

Filed 11/21/17 Pleasant Valley Cty Water Dist. v. Fox Canyon Groundwater
Management Agency CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

PLEASANT VALLEY
COUNTY WATER DISTRICT,

Plaintiff and Appellant,

v.

FOX CANYON
GROUNDWATER
MANAGEMENT AGENCY,

Defendant and Respondent.

2d Civil No. B281425
(Super. Ct. No. 56-2015-00464072-CU-WM-
OXN)
(Ventura County)

“When the well’s dry, we know the worth of water.”
Benjamin Franklin wrote this aphorism in *Poor Richard’s Almanack* (1746). It is as astute today as it was two centuries ago and illustrates the Legislature’s prescience in creating the Fox Canyon Groundwater Management Agency (Fox Canyon) to address groundwater overdrafts. (West’s Ann. Wat.-Appen. (1995

ed.) ch. 121, § 121-102 et seq.)¹ Pleasant Valley County Water District (PVCWD) appeals from the judgment entered after the trial court denied PVCWD's writ petition and complaint to invalidate Fox Canyon Ordinance No. 8.8 which clarifies the rules for groundwater extraction surcharges. The trial court found that Ordinance No. 8.8 does not exceed Fox Canyon's statutory lawmaking authority, that adoption of the ordinance is categorically exempt from California Environmental Quality Act (CEQA), and that Ordinance No. 8.8 does not violate the equal protection clause of the California constitution. We affirm.

Facts and Procedural History

Fox Canyon is a special water agency created by the Legislature in 1982 to manage and conserve groundwater resources for agricultural, municipal, and industrial uses, for the common benefit of all water users. (§ 121-102.) Its mission is to develop, adopt, and implement a plan to control groundwater extractions in the Oxnard Plain with the objective of balancing water supply and demand by the year 2000. (§ 121-601.) Because of severe drought conditions, Fox Canyon has not yet been able to implement a long term plan. Groundwater overdrafts continue to threaten the groundwater basins and have caused seawater intrusion. It is an onerous undertaking. Fox Canyon's management area includes an upper and lower aquifer system, and seven groundwater basins serving approximately

¹ Unless otherwise stated, all further statutory citations are to this uncodified law as reprinted in West's Annotated Water Code Appendix. "Much of California's water law is comprised of 'uncodified acts,' also known and referred to as the 'Water Code Appendix.'" (Legislative Intent Service, Inc. *California Water Code Statutory History*, <http://www.legintent.com/california-water-code-statutory-history>, Sept. 8, 2017.)

51,000 acres of agricultural land.² The aquifers are recharged by stream water infiltration, primarily from the Santa Clara River, and by United Conservation Water District's (United) artificial recharge system which diverts stream water from the Santa Clara River (river surface water) through three pipelines. United sells some of the river surface water to PVCWD for agricultural use.

PVCWD, a special district authorized by the County Water District Law (Wat. Code, § 30000 et seq.), encompasses approximately 12,000 acres of land in the Oxnard Plain, all within the Fox Canyon Groundwater Management Area. As a water purveyor, PVCWD sells United river surface water to farmers and agricultural operators. Agricultural operators are the primary beneficiaries of United's pipeline system to the extent that 12.22 percent of all water diverted from the Santa Clara River at the Freeman Diversion is contractually obligated to PVCWD.

Emergency Ordinance E

In response to the Governor's 2014 proclamation declaring a statewide drought emergency, Fox Canyon adopted Emergency Ordinance E. Among other things, Emergency Ordinance E imposes groundwater extraction surcharges and requires that agricultural operators follow an annual efficiency allocation to reduce groundwater extractions. Emergency Ordinance E, which took effect in May 2014, is a temporary measure to limit groundwater extractions and give Fox Canyon time to implement

² The groundwater basins are the Oxnard Forebay, Oxnard Plain, Pleasant Valley, Santa Rosa, and West, East and South Las Posas basins.

a long-term solution to bring groundwater extractions into balance with recharge, i.e., a “safe yield.” (§ 121-331.)

Ordinance No. 8.8

On January 9, 2015, the Fox Canyon Board of Directors adopted Ordinance No. 8.8 to clarify the groundwater extraction surcharge rules concomitant with Emergency Ordinance E. Before the adoption of Ordinance No. 8.8, Fox Canyon Ordinance section 5.8.5 provided that all sources of water, including surface water, would be considered in determining whether an operator exceeded his or her annual efficiency allocation, also known as an Irrigation Allowance Index. (See Fox Canyon Ordinance Code § 5.6.1.2.)

