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RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from April 1 through June 30, 2015. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar can be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.

The current legislative calendar is also included at the end of the *Update. Please note that all case law, legislative and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form.* In addition, this issue also includes selected recent Federal case law of note from the U.S. Supreme Court, Ninth Circuit Court of Appeals and Federal District Courts.

Each edition of the *Environmental Law Section Update* is posted in the "Members Only Area" of the State Bar's Environmental Law Section website at http://www.calbar.ca.gov/enviro. Notice of the availability of the *Update* on the Environmental Law Section website is distributed by electronic mail to all State Bar Environmental Law Section members who have provided the Bar with an e-mail address. If you have not provided the Bar with your e-mail address, you can do so by setting up your *State Bar Member Profile*. When you set up your *Profile*, be sure to click on "Change my e-mail list preferences" and check the box for the Environmental Law Section's e-mail list. If you have already set up your *State Bar Profile*, but did not check the box for the Environmental Law Section's e-mail list, you can do so at any time by logging in and clicking on "Change my e-mail list preferences."

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cday-wilson@ci.eureka.ca.gov. I would like to thank Michael Haberkorn, Anthony Todero, Mitchell Tsai, Anna Leonenko, Whit Manley, Danielle K. Morone, John Epperson, Amanda MacGregor Pearson, Joseph Petta, Anthony Todero and Amy Hoyt, for their contributions to this issue of the Update. – Cyndy Day-Wilson.

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AIR QUALITY

Recent Court Rulings

See "Ninth Circuit Court of Appeals, Air Quality."

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Ambient Air Monitoring Reference and Equivalent Methods. In June 2015, the USEPA provided notice that it designated one new reference method and one new equivalent for measuring concentrations of $PM_{2.5}$, one new equivalent method for measure $PM_{10\text{-}2.5}$, and two new equivalent methods for measuring ozone in the ambient air. See 80 Fed.Reg. 32114.

Designation of Areas for Air Quality Planning Purposes. In April 2015, the USEPA announced it was withdrawing a proposed action to reclassify the Indian country pertaining to the Pechanga Band of Luiseno Mission Indians from "Severe-17" to "Extreme" for the 1997 8-hour ozone NAAQS. The withdrawal became effective on April 3, 2015. See 80 Fed.Reg. 18184.

In April 2015, the USEPA also announced it was taking final action to reclassify the San Joaquin Valley "Moderate" nonattainment area, including areas of Indian country within it, as a "Serious" nonattainment area for the 1997 $PM_{2.5}$ NAAQS based on the USEPA's determination that the area could not practicably attain these NAAQS by the applicable attainment date of April 5, 2015, and in response to a request from the San Joaquin Valley Air Pollution Control District. See 80 Fed.Reg. 18528.

Finally, in April 2015, the USEPA issued a final rule determining that the Southeast Desert nonattainment area, which includes portions of Los Angeles, Riverside and San Bernardino counties, has attained the 1-hour ozone NAAQS. The final rule became effective on May 15, 2015. See 80 Fed.Reg. 20166.

Emission Factors for Flares and Other Refinery Process Units. In May 2015, the USEPA issued new and revised emission factors for flares and other refinery process units and issued its final determination that revisions to existing emissions factors for tanks and wastewater treatment systems are not necessary. See 80 Fed.Reg. 26925.

General Permits for the Federal Minor New Source Review (NSR) Program in Indian Country. In May 2015, the USEPA finalized general permits for use in Indian country pursuant to the Federal Minor NSR Program in Indian Country for new or modified minor sources in the following two source categories: hot mix asphalt plants; and stone quarrying, crushing, and screening facilities. The USEPA also finalized permits by rule for use in Indian country for new

or modified minor sources in three source categories: auto body repair and miscellaneous surface coating operations; gasoline dispensing facilities, except in California; and petroleum dry cleaning facilities. The final rule became effective June 1, 2015. See 80 Fed.Reg. 25068.

National Ambient Air Quality Standards (NAAQS). In May 2015, the USEPA announced the availability of the document titled, "Review of the Primary NAAQS for Nitrogen Dioxide: Risk and Exposure Assessment Planning Document." This document presented considerations relating to and the proposed approach for conducting quantitative analyses of NO_2 exposures or health risks in the current review of the primary NO_2 NAAQS. See 80 Fed.Reg. 27304.

National Emissions Standards for Hazardous Air Pollutants (NESHAPs): Ferroalloys Production. In June 2015, the USEPA announce that it finalized the residual risk and technology review conducted for the Ferroalloys Production source category. These final amendments include revisions to PM standards for electric arc furnaces, metal oxygen refining processes, and crushing and screening operations, and expand and revise the requirements to control process fugitive emissions from furnace operations, tapping, casting, and other processes. They also finalized opacity limits as proposed in 2014. Additionally, the USEPA finalized emission standards for four previously unregulated hazardous air pollutants: formaldehyde, hydrogen chloride, mercury and polycyclic aromatic hydrocarbons. See 80 Fed.Reg. 37366.

Protection of Stratospheric Ozone. In April 2015, the USEPA announced a final rule regarding its Significant New Alternatives Policy program. This action listed five flammable refrigerants as acceptable substitutes, subject to use conditions, in the enumerated end-uses. This action also exempted, from the Clean Air Act Section 608's prohibition on venting, release, or disposal, the four hydrocarbon refrigerant substitutes listed in this action as acceptable, subject to use conditions, in specific end-uses. This rule became effective May 11, 2015. See 80 Fed.Reg. 19454.

In June 2015, the USEPA proposed uses that qualify for the critical use exemption and the amount of methyl bromide that may be produced or imported for those uses for the 2016 control period. See 80 Fed.Reg. 33460.

Reconsideration on the Mercury and Air Toxics Standards (MATS) and the Utility New Source Performance Standards. In April 2015, the USEPA provided notice of final action denying 23 petitions for reconsideration of the final rules titled, NESHAP From Coal- and Oil-Fired Electric Utility Steam Generating Units and NSPS for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, published in the Federal Register on February 1, 2012. See 80 Fed.Reg. 24218.

State Implementation Plan (SIP) Revisions. In April 2015, the USEPA:

(1) Announced it was taking final action to approve a revision to the Regional Haze SIP submitted by CARB documenting that the State's existing plan is making adequate progress to achieve visibility goals by 2018. See 80 Fed.Reg. 17327.

(2) Announced it was finalizing a limited approval and limited disapproval of a revision to the San Joaquin Valley Air Pollution Control District (SJVAPCD) portion of the California SIP. This regulation established requirements and procedures for the District's quantification of emission reductions achieved through incentive funding programs. See 80 Fed.Reg. 19020.

(3) Announced it was taking direct final action to approve a revision to the Northern Sierra Air Quality Management District (NSAQMD) portion of the California SIP. The submitted SIP revision contains the NSAQMD's demonstration regarding Reasonably Available Control Technology requirements for the 1997 8-hour ozone NAAQS. See 80 Fed.Reg. 19544.

(4) Proposed to approve a revision to the South Coast Air Quality Management District (SCAQMD) portion of the California SIP. This revision concerns VOC emissions from Large Confined Animal Facilities. See 80 Fed.Reg. 19931.

(5) Proposed revisions to the Ventura County Air Pollution Control District (VCAPCD) and eastern Kern Air Pollution Control District (EKAPCD) portions of the California SIP. These revisions clarify, update, and revise exemptions from New Source Review permitting requirements for various air pollution sources. See 80 Fed.Red. 19932.

(6) Announced it was taking direct final action to approve revisions to the Feather River Air Quality Management District (FRAQMD) portion of the California SIP. These revisions concern VOCs, NO_x, and PM emissions from rice straw burning, surface preparation and cleanup for solvents, wood product coating operations, boilers, steam generators, process heaters, and stationary internal combustion engines. The rule became effective on June 22, 2015. See 80 Fed.Reg. 22646.

(7) Announced it was taking direct final action to approve revisions to the Yolo-Solano Air Quality Management District (YSAQMD) portion of the California SIP. These revisions concern VOC emissions from solvent cleaning and degreasing operations. See 80 Fed.Reg. 23449.

In May 2015, the USEPA announced it was taking final action to approve Rule 1325, Federal $PM_{2.5}$ New Source Review Program, into the SCAQMD portion of the California SIP. Rule 1325 governs the issuance of permits for major stationary sources and major modifications located in areas designated as nonattainment for the $PM_{2.5}$ NAAQS to meet Clean Air Act Part D requirements for emissions of $PM_{2.5}$ and $PM_{2.5}$ precursors. See 80 Fed.Reg. 24821.

In June 2015, the USEPA:

(1) Proposed to approve revisions to the Eastern Kern Air Pollution Control District (EKAPCD) and Mojave Desert Air Quality Management District (MDAQMD) portions of the California SIP. These revisions concern VOC emissions from polyester resin operations and oil-water separators. See 80 Fed.Reg. 32078.

(2) Proposed to approve revisions to the Butte County Air Quality Management District (BCAQMD), FRAQMD, and San Luis Obispo County Air Pollution Control District (SLOCAPCD) portions of the California SIP. These revisions concern emission statements, definitions, and vehicle and mobile equipment coating operations. See Fed.Reg. 33195.

State Nonroad Engine Pollution Control Standards Amendments. In May 2015, the USEPA provided notice of its decision to grant CARB's authorization request for amendments to the Spark Ignition Marine Engine and Boat regulations. The amendments apply to spark ignition marine outboard motors, personal watercraft, and stern drive and inboard engines subject to California emissions regulations. See 80 Fed.Reg. 26032.

Also in May 2015, the USEPA provided notice of its decision to confirm that CARB's amendments to the small off-road engines (SORE) regulations are within the scope of previous USEPA authorizations. CARB's SORE regulations apply to all small off-road engines rated at or below 19 kilowatts (25 horsepower). See 80 Fed.Reg. 26041.

