved it at 180 units in 2020. The revisions reduced the project's footprint, increased its setback from the Petaluma River, and preserved additional wetlands and trees.

Plaintiffs asserted that an EIR must describe site conditions as they existed in the year of the notice of preparation of the EIR. Here, the City issued the NOP in 2007, but the EIR's analysis cited a 2004 Special Status Species Report that in turn cited a 2001 site survey. Plaintiffs challenged the EIR's baseline for analysis of impacts to biological resources because no study had been conducted in 2007.

The court rejected this claim, citing case law holding that CEQA does not mandate a uniform, inflexible rule for determination of the existing conditions baseline. Here, the EIR's description of existing biological conditions was drawn from site visits, studies, and habitat evaluations that took place both before and after 2007. And nothing in either the record or in plaintiffs' briefs suggested that on-site biological conditions had changed over the years.

Plaintiffs also argued that the project would cause a significant public safety impact by interfering with evacuation during a flood or a wildfire. The court upheld the EIR's analysis of this issue as based on substantial evidence, which included the project's siting of both buildings and evacuation routes outside the floodplain, the project's location outside the city's high fire hazard severity zone, and the fire department's confirmation that it did not have significant flood or fire access/egress concerns with development above the 100-year floodplain. The plaintiffs' late submission of an expert's one-page memorandum requesting additional study did not entitle the court to reweigh the allegedly conflicting evidence.

It is fairly common for expert surveys and studies of existing environmental conditions to be prepared either before or after the NOP is issued. So long as the EIR's description is supported by substantial evidence, the Save North Petaluma case confirms that nothing in CEQA requires such surveys and studies to be conducted in the year of the NOP.

Julie Jones

EIR Invalidated for Failure to Analyze Potential Public Acquisition of Residentially Zoned Land

Save the Hill Group v. City of Livermore,

76 Cal. App. 5th 1092 (2022)

The EIR for a residential project has been struck down because its discussion of project alternatives did not analyze the possibility that public funds might be used to acquire the land for open space. *Save the Hill Group v. City of Livermore*, 76 CA5th 1092 (2022).

The project site was zoned residential and was the last remaining undeveloped area in that section of the city. The 32-acre site was environmentally sensitive: it housed numerous special-status plant and animal species; was adjacent to a wetlands preserve; and was hydrologically connected to the unique Springtown Alkali Sink. Project opponents commented that the site should be preserved as open space rather than developed for housing. They filed a CEQA suit after the city approved the project.

The city noted that during its CEQA and project approval process, the plaintiffs had never tied their request for site preservation to the EIR or its alternatives analysis. Accordingly, the city argued that the plaintiffs had not presented to the city the "exact issue" they alleged in court and therefore had failed to exhaust administrative remedies. The court concluded, largely due to exchanges between city council members and city attorneys rather than comments by the public, that it was clear CEQA project alternatives were at issue and equally clear that even had the plaintiffs mentioned the EIR in relation to their open-space advocacy, it would have made no difference to the city's decision. Therefore, the court found that the plaintiffs had met CEQA's exhaustion requirement.

The court then held that the EIR's analysis of the No Project Alternative was inadequate because it did not explore the possibility of public acquisition - even though the site was eligible for such acquisition through two settlement funds specifically designed to acquire environmentally sensitive lands in the area where the project site was located. In addition, in 2011 the city had acquired another private property to preserve habitat and avoid residential development, using these same funding sources. Under these circumstances, the court concluded that the existence of these funding sources was "just the sort of information CEQA intended to provide those charged with making important, often irreversible, environmental choices on the public's behalf."

Finally, although the plaintiffs abandoned their challenges to the EIR's analyses and mitigation measures for impacts to vernal pool fairy shrimp and the Springtown Alkali Sink, the court addressed and rejected those challenges, concluding that: 1) mitigation requiring future presence/absence surveys for the shrimp was not impermissibly deferred; 2) substantial evidence supported the EIR's finding that the project would not cause a significant impact to the Springtown Alkali Sink; and 3) mitigation requiring offsite compensatory mitigation for species impacts at the 85-acre "Bluebell" site was adequate even though the city's general plan already called for preservation of that entire area, because the mitigation measure, unlike the general plan, required a permanent easement with an endowment for restoration and management.

Proposed greenfield development often elicits comments that a project site should be preserved rather than developed. The circumstances of *Save the Hill Group* are unusual, however, both in the biological quality of the site and, particularly, in the apparent availability of funds to acquire the site for preservation. Although most greenfield development projects will not feature these characteristics, the court's decision indicates that lead agencies should take special care in their EIRs analyzing

developments with potentially significant impacts to biological resources. In such cases, it may be wise to discuss whether legal or other reasons render public acquisition of the project site infeasible.

Julie Jones

EIR for Water Ditch to Pipeline Conversion Adequately Described Project and Analyzed Impacts to Resources

Save the El Dorado Canal v. El Dorado Irrigation District,

75 Cal. App. 5th 239 (2022)

The EIR for a water ditch to underground pipeline conversion project withstood challenges to the project description and impacts analysis. The Third Appellate District held that the project description sufficiently disclosed the importance of the existing ditch to stormwater runoff and the EIR adequately analyzed impacts to hydrology, biological resources, and wildfire risks. *Save the El Dorado Canal v. El Dorado Irrigation District*, 75 Cal. App. 5th 239 (2022).

El Dorado County relies exclusively on surface water—and the interconnected system of ditches and pipelines that moves it—to meet its potable water demands. In 2017, the El Dorado Irrigation District proposed to underground a three-mile portion of this system, known as the "Upper Main Ditch," to prevent water loss and improve water quality. The pipeline was originally slated to follow the alignment of the existing ditch, but an alternative route that instead tracked nearby Blair Road was ultimately approved. In the approved alternative, the El Dorado Irrigation District would abandon its authority related to the existing ditch, including easements for maintenance, but the ditch would remain intact to convey stormwater runoff consistent with its current flow capacity.

Appellants challenged the project approval, contending that (1) the project description omitted the crucial fact that the existing ditch was the "only drainage system" for the watershed, and (2) the EIR failed to properly analyze impacts to hydrology, biological resources, and wildfire risks.

The court held that the project description adequately described the importance of the existing ditch to the local watershed. The description acknowledged the ditch currently accommodated storm water flows up to a 10-year storm event capacity, and straightforwardly revealed that the Blair Road Alternative would result in abandonment of the maintenance easement along the existing ditch. The irrigation district was not required to specifically state, even if true, that the ditch was the watershed's "only drainage system." The court does not require perfection, but rather "adequacy, completeness, and a good faith effort at full disclosure."

The court also held that the EIR adequately analyzed all environmental impacts. First, regarding hydrology, appellants contended the EIR failed to analyze the likelihood that the abandoned ditch would become clogged with debris or vegetation after the irrigation district relinquished maintenance authority, citing a comment letter from El Dorado County. The court disagreed. An EIR must address "reasonably foreseeable indirect effects," but skepticism that a property owner might intentionally fill the ditch is not within this requirement. While there was a risk that the ditch would become clogged due to lack of attention (e.g., overgrowth of vegetation), the EIR provided a sufficient response, explaining that property owners had an incentive to monitor the ditch to prevent flooding and avoid potential civil liability. The disagreement between the irrigation district and the county on this point did not render the EIR inadequate.

Likewise, the irrigation district thoroughly explained and supported its analysis of impacts to biological resources. Disagreement between the irrigation district and CDFW regarding the impact to riparian habitat was fully disclosed and reasonably addressed. The district also explained in detail, with input from experts, how the reduction in natural water seepage was unlikely to increase bark beetle infestations in trees near the existing ditch. That the project would not result in significant impacts to either of these resources was supported by substantial evidence and appellants did not satisfy their burden to show why the evidence provided was lacking.

In response to wildfire risks, the EIR more than adequately addressed the project's impact on fighting wildfires. The irrigation district countered anecdotal information that the ditch was previously used as a water source for firefighting with evidence to the contrary and reasonably concluded that minor infrastructure like the ditch would have little to no impact during major wildfires. Review of CalFIRE strategic plans further confirmed that the ditch was not designated as a fire protection resource.

Taylor Jones

Court Upholds EIR for Kern River Diversion and Storage Project

Buena Vista Water Storage District v. Kern Water Bank Authority,
76 Cal. App. 5th 576 (2022)

A California Court of Appeal held that the EIR for a public water authority's river diversion and water storage project adequately described the unadjudicated waters to be diverted and adequately analyzed impacts to water rights and groundwater supply. *Buena Vista Water Storage District v. Kern Water Bank Authority*, 76 Cal. App. 5th 576 (2022).

Until 2010, the Kern River had been designated by the State Water Resources Control Board as a fully appropriated stream, and only those who held an appropriative water right could divert Kern River water. The State Board removed the fully appropriated designation after observing that, in certain wet years, unappropriated water in the form of excess flood flows remained in the Kern River. Shortly thereafter, the Kern Water Bank Authority applied to the State Board for a new appropriative right to divert and store 500,000 acre-feet per year (AFY) in wet years and prepared and certified an EIR for a corresponding water supply reliability project using existing infrastructure. The EIR's stated objectives were "to secure water rights to unappropriated Kern River Water to maximize use of Ken Water Bank Authority's existing capabilities," to "continue allowing Kern River water to be diverted . . . during times of excess Kern River flows for recharge and later recovery," and to enhance "water supply reliability, particularly in dry years." The EIR acknowledged that, under observed hydrologic conditions, excess flood flows would be available for diversion in an estimated 18 percent of all years. The corresponding water rights permit application specified that Kern Water Bank Authority sought to divert only during years when water was available, and the State Board relied upon the Authority's EIR to approve the diversion permit.

The Buena Vista Water Storage District, a senior water rights holder in the Kern River, sought a writ of mandate to set aside the EIR and diversion permit.