Ordinance No. 8.8 amends Ordinance section 5.8.5., Chapter 5.0, to clarify what water sources, if not used efficiently, subject an agricultural operator to a groundwater surcharge. The ordinance uses an Irrigation Allowance Index (IAI) threshold of 1.0 and requires three surcharge calculations: First, does the total annual amount of water used for agricultural production from all water sources (i.e., groundwater, river surface water, recycled or reclaimed water, and supplemental water) exceed the IAI threshold of 1.0? If the answer is “Yes,” the IAI is recalculated using only groundwater extractions and river surface water. If the IAI is 1.0 or less, the agricultural operator pays no groundwater extraction surcharge.

If the agricultural operator’s IAI exceeds 1.0, a surcharge is imposed but is limited to the amount of groundwater extractions that contributes to the annual efficiency allocation overage (i.e., an IAI greater than 1.0). “[T]he total water applied from those sources will be determined and compared to the extractions. If the extractions are greater than or equal to the water applied

above an IAI of 1.0, surcharges will be imposed on the water applied above an IAI of 1.0. If the [groundwater] extractions are less than the water applied above an IAI of 1.0, surcharges will be imposed on all extractions.”³

On February 18, 2015, a month after Ordinance No. 8.8 was adopted, PVCWD sued for declaratory/injunctive relief and filed a petition for writ of mandate based on the theory that Fox Canyon lacked the statutory power to consider river surface water use in calculating the groundwater extraction surcharge. PVCWD claimed that Ordinance No. 8.8 violated the CEQA because the methodology for calculating the surcharge would incentivize groundwater pumping and deplete groundwater

³ Ordinance No., 8.8, Section Two, states: “For the duration of Emergency Ordinance E, Section 5.8.5 of Chapter 5.0 of the Ordinance Code, Reduction of Groundwater Extractions, is hereby amended to read as follows: [¶] 5.8.5 Irrigation Allowance Index Surcharge - Facilities relying on the annual efficiency allocation shall also be subject to surcharge for exceeding an Irrigation Allowance Index (IAI) of 1.0. Extraction surcharges will be imposed as follows: if the total water applied includes only extractions, surcharges will be imposed on all water used over an IAI of 1.0. If the total water applied includes a blend of extractions and other water, and the total water applied results in an IAI above 1.0, the IAI will be recalculated using only extractions and any surface water delivered through United Water Conservation District’s Pumping Trough Pipeline, Pleasant Valley Pipeline, or Line C. If the IAI as recalculated exceeds 1.0, the total water applied from those sources will be determined and compared to the extractions. If the extractions are greater than or equal to the water applied above an IAI of 1.0, surcharges will be imposed on the water applied above an IAI of 1.0. If the extractions are less than the water applied above an IAI of 1.0, surcharges will be imposed on all extractions.”

sources. After the matter was briefed and argued, the trial court denied the writ petition and dismissed the complaint.

Ultra Vires Act

PVCWD argues that Fox Canyon exceeded its statutory powers in treating Santa Clara River surface water as groundwater for purposes of calculating groundwater extraction surcharges. Where an agency has been delegated the Legislature's lawmaking power, the agency's quasi-legislative rules have the dignity of statutes and judicial review is limited to determining whether the regulation is within the scope of authority conferred and is reasonably necessary to effectuate the statute's purpose. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-11; see Gov. Code, § 11342.2 [implementing regulations adopted pursuant to statutory authorization must be "consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute."].) In deciding whether Ordinance No. 8.8 conflicts with the legislative mandate (i.e., the Fox Canyon Groundwater Management Act; § 121-102 et seq.), we independently interpret the pertinent statutory law. (*Id.* at p. 11, fn. 4.) "The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued. [Citations.]" (*Ibid.*)