Finally, in May 2015, the USEPA provided notice of its decision to grant CARB's authorization request for amendments to the regulations governing mobile cargo handling equipment at ports and intermodal rail yards. The USEPA also confirmed that certain amendments are within the scope of prior USEPA authorizations. These regulations apply to all newly purchased, leased or rented on-and off-road vehicles and equipment, as well as in-use on- and off-road vehicles and equipment, with compression –ignition engines that operate at ports and intermodal rail yards. See 80 Fed.Reg. 26249.

Tribal Implementation Plans (TIPs). In April 2015, the USEPA announced it was taking final action to revise the boundaries of the Southern California air quality planning areas to designate the reservation of the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation, California as a separate air quality planning area for the 1997 8-hour ozone NAAQS. The USEPA also took final action to approve the Tribe's TIP for maintaining the 1997 8-hour standard within the Pechanga Reservation through 2025. Lastly, the USEPA granted a request from the Tribe to re-designate the Pechanga Reservation nonattainment area to attainment for the 1997 8-hour ozone standard. The rule became effective on April 3, 2015. See 80 Fed.Reg. 18120.

ATTORNEYS FEES

Recent Court Rulings

Fourth District rejects a petitioner's fee motion based on a "catalyst" theory, and upholds the trial court's conclusion that the petitioner's CEQA lawsuit was not the catalyst resulting in the city's decision to rescind entitlements. *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2015) 238 Cal.App.4th 513

The coalition filed a CEQA petition challenging the EIR for a proposed shopping center anchored by a Target. The trial court denied the petition. The coalition appealed. While the appeal was pending, Target abandoned the project, the city rescinded the entitlements, and the

Court of Appeal ordered the trial court to dismiss the petition as moot. (*Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939.) After the trial court dismissed the petition, the coalition filed a motion for attorneys' fees under CCP section 1021.5 on the theory that its CEQA petition was the catalyst for Target abandoning the project. The trial court declined to award fees. The coalition appealed.

The Fourth District reviewed the trial court's decision under an "abuse of discretion" standard. The appellate court then focused whether the trial court's ruling – that the coalition was not a "successful party" – was within the trial court's discretion. The "catalyst theory" allows the court to award fees even if judgment is not entered in the petitioner's favor, if the petitioner can show that (1) the respondent changed its behavior in a way that matched up with the relief sought in the petition, (2) the lawsuit had merit and played a role in the change in the respondent's behavior – the "causation" prong in the test, and (3) the petitioner reasonably attempted to settle the litigation before filing the lawsuit.

The court ruled that the record contained sufficient evidence to support the trial court's finding that the coalition's lawsuit was not a substantial factor contributing to the city's decision to rescind the entitlements. The record showed the reason for the city's action was a falling out between Target and the landowner, resulting in Target's decision to pull the plug. After this decision, neither Target nor the landowner would indemnify the city in defending the entitlements. The city rescinded the entitlements, not because the coalition had filed a CEQA lawsuit, but due to the absence of an entity wishing to defend them. Moreover, the coalition's appeal of the trial court's denial of its petition did not convert an unsuccessful action into a meritorious one. Having lost twice, the coalition could not show "threat of victory." Finally, given the standard of review of the merits on appeal – an absence of substantial evidence – the odds of a successful appeal on the merits were remote.

Sixth District rules the record contains a "fair argument" regarding potential noise and traffic-safety impacts, and holds that Santa Clara County erred in relying on a negative declaration in granting a proposed use permit for a rural wedding facility. *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714

Beginning in 2006, a landowner hosted weddings and other events on property located in rural Santa Clara County. Neighbors complained. The landowner applied for a use permit. The landowner stated that approximately 100 people typically attended the events. Noise complaints from neighbors, however, suggested attendance at some events was upwards of 200. The county's noise consultant found that, though the county's noise standards were not exceeded during a sample weekend, the consultant was unable to conclude that the events unequivocally did not generate significant noise impacts. A mock event was held at the property to assess noise levels. Neighbors acknowledged not hearing the event, but stated the mock event was not representative of actual events held on the property. The county adopted a mitigated negative declaration (MND) and approved a use permit authorizing 28 special events per year for 100 guests, to be held between 2 p.m. and 10 p.m. on Saturdays and Sundays in the spring and summer, as well as one live concert in the first year of operation. The MND recommended, and the county adopted, conditions: orienting speakers away from neighboring residences; posting a noise complaint phone number;

and conducting an annual report assessing compliance with the conditions in the first year. Neighbors sued. The trial court granted the petition. The landowner appealed.

The Sixth District noted that a project's effects can be significant even if they are not greater than those deemed acceptable in a general plan. The court agreed with the association that the lead agency should consider both the increase in noise level and the absolute noise level associated with a project. The court found the neighbors' comments about the discrepancy in noise levels between the mock event and actual events constituted substantial evidence supporting a fair argument that the project may have unmitigated noise impacts. Relatedly, the court found that substantial evidence supported a fair argument that project-related crowd noise may have significant noise impacts on the surrounding residents. The court also found evidence supported a reasonable inference that the project may have significant impacts on biological resources, but no substantial evidence supported the argument that the project might have significant noise impacts on visitors at a nearby open-space preserve because no trails currently provided access to the area. Finally, the court found substantial evidence that the project could have significant traffic impacts. Neighbors provided comments, based on personal knowledge, that nearby roadways were unsafe. Traffic to and from the event center would exacerbate those hazards.

The trial court awarded $146K in attorneys' fees under CCP section 1021.5. On appeal, the landowner argued no fees should have been awarded, and the associate argued the amount was too low. The Court of Appeal rejected both arguments and upheld the award.

In fee motion following a successful CEQA lawsuit, Fourth District affirms the trial court's decision to award $19K, rather than the requested $231K, due to limited scope of writ, excessive hours and inflated rates. *Save Our Uniquely Rural Community Environment v. County of San Bernardino* (2015) 235 Cal.App.4th 1179

An Islamic center proposed to erect a mosque in a residential neighborhood. The county adopted a mitigated negative declaration and approved a use permit for the mosque. The neighbors sued. The trial court granted the writ based on its conclusion that the project's approach to handling sewage flows could have significant effects. The neighbors filed a motion for attorneys' fees. They asked for $111K based on rates up to $550 per hour, plus a multiplier of 2, plus another $10K for work on the fee motion, for a total request of $231K. The trial court granted the motion, but found the requested amount "outrageous." The court awarded $19K, noting that the neighbors prevailed on only one of seven claims. The neighbors appealed.

The court reviewed the trial court's ruling for abuse of discretion. The neighbors advanced various arguments why they were entitled to the amount of fees sought, including the double multiplier. "That a court might have exercised its discretion in the manner [the neighbors] assert[] is not, however, sufficient to demonstrate that it was an abuse of discretion not to award the fees [] sought. A trial court may reduce attorney fees sought pursuant to [CCP] section 1021.5 for a number of reasons. Here, the trial court stated some of its reasons for reducing the award. The record supports those reasons. It also supports other reasons for reducing the fees that the court might legitimately have relied upon, even if it did not state them explicitly." Those reasons included: (1) the neighbors' success on only one issue, (2) excessive time spent on preparing briefs, (3) an inadequate showing that time spent during the administrative process was necessary to the

litigation, (4) billing partners' rates for clerical work, and (5) the lack of evidence showing that the neighbors sought out local counsel at lower hourly rates. The court also ruled the trial count had an adequate basis for disallowing the requested multiplier. The neighbors' payment of $10,000 meant counsel's work was not entirely contingent. The record was small and not particularly complex, and did not require experienced CEQA counsel. Finally, although the trial court did not show its math in arriving at the $19K figure, the record otherwise showed the trial court had legitimate reasons for its decision.

Legislative Developments

No Summaries or updates this quarter.

Regulatory Updates

No Summaries or updates this quarter.

CEQA

Recent Court Rulings

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California Supreme Court rules California State University Regents had to broaden their efforts to raise funds to pay for off-site mitigation required to handle a planned expansion of the CSU San Diego campus. *City of San Diego v. Board of Trustees of the California State University* (2015) – Cal.4th – [2015 WL 4605356]

The CSU Regents Board of Trustees certified an EIR and approved a proposal to expand the San Diego campus to accommodate 10,000 additional full-time students. The EIR found the project would generate traffic, which in turn would necessitate improvements to various off-campus roads, intersections and transit in the area. The EIR estimated the campus' "fair share" for the cost of these improvements. The Board committed to ask the Legislature to appropriate the money necessary to make these fair-share payments to Caltrans, the City of San Diego, and the San Diego Association of Governments (SANDAG). The Board also found, however, that if the Legislature did not appropriate funds, fair-share payments would be legally infeasible because the Board lacked authority to commit funding outside the appropriations process. The Board adopted a statement of overriding considerations based on its decision to move forward, even if no money was forthcoming. The City and SANDAG sued. The trial court denied the petitions. The Court of Appeal reversed. The Supreme Court granted the Boards' petition for review.

The Board based its position on dictum in the Supreme Court's decision in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341. In that case, the court had rejected as legally incorrect the Board's position that CSU was prohibited from paying other agencies for off-site infrastructure necessitated by CSU's expansion plans. In the course of reaching that decision, the court had stated: "[A] State agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (39 Cal.4th at p. 367.) The Board interpreted this dictum to mean CSU could obtain such funds only through a specific legislative appropriation.

The court held that, because this conclusion turned on a question of law – the meaning of the court's *Marina* dictum – review was de novo. The court rejected the Board's position. CSU had discretion over its use of appropriated funds. Nothing prevented the Board from including the

fair-share payments in its capital budget for the project; in fact, CEQA directs all State agencies – including CSU – to do that. A healthy portion of the funding would, in any event, come from other sources, and did not depend on specific legislative appropriations. CEQA makes no distinction between those impacts arising on the agency's property, and those occurring off-site, yet the Board's position turned on such a distinction. Finally, CSU's position, if accepted, could logically be asserted by any State agency subject to the appropriations process, and thus might turn the courts into arbiters of whether and when payments can be made for off-site improvements. The court held such an outcome was contrary to CEQA.