The EIR Satisfied CEQA's Requirement for an Accurate, Stable and Finite Project Description Without Quantifying Adjudicated and Existing Appropriative Water Rights

The Court of Appeal found that the EIR satisfied CEQA's requirement that environmental analysis be based upon a clear, stable and finite project description. Although the EIR used multiple phrases and references to describe the hydrologic conditions under which diversions would occur, the court found its description of "flood flows," water that the Authority "has historically received," and "unappropriated water" to be internally consistent. The court also found no instability arising from the proposed 500,000 AFY limit, because CEQA allows for flexible parameters to describe a diversion that will occur during changing hydrologic conditions and subject to a finite maximum diversion.

For similar reasons, the Court of Appeal rejected the contention that CEQA required the EIR to "actually quantify the amount that [existing senior] water right holders" are entitled to, include "quantified measurements of water used by existing Kern River water rights holders," and "quantified measurements of the water those rights holders have the right to divert." Looking to CEQA Guidelines Section 15124, the Court of Appeal found that the EIR included the minimum requirements by identifying (a) the location and boundaries of the project, (b) a statement of its objectives, (c) a general description of the project's technical, economic, and environmental characteristics, and (d) a statement of the intended use of the EIR. None of these elements required the Authority to specifically quantify existing water rights in either the project description generally or the environmental setting descriptions in the EIR. The court found that such a requirement would be particularly onerous given that there had never been a stream-wide adjudication of the Kern River in which such rights had been officially quantified. In essence, the court found that where a project proponent seeks to divert and beneficially use unappropriated surface waters and that intention is reflected in an adequately finite and stable project description, CEQA does not require it to inventory existing appropriated water rights in the water source.

The EIR Adequately Evaluated Impacts on Water Supply

Last, the Court of Appeal ruled that the EIR's analysis of water supply impacts was supported by substantial evidence notwithstanding the failure to quantify existing water rights. The EIR had properly used historical measurements of actual diversions as the baseline against which to evaluate impacts on water supply and concluded based on evidence in the record that water for the project would be available about 18 percent of the time. The EIR's conclusion that no mitigation would be required because diversions would only occur surplus to existing proprietary rights was therefore supported by substantial evidence.

The court also found that the EIR adequately analyzed impacts associated with groundwater storage and recovery aspects of the project. Specifically, the court concluded that the EIR's less-than-significant impact finding was supported by substantial evidence because the EIR analyzed effects upon groundwater withdrawals compared to baseline conditions and concluded that there would be no increased withdrawals or lowering of the water table. The EIR specifically disclosed that maximum groundwater recovery volumes in dry years would not exceed the quantities of water diverted and banked in wet years during periods where surplus water was available for storage.

John Morris

EIR Recirculation Not Required Although Final Version of Approved Project Was Not Specifically Evaluated in EIR

Southwest Regional Council of Carpenters v. City of Los Angeles (The Icon at Panorama, LLC),

76 Cal. App. 5th 1154 (2022)

The Second District Court of Appeal held that: (1) despite revisions to a mixed-use development project, the project description in the EIR was "accurate, stable, and finite;" (2) an opportunity for public comment on the finally approved project was not required under CEQA; and (3) because the revised project was not significantly different from alternatives considered, recirculation of the EIR was not required. *Southwest Regional Council of Carpenters v. City of Los Angeles (The Icon at Panorama, LLC)*, 76 Cal. App. 5th 1154 (2022).

The Icon at Panorama, LLC ("Icon") proposed a mixed-use commercial and residential development in Los Angeles. The City circulated two draft EIRs for public review and comment and eventually issued its final EIR for the project in February 2018. In March 2018, City staff recommended approval of a new alternative project ("Revised Project") not set out in the draft or final EIRs. This Revised Project was a smaller version of an alternative previously provided ("Alternative 5"). Compared to Alternative 5, the Revised Project contained fewer residences, but the same amount of commercial area. Petitioners challenged the project approval, contending that: (1) the project description in the EIR was inadequate; (2) the EIR should have been recirculated after being substantially revised; and (3) the revised project description violated CEQA.

The court explained that, per case law and CEQA Guidelines, the EIR must include enough detail to allow others to "understand and to consider meaningfully the issues raised by the proposed project." Here, because the project remained a mixed-use commercial/residential project on a defined project site from proposal to approval, the size and site of the project remained the same, and the only changes involved the "residential to commercial footprint," the City did not violate CEQA's requirement of an "accurate, stable, and finite" project description.

The court acknowledged that the approved project was not included in any EIR circulated and thus, no opportunity for public comment was given, but the court found that CEQA does not appear to require an opportunity for public comment on the final approved project. Recirculation of a revised draft EIR that contains the final approved project and an opportunity for public comment is not required by CEQA either. The court declined to require a further opportunity for the public to comment on the actual project before approval. The court found the City fully compliant with CEQA's information requirements as the City provided ninety-two days for public comment on the draft EIR, and the public was given five months and multiple public hearings to comment on the Revised Project. Further, the court found no record of any "prohibited impediment to informed decision-making."

With respect to recirculation, CEQA requires that a new public comment period be provided if the lead agency adds "significant new information" to the EIR after the public comment period ends but before the final EIR is certified. The court explained that because CEQA requires circulation of the draft EIR, public comment, and response to such comments before the final EIR is certified, the final EIR will almost always contain information not included in the draft EIR. As such, the addition of new information alone does not mean recirculation is required. Here, the court found that the Revised

Project was not "considerably different from other alternatives previously analyzed" in the draft EIR and thus recirculation was not required.

Kelly Eshima

EIR's Statement of Project Objectives Was Unduly Narrow

We Advocate Through Environmental Review v. County of Siskiyou,
78 Cal. App. 5th 683 (2022)

The EIR for a bottling plant in Siskiyou County withstood challenges to the project description and impacts analysis, but the EIR's stated project objectives were unreasonably narrow and the County should have recirculated the EIR in light of significant new information about project emissions. *We Advocate Through Environmental Review v. County of Siskiyou, 78 Cal. App.* 5th 683 (2022).

Siskiyou County granted permits to Crystal Geyser Water Company to reopen a bottling plant that had ceased operations under prior ownership. Plaintiffs sued, alleging that the County's environmental review for the bottling facility was inadequate under CEQA.

The plaintiffs claimed that the County provided a misleading description of the project. The appellate court disagreed, finding that the County properly considered the project as a whole, disclosed its limited approval authority, offered groundwater extraction estimates based on substantial evidence, and evaluated the maximum pumping that would be allowed.

The court rejected plaintiffs' challenges to the County's evaluation of environmental impacts to aesthetics, air quality, climate, mitigation measures and enforcement, noise, and hydrology, dismissing many claims as unsubstantiated or undeveloped. The court agreed, however, that the County should have recirculated the EIR based on the addition of significant new information about project greenhouse gas emissions, even though the EIR's ultimate conclusions remained unchanged.

The court also rejected plaintiffs' argument that the County improperly approved the project because it would result in noise impacts inconsistent with the County's and the City's general plans, finding that plaintiffs did not properly identify such a conflict.

Plaintiffs also contended that the County defined the project objectives in an impermissibly narrow manner. The court agreed, explaining that a clearly written statement of a project's objectives is essential to develop a reasonable range of alternatives capable of achieving those objectives. The EIR stated eight objectives that largely defined the project objectives as operating the project as planned, precluding the proper consideration of project alternatives and turning the EIR's alternatives section into "an empty formality." The court thus found that the County's reliance on these objectives prejudicially prevented informed decision making and public participation.

The court accordingly ordered entry of judgment requiring the County to (1) revise the statement of the project objectives, (2) revise the alternatives analysis in light of the new statement of project objectives, and (3) recirculate the EIR's discussion of greenhouse gas emissions to allow comment on the new emission estimates.

Caitlin Stern

C. Responsible Agencies

Responsible Agency Under CEQA Must Make Express Findings as to Each Potentially Significant Impact Identified in Lead Agency's EIR

We Advocate Through Environmental Review v. City of Mt. Shasta,

78 Cal. App. 5th 629 (2022)

The Court of Appeal held that the City of Mount Shasta violated CEQA by approving a wastewater permit for a water bottling plant without making specific findings as to each potentially significant impact identified as required by Pub. Res. Code section 21081. The City's determination that there were "no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods" was insufficient to comply with CEQA. *We Advocate Through Environmental Review v. City of Mt. Shasta*, 78 Cal. App. 5th 629 (2022).

Crystal Geyser Water Company purchased a defunct water bottling plant in Siskiyou County and sought to reopen it. It applied for a permit from the City to allow the plant to discharge wastewater into the city's sewer system, which the City granted. The County of Siskiyou served as the lead agency and prepared an EIR for the reopened bottling plant, and the City served as one of several responsible agencies. An environmental group and a local Indian tribe filed petitions for writ of mandate challenging the City's approval of the wastewater discharge permit, arguing that the City failed to make certain findings under CEQA.

The court agreed with appellants, concluding that the City's approval violated CEQA's procedural requirements. The wastewater permit authorized the plant to discharge to the City's sewer system process, non-process, and sanitary wastewater. The types of discharge included high-strength wastewater from spilled product and internal and external cleaning and sanitizing chemicals; flavor change rinse water; final rinse water from product lines and tanks; condensate, boiler-blowdown water; and cooling-tower-blowdown water. The County's EIR identified as potential impacts that the wastewater could exceed the capacity of the City's wastewater treatment plant, as well as that the installation of additional pipelines could result in significant impacts to fishery resources, several endangered species, and cultural resources. (In a separate decision, the Court of Appeal invalidated the County's EIR, holding that the stated project objectives were unduly narrow and that the EIR should have been recirculated in light of significant new information about project emissions. Our report on that decision is available here.)

The City did not acknowledge the impacts identified in the County's EIR in its approval of the wastewater permit. It did not say whether those impacts would be mitigated, whether another agency would handle mitigation, or whether mitigation would be infeasible, and it did not supply any reasoning for the required findings. The City instead concluded in a single sentence that the City had reviewed the EIR and "[found] no unmitigated adverse environmental impacts relating to the alternate waste discharge disposal methods."