The Fox Canyon Groundwater Management Agency Act provides that Fox Canyon "shall exercise the powers granted by this act for purposes of groundwater management within the boundaries of the agency, together with such other powers as are reasonably implied and necessary and proper to carry out the objectives and purposes of the agency." (§ 121-102.) The Legislature granted Fox Canyon broad authority to engage in groundwater management activities to preserve, protect, and

enhance groundwater resources (§ 121-311), and to impose surcharges for excessive groundwater extractions (§ 121-330). Fox Canyon is authorized to adopt ordinances that regulate, conserve, manage, and control the use and extraction of groundwater. (§§ 121-403, 121-701; see, e.g., *Central and West Basin Water Replenishment Dist. v. Southern Cal. Water Co.* (2003) 109 Cal.App.4th 891, 915-916 [water district's authority to store water for conjunctive use includes authority to manage storage space in groundwater basin]; *Zack v. Marin Emergency Radio Authority* (2004) 118 Cal.App.4th 617, 637 [water district has authority under implied powers doctrine to construct and maintain emergency communications system].)

Fox Canyon was also granted the authority to implement conjunctive use objectives for groundwater management. (§ 121-305.5.)⁴ “Conjunctive use describes a management technique which involves the coordinated use of both surface water and groundwater resources. [Citation.] It is the method currently favored by the Legislature ([Water Code] § 1101.5)” (*Central and West Basin Water Replenishment Dist. v. Southern California Water Co.*, *supra*, 109 Cal.App.4th at pp. 897-898.)

⁴ Section 121-305.5 provides: “‘Conjunctive use’ means the coordinated operation of a groundwater basin and groundwater and surface water supplies. Conjunctive use includes increased groundwater use or decreased groundwater replenishment with surface supplies in years when surface supplies are less than normal and, in years of more abundant surface supplies, the increased use or surface water in lieu of groundwater, either to allow groundwater levels to recover or to replenish artificial groundwater supplies. Conjunctive use also includes long-term storage of water in a groundwater basin.”

Where river surface water and groundwater are hydrologically interconnected, they may be managed as an integrated resource to maximize the yield of available water sources. (See Cal. Dept. of Water Resources, Bull. No. 118 (2003) p. 81, http://www.water.ca.gov/groundwater/bulletin118/docs/Bulletin_118_Update_2003.pdf, 10/13/2017.) “Conjunctive management in its broadest definition is the coordinated and combined use of surface water and groundwater to increase the overall water supply of a region and improve the reliability of that supply. Conjunctive management may be implemented to meet other objectives as well, including reducing groundwater overdraft and land subsidence, protecting water quality, and improving environmental conditions.” (*Id.* at p. 100.)

PVCWD argues that groundwater management is limited to groundwater basins and does not grant Fox Canyon the authority to mathematically structure groundwater extraction surcharges on the availability and use of river surface water.⁵ We disagree, as did the trial court. Fox Canyon’s express power to preserve, protect, and enhance groundwater resources includes the implied power to consider surface water usage in calculating the groundwater extraction surcharge. (§ 121-403.) Fox Canyon is authorized to “adopt ordinances for the purpose of regulating,

⁵Arguing from the lesser to the greater, PVCWD claims that if Fox Canyon lacks the authority to surcharge river surface water use, then it has no authority to regulate river surface water at all. Ordinance No. 8.8, however, does not impose a surcharge on river surface water use but does surcharge groundwater extractions that exceed the IAI 1.0 threshold. This is consistent with section 121-330 which provides that “‘Extraction surcharge’ means a surcharge assessed annually each time an operator exceeds his or her extraction allocation.”

conserving, managing, and controlling the use and extraction of groundwater within the territory of the agency.” (*Ibid.*) The power to conserve groundwater is broad and comes fully equipped with a regulatory toolbox to exercise “such other powers as are reasonably implied and necessary and proper to carry out” Fox Canyon’s objectives and purposes in groundwater management and preservation. (§ 121-102; see Foley-Gannon, Institutional Arrangements for Conjunctive Water Management in California and Analysis of Legal Reform Alternatives (2000) 6 Hastings W.-N.W. J. Envtl. L. & Policy 273, 291.)

The monitoring of river surface water use, while not the primary purpose for which Fox Canyon was created, is within the scope of Fox Canyon’s express and implied powers to preserve, protect, and enhance groundwater resources. (§ 121-311.) The delegation of regulatory power to a special water agency, without providing the mode for carrying such power into effect, impliedly permits Fox Canyon the right to select a lawful and reasonable means to carry out that power. (*Zack v. Marin Emergency Radio Authority, supra*, 118 Cal.App.4th at p. 637.)