Fourth District finds that amendments to a habitat conservation plan were a "project" under CEQA and, because the amendments might culminate in environmental effects, the amendments were not exempt from CEQA review. *Paulek v. Western Riverside County Regional Conservation Auth.* (2015) 238 Cal.App.4th 583

The Multiple Species Habitat Conservation Plan (MSHCP) for Western Riverside County, adopted in 2003, called for preservation of 500,000 acres. Out of this total, 153,000 acres were privately owned and to be acquired from within a 340,000-acre "criteria area." The criteria area was broken into 160-acre cells. Each cell was evaluated based on its habitat value. The MSHCP included a process to change how a cell was evaluated based on new information; if appropriate, a cell could be dropped from the criteria area, and replaced by "biologically equivalent" land. Anheuser-Bush owned a 964-acre ranch. The ranch included six MSHCP cells. Base on their habitat value, Riverside County informed Anheuser the six cells would be subject to a "conservation" overlay, meaning the process would have to undergo detailed review to determine whether the land ought to be acquired for preservation in the MSHCP, rather than developed.

In 2005, Anheuser filed an application to develop the ranch. The county concluded that all but 71 acres ought to be preserved. The county and Anheuser tried to negotiate a land swap, but failed. The county, the Agency and Anheuser entered into an agreement to settle their dispute over the fate of the ranch. As part of the agreement, the Agency committed to process a "criteria refinement" for the 200-acre "phase 9 property," a proposal that, if approved, would remove the cells on the phase 9 property, freeing the land from the conservation overlay. In 2012, the Agency approved the criteria refinement, removing the conservation overlay from the Phase 9 property, and placing it on two other properties totaling 1,064 acres. Paulek sued. The trial court denied the petition. Paulek appealed.

The Agency argued Paulek lacked standing. In a letter and at an Agency hearing, Paulek stated he provided his comments as a member of the "Friends of the Northern San Jacinto Valley." The Agency argued at most this provided the Friends with standing, not Paulek as an individual. The court disagreed, finding that if an individual speaks on behalf of a group, the individual establishes standing for both the group and the speaker.

The Agency argued the criteria refinement was not a "project" under CEQA. The court disagreed. Removing the MSHCP conservation overlay meant the 200-acre property would not have to be evaluated for acquisition by the Agency, and a development proposal would instead be evaluated just like any other entitlement application. "[T]he change embodied a fundamental land use policy that has the potential for causing ultimate physical changes in the environment, because land that was protected for conservation purposes will no longer be subject to such protections."

The fact that the Agency placed the overlay on 1,064 substitute acres did not change this analysis. The Agency could not combine these acts into a single action that somehow netted out the change in policy with respect to the 200 acres, regardless of the asserted biological superiority of the substitute 1,064 acres. Nor could the Agency cite its agreement to acquire the phase 9 property in 2020; Anheuser remained the owner, a policy to preserve the land had been removed, and anything else that might occur was speculation.

The Agency had also approved the criterial refinement based on the Class 7 and Class 8 categorical exemptions. The court held that neither exemption applied. First, the record contained a "fair argument" that the project might have a significant impact on a natural resource – the species present on the phase 9 property but not on the substitute acreage – so the Class 7 exemption did not apply. Second, the record contained a fair argument that the criterial refinement might not assure the maintenance, restoration or enhancement of the environment, such that the Class 8 exemption did not apply. Development of the phase 9 property could affect biological species not present on the other properties, and might affect neighboring conservation lands due to edge effects. In the context of a categorical exemption, the Agency could not cite the relative benefits of preserving 1,064 acres as an offset to the impacts that might occur on the phase 9 property. Nor could the Agency cite the relatively degraded character of the phase 9 property; the fact that the land was not "prime" habitat did not establish that it had no biological value. The Agency's prior efforts to acquire the land belied its claim that the property had no habitat value.

Anheuser argued CEQA review would be premature. Under the agreement, the Agency had up to six years to acquire the phase 9 property. If the owner thereafter sought entitlements, CEQA review would be performed at that time. The court disagreed, concluding that CEQA review had to be performed prior to altering land use policy for the property.

The Agency's notice of exemption also cited the "common sense" exemption. Paulek argued the common-sense exemption did not apply. The Agency argued Paulek failed to exhaust on this issue. The court rejected this argument because the Agency's notice and resolution made no mention of the common-sense exemption. Paulek was not required to exhaust claims he had no way of knowing about. The evidence in the record showed the Agency could not conclude there was no possibility of impacts on the phase 9 property.

Finally, the Agency argued Paulek missed the statute of limitations. Paulek filed within 35 days of the Agency's adoption of the challenged resolution, as required by Public Resources Code section 21167, subdivision (d). The Agency argued, however, that its consideration of the criteria refinement arose out of the earlier settlement agreement between the Agency, Riverside County and Anheuser. The court rejected this argument because, in its view, Paulek's lawsuit challenged not the substance of the agreement, but the Agency's procedural obligations with respect to the resolution refining the criteria. For the same reason, the county was not an indispensable party, since it was not directly involved in the Agency's decision to approve the resolution.

Fourth District holds Supplemental EIR for oft-litigated Orange County jail upgrade satisfies CEQA. *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526.

In the 1990s, Orange County certified an EIR to expand the James A. Musick Jail Facility. The City of Irvine challenged that EIR and lost. Project construction was delayed indefinitely due to inadequate funding. When state funding became available, the county revived the proposal. The city filed a lawsuit challenging the county's decision to apply for state funding. The Fourth District held CEQA review did not need to precede the county's application. (*City of Irvine v. County of Orange* (2013) 221 Cal.App.4th 846.) In 2012, the county prepared a Supplemental EIR to account for project changes and changed circumstances. The city sued. The trial court denied the petition. The city appealed.

The city argued the county was required to prepare a "Subsequent EIR" rather than a "Supplemental EIR." The court rejected this claim, explaining that courts should look to the substance of the EIR, not its nominal title.

The city challenged the Supplemental EIR's analysis of traffic impacts during project construction. Due to delays, there were discrepancies in the county's construction timeline. The city argued these discrepancies meant the project description was impermissibly unstable, such that there was no way to account for the traffic impacts caused by construction in a given year. The court found that CEQA does not require a continuous update of traffic impacts as a result of construction delays. Moreover, the impacts would not be substantially different from those disclosed in the Supplemental EIR even if traffic data was updated. For this reason, even if there were errors, the city failed to show prejudice.

The city argued the Supplemental EIR contained inadequate mitigation for the loss of agricultural land. The Supplemental EIR discussed seven possible mitigation measures, but none was found to be feasible. The city challenged the county's feasibility findings for three of the measures: (1) the purchase of conservation easements on existing agricultural land to prevent it from being used in the future for nonagricultural purposes, (2) a transfer of development rights program, and (3) a "right to farm" ordinance. The court held that the county's findings rejecting these measures as infeasible were supported by substantial evidence. Conservation easements were infeasible because there was no additional land for agriculture in the county that would be profitable, and putting a conservation easement on land that is already used for agriculture would do nothing to mitigate the loss of other agricultural lands. Transfers of development rights were infeasible because the land upon which the county was to expand the jail facility was county-owned, and the county had no other fallow land from or to which the development rights could be transferred. A right to farm ordinance was infeasible because, based on land values, farming was infeasible, so there was no viable farmland to protect.

The city argued the county failed to provide adequate responses to comments. From previous case law, the court divined the following standards to measure the adequacy of responses: (1) when a comment raises a "significant" environmental issue, there must be some genuine confrontation with the issue – the issue cannot be swept under the rug; (2) responses that leave big gaps in the analysis of environmental impacts are obviously inadequate; (3) comments that bring some new issue to the table need genuine confrontation; and (4) comments that are only objections

to the merits of the project itself may be addressed with cursory responses. Based on these guiding principles, the court found that the county had adequately responded to each of the city's comments that merited a response. The court closed with the following observations:

> "At its best, the comment-and-response process in CEQA produces a *better EIR*, by bringing to the attention of the public and decision-makers significant environmental points that might have been overlooked. After all, an EIR is an informational document [citation] and when comments . . . reveal a significant, overlooked environmental effect, the necessity of a non-conclusory response forces decision makers to confront the real downsides to a development project. [Citation.]
>
> "But the comment-and-response process can also be abused. At its worst, it could become an end in itself, simply a means by which project opponents can subject a lead agency's staff to an onerous series of busy-work requests and "go fetch" demands. As Presiding Justice McConnell wrote in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 524, the point of CEQA, 'is to inform government decision makers and their constituency of the consequences of a given project, not to derail it in a sea of administrative hearings and paperwork.' This case is an example of the drowning in 'paperwork' Presiding Justice McConnell warned about. We find no infirmity in the SEIR."

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Prevention of Significant Deterioration Permitting for GHG. In May 2015, the USEPA announced it was taking direct final action to amend the Prevention of Significant Deterioration (PSD) program regulations to allow for rescission of certain PSD permits issued by the USEPA

and delegated reviewing authorities under Step 2 of the PSD and Title V GHG Tailoring Rule. See 80 Fed.Reg. 26183.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Findings on 10 Petitions. In April 2015, the USFWS announced 90-day findings on various petitions to list eight species, reclassify one species, and delist one species under the ESA. Based on their review, the USFWS found that these 10 petitions presented substantial scientific or commercial information indicating that the petitioned action may be warranted. A review of the status of each of these species was initiated to determine if the petitioned actions were warranted. The subject species located in California include: the Clear Lake hitch, Mojave shoulderband snail, northern spotted owl, the San Joaquin Valley giant flower-loving fly, and the western pond turtle. See 80 Fed.Reg. 19259.

Fisher. In April 2015, the USFWS announced a 6-month extension of the final determination of whether to list the West Coast distinct population segment of fisher as a threatened species. The USFWS will submit a final listing determination to the Federal Register on or before April 7, 2016. See 80 Fed.Reg. 19953.