The court held that this determination was inadequate under CEQA, ruling that the City was required to find either that significant impacts identified in the EIR had been mitigated or avoided; that measures necessary for mitigation were within the responsibility and jurisdiction of another public agency and had

been, or could and should be, adopted by that other agency; or that specific economic, legal, or other considerations made mitigation infeasible. Pub. Res. Code section 21081 (a). Moreover, each agency's findings must be "accompanied by a brief explanation of the rationale for each finding," as required by CEQA Guidelines section 15091(a). The court rejected the City's contention that a responsible agency need only make findings under section 21081 when the EIR identifies significant, unmitigated environmental impacts.

Separately, the court rejected appellants' argument that the City should have performed additional environmental review because the amended draft of the permit identified impacts that were not addressed in the County's EIR. The County's EIR evaluated the potential environmental impacts associated with all governmental approvals, including the City's wastewater discharge permit. The court explained that the suit against the City was not an appropriate forum for challenging the County's EIR (citing 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality (Cont. Ed. Bar 2021 update) § 3.23 ("A lawsuit brought against a responsible agency is limited to the actions that the responsible agency takes in approving the project, but does not extend to actions by the lead agency, or to the adequacy of the lead agency's CEQA review of the project.")).

Angela Luh

D. Subsequent and Supplemental Environmental Review

No Further Environmental Review Needed for Subdivision That Was Consistent with Approved Specific Plan

Citizens' Committee to Complete the Refuge v. City of Newark,

74 Cal. App. 5th 460 (2022)

The Court of Appeal found that a development project that was consistent with a previously approved specific plan was not required to prepare a new EIR because no changes significantly increased impacts on endangered species. *Citizens' Committee to Complete the Refuge v. City of Newark*, 74 Cal. App. 5th 460 (2021).

In 2010, the City of Newark certified an environmental impact report for a specific plan covering Areas 3 and 4, located next to San Francisco Bay. The EIR stated that the City would evaluate all new projects in accordance with CEQA Guidelines section 15168, which allows the City to use a checklist or initial study to evaluate specific development proposals, and that no further environmental documents would be required for subsequent activities found to be within the scope of the specific plan EIR.

In 2019, the City approved a subdivision map for development of residential lots on a portion of Area 4. The City prepared a checklist comparing the analysis in the EIR with the impacts of the proposed project. The checklist included supporting materials such as plans, letters, expert memos, and technical reports, including an updated analysis of the effects of sea level rise. The City approved the project after finding that it would have no significant impacts. The plaintiffs challenged the map approval and the use of the checklist.

The court of appeal held that the subdivision map was exempted from further CEQA review under Government Code section 65457 because it was consistent with the specific plan, which had a certified

EIR. Under that circumstance, no further environmental review is required in the absence of substantial changes to the project or the circumstances under which the project will be developed or if new information becomes available.

The plaintiffs claimed that there were three aspects of the subdivision map that were significantly different from the specific plan analyzed in the EIR and would have significant new impacts on the salt marsh harvest mouse. However, substantial evidence supported the City's conclusion that none of the changes would significantly increase the impacts on the harvest mouse beyond those addressed in the EIR. The court recognized that there was proposed use of riprap to reduce erosion, which was not mentioned in the EIR, but held that this did not rise to the level of a "[s]ubstantial change[] . . . in the project which will require major revisions of the environmental impact report." While plaintiffs argued that use of riprap deserved further study because it would substantially increase the severity of rat predation of the harvest mouse, they failed to offer any substantial evidence to support this claim.

Plaintiffs also contended that the project risked exacerbating the effects of sea level rise on the environment because of the interaction of the project with wetlands in the area. The court found that, even if plaintiffs' theory was correct, these dynamics were not new in relation to this project, so the City did not need to address them in reviewing the project—the time to address them, if at all, was in relation to the original EIR.

The court likewise rejected plaintiffs' argument that a hydrology report's reliance on adaptive management to address flooding of the project from sea-level rise (such as by creating levees or floodwalls) amounted to improper deferral of mitigation measures. The court reasoned that because sea level rise was not an impact on the environment caused by the project, neither the EIR nor the checklist needed to discuss this impact. For the same reason, the adaptive responses to sea level rise discussed in the hydrology report were not mitigation measures were not governed by the rules concerning deferred mitigation.

Kaela Shiigi

CEQA Review Not Required for Water Allocations That Were Part of Earlier Project

County of Mono v. City of Los Angeles,

81 Cal. App. 5th 657 (2022)

A CEQA challenge to water allocations by the City of Los Angeles and its Department of Water and Power were barred by the statute of limitations because the allocations were under leases approved years earlier. *County of Mono v. City of Los Angeles*, 81 Cal. App. 5th 657 (2022).

In 2010, the City approved a set of substantially identical leases covering about 6,100 acres of land owned by the City in Mono County. The City's determination that the leases were categorically exempt from CEQA was not challenged. The leases provided that any supply of water by the City to the leased premises was "conditioned upon the quantity in supply at any given time," and that "the amount and availability of water, if any, shall at all times be determined solely by the City of Los Angeles."

Over the eight-year period following approval of the leases, the City provided varying amounts of water to lessees on an annual basis, ranging from zero to 5.4 acre-feet. In March 2018, the City sent lessees copies of a proposed new form of lease — termed the "Proposed Dry Leases" — under which the City

would not furnish irrigation water but would, from time to time, provide "excess water" for spreading on the leased land. It also notified lessees that it was performing an environmental evaluation of the Proposed Dry Leases and that the 2010 leases would remain operative in holdover status until completion of environmental review. In May 2018, the City informed lessees that the 2018-19 allocation under the 2010 leases would be 0.71 acre-feet per lease.

The County of Mono, one of the lessees, filed suit contending that the City improperly failed to conduct CEQA review before deciding upon the 2018-19 allocation because the allocation constituted a "new reduced water project," either on its own or as part of the Proposed Dry Leases.

The Court of Appeal was unpersuaded. Based on a close examination of the history of water allocations under the 2010 leases, the court found no indication that the 2018-19 allocation represented "a turning point toward a low-water policy or Proposed Dry Leases." It rejected, as unsupported by the evidence, the County's claim that the City's prior water allocations had been closely tied to the snowpack and anticipated runoff and that the 2018-19 allocation represented a departure from this practice. Rather, the allocations were only loosely tied to snowpack and runoff estimates and depended on other factors, including the City's own needs and conservation practices.

The court also dismissed the County's claim that the timing of the 2018-19 allocation relative to the Proposed Dry Leases indicated that the City was engaging in de facto implementation of proposed new leases before completing CEQA review. The court pointed out that the City had announced its intention to perform environmental review before approving the new leases and expressly committed to abiding by the 2010 leases while proceeding with that review. The 2018-19 allocation was both within the City's authority under the 2010 leases and consistent with its prior allocation practices.

Because Mono County's suit was filed years after the approval of the 2010 leases, it was time-barred. The fact that the 2018-19 allocation was a discretionary decision did not remove it from the ambit of the project approved as part of the 2010 leases, as those leases plainly gave the City authority to make such subsequent discretionary decisions. If Mono County believed the decision to reduce water allocations in specific years would be a substantial change in practice that could have significant environmental effects, it should have raised that argument in 2010 when the City approved the leases that gave it authority to make such decisions.

Geoffrey Robinson

E. CEQA Litigation

Meritless CEQA Suit Warranted Malicious Prosecution Claim Against Attorneys

Jenkins v. Brandt Hawley,

No A162852 (1st Dist., Dec 28, 2022)

In a highly unusual case, a court of appeal allowed a malicious prosecution case to proceed against the attorneys for unsuccessful CEQA plaintiffs in a case brought to challenge permits to demolish a single family home and to build a new home on the site. *Jenkins v Brandt Hawley*, No A162852 (1st Dist., Dec 28, 2022).

The underlying lawsuit challenged permits issued by the Town of San Anselmo allowing the Jenkins family to demolish a small home and accessory cottage and to build a new home and detached studio on their property. The petition for writ of mandate alleged that the Town had violated CEQA, the Town Municipal Code, and the Town's general plan. The trial court upheld the Town's actions; the petitioners' attorneys then filed an appeal which they dismissed a few months later. The Jenkinses then filed a complaint for malicious prosecution against petitioners' attorney and her law firm. They responded to with an "anti-SLAPP" motion – a motion to strike the complaint on the ground the claims asserted in the underlying case amounted to protected speech on a matter of public concern. The trial court denied the motion to strike, finding that the Jenkinses had shown a probability they would prevail on their claim for malicious prosecution.

To prevail in a malicious prosecution action the plaintiff must prove that the underlying lawsuit was pursued to a legal termination in the plaintiff's favor; it was brought without probable cause; and it was pursued with "malice." There was no dispute that the underlying lawsuit was decided in the Jenkinses' favor.

Absence of probable cause. The court found this test was easily met. There was no support in the language of the Municipal Code or the record supporting the petitioners' argument the Town had violated the Code. As for the CEQA claim, no showing was made that the petitioners had exhausted administrative remedies, and the argument the project was ineligible for CEQA's categorical exemption for single family residences was "untenable."

Malice. The court concluded that the record contained "abundant other evidence" of malice including numerous misleading or incorrect statements of fact in the petition, arguments that failed to fairly characterize evidence in the administrative record, and apparent "indifference" to the detailed information provided by the Jenkinses' attorney to show the case was meritless. The record also showed that the plaintiffs' attorney was highly experienced in CEQA and land use cases and should have known claims in the petition were untenable.

In its concluding observations, the court rejected suggestions in several amicus briefs that CEQA is too uncertain and complicated for an unsuccessful CEQA petition ever to support a malicious prosecution claim, finding no basis for such a "carve out." The court pointed to its opinion in *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700 in which it described the possible misuse of CEQA actions and the harm they could cause because they can be used as "a formidable tool of obstruction." And it concluded by citing an argument by the Jenkinses' counsel that the case had "nothing to do with environmental protection and everything to do with the privacy and aesthetic design concerns of several of the Jenkinses neighbors."