PVCWD asks how is it that river surface water can be regulated like groundwater? The answer is: where river surface water is a primary source of groundwater recharge and a component part of a conjunctive water use management plan. “‘Recharge’ means the natural or artificial replenishment of groundwater storage by percolation or injection of one or more sources of water at the surface.” (§ 121-321.) Alberto Boada, Fox Canyon’s legal counsel, explained that the groundwater “surcharge [will] only be applied on any extractions. So even though the surface water being delivered by United is used to calculate whether or not the -- the operator has exceeded its [IAI]

allowance, . . . the surcharge would still only be applied on that operator's extractions. [¶] And the fundamental reason being that, under our legislation, we do not have the authority to surcharge use of surface water."

PVCWD opines that Fox Canyon is authorized to surcharge groundwater extractions but may not consider river surface water use in computing the surcharge. If that was true, an agricultural operator could extract the maximum allocated amount of groundwater without paying a surcharge, regardless of how much surface water is used and how wasteful the irrigation practices are. If river surface water is not considered in determining whether the operator's blended water use exceeds the IAI 1.0 threshold, there would be no financial incentive to efficiently use water. It would undermine Fox Canyon's ability to implement a groundwater water conservation program and violate established law that the unreasonable use of water be prevented and water resources be put to beneficial use to the fullest extent possible. (Cal. Const., art. X, § 2; Wat. Code, § 100.) Before Ordinance No. 8.8 was adopted, Emergency Ordinance E imposed a groundwater extraction surcharge and considered all water applied by the grower without regard to water source.⁶ Ordinance No. 8.8 clarifies how the surcharge is calculated based on specific water sources and provides that it will sunset when Emergency

⁶ Chapter 1.0 of the Fox Canyon Ordinance Code defines "**Actual Applied Water**" to mean "the total water applied by the grower to the crop over the course of a calendar year without regard to the water source. Examples of actual applied water include the sum of well water, water delivered from a water supplier, and or from surface water diversions. Total applied water does not include precipitation."

Ordinance E is no longer operative. (Ord. No. 8.8, SECTION TWO, [¶] 5.8.5.)

We reject the argument that Fox Canyon lacked the statutory power to adopt Ordinance No. 8.8 or that the Fox Canyon Board of Directors acted in an arbitrary, capricious, or unreasonable manner in making river surface water use a factor in calculating groundwater extraction surcharges. PVCWD insists that river surface water use has nothing to do with groundwater management. That is for Fox Canyon to decide.⁷ ““The courts have nothing to do with the wisdom or expediency of the measures adopted by an administrative agency to which the formulation and execution of state policy have been entrusted, and will not substitute their judgment or notions of expediency, reasonableness or wisdom for those which have guided the agency.” [Citations.]’ [Citation.]” (*Carlton Santee Corp. v. Padre Dam Mun. Water Dist.* (1981) 120 Cal.App.3d 14, 28)

Supplemental Water

PVCWD asserts that Santa Clara River surface water is “supplemental water” and exempt, as a matter of law, from Fox Canyon’s groundwater management program. Section 121-702 provides: “The availability of supplemental water to any operator shall not subject that operator to regulations more restrictive

⁷ “Under a conjunctive use program, surface water and groundwater supplies commingle, and the legally distinct water rights of various users are melded together. Many different private parties and public agencies may claim a right to use, or to regulate the use of, the water found within the groundwater basin.” (Foley-Gannon, Institutional Arrangements for Conjunctive Water Management in California and Analysis of Legal Reform Alternatives, *supra*, 6 Hastings W.-N.W. J. Envtl. L. & Policy at p. 275.)

than those imposed on other operators.” “Supplemental water” is defined as “surface water or groundwater *imported from outside the watershed* or watersheds of the groundwater basin or aquifer and flood waters that are conserved and saved within the watershed or watersheds *which would otherwise have been lost* or would not have reached the groundwater basin or aquifers.” (§ 121-323, italics added.) Santa Clara River surface water is not imported water or “lost” water. United diverts the surface water to either recharge the Fox Canyon aquifers or pipes it to PVCWD’s customers for irrigation.