Greater Sage-Grouse. In April 2015, the USFWS announced its withdrawals of the proposed rule to list the bi-state distinct population segment of greater sage-grouse in California and Nevada

as threatened under the ESA, as well as the proposed ruled under section 4(d) of the ESA and proposal to designate critical habitat for the bi-State DPS of greater sage grouse. See 80 Fed.Reg. 22828.

Humboldt Marten. In April 2015, the USFWS announced a 12-month finding on a petition to list the previously classified subspecies Humboldt marten or the Humboldt marten distinct population segment of the Pacific marten as an endangered or threatened species under the ESA. The USFWS founds the DPS was not warranted for listing at the time. See 80 Fed.Reg. 18742.

Leona's Little Blue Butterfly. In June 2015, the USFWS announced a 12-month finding on a petition to list Leona's Little Blue Butterfly as an endangered or threatened species under the ESA. The USFWS found that listing Leona's little blue butterfly was not warranted. See 80 Fed.Reg. 35916.

Livermore Tarplant. In April 2015, the California Fish and Game Commission gave notice that, at its April 9, 2015 meeting in Santa Rosa, California, it accepted for consideration the petition to list the Livermore tarplant as an endangered species. The Livermore tarplant was declared a candidate species as defined by Section 2068 of the Fish and Game Code. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 656.

Tiger Salamander. In April 2015, the USFWS announced the availability of the draft recovery plan for the Santa Barbara county district population segment of the California tiger salamander. See 80 Fed.Reg. 23045.

ENERGY

Recent Court Rulings

The First District Court of Appeal affirmed the decision of the Public Utilities Commission to fine Pacific Gas & Electric Company $14,350,000 for misleading the Commission. *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n*, 237 Cal. App. 4th 812 (2015).

After a massive explosion of an underground gas pipeline owned and operated by Pacific Gas and Electric Company ("PG&E"), the California Public Utilities Commission (the "Commission") required PG&E to institute several reforms. One reform required PG&E to improve its recordkeeping and to keep the Commission informed of any information regarding the safety of PG&E's pipeline operations.

PG&E later discovered that some of the information it provided to the Commission regarding the pressure at which PG&E could safely operate certain pipelines was incorrect. Approximately seven months later, PG&E communicated the discovery to the Commission via a written "Errata" to a previous filing. After extensive hearings, the Commission found PG&E violated California Code of Regulations, title 20, section 1.1 ("Rule 1.1", which provided in pertinent part that "[a]ny person who . . . transacts business with the Commission . . . agrees . . . never to mislead the Commission." Finding PG&E violated Rule 1.1 twice, by failing to report

the discovery earlier and by submitting the Errata, which the Commission found misleading, the Commission fined PG&E $14.35 million. PG&E petitioned the court for a writ of review.

On review, the issues were: (1) whether Rule 1.1 required an element of intent to deceive; (2) whether the Commission correctly treated PG&E's act and omission as continuing violations; (3) whether the Commission gave PG&E sufficient notice of the possible penalties; and (4) whether the fine was constitutionally excessive. Any public utility that violates or fails to comply with any requirement of the Commission is subject to a monetary civil penalty of not less than $500 and not more than $50,000 for each offense. Cal. Pub. Util. Code § 2107. Every violation is a separate and distinct offense, and for a continuing violation, each day's continuance of the violation is a separate and distinct offense. *Id.* § 2108.

First, the court found a violation of Rule 1.1 did not require any mental state to mislead the Commission. Although the trend was against imposing criminal penalties without proof of a guilty mental state, the trend did not apply to statutes that impose civil penalties for noncompliance with measures designed to protect the public. The California Legislature's decision to omit qualifying words like "willfully" or "knowingly" in California Public Utilities Code (the "Code") section 2107 indicated a legislative intent to exclude a requirement for a mental state. PG&E characterized the Errata as an innocent mistake that did not cause any harm, but the court found that requiring actual damages would negate the deterrent effect of civil penalties and neuter the Commission's enforcement efforts.

Second, the court held a continuing violation does not require proof of continuing misconduct. Reviewing section 2108 of the Code, the court found that the California Legislature left it to the Commission to decide what amounts to a violation, and as such, a reviewing court must give considerable deference to the Commission's decisions. Although PG&E argued a continuing violation required a continuing course of unlawful conduct, the court found this would not cover persistent failures to act and would gut the Commission's ability to sanction noncompliance with its orders.

Third, the court found the Commission gave PG&E adequate notice of potential fines. Due process did not require any particular form of notice, and PG&E cited no authority that due process required the Commission to spell out all the possible adverse consequences. The Commission's notice told PG&E that the Errata was procedurally improper because it went beyond correcting minor typographical or computational errors and was substantively improper by making substantive changes to a previously filed document upon which the Commission relied in making a decision. The notice advised PG&E that the Commission was accusing PG&E of violating Rule 1.1, and PG&E did not show that the Commission's notice prejudiced PG&E in presenting its defense.

Finally, the court held the fine was not constitutionally excessive. PG&E noted the disparity between the fine and any actual damage from the violations of Rule 1.1. The court dismissed PG&E's argument, finding it would make the Commission's order to self-report meaningless. Although the amount of the fine was large, so was the potential harm of PG&E's inaction, and PG&E did not argue that it lacked the ability to pay the fine.

After a massive gas explosion, the Commission ordered PG&E to report to the Commission any information regarding the safety of PG&E's pipelines. PG&E discovered errors in information it previously reported to the Commission, but it did not inform the Commission until several months later via a written Errata. The Commission found PGE's failure to report its findings earlier and the Errata were both continuing violations of Rule 1.1, which prohibited misleading the Commission. The Commission, therefore, fined PG&E over $14 million, and upon review, the court upheld the fine.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Siting and Licensing Amendments. In April 2015, the California Energy Commission proposed to update its siting, process and procedure regulations, located in Title 20 of the CCR. The updates address issues raised by stakeholders regarding the Commission's licensing procedures and general process issues. The Commission held a public hearing for consideration and possible adoption of the 45-day language on June 10, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 645.

FEES/TAXES

Recent Court Rulings

The Fourth Appellate District has held that Prop. 218 prohibits water districts from basing tiered water rates on the district's overall costs to provide service, instead of the specific cost to provide water to each parcel. *Capistrano Taxpayers Association, Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493.

The city, acting as the water district, adopted a new rate structure. It first calculated its total costs to provide water service, then created four pricing tiers based on use: low, reasonable, excessive, and very excessive. Revenues from all tiers would cover the city's total costs of service. The city did not calculate the incremental cost of providing water at each tier; rather, each rate represented a percentage of the city's fixed costs. Petitioner challenged this rate structure under the constitutional requirement that fees be limited to the "cost of service attributable to the parcel." (Art. XIIID, § 6(b)(3).) The trial court ruled for petitioner. Because recycled water (which the city would provide once a new plant came online in 5 years) was not used by all residential parcels, the trial court also found the rates in violation of § 6(b)(4), prohibiting fees unless service "is actually used by, or immediately available to, the owner of the property."

The issue on appeal was whether the city's water rate structure violated Prop. 218, specifically sections 6(b)(3) or (b)(4) of Article XIIID of the California Constitution.

The court affirmed the trial court ruling on section 6(b)(3). Because the rate tiers were precisely differentiated from each other, it was clear they were arbitrary and that each rate did not correlate with a corresponding cost of service. The constitutional requirement that the proportional cost of service must be attributable to "*the* parcel" meant that each parcel must have a specific cost to provide service. The city's legislative power did not allow it to attribute a percentage of its total costs to each tier. The court also rejected the argument that Prop. 218's "penalty" exception authorized proportionally higher rates on heavier users, as this would enable any agency to justify excessive rates as a "penalties." Finally, the court rejected the argument that Prop. 218 must be "balanced" against Article X, section 2's water conservation requirement.

The court held further that whether the city provided recycled or potable water to users, under section 6(b)(4) it provided a single, immediately available service because non-potable water for some customers frees up potable water for others. However, because the rate structure did not show whether the city improperly charged *very* low users for recycled water (which they could not have used, by definition of their "class"), the court remanded to the trial court to determine this factual issue.

The Supreme Court recently denied the State's request to have the opinion depublished.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Working Forest Management Plan. In May 2015, the California Board of Forestry and Fire Protection gave notice of a proposed action to make specific the use of a Working Forest Management Plan (WFMP) and a Working Forest Harvest Notice pursuant to AB 904. As part of this proposal, the Board also adopted/amended various other sections of the CCR. The public hearing was held on June 17, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 18-Z, pg. 698.
Also in May 2015, the California Board of Forestry and Fire Protection gave notice that it decided not to proceed with a rulemaking action published in the California Regulatory Notice Register on January 16, 2015. The proposed rulemaking concerned creating the Working Forest Management

Plan program based on the model of the Nonindustrial Timber Management Plan program, in order to provide non-industrial landowners greater opportunities for cost-effective timber management than currently exist through the application of a timber harvesting document that would allow for long-term approval with certain conditions. See Cal. Reg. Notice Register 2015, Vol. No. 18-Z, pg. 716.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

See "United States Court of Appeals."

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Hazardous and Solid Waste Management System. In April 2015, the USEPA published a final rule to regulate the disposal of coal combustion residuals (CCR) as solid waste under subtitle D of the Resource Conservation and Recovery Act (RCRA). The rule requires any existing unlined CCR surface impoundment that is contaminating groundwater above a regulated constituent's groundwater protection standard to stop receiving CCR and either retrofit or close, except in limited circumstances. It also requires the closure of any CCR landfill or CCR surface impoundment that cannot meet the applicable performance criteria for location restrictions or structural integrity. Finally, those CCR surface impoundments that do not receive CCR after the effective date of the rule, but still contain water and CCR will be subject to all applicable regulatory requirements, unless the owner or operator of the facility dewaters and installs a final cover system on these inactive units no later than three years from publication of this rule. The final rule is effective on October 14, 2015. See 80 Fed.Reg. 21302.