Attorneys' Fees May Be Awarded When a CEQA Lawsuit Was a Substantial Contributing Factor or a Significant Catalyst that Motivates the Agency to Abandon the Project

Department of Water Resources Environmental Impact Cases,

79 Cal. App. 5th 556 (2022)

Several public agencies, environmental organizations and other interested parties filed multiple lawsuits challenging the Department of Water Resources' EIR and its approvals for the California WaterFix project, a proposal to improve the state's water supply infrastructure by constructing two tunnels that would convey water from Sacramento River to pumping stations in the southern Sacramento–San Joaquin Delta. The cases were coordinated for trial, and while the coordinated proceeding was

pending, the Governor announced he did not support the WaterFix proposal and directed DWR to consider an alternative plan. A short time later, DWR decertified the EIR and rescinded its project approvals. After the pending cases were dismissed, the plaintiffs filed motions for attorneys' fees claiming they were successful parties in the litigation under the "catalyst" theory -- that the litigation motivated DWR to provide all of the relief they were seeking without a court decision. The trial court denied a fee award, concluding that the Governor's directive was as an "external superseding cause" of DWR's decision to abandon the project. The court of appeal held, however, that the trial court had applied the wrong legal standard. Under the proper standard, to receive a fee award under the catalyst theory the plaintiff need not show the lawsuit was the only cause of the defendant's change in policy; instead, a showing that the lawsuit was a substantial contributing factor or a significant catalyst motivating the change is sufficient.

County Did Not Violate Its Duties Under CEQA By Approving a Project at the Density Agreed to in a Stipulated Judgment

Tiburon Open Space Committee v. County of Marin,

78 Cal. App. 5th 700 (2022)

The court held that the County of Marin did not abdicate its duties under CEQA when it approved a specific project pursuant to a stipulated judgment. *Tiburon Open Space Committee v. County of Marin*, 78 Cal. App. 5th 700 (2022).

The dispute in this case surrounded the potential development of a 110-acre parcel on an undeveloped hilltop in Tiburon owned by The Martha Company (Martha). Beginning in 1975, Martha faced opposition to their development plans. This opposition resulted in two stipulated federal court judgments, the latest in 2007, with the most significant result being that the County of Marin agreed to approve Martha for the development of a minimum of 43 residential units on the disputed parcel. In 2017 the County certified the EIR for the conditional approval of Martha's 43-unit development.

The court found no merit in these claims. First, the court found that the County did not abdicate its CEQA duties when agreeing to the stipulated judgments because 1) the stipulated judgment did not excuse the County from complying with CEQA and 2) land use laws – including CEQA – are police powers that cannot be contracted away. EIRs were implicitly or explicitly required in the 1976 and 2007 stipulated judgments and bypassing the CEQA process was not an element of the judgments.

In response to the conditional project approval, the Town of Tiburon and residents of the Town brought suit claiming that by agreeing to comply with the 2007 stipulated judgment, the County had effectively consented to not apply the California Environmental Quality Act or other state laws to prevent the Martha development. Furthermore, the Town and the private plaintiffs contend that the County ignored CEQA when it approved the project despite the environmental impacts shown in the EIR and that it was an abuse of discretion to approve the 43-unit project as opposed to a smaller, less environmentally impactful option.

Second, the court found that the County did not, in fact, use the stipulated judgment to bypass the CEQA process. The EIR prepared for project approval was over 800 pages and went through three drafts with extensive revisions. The administrative process for the project included planning commission meetings, public input, public hearings, and consultation with outside agencies (such as the fire

department), all before the Board of Supervisors made its required findings and confirmed that it had used independent judgment in approving the project.

The court found that had the Board felt free to ignore CEQA as a result of the stipulated judgment, it would not have gone through such a "protracted charade". The court also found that the County's acknowledgement in the stipulated judgment that "any development alternative, or any proposed mitigation measure, which does not accord Martha all rights to which it is entitled under the 1976 Judgment is legally infeasible" did not change the essence of the County's CEQA responsibilities. Under CEQA, agencies must avoid or mitigate significant environmental impacts in project approvals to the extent feasible, but any mitigation measure that is at odds with a legal obligation is legally infeasible. Relying on caselaw affirming that a state statute can render less dense project alternatives legally infeasible, the court found that "no reason in law or logic prevents a final federal court judgment from having the same impact."

Lucy Miller

CEQA Challenge to Campus Town Project in Monterey County Was Untimely

Committee for Sound Water v. City of Seaside,

79 Cal. App. 5th 389 (2022)

The Court of Appeal held that a writ petition asserting potential CEQA violations concerning the Campus Town project, a significant development project in Monterey County, was untimely because it was filed after the fixed end date of the COVID 19-related Emergency Rule 9(b) tolling period established by the Judicial Council. Committee for *Sound Water v. City of Seaside*, 79 Cal. App. 5th (2022).

Plaintiff sought a writ of mandate challenging the city's approval of the Campus Town project and the determination by the Fort Ord Reuse Authority (FORA) that the project was consistent with the Fort Ord Reuse Plan. Plaintiff also alleged that its constitutional right to due process had been compromised by an amendment to Emergency Rule 9(b), which substituted a fixed end date for the originally undefined tolling period. Furthermore, plaintiff argued that FORA failed to provide notice of FORA's Campus Town Hearing meeting, also denying their right to due process.

As originally adopted on April 6, 2020, the Judicial Council's Emergency rule 9 tolled all statutes of limitation for civil causes of action until 90 days after the Governor lifted the state of emergency related to the COVID-19 pandemic. The Judicial Council subsequently received comments regarding the adverse impact of Emergency rule 9 on CEQA actions, which have particularly short deadlines, generally 30 or 35 days. Thereafter, the Judicial Council amended Emergency rule 9 to set a fixed end date of August 6, 2020, for all claims subject to statutes of limitations of 180 days or less. Plaintiff filed its action on September 1, 2020.

Plaintiff claimed that the writ petition was filed on time as the amendment to Emergency rule 9 unconstitutionally "truncated" their filing deadline. The court, however, was not convinced that the so-called "truncation" of the statute of limitations unduly reduced the filing period, as CEQA statutes of limitations are extremely short, and the amended rule still provided plaintiff an extension of over two months to timely file its writ petition.

The court also concluded that plaintiff's due process claim based on the alleged failure of FORA to provide notice of its Campus Town consistency hearing was moot because FORA had since been dissolved and the statutory requirement that FORA determine consistency with the Fort Order Reuse Plan had been repealed.

Finally, the court determined that the trial court did not err in denying leave to amend as plaintiff had not met its burden to show that any amendment to the writ petition could provide relief vis-a-vis the constitutional due process claims.

Nicholas Sypherd

F. Federal Preemption

County of Butte v. Department of Water Resources,

13 Cal. 5th 612 (2022)

Two counties challenged the sufficiency of the EIR prepared by the California Department of Water Resources for the relicensing of a hydroelectric power facilities owned by the state and operated by DWR. The court of appeal concluded that the Federal Energy Regulatory Commission's exclusive licensing authority over hydroelectric plants under the Federal Power Act preempted application of CEQA to the project. The California Supreme Court held, however, that while challenges to the EIR were preempted to the extent the relief requested would interfere with FERC's licensing authority or DWR's ability to operate its facilities under the license, that did not mean that application of CEQA to the project was entirely preempted. Instead, DWR had discretion under California law to prepare an EIR for the purpose of informing its decision-making about its options relating to the proposed terms of the license and mitigation measures it might impose in response to the project's environmental impacts, as long as doing so would not hamper FERC's exercise of its jurisdiction or encroach on its licensing authority.

2022 Year in Review: Waters, Wetlands, Protected Species & Federal Environmental Review

CEQ Issues Guidance on Evaluating Greenhouse Gas and Climate Change Effects Under NEPA

01.10.2023 | UPDATES

The Council on Environmental Quality (CEQ) published guidance on January 9, 2023, regarding how to evaluate greenhouse gas (GHG) emissions and climate change under the National Environmental Policy Act (NEPA), which requires federal agencies to assess the environmental impacts of major federal actions that could significantly affect the quality of the human environment, including infrastructure projects that are undertaken, funded, or approved by federal agencies.[1]

This interim guidance updates the CEQ's 2016 guidance and, perhaps most significantly, states that agencies should quantify a project's reasonably foreseeable direct and indirect gross and net GHG emissions and monetize the social cost of those GHG emissions. The guidance also encourages agencies to avoid and mitigate GHG emissions to the greatest extent possible.

Background

Over the past decades, courts have developed a body of jurisprudence to require federal agencies to evaluate a proposed action's GHG emissions as part of the NEPA process and to consider how climate change may affect a project. In 2016, under the Obama administration, the CEQ issued final guidance to federal agencies regarding how they consider GHG emissions and climate change. Under the Trump administration, the CEQ rescinded the 2016 guidance and issued new draft guidance in 2019. In 2020, the CEQ adopted the first comprehensive revision of its NEPA-implementing regulations since these were adopted in 1978. The CEQ asserted that categorizing and determining the geographic and temporal scope of cumulative effects under the 1978 regulations "has been difficult and can divert agencies from focusing their time and resources on the most significant effects." The 2020 regulations revised the definition of "effects" and removed the definition of "cumulative impacts," which the CEQ stated "does not preclude consideration" of climate change impacts, but the "analysis of the impacts on climate change will depend on the specific circumstances of the proposed action."

The day President Biden took office, he issued an executive order that directed the CEQ to rescind the 2019 draft guidance and to review, revise, and update the 2016 guidance. Under the Biden administration, the CEQ has also undertaken a revision of the 2020 NEPA regulations in two phases. The Phase 1 rule, which was finalized on April 20, 2022, added "cumulative effects" to the definition of "effects" (among other limited changes to the regulations). With respect to the potential impacts on NEPA review timelines, CEQ stated it is not aware of data supporting the claim that evaluation of direct, indirect, and cumulative effects necessarily leads to longer timelines, citing the CEQ's list of GHG accounting tools as an example of modern techniques leveraging science and technology to make environmental reviews comprehensive yet efficient. The CEQ has indicated that it will propose a more comprehensive revision of the regulations in Phase 2 of its rulemaking, expected later this year.