Ordinance No. 8.8 makes no distinction between agricultural operators who use both groundwater and United water (i.e., blended water users) and agricultural operators using only groundwater. The rule is the same: agricultural operators may irrigate up to the 1.0 IAI threshold before a groundwater surcharge is imposed. Ordinance No. 8.8 does not subject PVCWD’s customers to more restrictive regulations than those imposed on other agricultural operators. (§ 121-702.)

Sustainable Groundwater Management Act

PVCWD contends that the Sustainable Groundwater Management Act (SGMA; Wat. Code, § 10720),⁸ which was enacted in 2014, grants groundwater agencies formed under SGMA the legal authority to regulate groundwater and surface water interactions. The argument is based on the theory that

⁸ SGMA, which became effective January 1, 2015 (Stats. 2014, chs. 346, 347, 348), was enacted to, among other things, “provide for the sustainable management of groundwater basins” and “[t]o enhance local management of groundwater consistent with rights to use or store groundwater and Section 2 of Article X of the California Constitution.” (Wat. Code, § 10720.1.)

SGMA restricts or supersedes Fox Canyon’s groundwater management authority. Water Code, section 10723, subdivision (c)(1)(D), however, states that Fox Canyon is the exclusive local groundwater management agency within its statutory boundaries. Since its creation in 1982, Fox Canyon has had the statutory authority to implement conjunctive water use objectives in preserving, protecting, and enhancing groundwater resources. (§ 121-502.) We, accordingly, reject the argument that SGMA restricts or supersedes Fox Canyon’s authority to consider river surface water use in calculation of a surcharge for excessive groundwater extractions.

Equal Protection

PVCWD contends that Ordinance No. 8.8 violates the equal protection clause of the California Constitution (Cal. Const., art. 1, § 7(a)) by subjecting agricultural operators who use river surface water (United water) to groundwater extraction surcharges but not imposing surcharges on similarly-situated farmers who use other types of surface water (i.e., non-United water). Two growers applying the same amount of water to identical crops could be the subject to different groundwater surcharges depending upon the source of water used.⁹

⁹ PVCWD argues that an operator with an IAI allocation of 100 acre feet of water who irrigates with 100 acre feet of groundwater plus 200 acre feet of non-United water would face no surcharge. The same operator would be surcharged if, instead of 200 acre feet of non-United water, the operator used one acre foot of United water. PVCWD argues that the surcharge is irrational because the source of the water used does not address “excessive irrigation” practices, which is the underlying purpose of Ordinance No. 8.8. That is incorrect. The primary purpose of Ordinance No. 8.8 is to “help eliminate overdraft from the aquifer

To prevail on the equal protection claim PVCWD must show: (1) it is treated differently from similarly situated persons, (2) the difference in treatment is intentional, and (3) there is no rational basis for the difference in treatment. (*Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.* (2003) 113 Cal.App.4th 597, 605.) With respect to the first prong, there is no evidence that similarly situated persons are treated differently. Ordinance No. 8.8 provides that agricultural operators may irrigate up to the IAI 1.0 threshold regardless of what water source is used. Surcharges are imposed only on groundwater extractions that contribute to excessive irrigation when the agricultural operator exceeds his or her annual efficiency allocation. The rule is the same for all agricultural operators except growers who irrigate with recycled water or desalinated water because those water sources are not used for groundwater recharge.

PVCWD makes no showing that the two classes of growers are similarly situated. Growers who use recycled water or imported water (i.e., supplemental water) are not depleting a water source that has been historically used to recharge Fox Canyon aquifers. Unless two similarly situated groups are defined by word or effect as members of a “suspect class” (such as race, national origin, gender, or illegitimacy, to name a few) or the law affects a fundamental right, a law will be upheld as long as there is any ““rational relationship between the disparity of treatment and some legitimate . . . purpose,”” even if the rational basis for that law was not articulated by the Legislature. (*Johnson v. Department of Justice* (2015) 60 Cal.4th 871, 881.)

systems.” There is no evidence that non-United water is a primary source of groundwater recharge.

On prong three of the equal protection analysis, PVCWD fails to show that Fox Canyon has no rational basis for the disparate treatment of growers based on the source of water used to irrigate. The administrative record indicates that the Santa Clara River is an important recharge source for groundwater basins and aquifers. Fox Canyon made United water part of the surcharge calculus to encourage the efficient use of an important groundwater recharge source. Ordinance No. 8.8 is rationally related to Fox Canyon's goal of conserving and enhancing groundwater resources with respect to the aquifers and the river surface water that recharges the aquifers.