Right-To-Know Toxic Chemical Release Reporting. In April 2015, the USEPA proposed to add 1-bromopropane to the list of toxic chemicals subject to reporting under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6607 of the Pollution Prevention Act (PPA). 1-Bromopropane has been classified as "reasonably anticipated to be a human carcinogen." See 80 Fed.Reg. 20189.

TSCA Reporting and Recordkeeping Requirements. In April 2015, the USEPA proposed reporting and recordkeeping requirements for certain chemical substances when they are manufactured or processed at the nanoscale. The USEPA proposes to require persons that manufacture or process, or intend to manufacture or process these chemical substances to electronically report to the USEPA certain information, which includes the specific chemical identity, production volume, methods of manufacture and processing, exposure and release information, and existing data concerning environmental and health effects. See 80 Fed.Reg. 18330.

INSURANCE COVERAGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

LAND USE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Marine Terminals – Building Standards. In June 2015, the California State Lands Commission proposed to adopt, codify and publish changes to the building standards contained in the CCR, Title 24, Part 2. The Commission proposed building standards related to Chapter 31F – Marine Terminals (MOT). A public hearing was held on August 13, 2015 at the Port of Long Beach. See Cal. Reg. Notice Register 2015, Vol. No. 26-Z, pg. 1069.

Off-Highway Motor Vehicle Recreation Program. In June 2015, the California Department of Parks and Recreation proposed to amend CCR Title 14, Division 3, Chapter 15, Articles 1 through 5, Sections 4970.00 through 4970.26 pertaining to the Off-Highway Motor Vehicle Recreation Grants and Cooperative Agreements Program. The Department held two public hearings on the proposed rulemaking (Sacramento on August 4, 2015 and Bakersfield on August 6, 2015). See Cal. Reg. Notice Register 2015, Vol. No. 25-Z, pg. 989.

Structures on State-Owned Land – Administrative Hearings. In April 2015, the State Lands Commission gave notice of its proposal to add Article 14, Sections 3000 through 3016 to Title 2, Division 3, Chapter 1 of the CCR. These sections implement administrative hearings under Public Resources Code Section 6224.3 and following. At an informal administrative hearing, the Commission will determine whether a person has built or maintains a structure on state–owned

land under the Commission's jurisdiction without authorization. The Commission held a public hearing on June 8, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 624.

PROPOSTITION 65

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Adoption of Maximum Allowable Dose Levels (MADLs). In June 2015, OEHHA proposed to adopt Proposition 65 MADLs for oral exposure to atrazine, propazine, simazine, 2,3-diamino-6-chloros-triazine (DACT), des-ethylatrazine (DEA), and desisopropyl atrazine (DIA) that induce reproductive toxicity by amending Section 25805(b) of Title 27 of the CCR. The proposed oral MADLs are 100 micrograms per day for each of the six chemicals. See Cal. Reg. Notice Register 2015, Vol. No. 24-Z, pg. 952.

Chemicals Listed. In April of 2015, OEHHA gave notice of its intent to list *Aloe vera*, whole leave extract and Goldenseal root powder, as known to the State to cause cancer under Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 656.

In May 2015, OEHHA gave notice that, effective May 11, 2015, it added *bisphenol A* (BPA) (CAS No. 80-05-7) to the list of chemicals known to the State to cause reproductive toxicity for purposes of Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 21-Z, pg. 834.

In June 2015, OEHHA provided notice that it was adding *ethylene glyclol* (ingested) (CAS No. 107-21-1) to the list of chemicals known to the state to cause reproductive toxicity for purposes of Proposition 65. This listing became effective June 19, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 25-Z, pg. 1010.

In June 2015, OEHHA provided notice of its intent to list *CMNP* (*pyrazachlor*) and *sedazane* as known to the State to cause cancer under Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 26-Z, pg. 1089.

In June 2015, OEHHA provided notice of its intent to list *teriparatide* as known to the Sate to cause cancer under Proposition 65. The FDA-approved label indicates that teriparatide therapy in patients with osteoporosis increases the risk of developing osteosarcoma (a malignant bone tumor). See Cal. Reg. Notice Register 2015, Vol. No. 25-Z, pg. 1008.

List of Chemicals Known to Cause Cancer or Reproductive Toxicity. In June 2015, OEHHA published an amended list of chemical known to the State to cause cancer or reproductive toxicity. See Cal. Reg. Notice Register 2015, Vol. No. 25-Z, pg. 1010.

Notice of Consideration by the Carcinogen Identification Committee (CIC). In May 2015, OEHHA gave notice that it determined the regulatory criteria in Section 25306(e), Title 27 of the CCR, had not been met for the spectrum of chemical covered by the broad class "nitrite in combination with amines or amides." The notice also stated OEHHA will ask the CIC to consider at a future meeting whether nitrite in combination with amines or amides, or a subset of chemicals of this class, have been clearly shown, through scientifically valid testing according to generally accepted principles, to cause cancer. See Cal. Reg. Notice Register 2015, Vol. No. 21-Z, pg. 834.

RESOURCE CONSERVATION

Recent Court Rulings

Nat'l Parks Conservation Association v. E.P.A. (9th Cir. No. 12-73710) (Jun 9, 2015)

In National Parks Conservation Association v. U.S. Environmental Protection Agency, the 9th Circuit unanimously partially granted and denied petitions brought by both industry and environmental groups challenging the United States Environmental Protection Agency's ("**USEPA**") regional haze regulations for the State of Montana.

At issue in the case was EPA's determinations for what would constitute Best Available Retrofit Technology ("BART") for the Colstrip Steam Electric Generating Station ("**Colstrip**") and the J.E. Corette Electric Station in Montana ("**Corette**").

PPL Montana, partial owner and operator of the Colstrip and Corette power plants, challenged USEPA's BART determination and the accompanying emissions limits for the Colstrip power plant, contending that the BART determinations were too stringent and that USEPA had failed to adequately explain or support their BART determination.

Environmental groups National Parks Conservation Association, Montana Environmental Information Center, and Sierra Club (collectively "Environmental Groups") challenged USEPA's BART determinations and the accompanying emissions limitations for the Colstrip and Corette power plants, alleging that the BART determinations and accompanying emission limitations for the aforementioned facilities were not stringent enough and that USEPA had failed to adequately explain or support their BART determination.

Sections 169A and 169B of the Federal Clean Air Act, 42 U.S.C. § 7401, *et seq* ("**Clean Air Act**") requires States as well as USEPA to adopt measures to prevent impairments of visibility in designated Class I areas, which includes all national parks greater than 6000 acres, as well as all national wilderness areas, and national memorial parks greater than 5,000 acres in existence as of August 7, 1977.

Certain types of industrial facilities that generate air pollutant emissions that were in existence as of August 7, 1977 and began operating after August 7, 1962 ("**BART-eligible Sources**"), including the Colstrip and Corette power plants, may be required to reduce air pollutant emissions in order to improve visibility in Class I areas through the implementation of BART.

States as well as USEPA, are required to determine the level of emission reduction required under the BART standard for each individual BART-eligible Source by looking at "(a) the costs of compliance, (b) the energy and non-air quality environmental impacts of compliance; (c) any existing pollution control technology at a source, (d) the remaining useful life of the emission source, and (e) the degree of visibility improvement anticipated[.]" 42 U.S.C. § 7491(b)(2),(g).

While the Court grants substantial deference to USEPA under the "arbitrary and capricious" standard, the Court found that USEPA had failed to provide any adequate, reasoned explanation for its BART determinations for the Colstrip and Corette power plants, and partially upheld and rejected PPL Montana's and the Environmental Groups' challenges, finding that USEPA had failed to adequately explain or support the cost effectiveness and visibility improvements of its BART Determinations for the two facilities

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Bobcat Protection Act of 2013. In May 2015, the California Fish and Game Commission provided notice of its proposal to amend CCR Title 14, Sections 478, 479, and 702 relating to implementation of the Bobcat Protection Act of 2013. The proposed regulatory changes consist of two options: (1) partial closure of the state bobcat trapping and establishing property – specific closure boundaries around protected areas; and (2) total prohibition on bobcat trapping in California. See Cal. Reg. Notice Register 2015, Vol. No. 22-Z, pg. 876.

Market Squid. In June 2015, the California Fish and Game Commission provided notice of its proposal to amend CCR Title 14, Section 149 and Appendix A relating to market squid logbooks. The proposed amendment to Subsection 149(e) would add reference to the revised forms' updated version number "Market Squid Vessel Logbook – DFW 149e (Rev. 05/01/15)," and "Market Squid Light/Brail Boat Logbook – DFW 149b (Rev. 05/01/15)." Additional changes were also proposed to improve the organization, clarity and consistency of the regulations. See Cal. Reg. Notice Register 2015, Vol. No. 26-Z, pg. 1059.

Migratory Bird Permits. In April 2015, the USFWS announced proposed permit regulations to govern the use of captive bred, trained raptors to control or take birds or other wildlife to mitigate damage or other problems, including risks to human health and safety. See 80 Fed.Reg. 17374, 22467.

In May 2015, the USFWS provided notice of its intent to prepare a programmatic environmental impact statement pursuant to the National Environmental Policy Act to evaluate the potential

environmental impacts of a proposal to authorize incidental take of migratory birds under the Migratory Bird Treaty Act. The rulemaking would establish appropriate standards for any such regulatory approach to ensure that incidental take of migratory birds is appropriately mitigated, which may include requiring measures to avoid or minimize take or securing compensation. See 80 Fed.Reg. 30033.

Refuge-Specific Hunting and Sport Fishing Regulations. In June 2015, the USFWS proposed to add 1 national wildlife refuge (NWR) to the list of areas open for hunting, add 4 NWRs to the list of areas open for fishing, increase the hunting activities available at 16 other NWRs, increase fishing opportunities at 1 NWR, and add pertinent refuge-specific regulations for other NWRs that pertain to migratory game bird hunting, upland game hunting, big game hunting, and sport fishing for the 2015-2016 season. Various NWRs located in California are addressed in this rulemaking. See 80 Fed.Reg. 33342.