Highlights of CEQ's New Climate Change Guidance

Quantifying Reasonably Foreseeable GHG Emissions

The CEQ interim guidance states that agencies should quantify reasonably foreseeable direct and indirect gross and net GHG emissions increases or reductions, both for individual pollutants and aggregated in terms of carbon dioxide equivalence. NEPA reviews should present annual GHG emission increases or reductions, as well as net emissions over a project's lifetime, particularly for projects that have both increases and reductions. GHG emissions and reductions should be quantified for the proposed action and alternatives (including the no-action alternative, which serves as the baseline for considering effects). Agencies should, where relevant, identify the alternative with the lowest net GHG emissions or the greatest net climate benefits.

The guidance suggests that quantification will be possible in most circumstances. The CEQ states that GHG emissions quantification and assessment tools are widely available and in broad use, referring to its website for a list of some such tools. The guidance states that agencies should request or require project applicants to provide information needed to quantify GHG emissions. If GHG emissions quantification tools, methodologies, or data are not reasonably available (described by the CEQ as a "rare instance"), agencies should present a reasonable estimated range of quantitative emissions or, if even that is not possible, provide a qualitative analysis and explain why quantification is not possible.

On the controversial topic of indirect effects, the guidance states that upstream and downstream GHG emissions are often reasonably foreseeable. For projects that may result in changes to energy mix (such as fossil fuel or renewable energy), the CEQ encourages agencies to conduct a substitution analysis to provide information on how the proposed action and alternatives will affect the energy resource or energy mix, including GHG emissions.

The guidance expressly disapproves of NEPA reviews stating merely that a project's GHG emissions would represent only a small fraction of global or domestic emissions. This has been a common approach taken by agencies, and one on which courts have offered mixed opinions. *See*, e.g., *Center for Community Action and Environmental Justice v. Federal Aviation Administration*, 18 F.4th 592, 606–07 (9th Cir. 2021); *350 Montana v. Haaland*, 50 F.4th 1254, 1255–56 (9th Cir. 2022).

Invoking NEPA's concept of proportionality, the CEQ states that less detailed analysis may be appropriate for projects that would have net reductions of GHG emissions (such as certain renewable energy projects, like utility-scale solar and offshore wind) or only small GHG emissions. *See* 40 C.F.R. § 1502.2(b) ("Environmental impact statements shall discuss impacts in proportion to their significance.").

The guidance does not establish a significance threshold for when a project's GHG emissions necessitate preparation of a lengthier environmental impact statement rather than an environmental assessment.

Providing Context for GHG Emissions

The guidance states that in most circumstances, agencies should use the best available estimates of the social cost of GHGs to monetize the climate change effects of a project's GHG emissions. The social cost of GHGs is the estimated monetary cost of damages associated with an incremental increase in GHG emissions (such as temperature increase, sea-level rise, infrastructure damage, and human health effects). Estimates for the social cost of GHGs were published by an interagency working group under the Obama administration, withdrawn under the Trump administration, and issued again under the Biden administration.[2]

The CEQ states that NEPA reviews should provide the social cost of a project's GHG emissions even if no other costs or benefits are monetized, because it can help decision-makers and the public understand the effects of a project's GHG emissions. This has been a frequently litigated topic, and courts and the CEQ have not previously required agencies to use the social cost of GHGs to provide context for climate change effects outside of a cost-benefit analysis. *See*, e.g., *350 Montana v. Haaland*, 50 F.4th 1254, 1270–72 (9th Cir. 2022); *EarthReports, Inc. v. Federal Energy Regulatory Commission*, 828 F.3d 949, 956 (D.C. Cir. 2016).

The guidance also states that agencies should explain how a proposed action and alternatives would help meet or detract from achieving climate action goals or commitments, including international agreements, federal governmentwide and agency goals and planning documents, and state, regional, and tribal goals. The guidance states that agencies should rely on scientific literature and modeling "to help explain the real-world effects—including effects that will be experienced locally in relation to the proposed action—associated with an increase in GHG emissions that contribute to climate change, such as sea-level rise, temperature changes, ocean acidity, and more frequent and severe wildfires and drought, and human health effects (including to underserved populations)." The guidance further suggests that agencies can provide comparisons of a project's GHG emissions to metrics that may be more familiar to the public, such as household emissions per year or gallons of gasoline burned.

Considering Climate Change in Alternatives and Mitigation

The guidance states that agencies should use information from the NEPA process to help inform decisions that align with climate change commitments and goals, such as evaluating reasonable alternatives that would have lower GHG emissions. The guidance states that agencies should consider mitigation measures to avoid or reduce GHG emissions and, given "the urgency of the climate crisis," agencies are encouraged to mitigate GHG emissions to the greatest extent possible. The guidance states that mitigation measures should meet appropriate performance standards to ensure they are additional, verifiable, durable, enforceable, and will be implemented.

Considering Effects of Climate Change on a Proposed Action

The guidance states that NEPA reviews should consider the projected future state of the environment and the effects of climate change on a proposed action based on the best available climate change reports, such as the National Climate Assessment. Agencies should consider how climate change can increase vulnerability to environmental effects and, in turn, exacerbate the environmental effects of a proposed action. The guidance recommends that agencies consider climate change risks during planning, siting, project design, and identification of reasonable alternatives. It states that where climate change risks are present, agencies should consider resilience and adaptation measures that could manage those effects, as well as whether those measures could have undesirable or unintended consequences. Further, the CEQ states that agencies should indicate whether a proposed action includes adaptation measures and, if so, describe those measures and the climate projections that informed them.

Environmental Justice Considerations

Consistent with the Biden administration's focus on environmental justice, the CEQ's guidance includes environmental justice considerations relevant to evaluating climate change effects in the NEPA process. The guidance notes that environmental justice communities and other groups are more vulnerable to climate-related health effects and may face barriers to engagement. CEQ recommends that agencies use environmental justice experts and resources from the White House Environmental Justice Interagency Council to identify approaches to avoid or minimize adverse effects on minority and low-income communities. The guidance states that agencies should engage environmental justice communities early in the scoping and project planning process to understand any unique climate-related risks and concerns. It also states that agencies should consider effects of climate change on vulnerable communities when designing a project and identifying alternatives. The guidance states that agencies should

consider (1) whether certain communities experience disproportionate cumulative effects that raise environmental justice concerns, (2) whether the effects of climate change in association with the effects of a proposed action may result in disproportionately high and adverse effects on environmental justice communities, and (3) how impacts from the proposed action could potentially amplify climate change-related hazards that affect environmental justice communities.

Analysis and Implications

The CEQ's new guidance goes significantly beyond the prior guidance document issued during the Obama administration, as well as beyond requirements established by courts. Some of the most notable developments include the following:

- The CEQ expects that, in most circumstances, agencies quantify a project's reasonably foreseeable direct and indirect GHG emissions increases or reductions annually and over a project's lifetime. This could create an additional burden on agencies as well as project applicants (particularly for projects that will have substantial direct and/or indirect GHG emissions, such as fossil fuel projects or some transportation infrastructure), who can be requested or required to provide information that the lead agency needs to quantify emissions. However, the CEQ offers its blessing for NEPA reviews to have less detailed analysis for projects that will have net GHG emissions reductions, such as utility-scale solar and offshore wind projects.
- The CEQ's prior guidance document issued during the Obama administration, as well as the Trump administration proposed guidance, recommended using a project's GHG emissions as a proxy for its climate change effects without linking the effects analysis to cost considerations. The CEQ's new guidance states that agencies should, in most circumstances, monetize the effects of a project's GHG emissions using the social cost of GHGs. And it suggests that agencies should, as relevant and helpful, use other practices—analyzing consistency with climate action goals and commitments (including international agreements), explaining climate change effects (including those experienced locally in relation to the project) associated with a project's increase in GHG emissions, and providing comparisons of a project's GHG emissions to more familiar terms—to contextualize the effects of a project's GHG emissions.
- The CEQ encourages agencies to mitigate GHG emissions to the greatest extent possible.

The guidance does not establish or change legal requirements. Nevertheless, agencies will likely rely on the guidance when conducting NEPA reviews, and courts may give some deference to the guidance, as they did with prior CEQ climate change guidance documents. *See*, e.g., *WildEarth Guardians v. Jewell*, No. 1:16-CV-00605-RJ, 2017 WL 3442922 (D.N.M. Feb. 16, 2017); *WildEarth Guardians v. Jewell*, 738 F.3d 298 (D.C. Cir. 2013).

Next Steps

The CEQ's new guidance on GHG emissions and climate change is effective immediately. The guidance states that agencies should use it for all new NEPA reviews going forward and should consider whether to apply it to ongoing NEPA reviews if it would inform the consideration of alternatives or help address public comments. The CEQ is accepting comments on the guidance for 60 days, due on or before March 10, 2023, and may revise the guidance in response to comments.

Endnotes

[1] 88 Fed. Reg. 1196 (January 9, 2023).

[2] 86 Fed. Reg. 24669 (May 7, 2021).

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Feds' Habitat Credit Program On Deck For First-Ever Regs

By **Juan Carlos Rodriguez**

Law360 (July 29, 2022, 8:01 PM EDT) -- The U.S. Fish and Wildlife Service for the first time is working toward formally regulating a program that offers salable credits to private parties that protect endangered species habitats, a process that will force the agency to clear up gray areas that landowners, conservation banks and developers have navigated for decades.

The species conservation banking program, which the service has relied on as a tool to protect species since the early 1990s, lets landowners and other private entities earn conservation credits for protecting a specific animal or plant species habitat, which then can be sold to project developers that need to disturb or destroy that species' habitat in another location.

During the rulemaking process, conservation banks, project developers and conservation groups are expected to clash on the details of how the agency values the credits and whether credits can be counted for different environmental benefits.

The FWS on Wednesday published a **notice of advanced rulemaking** in the Federal Register soliciting comments to help it craft a proposed rule that it said will establish objectives, measurable performance standards and criteria for the program.

"There has not been a lot of consistency with how [the program has] been deployed," Brett Hartl, the Center for Biological Diversity's government affairs director, told Law360. "It's probably overdue to put some more standardized sideboards on this process because we've seen mitigation projects that have been implemented well, and we have seen some mitigation projects where it really hasn't been working out well."