CEQA Exemptions

PVCWD argues that Fox Canyon abused its discretion in finding that Ordinance No. 8.8 is categorically exempt from CEQA based on what are known as class 7 and 8 CEQA exemptions. "Those exemptions apply to actions taken to assure the maintenance, restoration, or enhancement of a natural resource or the environment. (CEQA Guidelines, §§ 15307, 15308, referred to as the class 7 and class 8 exemptions)." (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 702.)¹⁰ On review, we determine whether substantial evidence supports Fox Canyon's determination that the adoption of Ordinance No. 8.8 falls within a categorical exemption. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 267.) If there is substantial evidence to support the finding that the adoption of Ordinance No. 8.8 will not have a significant environmental

¹⁰ CEQA "Guidelines" refers to the Guidelines for Implementation of CEQA and are found in California Code of Regulations, title 14, section 15000 et seq.

effect, Fox Canyon’s determination will be upheld even if other evidence arguably supports a different conclusion. (*Id.* at p. 269; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114.)

PVCWD argues that the class 7 and 8 exemptions do not apply unless Fox Canyon had the law-making power to adopt Ordinance No. 8.8. As discussed, Fox Canyon is authorized to protect and enhance groundwater resources (§ 121-311), and implement conjunctive water use management objectives to preserve the groundwater basins (§§ 121-502; 121-305.5). Fox Canyon’s decision to factor river surface water use into the surcharge equation accomplishes the conjunctive use objective of preserving a natural resource. Fox Canyon has the statutory authority to adopt regulations that protect groundwater and groundwater recharge sources, the exercise of which protects the environment and satisfies CEQA Guideline section 15308.¹¹ (See *Save the Plastic Bag Coalition v. County of Marin* (2013) 218 Cal.App.4th 209, 227-228 [rejecting argument that city ordinance banning plastic bags was “legislative” rather than “regulatory” and outside CEQA’s class 7 and 8 exemptions].)

When Emergency Ordinance E was adopted on April 11, 2014, Fox Canyon found it to be exempt from CEQA. PVCWD did not challenge that finding. Ordinance No. 8.8 was adopted nine months later to “clarif[y] the rules under the Annual

¹¹ CEQA Guidelines section 15308 provides in pertinent part: “Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.” (Cal. Code Regs., tit. 14, § 15308.)

Efficiency Allocation program while Emergency Ordinance E is in effect.” (Ord. No. 8.8, SECTION FIVE.) Because Ordinance No. 8.8 does not change existing policy, there is no new environmental impact under CEQA. (*Black Property Owners Assn v. City of Berkeley* (1994) 22 Cal.App.4th 974, 986 [CEQA does not require environmental review where new ordinance restates existing law].)

The Fox Canyon Board of Directors also found that adoption of Ordinance No. 8.8 “is exempt from the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines, sections 15307 and 15308 which exempt actions taken for the protection of natural resources and the environment. This Ordinance will help eliminate overdraft from the aquifer systems within the boundaries of the Agency.” The trial court reasonably concluded that Ordinance No. 8.8 satisfies the CEQA “commonsense exemption” set forth in CEQA Guidelines section 15063, subdivision (a). (See *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 388.) The commonsense exemption applies where the project will enhance rather than degrade existing environmental conditions. (*CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488, 512.)

Unusual Circumstances Exception

PVCWD contends that the CEQA “unusual circumstances” exception trumps the class 7 or 8 categorical exemptions because Ordinance No. 8.8 will have a significant effect on the environment. (Cal. Code Regs., tit. 14 § 15300.2, subd. (c); *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 455.) “The plain language of Guidelines section 15300.2, subdivision (c), requires that a

potentially significant effect must be ‘due to unusual circumstances’ for the exception to apply.” (*Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at p. 1105.) Because it is a factual question for the lead agency, our review is limited to whether the agency’s determination is supported by substantial evidence. (*Id.* at p. 1114; *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 822, fn. 5; *Citizens for Environmental Responsibility v. State, ex rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 588 & fn. 24.) Here the evidence supports Fox Canyon’s finding that Ordinance No. 8.8, as a temporary emergency measure, will help eliminate groundwater overdrafts.