Upland Game Birds. In April 2015, the California Fish and Game Commission gave notice of its proposal to amend CCR Title 14, Sections 300 and 310.5 relating to upland game birds. The Department of Fish and Wildlife recommended two regulation changes under these sections: (1) adjust the annual number of sage grouse hunting permits by zone; and (2) increase shooting time provided for spring turkey hunters under Section 310.5 by one hour. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 639.

Waterfowl Regulations. In April 2015, the California Fish and Game Commission gave notice of its proposal to amend CCR Title 14, Section 502 relating to waterfowl regulations. The Department of Fish and Wildlife proposed to: (1) provide a range of waterfowl hunting season lengths between 38 and 107 days for all hunting methods, including a range of daily bag limits given for ducks in all zones; (2) increase the bag limit for geese in the Colorado River Zone to match waterfowl regulations in neighboring Arizona; and (3) provide a range of brant season lengths in Northern Brand and Balance of State Brant special management areas to allow for a possible increase in season length. See Cal. Reg. Notice Register 2015, Vol. No. 17-Z, pg. 641.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

WATER QUALITY

Recent Court Rulings

The Fourth Circuit has held that expert testimony alleging unlawful conversion of freshwater to saltwater wetlands under the Clean Water Act could not overcome the fact that wetlands plaintiff sought to protect already were saltier than waters plaintiff sought to keep out, such that no case or controversy existed. *South Carolina Coastal Conservation League v. U.S. Army Corps of Engineers et al.*, 789 F.3d 475 (4th Cir. 2015).

South Coast Mitigation Group ("South Coast") sought approval from the U.S. Army Corps of Engineers to remove embankments between a private impoundment used for recreation and an adjacent tidal marsh to create a saltwater wetland mitigation bank. South Coast, which operated gates that historically let freshwater into the impoundment, had recently begun letting in saltwater. Removal of the embankment required Corps approval, which South Coast obtained under a nationwide permit, as well as approval of the proposed mitigation bank.

Plaintiff sued the Corps, EPA and South Coast. During litigation, South Coast found the impoundment salinity higher than the adjacent river and marsh, and moved to dismiss the case as moot. In reply, plaintiff submitted expert testimony stating that the impoundment remained freshwater such that plaintiff's injury could be redressed. The district court ruled for defendants.

The issues on appeal were whether the Corps acted arbitrarily and capriciously in approving the embankment removal, approving the mitigation bank, and failing to prepare an EIS.

The Fourth Circuit affirmed. Based on a key "change in facts" – salinity in the impoundment had become higher than outside – there was no longer a case or controversy. Plaintiff's testimony was irrelevant because the water outside the impoundment could not increase the salinity of the water inside, and therefore removal of the embankment would not cause the plaintiff harm. Based on plaintiff's lack of standing, the Fourth Circuit also dismissed the challenge to the proposed wetlands mitigation bank, and plaintiff's appeal of the district court's denial of leave to amend the complaint to add a claim that the Corps failed to consider the cumulative impacts of a nearby mitigation bank.

Second District rejects CEQA claim, upholds Regional Water Quality Control Board's decision to establish total maximum daily loads (TMDL) for pollutant-laden sediment in lake bed. *Conway v. State Water Resources Control Bd.* (2015) 235 Cal.App.4th 671

The Clean Water Act requires all states to identify polluted water bodies within their jurisdictions. For all such water bodies, the state must set TMDLs – the maximum amount (or load) of pollutants that a water body can receive from point and nonpoint sources. The Regional

Water Quality Control Board adopted TMDLs for pollutants in McGrath Lake. McGrath Lake is surrounded primarily by agricultural fields, as well as petroleum facilities, public roads, and a former landfill. The lake including its lake bed sediment is polluted with pesticides and PCBs. Owners of private property on the lake challenged the TMDL. The trial court denied the petition. The landowners appealed.

The landowners argued that a TMDL can regulate only the movement of pollutants into a receiving water. The court disagreed, noting that in this case the sediment is wet, is intermixed with the lake waters, and is thus part of the lake. The Regional Board could reasonably determine that the lake bed sediment is not a distinct physical environment. Instead, the lake waters and sediment form a single physical environment. Pollutants in the sediment leach into the water. The court noted that the federal regulations give the Board expansive authority for defining how TMDLs are measured, as appropriate to the circumstances.

The landowners argued that measures for calculating the TMDL could not include measurement by concentration in the sediment. Such a rule, they argued, would present a "slippery slope" towards expansive regulation of activities on land, such as regulation of pesticide use on agricultural land. The court acknowledged that the Regional Board could not adopt a TMDL regulating activities on land miles away from the impaired waterbody. But this case was not concerned with land miles from the lake, but with the lake bed itself.

The court also rejected, in fairly summary terms, the landowners' CEQA challenge. Essentially, the landowners argued that the Regional Board, which complies with CEQA through a certified regulatory program, had to consider the impacts of whatever remediation activities would be needed to reach the established TMDLs. The petitioners further argued that "dredging" was the only feasible remediation technique, and so the Regional Board had to evaluate the impacts of dredging. The court disagreed. It noted that the adoption of TMDLs was only the first step in the process. The environmental review for that was appropriately tiered, according to the court. The Regional Board had neither planned nor proposed to adopt any particular method for cleanup at this time. Rather, cleanup was a decision for the future, and would be subject to further environmental review at that time.

New York State's high court has held that the state's system of approving municipal stormwater discharges under a 2010 "general permit" is proper under state and federal law, despite the absence of substantive review of requests for coverage or an opportunity for public hearing. *Natural Resources Defense Council, Inc. v. New York State Department of Environmental Conservation* (2015) 25 N.Y.3d 373.

Pursuant to the federal Clean Water Act, New York State gives municipalities that manage stormwater discharge ("MS4s") two options for obtaining approval to discharge stormwater: submit an application for a State Pollutant Discharge Elimination System ("SPDES") permit, or submit a notice of intent ("NOI") to discharge stormwater under the State's 2010 General Permit. To obtain approval under the 2010 General Permit, MS4s must develop and implement Stormwater Management Programs ("SWMPs") incorporating at least 44 mandatory best management practices and, under state and federal law, implement measures to reduce discharges "to the maximum extent practicable." The NOI must set forth the MS4's measurable goals, discharge start and end dates, and best management practices. Petitioner challenged the State's approval of

requests to discharge under the 2010 General Permit on grounds that it provides no opportunity for public hearing and requires review of NOIs for mere "completeness," such that MS4s' duty to reduce discharges to the maximum extent practicable is unenforced.

The issue before the Court was whether the 2010 General Permit complied with EPA regulations and the state Environmental Conservation Law in treating NOIs as requests to be approved under an existing permit rather than "permit applications" subject to mandatory notice and a public hearing.

Acknowledging the 2010 General Permit's purpose to streamline hundreds, if not thousands, of municipal stormwater discharge applications, the Court held that the state's general permit procedure complied with EPA regulations. These regulations do not mandate an opportunity for a public hearing on an NOI. Although the Court recognized a federal circuit court split on the question whether NOIs are actually "permit applications," the Court determined that petitioner's lawsuit was an attempt to "litigate an underlying dispute with EPA"—the subject of a separate action by petitioner pending before the Ninth Circuit—by requesting relief from EPA's regulations as they applied to the state. The Court also held that the state's decision not to provide a public hearing on NOIs, and reviewing NOIs for "completeness," was reasonable under state law.

The dissent opined that the 2010 General Permit process failed to provide a public hearing in violation of both state and federal law because the NOI is a permit application "in everything but name." Further, the state was required to conduct substantive review of MS4s' intended discharge control measures before approval. Simply providing a "menu" of best management practices did not, in the dissent's view, force MS4s to reduce discharges to the "maximum extent practicable."

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Ambient Water Quality Criteria for the Protection of Human Health, Updated. In June 2015, the USEPA announced the final updated recommended ambient water quality criteria for the protection of human health for ninety-four chemical pollutants to reflect the latest scientific information and implementation of existing USEPA policies found in "Methodology for Deriving Ambient Water Quality Criteria for the Protection of Human Health" (2000). See 80 Fed.Reg. 36986.

Biofouling Management. In May 2015, the State Lands Commission proposed to amend and renumber Section 2298 and adopt Sections 2298.1, 2298.2, 2298.3, 2298.4, 2298.5, 2298.6, 2298.7, 2298.8, 2298.9, and 2298.9.1 under Article 4.8 in Title 2, Division 3 Chapter 1 of the CCR. These sections would establish regulations governing the management of biofouling on vessels arriving at a California port or place, as required by Public Resources Code Section 71204.6. A

public hearing was held on Tuesday June 16, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 18-Z, pg. 670.

Clean Water Act (CWA) Methods Update. In April 2015, the USEPA gave notice of its extension of the period for providing comments on the proposed rule entitled, "Clean Water Act Methods Update Rule for the Analysis of Effluent," published in the Federal Register on February 19, 2015. The public comment period was extended to May 20, 2015. See 80 Fed.Reg. 21691.

Effluent Limitations Guidelines. In April 2015, the USEPA proposed a Clean Water Act regulation that would better protect human health and the environment and protect the operational integrity of publicly owned treatment works (POTWs) by establishing pretreatment standards that would prevent the discharge of pollutants in wastewater from onshore unconventional oil and gas extraction facilities to POTWs. The USEPA conducted a public hearing on May 29, 2015 in Washington D.C. See 80 Fed.Reg. 18557.

Final National Pollutant Discharge Elimination System (NPDES) General Permit. In June 2015, the USEPA provided notice that the USEPA's Regions 1, 2, 3, 5, 6, 7, 8, 9, and 10 issued their final 2015 NPDES general permit for stormwater discharges from industrial activity, also known as Multi-Sector General Permit (MSGP). This permit replaces the old permits and provides coverage for industrial facilities in the areas where the USEPA is the NPDES permitting authority in the USPEA's Regions 7 and 8. The permit became effective on June 4, 2015. See 80 Fed.Reg. 34403.