Up to now, guidance published in 2003 has been the most formal articulation of the government's expectations for how the program is supposed to function. Congress in the 2021 National Defense Authorization Act directed the FWS to establish a rule for the species conservation banking program.

"Conservation banks contribute to the recovery of listed species and help reduce threats such as habitat fragmentation and lack of habitat connectivity by consolidating and managing priority habitat areas in a reserve network," the agency said in the Wednesday notice. "Service-approved conservation banks have protected approximately 260,000 acres of habitat for 57 species listed under the [Endangered Species Act]."

Conservation banks and other private entities that work with landowners and usually end up with the actual credits, along with project developers, will be pushing the service to make sure any regulations don't slow down the project approval process or make it harder to attain mitigation projects or mitigation funds, said Brooke Marcus of Nossaman LLP. Marcus often counsels energy companies and other project developers, and has extensive experience in species conservation banking.

"In a perfect world, the proposed rule looks a lot like what's happening already and just tightens it up a bit," she said.

In practice, landowners with property that is home to habitat for threatened or endangered species are often approached by a business or nonprofit that pays the landowner to sign an FWS-approved document that protects the land in perpetuity for the species. And generally, that entity takes

ownership of the credits generated by the transaction. The credits are banked and when a developer needs some, they can go to one of those entities to buy them.

Marcus said one potential problem, from the banks' and developers' perspective, is that traditionally ESA-centered standards tend to be much more protective of species than flexible for projects.

"So where you have a uniform standard that is cautious about species conservation, it tends to up the standard which then has the potential to increase the cost of mitigation," she said.

The service's goal is to ensure greater uniformity in the way the credits are accounted for and greater accountability to land protection agreements, said Stacey Bosshardt, senior counsel at Perkins Coie LLP. She said while traditional mitigation projects that developers undertake can have benefits, conservation banking can provide more long-term value to the species because the habitat is established in perpetuity.

"These are really helpful to our clients who want to develop projects, including renewable energy projects, because they allow people to harness this market-based approach, which provides flexibility to meet the goals of the Endangered Species Act," Bosshardt said. "Anything that enhances the flexibility of the Endangered Species Act we think is good."

She said she expects industry-side stakeholders to attempt to convince the FWS to assess credits fairly and not discount them too much based on considerations such as whether there's a busy road nearby or some other feature that might prevent full use of the protected land.

"I think that private parties would also have an interest in seeing deadlines or clear time frames for the agency to process applications," Bosshardt said. "And that's sometimes something that agencies don't like to bind themselves to. Also, regulatory assurances to make sure that there won't be any changes to the deal that the party purchasing the credits signs up for. And of course, accurate accounting based on sound science. That should be a consensus goal, I think."

Hartl, of the Center for Biological Diversity, said conservation groups will be sure to fight for language that bars "additionality," a term used to describe the idea that a species conservation credit could also be used to satisfy the requirements for a different type of regulatory regime, such as the U.S. Army Corps of Engineers' Clean Water Act, or vice versa.

"If you decide to build a mitigation bank for a wetland, for example, and there's a bunch of endangered species there, can you double count?" he said. "If there's a benefit that accrues more broadly, how do you credit that appropriately so that one party doesn't do all the work and then someone hitches a free ride or you get to count your benefits twice?"

The Obama administration published an Endangered Species Act compensatory mitigation policy in December 2016, which, among other things, helped inform the banking program, but that policy was withdrawn by the Trump administration in July 2018.

A new ESA compensatory mitigation policy is currently under review at the White House Office of Information and Regulatory Affairs, as is a separate, more general mitigation policy for the entire Fish and Wildlife Service.

Public comments on the species conservation banking program's advanced notice of proposed rulemaking are due on or before Sept. 26.

--Editing by Jay Jackson Jr and Lakshna Mehta.

The Biden Rule: Redetermining Where Water Ends and Land Begins

01.11.2023 | UPDATES

The U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army (Corps) jointly announced on December 30, 2022, the latest final rule (Rule) that attempts to define "waters of the United States" (WOTUS) under the Clean Water Act (CWA). The Rule will take effect 60 days after its publication in the *Federal Register*.

How the agencies define WOTUS is important because this definition determines the scope of two of the CWA's major permitting programs. The first is the Section 402 permitting program, which regulates the discharge of pollutants from point sources (e.g., pipes, ditches, or channels) into navigable waters. Large industrial operations that discharge wastewater into waterbodies usually must obtain a permit under this program. The second is the Section 404 permitting program, which regulates the discharge of dredged or fill material into navigable waters. Permits are often required under this program for construction projects (e.g., highways, airports, or pipelines) that involve placing fill material in waters, including wetlands.

Changes to the definition of WOTUS can significantly impact permitting and project development by regulated entities. For example, under the definition of WOTUS that was used during the Trump administration, if a river were surrounded by wetlands, a regulated entity building a road or levee in that area could remove the wetlands from the CWA's reach. Under the Biden Rule, this would no longer be true.

As another example, the previous rule excluded "diffuse stormwater run-off and directional sheet flow over upland; ditches that are not traditional navigable waters, the territorial seas, or tributaries" and "those portions of ditches constructed in adjacent wetlands" that were not jurisdictional.[1] The new Rule eschews broad categories in favor of a much more context-specific approach, increasing litigation risks for regulated entities.

The agencies assert that the Rule is intended to restore the pre-2015 definition of WOTUS, accounting for various subsequent court decisions.[2] According to the agencies, changes to the Rule were informed by the CWA's text, the scientific record, and the agencies' "experience and technical expertise."[3] The agencies also promulgated the Rule to provide additional guidance regarding their views on which wetlands should be considered WOTUS.[4]

Background

The CWA generally prohibits persons from discharging "pollutants" or "dredged or fill material" into "navigable waters" without first obtaining a permit.[5] The CWA defines "navigable waters" as "waters of the United States, including the territorial seas." However, the U.S. Congress did not further define the term "waters of the United States" in the CWA.[6] Therefore, the EPA and the Corps defined that term in the statute's implementing regulations. It is generally acknowledged that Congress intended the CWA to regulate at least some waterbodies and wetlands that are not "navigable" in the traditional sense. However, the line between navigable and non-navigable waters has been a constant point of debate within both the courts and the executive branch.

Since 2015, there have been three different rules defining WOTUS.[7] The 2015 Rule, enacted by the Obama administration, sought to resolve uncertainties surrounding U.S. Supreme Court Justice Kennedy's "significant nexus" test, as defined in *Rapanos v. United States*, 547 U.S. 715 (2006). To qualify as a "water of the United States" under that test, a water or wetland must possess a "significant nexus" to waters that are or were navigable in fact; this means the water or wetland must significantly affect the chemical, physical, and biological integrity of a traditional navigable water. Due to a nationwide stay resulting from litigation, the 2015 Rule did not take effect until 2018. And when it did take effect, it only did so in 22 states. The result was a confusing patchwork of WOTUS rules, and under the Trump administration, the EPA and Corps eventually repealed the 2015 Rule in December 2019.

One month after the repeal of the 2015 Rule, the agencies announced the 2020 Rule, or the Navigable Waters Protection Rule (NWPR). Unlike the 2015 Rule, the NWPR defined WOTUS using the "relatively permanent" test from U.S. Supreme Court Justice Scalia's plurality opinion in *Rapanos*. This test adopts a narrower view of federal jurisdiction under the CWA: Waters only qualify as "navigable" if they are relatively permanent, standing, or flowing bodies of water, and wetlands are only considered "navigable" if they bear a continuous surface connection to such a water. The 2020 Rule faced numerous legal and political challenges.

On June 9, 2021, the EPA and Corps announced that they would replace the 2020 Rule. Then, on December 7, 2021, the agencies announced that they would return to the approach used in the pre-2015 regulations, informed by intervening U.S. Supreme Court precedent.[8]

This final Rule and the over 500-page pre-publication notice document represent the latest attempt to define WOTUS.

The Biden Rule

THE LATEST WOTUS RULE

The agencies determined that the following should be considered WOTUS:

- Traditional navigable waters, the territorial seas, and interstate waters (paragraph (a)(1) waters).
- Impoundments (created by discrete structures like dams and levees that are often human-built) of WOTUS (paragraph (a)(2) impoundments).
- Tributaries to traditional navigable waters, the territorial seas, interstate waters,[9] or paragraph (a)(2) impoundments, where such tributaries meet either the "relatively permanent standard" or the "significant nexus standard," which standards are explained in greater detail below (jurisdictional tributaries).
- Several categories of wetlands, including:
  - Wetlands adjacent to paragraph (a)(1) waters.
  - Wetlands adjacent to and with a continuous surface connection to relatively permanent paragraph (a)(2) impoundments.
  - Wetlands adjacent to tributaries that meet the relatively permanent standard.
  - Wetlands adjacent to paragraph (a)(2) impoundments or jurisdictional tributaries, where the wetlands meet the significant nexus standard (jurisdictional adjacent wetlands).
- Other intrastate lakes and ponds, streams, or wetlands that meet either the relatively permanent standard or the significant nexus standard (paragraph (a)(5) waters).[10]

The Rule retains exclusions for prior converted cropland, waste treatment systems, and features that were "generally considered non-jurisdictional under the pre-2015 regulatory regime."[11] However, the exclusion for prior converted cropland would cease upon a change of use.[12] Moreover, the exclusions do not apply to traditional navigable waters, territorial seas, and interstate waters.

THE "RELATIVELY PERMANENT" AND "SIGNIFICANT NEXUS" STANDARDS

Historically, there has not been much controversy about whether traditional navigable waters—such as large rivers or lakes—qualify as WOTUS under the CWA. The debate has focused on whether smaller or more ephemeral waters—including wetlands—connected or adjacent to these traditional navigable waters can be considered WOTUS. Compared to the 2020 Rule, the new Rule effectively expands federal jurisdiction over these "non-traditional" waters and wetlands.