Citing *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 (disapproved in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, fn. 2), PVCWD speculates that groundwater surcharges will financially incentivize groundwater pumping. In *Dunn-Edwards*, the Court of Appeal overturned amendments to air district regulations designed to reduce the amount of volatile organic carbons in paint. The new regulations required the public to use lower quality paint products, which resulted in the need to use more paint and caused a net increase in VOC emissions. (*Id.* at pp. 657-658.) PVCWD argues that if it is cheaper to pump groundwater with extraction surcharges than it is to use river surface water, Ordinance No. 8.8 will have the unintended result of depleting groundwater basins and harm the environment.

Unlike *Dunn-Edwards*, there is no data, evidence, or expert testimony that Ordinance No. 8.8 will incentivize groundwater pumping or harm groundwater resources. PVCWD’s counsel, John Mathews, appeared at a January 9, 2015 hearing on

Ordinance No. 8.8 and testified that neither he nor Fox Canyon can show that the methodology (Approach D) used in Ordinance No. 8.8 to calculate the groundwater extraction surcharge will help or hurt the aquifer. Mathews said “[t]he best thing for Ventura County is to put that water [i.e., river surface water] in the [Oxnard] Forebay [Basin].” That is what Ordinance No. 8.8 does. Counsel tacitly admitted there was no evidence that Ordinance No. 8.8 would harm groundwater resources or cause a significant environmental impact.

PVCWD has the burden of showing the administrative record contains substantial evidence to support the fair argument that a significant environmental impact will occur. (*Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at p. 1105; *Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 777.) That evidence was not forthcoming, although there was testimony that the cost of water, no matter what the source, is expensive and will increase in cost.

PVCWD’s arguments about the relative costs of pumping groundwater or using river surface water are speculative and fail to make a *prima facie* showing that a groundwater extraction surcharge will have a significant environmental effect. “[T]o establish the unusual circumstances exception, it is not enough for a challenger merely to provide substantial evidence that the project *may* have a significant effect on the environment On the other hand, evidence that the project *will* have a significant effect does tend to prove that some circumstances of the project is unusual. An agency presented with such evidence must determine, based on the entire record before it -- including contrary evidence regarding significant environmental effects -- whether there is an unusual circumstance that justifies removing

the project from the exempt class.” (*Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at p. 1105.)¹²

Ordinance No. 8.8 creates an economic incentive to conserve water and is consistent with section 121-1102, subdivision (b): “[E]xtraction surcharges are intended to discourage the use of groundwater beyond the extraction allocation. They are not intended to generate tax revenues or proceeds from regulatory licenses, user charges, or user fees.” In the words of Fox Canyon Board Chairperson Lynn Maulhardt, Fox Canyon is making “a policy decision; not a scientific decision. Not some \$50 million study. We’re making a policy decision based on, in my opinion, commonsense.” Historic drought conditions and groundwater overdrafts have created “a perfect storm of problems that we’re trying to work our way through.”

¹² PVCWD cites comments by its general counsel, John Mathews, that a hypothetical grower could rehabilitate an old water well and pump ground water because United “water is more expensive [than] . . . well water. [¶] [¶] . . . The aquifer just suffered.” John Grether, a grower in the Las Posas Valley concurred with counsel’s comments and equated groundwater extraction surcharges with the price of using solar power to generate electricity. Gerald Smith, a Las Posas Valley grower asked “what is my motivation as a grower? My motivation is to protect the aquifer. But at the same time, my motivation is to stay in business. [¶] . . . “I’m going to keep pumping. If that’s the cheapest way to go, even if it’s at the expense of the aquifer, I’m going to keep pumping because it makes more economic sense for me to do that.” No witness testified that Ordinance No. 8.8 surcharges would have a significant environmental effect or financially undermine Fox Canyon’s plan to protect and preserve groundwater resources.

The Fox Canyon Board of Directors reasonably concluded that Ordinance No. 8.8 would help reduce groundwater overdrafts, conserve and enhance groundwater resources with respect to the aquifers and the river surface water used to recharge ground basins, and not harm the environment.

Disposition

PVCWD's remaining arguments has been considered and merit no further discussion. The judgment (order denying the petition for writ of mandate and complaint for declaratory and injunctive relief) is affirmed. Fox Canyon is awarded costs on appeal.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

John A. Torribio, Judge

Superior Court County of Ventura

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