WATER RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Aquifer Exemption Compliance Schedule Regulations. In May 2015, the California Department of Conservation proposed to adopt Sections 1760.1 and 1779.1 of the CCR. The proposed regulations would phase out the injection into non-exempt underground sources of drinking water, according to the compliance deadlines directed by the U.S. EPA. The regulations would also identify the civil penalty for unlawful injection that occurs beyond the compliance deadlines. See Cal. Reg. Notice Register 2015, Vol. No. 22-Z, pg. 870.

Definition of "Waters of the United States". In June 2015, the USEPA and the U.S. Army Corps of Engineers published a final rule defining the scope of waters protected under the CWA, in light of the statute, science, Supreme Court decisions in *U.S. v. Riverside Bayview Homes, Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers (SWANCC),* and *Rapanos v.*

United States, and the agencies' experience and technical expertise. The rule became effective August 28, 2015. See 80 Fed.Reg. 37054.

Federal Summaries

Supreme Court

California Supreme Court upheld the appellate court's decision finding that a city law requiring developers to include affordable housing units is not an unconstitutional taking and is within the city's police power right to regulate. *California Building Industry Association v. City of San Jose* (2015) S212072

The City of San Jose (the city or San Jose) enacted a citywide inclusionary housing ordinance that requires new residential development projects with twenty or more units to set aside 15% of those units to sell at a price affordable to low-income households. The ordinance provides alternative options for meeting this requirement, which include paying an in-lieu fee, constructing affordable units elsewhere, or dedicating land of equal value. The purpose of the ordinance is to enhance public welfare by requiring the development of affordable housing.

California Building Industry Association (CBIA) filed a lawsuit challenging the validity of San Jose's inclusionary housing ordinance. CBIA alleged that the ordinance imposes an exaction in violation of the takings clauses of the United States and California Constitution, and that the ordinance is invalid on its face because the city was required to and failed to demonstrate that the inclusionary housing requirements of the ordinance are related to the need for affordable housing created by the new development.

The superior court found in favor of CBIA concluding that the ordinance was constitutionally invalid because the city failed to show a relationship between the new development and the need for affordable housing. The Court of Appeal reversed the superior court's decision holding that the ordinance was not an exaction and therefore the city did not need to demonstrate a nexus to justify its inclusionary housing requirement. The Court of Appeal held that the traditional ordinary standard is the proper legal standard for determining whether a land use ordinance is a valid exercise of the city's police power, which is whether the ordinance bears a substantial relationship to a legitimate public interest. The Court of Appeal remanded to trial court to determine whether the ordinance was within the city's police power authority. CBIA sought review in the California Supreme Court claiming that the ruling in this case conflicts with a controlling prior decision.

The issue before the court is whether the San Jose ordinance is subject to the ordinary standard of review that has traditionally been applied to land use regulations, as held by the Court of Appeal.

The California Supreme Court affirmed the judgment of the Court of Appeal. The court found that the conditions imposed on future developments by the San Jose ordinance do not constitute exactions under the takings clause. The court distinguished the previous cases, which

analyzed the city's ability to require dedications of property for public use, finding that the San Jose ordinance is a land use restriction and not a dedication requirement. The California Supreme Court remanded to trial court to determine whether the ordinance is substantially related to a legitimate public interest under the ordinary standard of judicial review.

United States Court of Appeals

Recent Court Rulings

The U.S. Court of Appeals for the First Circuit held the Eleventh Amendment did not bar a town's suit against the Massachusetts Department of Public Utilities and the Massachusetts Department of Energy Resources. *Town of Barnstable v. O'Connor*, 786 F.3d 130 (1st Cir. 2015).

Cape Wind Associates, LLC ("Cape Wind") has attempted to develop offshore wind power in Nantucket Sound since 2001. In 2008, the Massachusetts legislature enacted the Green Communities Act, requiring each Massachusetts electric utility to solicit proposals from renewable energy developers to enter into cost-effective long-term contracts. In 2010, NSTAR Electric Company ("NSTAR") filed an application with the Massachusetts Department of Public Utilities ("DPU") to merge with Northeast Utilities, a Connecticut-based distribution company for electric utilities ("Northeast"). At the time, DPU applied a "no net harm" standard in assessing mergers. The Massachusetts Department of Energy Resources ("DOER") intervened in the DPU proceeding to urge a "substantial net benefit" standard that would account for clean energy goals under the Green Community Act. DPU adopted a "net benefit" standard more stringent than the "no net harm" standard but less stringent than the "substantial net benefit" standard, reasoning the Green Community Act required DPU to consider whether the merger would contribute to reliable cost effective energy and climate change. DOER moved for a stay of the merger, so it could determine the merger's effect on utility rates.

Plaintiffs alleged DOER's actions represented an implicit threat to scuttle the merger unless NSTAR entered into a contract with Cape Wind. Plaintiffs reasoned that DOER's potent advocacy caused NSTAR to enter into negotiations with the Massachusetts governor's administration to support the merger, which culminated in a settlement agreement, whereby NSTAR would purchase 27.5% of Cape Wind's output under a 15-year power purchase agreement. DPU approved the agreement. Plaintiffs alleged these actions violated (1) federal law, which required energy prices to be the product of free negotiations, and (2) the dormant Commerce Clause, by discriminating against out-of-state businesses like Northeast.

The district court ruled it had no subject matter jurisdiction and dismissed the lawsuit. On appeal, the primary issue was whether DOER and DPU, both state entities, had sovereign immunity from plaintiffs' suit in federal court under the Eleventh Amendment bar to a citizen bringing an action in federal court against the citizen's state. There was an exception, however, that allowed federal courts to enjoin state officials to conform future conduct to federal law. The pivotal questions to the application of the exception were whether the complaint alleged an ongoing violation of federal law and sought prospective relief.

The Court of Appeals reversed. Under the DPU's order approving the power purchase agreement, the DPU had an ongoing responsibility to review NSTAR's recovery of above-market costs. Under the power purchase agreement itself, upon petition by NSTAR, DPU had to determine whether Cape Wind started physical construction of the wind power facility by December 2015. DPU's ongoing role in enforcing the power purchase agreement meant there could be an ongoing violation of federal law, and the suit fell within the exception to the Eleventh Amendment's sovereign immunity bar.

Ninth Circuit Court of Appeals

Air Quality

<u>**Recent Court Rulings**</u>

The Ninth Circuit Court of Appeals has held that the Environmental Protection Agency (EPA) violated the Clean Air Act (CAA) in approving California's State Implementation Plans (SIPs) for ozone and fine particulate matter because the SIPs did not include the mobile emission standards that were necessary for the SIPs to achieve their emission reduction goals, but concluded that the other control measures approved by the EPA were enforceable commitments as the CAA requires. *Committee for a Better Arvin v Environmental Protection Agency* (9th Cir. 2015) 786 F.3d 1169.

The CAA requires states to adopt SIPs to address non-attainment areas where air quality does not meet the National Ambient Air Quality Standards (NAAQS). The SIPs are subject to EPA review and approval and once approved, they become federal law. In this case, the EPA approved revisions to California's SIP for ozone and fine particulate matter for the San Joaquin Air Control District. Environmental and community groups sued.

Plaintiffs challenged the approval on two grounds. First, they argued that the EPA abused its discretion in approving the SIP because the SIP did not include all the control measures necessary to attain the NAAQS. Second, they argued that the EPA abused its discretion in approving California's commitments to (1) propose and adopt emission control measures and (2) achieve aggregate emission reductions, contending that these were aspirational goals and not enforceable.

The Court of Appeals held that all state law standards that are necessary to achieve the NAAQS must be included in a SIP. But the Court also held that "trifling control measures" that have no measurable impact on the state's ability to meet the NAAQS do not need to be included in a SIP. Finally, the Court held that California's commitments were not merely targets or goals but instead were enforceable, and as such, the EPA did not err in approving them.

The Ninth Circuit Court of Appeals has held that the Environmental Protection Agency (EPA) was not arbitrary or capricious in approving revisions and additions to the Pesticide Element of California's State Implementation Plan (SIP) for the reduction of volatile organic

compounds (VOCs). *El Comité Para El Bienstar de Earlimart v. Environmental Protection Agency* (9th Cir. 2015) 786 F.3d 688.

The Clean Air Act (CAA) requires states to adopt SIPs to address non-attainment areas where air quality does not meet the National Ambient Air Quality Standards (NAAQS). The SIPs are subject to EPA review and approval and once approved, they become federal law. In this case, the State of California included a Pesticide Element to its SIP for VOCs. The EPA approved revisions and additions to the Pesticide Element. Environmental and community groups brought citizens' suits to challenge the approval.

Plaintiffs challenged the approval on three grounds. First, they argued that the EPA's interpretation of the Pesticide Element's commitment to reduce emissions by certain levels was arbitrary and capricious. Second, they argued that the EPA was unreasonable in determining that the revisions to the Pesticide Element fulfilled California's prior commitment to adopt enforceable regulations for reducing emissions. Third, Plaintiffs argued that the EPA was unreasonable in finding that California's assurances of compliance with federal and state law were adequate in light of an earlier civil rights complaint filed with the EPA concerning VOC emissions in the San Joaquin Valley.

The Court of Appeals held that the EPA reasonably construed the Pesticide Element's admittedly ambiguous language as committing to a 12% reduction in emissions; Court deferred to agency interpretation. The Court also held that the EPA reasonably concluded that the SIP revision and additional regulations regarding fumigants satisfied the Pesticide Element's commitment to adopt enforceable regulations. And finally, the Court concluded that the EPA did not arbitrarily or capriciously determine that California provided "necessary assurances" that no federal or state law prohibits California from carrying out the SIP. The Court deferred to the agency's discretion in determining what assurances are necessary.