Like the 2020 Rule, the latest Rule considers "relatively permanent, standing, or continuously flowing waters connected to paragraph (a)(1) waters, and waters with a continuous surface connection to such relatively permanent waters or to traditional navigable waters, the territorial seas, or interstate waters" to be WOTUS.[13] Such waters are included within the WOTUS definition because these relatively permanent waters will almost always significantly affect traditionally navigable waters, territorial seas, and interstate waters.[14]

However, the agencies concluded that the relatively permanent test is "insufficient as the sole test" for defining WOTUS under the CWA.[15] Consequently, the Rule also adopts the significant nexus standard, which encompasses "waters that, either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, *or* biological integrity of traditional navigable waters, the territorial seas, or interstate waters."[16]

The application of both the "relatively permanent" and "significant nexus" tests to determine whether a water is a WOTUS has significant implications. For example, the new Rule allows adjacent wetlands to be considered WOTUS when they either (i) have a continuous surface connection to the "relatively permanent, standing, or continuously flowing water" that is connected to a paragraph (a)(1) water, or (ii) have a "significant [e]ffect [on] the chemical, physical, or biological integrity of a paragraph (a)(1) water."[17] The ability of the agencies to use either test to determine whether a water is a WOTUS effectively authorizes more expansive federal jurisdiction over ephemeral and intermittent waters, including over "waters" that remain dry for much of the year.

Sackett v. EPA

On October 3, 2022, the Supreme Court heard oral arguments in *Sackett v. EPA*, No. 21-454 (U.S.). For the Sacketts, the issue is whether their second trip to the Supreme Court will finally provide an answer to the question of whether they can build their home on a somewhat soggy 2/3-acre residential lot that has been in dispute for more than 15 years. For the Supreme Court, the issue is whether the U.S. Court of Appeals for the Ninth Circuit set forth the proper test for determining whether wetlands are WOTUS under the CWA. During the oral arguments, U.S. Supreme Court Justice Kagan asked about the Biden administration rulemaking and its attempt to redefine WOTUS and provide guidance on which wetlands should be considered WOTUS; the acting solicitor general informed the Supreme Court that the Rule provides additional guidance about which adjacent wetlands should qualify.[18] The agencies have indicated that, under this Biden Rule, the Sacketts' property would be considered jurisdictional; it would be a "wetland" that is "adjacent to a jurisdictional tributary" that, "together with other similarly situated adjacent wetlands," has "a significant nexus" to "a traditional navigable water."[19]

Takeaways

The Rule represents the federal government's latest attempt to define WOTUS under the CWA and, as such, will have significant impacts on both the environment and regulated entities. A couple of key points are worth considering.

First, the Rule adopts the "significant nexus" test articulated by Justice Kennedy in *Rapanos*.[20] This test, which by its nature is fact-intensive,[21] will result in more case-by-case determinations of what waters qualify as "navigable," potentially increasing costs and delays for regulated entities and creating additional permitting uncertainties. For example, the agencies assert that a case-specific analysis of the effects of intrastate lakes and ponds, streams, or wetlands not identified in paragraphs (a)(1) through (4) of the Rule on downstream waters is "appropriate from both a scientific and policy perspective."[22]

Second, the Rule will expand federal jurisdiction over ephemeral and intermittent waters. The agencies note that, in Arizona, 96% of stream channels (by length) are classified as ephemeral or intermittent.[23] The agencies suggest that many of these streams should be included as WOTUS, stating that the "functions that streams provide to benefit downstream waters occur even when streams do not flow constantly."[24] They also state that "there was a 10-fold increase in non-jurisdictional findings for streams in Arizona and a 36-fold increase in non-jurisdictional findings for streams in New Mexico following implementation" of the 2020 Rule, which had expressly rejected including ephemeral streams as waters of the United States.[25] More generally, the agencies noted that 75% of waterbodies were found to be non-jurisdictional under the 2020 Rule, as opposed to only 45% under the prior regulations.[26] Additionally, the Corps found that the number of projects that no longer needed a Section 404 permit under the 2020 Rule was twice as high as under the previous regulatory regime.[27]

That said, it is unclear how long the Rule will actually last. The Biden administration released the Rule before the Supreme Court's decision in *Sackett*. It appears as if the Supreme Court is primed to use *Sackett* to eliminate or narrow the "significant nexus" test.[28] Thus, a significant portion of the Rule's legal underpinnings may be gone in a few months, which would require the Biden administration to promulgate yet another rule defining WOTUS. The Biden administration has repeatedly stated that its goal with this Rule is to ensure that it will endure. Given this goal, a narrowing of the "significant nexus" test would likely result in a final WOTUS rule that bears a closer resemblance to the pre-2015 WOTUS definition.

Endnotes

[1] Prepublication Notice at 44.

[2] These include *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985) (*Riverside Bayview*); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159 (2001) (*SWANCC*); and *Rapanos v. United States*, 547 U.S. 715 (2006) (*Rapanos*).

[3] Prepublication Notice at 58.

[4] *Id.* at 9–10.

[5] Federal Water Pollution Control Act, §§ 301(a), 502(12)(A), as amended by the Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act) § 2, 86 Stat. 844, 886, 33 U.S.C. §§ 1311(a), 1362(12)(A).

[6] 33 U.S.C. § 1251 *et seq*.

[7] 80 Fed. Reg. 37054 (June 29, 2015); 84 Fed. Reg. 56626 (Oct. 22, 2019); 85 Fed. Reg. 22250 (Apr. 21, 2020).

[8] 86 Fed Reg. 69372 (Dec. 7, 2021).

[9] The agencies temporarily deferred action "related to considering designating waters that cross a State/Tribal boundary as interstate waters" under the WOTUS definition. Prepublication Notice at 259–260.

[10] *Id.* at 8-9; *see* 33 C.F.R. § 328.3(a).

[11] Prepublication Notice at 228.

[12] *Id.* at 229.

[13] *Id.* at 9.

[14] *Id.* at 12.

[15] *Id.* at 13.

[16] *Id.* at 9 (emphasis added).

[17] *Id.* at 10.

[18] Transcript of Oral Argument at 93-95, *Sackett v. EPA*, No. 21-454 (U.S.), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-454_8m59.pdf.

[19] *Id.* at 107–12.

[20] As Justice Scalia noted, Justice Kennedy's "reading of 'significant nexus' bears no easily recognizable relation to either the case that used it (*SWANCC*) or to the earlier case that case purported to be interpreting (*Riverside Bayview*)." *Rapanos*, 547 U.S. at 753.

[21] Emboldened by the case-specific factors in *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), the Rule draws an analogy between the "functional equivalent" standard in *County of Maui* and the significant nexus standard, noting that both "require an analysis focused on the specific facts at issue in a particular instance." Prepublication Notice at 141.

[22] *Id.* at 105–106.

[23] *Id.* at 98.

[24] *Id.* at 98, 128.

[25] *Id.* at 217.

[26] *Id.* at 214-215.

[27] *Id.* at 218.

[28] *Id.* at 1491–92 (Alito, J., dissenting) (quoting *Rapanos*, 547 U.S. at 758). This also seems to foreshadow a potential repeat of the Navigable Waters Protection Rule /*County of Maui* debacle. There, on April 21, 2020, EPA and the Corps released the Navigable Waters Protection Rule: Definition of "Waters of the United States," 85 Fed. Reg. 22250. Two days later, the Supreme Court ruled in *County of Maui* that the federal government could regulate discharges to groundwater after all, depending upon the application of a host of factors only partially identified in the Court's opinion. 140 S. Ct. 1462.

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Biographies

Biographies

CECILY T. BARCLAY | PARTNER | SAN FRANCISCO, CA

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Cecily Barclay focuses her practice on land use and entitlements, real estate acquisition and development, and local government law. She regularly assists landowners, developers, and public agencies throughout California in all aspects of acquisition, entitlement, and development of land, including land use application processing, drafting and negotiating purchase and sale agreements, negotiating and securing the approval of development agreements, general plan amendments, specific plans, planned development zoning, annexations, initiatives and referenda, and tentative and final subdivision maps. Cecily's current projects include redevelopment of land for market rate and affordable housing, life science campuses, hotels and resorts, and transit-oriented mixed-use development projects.

Cecily has significant experience in processing entitlements for redevelopment and expansion of regional retail centers, resort hotels, and entertainment centers, Biotech/R&D campuses, large mixed-use master-planned communities, and multi-faceted reuse of former military facilities and other infill development sites. Her work extensively involves advising on land use initiatives, negotiating school fee mitigation agreements, preparing conservation easements to mitigate for loss of biological resources, and drafting affordable housing programs, Williamson Act contracts, and related issues pertaining to agricultural properties. She assists local agencies in drafting ordinances relating to updating general plans and housing elements, planned development zoning, specific plans, mitigation fees, affordable housing, and growth management. Cecily's practice also focuses on how agencies and developers can apply state housing laws, particularly anti-NIMBY (Housing Accountability Act) and density bonus laws.

Cecily is a lead author of Curtin's California Land Use and Planning Law, a well-known publication which definitively summarizes the major provisions of California's land use and planning laws. Cecily also co-authored Development by Agreement, an ABA publication providing a national analysis of laws and practices concerning various forms of development agreements. She regularly speaks and writes on topics involving land use and local government law, including programs and articles for the American Bar Association, American Planning Association, California Continuing Education of the Bar, League of California Cities, University of California Extension programs, Urban Land Institute, and other state and national associations and conferences.

For over a decade, Cecily served as the president of two nonprofit affordable housing corporations in Oakland and currently serves on the ABA state and local government section's Publications Oversight Board.

STACEY BOSSHARDT | SENIOR COUNSEL | WASHINGTON, D.C.

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Stacey Bosshardt litigates environmental and administrative law cases. She represents mining, energy, pipeline, and other business and governmental clients in environmental and natural resources litigation throughout the country. Stacey's substantial experience includes positions as assistant section chief and senior trial attorney in the Natural Resources Section of the U.S. Department of Justice (DOJ), Environment and Natural Resources Division, where she litigated and supervised dozens of cases brought in U.S. district courts. Her experience with cases involving public lands includes litigation under the National Environmental Policy Act, Endangered Species Act, National Historic Preservation Act, Clean Water Act, Federal Lands Policy Management Act, Mineral Leasing Act, National Forest Management Act, and Administrative Procedure Act.

In her positions at DOJ, Stacey supervised a team of 10 trial attorneys representing the federal government in lawsuits related to its management of public lands and natural resources. She was selected as lead attorney to defend federal agency high-profile decisions in U.S. district courts throughout the country, including loan guarantees, proposed land management decisions, and rights of way and special use permits for renewable energy facilities, transmission line upgrades, a groundwater development project, and cleanup of contaminated sites. Her client agencies in those challenges to federal approvals included the Bureau of Land Management, Bureau of Indian Affairs, U.S. National Park Service U.S. Department of Transportation (DOT), U.S. Forest Service, U.S. Export-Import Bank, U.S. Department of Energy, U.S. Army Corps of Engineers, U.S. Department of Homeland Security, U.S. General Services Administration and U.S. Fish and Wildlife Service. Stacey has also worked either as trial counsel or supervisor on the defense of challenges to multiple DOT-funded projects, including highways, interchanges, trail conversions, bridges, light rail, high-speed rail, and bus rapid transit projects.

Stacey served as ethics advisor to the White House Counsel's office during the Obama administration. She was also recruited as counsel to the U.S. Senate Committee on Homeland Security & Governmental Affairs' special investigation into the government's response to Hurricane Katrina, which focused on the intersection of climate-driven events and disaster preparedness.

Before focusing on environmental and administrative law, Stacey was a trial attorney in DOJ's Civil Division in the Torts Branch, where she defended the government in 16 cases arising out of the U.S. Federal Bureau of Investigation (FBI) Boston Field Office's handling of confidential informants over a 40-year period.

MICHELLE W. CHAN | PARTNER | SAN FRANCISCO, CA

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Michelle Chan focuses her practice on land use entitlements, environmental compliance, and real estate transactions, representing developers, landowners, and public agencies in all stages of the development process for mixed-use, commercial, and residential development projects. Michelle assists clients in drafting and negotiating purchase and sale agreements, development agreements, general plan amendments, zoning, and securing approvals under the Subdivision Map Act.

Michelle regularly advises clients on compliance with the California Environmental Quality Act and represents clients at public hearings to obtain land use approvals. She also has experience with litigation involving environmental and land use laws and challenges to development exactions in federal and state courts and administrative proceedings.

Michelle's experience includes securing entitlements and permits in connection with the Candlestick Point/Hunters Point Shipyard Phase 2 redevelopment project, which includes 10,500 residential units; 3-5 million square feet of office and research and development uses; nearly 1 million square feet of retail; and 300 acres of open space and parks.

Maintaining an active pro bono practice, Michelle represents clients seeking asylum and has assisted a nonprofit theatre company with drafting and negotiating a lease extension.

GARRETT COLLI | PARTNER | SAN FRANCISCO, CA

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Garrett Colli focuses on coordinating land use entitlements and environmental compliance for residential, commercial, industrial, and renewable energy projects. Garrett also negotiates purchase and sale agreements, leases, easements, and related transactional documents in support of development projects. Garrett regularly advises clients regarding California Environmental Quality Act (CEQA) compliance, and is experienced in securing approvals under the Subdivision Map Act, the Clean Water Act, the Federal Land Policy Management Act, and the California Surface Mining and Reclamation Act. He frequently represents clients at public hearings to obtain zoning approvals, and has also defended clients in regulatory enforcement proceedings, including actions by the U.S. Environmental Protection Agency, regional water quality boards and local agencies.

Garrett's clients include developers, financial institutions, landowners, energy companies, and public agencies. His recent work includes representing one of the country's largest mixed-use developers in projects in San Francisco accounting for more than 20,000 units of housing with related commercial and retail components. This past year, Garrett represented a private real estate investment company in securing entitlements to transition a dated mall in Laguna Hills, California into a premier regional mixed-use destination with nearly 1,000,000 square feet of commercial use and 988 condominium units. Garrett is currently representing a developer in negotiations for a disposition and development agreement, preparation of a specific plan and CEQA compliance with respect to the redevelopment of a former Navy base.

MATTHEW S. GRAY | PARTNER | SAN FRANCISCO, CA

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Matt Gray focuses his practice on land use entitlement processing, environmental compliance, and real estate transactions. He represents real estate developers, landowners, and local agencies in all stages of the land use entitlement and development process. He negotiates and secures approval of development agreements, general plan amendments, specific plans, zoning, subdivision approvals, and annexation of property into cities and special districts; regularly appears before planning commissions and city councils; and advises clients on compliance with the California Environmental Quality Act and other federal and state regulatory programs during the development process. Matt also has experience negotiating affordable housing agreements, mitigation fee agreements and conservation easements; forming land-based financing mechanisms, including Mello-Roos Districts; advising clients on issues relating to water supply; and using the initiative and referendum process in the land use planning context. Matt negotiates purchase and sale agreements; site development agreements; CC&R's and easement agreements; and related transactional documents in connection with mixed-use, commercial, and residential development projects.

Matt has worked on a wide variety of significant land use projects throughout California, including large urban redevelopment projects, military base reuse projects, mixed-use waterfront developments, renewable energy and related infrastructure projects, regional shopping centers, and master-planned residential communities.

Matt teaches an Annual Land Use Law Review and Update course at University of California Davis Extension. He has also taught Planning Law and Legal Process at University of California Berkeley Extension. He regularly lectures on the Subdivision Map Act through California Continuing Education of the Bar (CEB) and before local municipal engineers' associations.

He has served on the board of directors of the AIDS Legal Referral Panel and as chair of the Amicus Committee of Bay Area Lawyers for Individual Freedom.

JULIE JONES | PARTNER | SAN FRANCISCO, CA

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Julie focuses on environmental and land use counseling and litigation for complex development projects. She resolves issues that arise under the California Environmental Quality Act, the National Environmental Policy Act, the Clean Water Act, federal and state species protection statutes, and a range of other local, state and federal statutes and common law doctrines that affect land use. An experienced litigator in California and federal courts, Julie defends projects and uses this experience to help clients obtain the approvals they need while minimizing litigation risk.

Julie's strategic problem solving has assisted private and public entities in permitting major university, traditional and renewable energy, water supply, marine terminal, residential and commercial projects.

Additional litigation successes include defending a transportation sales tax ballot measure; a city/county agreement for urban services; a transportation authority's light rail extension; and a university development and roadway project. Julie also represented a port in the successful defense of major expansion and dredging projects against NEPA and Endangered Species Act claims.

Julie is the author of the sustainable development chapter of *California Land Use and Planning Law* and has co-authored the treatise's chapters on federal and state wetland regulation and endangered species protections. She is also a regular contributor to the California Land Use and Development Law Report, and lectures on CEQA and NEPA for clients, professionals and industry associations.

CAMARIN E.B. MADIGAN | PARTNER | SAN FRANCISCO, CA

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Camarin practices on the cutting edge between real estate, land use, and environmental laws. Her unique skillset and ability to work across multiple disciplines allow her to lead teams advising on all aspects of complex development projects, including acquisitions, dispositions, leasing, and financing. Her experience extends to land use entitlements and environmental permitting for similar projects and she is also widely recognized for her preeminent experience and abilities when it comes to ground leasing.

Camarin's clients include developers, landowners, lenders and public agencies, and she handles real estate issues for a wide range of properties, from office buildings and shopping centers to agricultural lands and medical facilities. She also manages all the real estate work for a renowned higher education institution.

Experienced in representing clients before the California Energy Commission, the California Coastal Commission, the U.S. Bureau of Land Management, the U.S. Army Corps of Engineers and various local agencies, Camarin also regularly handles energy, regulatory and environmental permitting. She is highly knowledgeable of the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA).

Camarin's background includes living in Japan for two years as part of a secondment to the in-house legal department of an international trading, investment and service company. In this role, Camarin managed the legal affairs of the client and its subsidiaries in North, Central and South America involved in various industries, including energy and natural resources, agricultural resources and information technology.

Active in the San Francisco community, Camarin serves on the board of the Friends of Port Chicago National Memorial and Contra Costa Senior Legal Services.

ALAN MURPHY | PARTNER | SAN FRANCISCO, CA

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Alan Murphy focuses his practice on land use and development matters, including associated environmental review. He secures and defends land use entitlements and counsels clients in preparing development applications, throughout the approval process and in due diligence. Alan has significant experience with general plan and zoning interpretation and amendments, use permits, variances, development agreements, the Density Bonus Law, the Housing Accountability Act, SB 35 streamlining, other state housing legislation, and the California Environmental Quality Act (CEQA).

In his practice, Alan strives to identify innovative solutions to complex and politically sensitive development challenges. He routinely interacts with public agency staff and regularly represents clients before city councils and boards of supervisors, planning commissions and local appellate boards. He also represents property owners in zoning enforcement actions.

Among Alan's clients are developers, landowners, educational and financial institutions, and public agencies. His experience includes representing clients in securing entitlements to develop hundreds of new residential units in the San Francisco Bay Area, to redevelop property into three life sciences buildings totaling 595,000 square feet in Foster City, and to redevelop over 500,000 square feet of office and R&D space in Mountain View. Alan also has experience with preparing a citizens' initiative for a major project in the South Bay and analyzing multifamily residential development options on numerous properties between San Francisco and San Jose.

Alan co-chairs CLE International’s annual conference on California land use law and speaks publicly in this area, especially on issues associated with multifamily housing development. Alan served as chair of the Program Committee for the Association of Environmental Professionals 2017 state conference, and he also actively participates in Urban Land Institute initiatives.

DEBORAH E. QUICK | SENIOR COUNSEL | SAN FRANCISCO, CA

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Debbi Quick represents clients seeking land-use and resource permits and entitlements and compliance with environmental laws, including the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA), before administrative agencies. She defends those entitlements in litigation at both trial and appeal courts. Her practice also includes representing clients in complex civil appeals and trial court litigation in anticipation of possible appeals.

In appeals and defenses of both pretrial and posttrial decisions, Debbi's experience includes interlocutory review of summary judgments and motions denying arbitration. Working with clients across a range of industries, she has handled matters involving banking, retail, energy, manufacturing, insurance, and the environment.

Debbi is an editor of the Environmental Liability, Enforcement & Penalties Reporter.