In a case of first impression, the Ninth Circuit held that section 110(k)(6) of the Clean Air Act (CAA) gives the Environmental Protection Agency (EPA) authority to retroactively amend its approval of New Source Review rules to correct an error. *Association of Irritated Residents v Environmental Protection Agency* (9th Cir. 2015) ---F3d ---.

The CAA requires states to adopt SIPs to address non-attainment areas where air quality does not meet the National Ambient Air Quality Standards (NAAQS). The SIPs are subject to EPA review and approval and once approved, they become federal law. The CAA includes a New Source Review (NSR) Program that requires new and modified major pollutant sources in non-attainment areas to acquire construction permits, install Best Available Control Technology, and purchase offsets from other sources. California adopted NSR Rules and the EPA approved them in 2004. The EPA later discovered that it had made an error in approving the NSR Rules because there was a "substantive mismatch" between the NSR Rules and California law. The EPA promulgated a regulation to retroactively correct the error and plaintiffs sued to challenge the regulation.

Plaintiffs challenged the regulation on two grounds. First, the plaintiffs argued that the EPA incorrectly determined that it had made an error in approving the NSR Rules. Second,

plaintiffs argued that the CAA did not authorize the EPA to retroactively correct its approval of the NSR Rules because it also affected an approved SIP.

The Court applied a deferential standard to the EPA's determinations and held that the EPA had used a rational, non-arbitrary approach to determining whether it had made an error in approving the NSR Rules. The Court also held that the CAA gives the EPA authority to retroactively revise the scope of an earlier approval of NSR Rules.

The Ninth Circuit has held that the Environmental Protection Agency's (EPA) approval of a regulation as part of California's State Implementation Plan (SIP) divested the district court of jurisdiction over a challenge to the regulation. *California Dump Truck Owners Association v. Nichols* (9th Cir. 2015) 784 F.3d 500.

Plaintiff brought a federal preemption challenge to a state environmental regulation. While that action was pending, the EPA approved the regulation as part of California's SIP. The district court dismissed the action for lack of subject matter jurisdiction pursuant to section 307(b)(1) of the Clean Air Act (CAA), which grants circuit courts exclusive jurisdiction over challenges to SIPs.

Plaintiff argued that dismissal was improper because its action challenged only the regulation and not the SIP or the EPA's approval of the SIP.

The Court rejected this argument, holding that CAA section 307(b)(1)'s scope extends to any claim that as a practical matter challenges a final action of the EPA.

Forest Resources

Recent Court Rulings

Hazardous Waste/ Materials

Recent Court Rulings

NEPA

Recent Court Rulings

OTHER ISSUES OF INTEREST

The U.S. Court of Appeals for the Ninth Circuit, splitting from the Third and Fifth Circuits, held that the Class Action Fairness Act local single event exception to federal jurisdiction is limited to a single happening and does not extend to a continuous activity. *Allen v. The Boeing Company* (2015) ____ F.3d ____

Plaintiffs sued The Boeing Company (Boeing) and Landau Associates (Landau) in state court. Plaintiffs alleged that for forty years Boeing was using solvents containing hazardous chemicals and contaminated groundwater around its manufacturing facility. Plaintiffs also alleged that Boeing's remediation contractor, Landau, was negligent in investigating and remediating the contamination.

Boeing removed the action to federal court asserting federal jurisdiction on two bases: diversity and under the Class Action Fairness Act (CAFA). The district court held that the action fell within the local single event exception to federal jurisdiction under CAFA and remanded the case to state court. Boeing appealed the district court's order to remand to state court.

Under CAFA, the local single event exception to federal jurisdiction applies to cases in which all claims arise from an "event or occurrence" in the state. The Ninth Circuit addressed the meaning of the term "event or occurrence" to determine whether an action falls within the local single event exception.

The Ninth Circuit held that the term "event or occurrence" means a single happening and the single event exception under CAFA is limited to actions that arise from a single happening. According to this interpretation, the court found that Plaintiff's action did not fall within the exception because it did not arise from a single event and instead was a result of continuous release of toxins over forty years. The Ninth Circuit rejected the Third and Fifth Circuit's broader interpretation of "event or occurrence" which covers continuous activity stating: "[w]ith due respect to the Third Circuit, we do not agree with its definition of 'event or occurrence' as that term is used in CAFA." The court further noted that, even under the broadest interpretation, this case would not fall within the exception because Plaintiff asserted claims against two different defendants and for two separate activities. The Ninth Circuit vacated the district court's order to remand, concluding that Plaintiff's action did not fall within the local single event exception and the district court has federal jurisdiction under CAFA. The court rejected Boeing's other claim for fraudulent joinder and remanded to the district court to determine the issue of whether a local controversy exception applies.

The United States Court of Appeals for the Ninth Circuit found the Bureau of Safety and Environmental Enforcement did not act unlawfully in approving two of Shell's oil spill response plans. *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (2015).

Shell Gulf of Mexico Inc. and Shell Offshore Inc. (collectively, "Shell") have sought to develop offshore oil and gas resources in the Beaufort and Chukchi seas off of Alaska's Arctic coast for many years. After the April 2010 Deepwater Horizon oil spill, the Bureau of Safety and Environmental Enforcement ("BSEE") assumed responsibility for approving oil spill response plans ("OSRP"), and the Department of Interior issued new guidance and analysis for the content of OSRPs. In response, Shell updated its OSRPs for the Chukchi and Beaufort seas, and BSEE approved them. A coalition of environmental groups sued, alleging the BSEE acted unlawfully in approving Shell's OSRPs. The district court granted summary judgment in favor of BSEE, and the Ninth Circuit affirmed.

The first issue on appeal was whether BSEE's approval violated the Administrative Procedures Act (the "APA"). Plaintiffs alleged Shell assumed, in the event of a worst-case discharge, it would achieve recovery of 90 to 95% of any spilled oil. The court found, however, that Shell claimed it could store 90 to 95% of the volume, not that it would actually collect that much. Moreover, BSEE was aware of the distinction between collection and storage and therefore, even if Shell asserted it would collect 90 to 95% of the oil, BSEE did not rely on this claim in approving the OSRPs.

The second issue on appeal was whether BSEE should have engaged in environmental consultation under the Endangered Species Act (the "ESA") before approving the OSRPs. The court found that only discretionary federal involvement or control triggers consultation under the ESA and that BSEE's action was nondiscretionary. The Clean Water Act, as amended by the Oil Pollution Act of 1990, lists six requirements OSRPs must meet and mandates approval of plans that meet the requirements. The court, therefore, found BSEE's interpretation that it lacked discretion to disapprove the OSRPs was reasonable.

Finally, Plaintiffs argued that BSEE violated the National Environmental Policy Act (the "NEPA") by failing to prepare an Environmental Impact Statement before approving the OSRPs. The court found, however, that NEPA frees agencies from preparing an Environmental Impact Statement on the environmental impact of an action that an agency cannot refuse to perform. BSEE reasonably concluded it had to approve the OSRPs because the plans met the requirements of the Clean Water Act. Accordingly, BSEE could not refuse to approve Shell's OSRPs and accordingly, BSEE's approval was not subject to NEPA's requirements.

Under the Clean Water Act, BSEE must approve an OSRP that meets a checklist of six statutory requirements. Under BSEE's interpretation of the Clean Water Act, it lacked discretion to deny approval to Shell's OSRPs because they met the requirements. The Ninth Circuit found BSEE's interpretation reasonable and therefore, BSEE's approval of Shell's OSRPs did not violate the APA, the ESA, or the NEPA.

State of California v. Federal Energy Regulatory Commission (Apr. 29, 2015) (9th Cir No. 12-71958)

In State of California v. Federal Energy Regulatory Commission (Apr. 29, 2015) (9th Cir. No 12-71958) the 9th Circuit unanimously struck down the Federal Energy Regulatory Commission's ("**FERC**") determination on market based tariffs and refunds against sellers of power and auxiliary services ("**Energy Wholesalers**") involved in the 2000-2001 California Energy Crisis ("**Energy Crisis**").

The case returned to the Court from the 9th Circuit's 2004 *California ex rel Lockyer v. FERC,* 383 F.3d 1006 (9th Cir. 2004) (***"Lockyer")*** decision where the Court reviewed California's facial challenge to FERC's approval of market-based energy rates as well as FERC's determination that California utilities were not entitled to refunds from Energy Wholesalers for overcharging during the Energy Crisis under the Federal Power Act, 16 U.S.C. § 824 – 824w ("**FPA**") which requires FERC to ensure "just and reasonable" wholesale rates for electricity. 16 U.S.C. § 824d(a).

In *Lockyer* the Court approved of FERC's use of market based energy, with the caveat that FERC must incorporate ex ante market power analysis and enforceable post-approval transaction reporting as part of approving market based rates, and struck down FERC's determination that California utilities were not entitled to refunds from Energy Wholesalers as a result of the Energy Crisis. The Court then remanded the matter back to FERC for administrative proceedings consistent with the Court's opinion.

In response to *Lockyer,* FERC ordered a trial-type hearing . . . [as to whether] improper or untimely filing of its quarterly transaction reports masked an accumulation of market power such that the market rates were unjust and unreasonable, during the relevant period." *State of California v. FERC* at 8. At the subsequent hearings, FERC denied California's requests for refunds.

At issue was whether FERC's proceedings complied with the *Lockyer* decision. Specifically, whether FERC limiting its assessment as to whether individual Energy Wholesalers gained enough market share to exercise market power and cause market-based rates to be unjust and unreasonable under 16 U.S.C. § 824d(a) was consistent with the Court's holding in *Lockyer*.

The Court found that the FERC acted inconsistently with the *Lockyer* decision, finding that FERC's exclusive focus on market power ignored *Lockyer's* decision which requires FERC to also consider "enforceable post-approval transaction reporting" to determine whether or not the energy rate at issue was actually the product of market forces, relevant for FER to consider the market manipulation strategies that Energy Wholesalers utilized during the Energy Crisis.