State Bar of California
ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

APRIL/MAY/JUNE/JULY/AUGUST/SEPTEMBER 2016
VOL. ___, NO. ___

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 September 30, 2016. 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, Anna Leonenko, Whit Manley, Danielle K. Morone, Mitchell Tsai, Amanda MacGregor Pearson, Joseph Petta, and Amy Hoyt, for their contributions to this issue of the Update. – Cyndy Day-Wilson.

Cyndy Day-Wilson
City Attorney
City of Eureka
Editor, Co-Author

Case Law and Regulatory Update Authors:

Michael Haberkorn
Gatzke Dillon & Ballance LLP

Whitman Manley
Remy, Moose & Manley LLP

Danielle K. Morone
Gatzke Dillon & Ballance LLP

Anthony Todero
Baird Holm LLP

Anna Leonenko

Amy Hoyt
Burke, Williams & Sorenson LLP

Amanda MacGregor Pearson
Downey Brand LLP

Joseph Petta
Shute, Mihaly & Weinberger LLP

Mitchell Tsai
Mitchell Tsai, Attorney at Law

TABLE OF CONTENTS
State of California Summaries

Federal Summaries

STATE OF CALIFORNIA SUMMARIES

AGENCY ADMINISTRATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

EPA Acquisition Regulation. In May 2016, the U.S. Environmental Protection Agency (EPA):

1. Provided notice of a direct final rule to remove outdated information and make administrative changes to the EPA Acquisition Regulation concerning small business programs, solicitation provisions and contract clauses. The EPA does not anticipate adverse comments. 81 Fed. Reg. 29793.

2. Provided notice of a direct final rule to make administrative changes to the EPA Acquisition Regulation concerning improper business practices and personal conflicts of interest, solicitation provisions and contract clauses. The EPA does not anticipate adverse comments. 81 Fed. Reg. 31177.

3. Provided notice of a direct final rule to make administrative changes to the EPA Acquisition Regulation concerning publicizing contract actions, types of contracts, contract financing, solicitation provisions and contract clauses. The EPA does not anticipate adverse comments. 81 Fed. Reg. 31526.

4. Provided notice of a final rule to update policy, procedures, and contract clauses of the EPA Acquisition Regulation clause "Level of Effort—Cost-Reimbursement Contract." 81 Fed. Reg. 31865.

EPA Spring 2016 Regulatory Agenda. In June 2016, the EPA provided notice of, and requested comments on, its semiannual regulatory agenda online. The document contains information about: (i) regulations under development, completed, or cancelled since the last agenda; (ii) retrospective reviews of existing regulations; and, (iii) reviews of certain regulations with small business impacts. 81 Fed. Reg. 37374.

FWS Seizure and Forfeiture Procedures. In June 2016, the U.S. Fish and Wildlife Service (FWS) provided notice of a proposed rule to revise its seizure and forfeiture procedures. The revisions will: (i) set forth the procedures the Service uses; (ii) reflect the procedures required by the Civil Asset Forfeiture Reform Act of 2000 and the U.S. Customs and Border Protection; (iii)

make the procedures more efficient; and, (iv) make the procedures more uniform with those of other agencies. 81 Fed. Reg. 39848.

AIR QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Air Emission Sources. In August 2016, the EPA provided notice of final regulations related to source testing of emissions. The revisions are technical and editorial corrections that will improve the quality of data, and provide flexibility in the use of approved alternative procedures. 81 Fed. Reg. 59799.

Air Pollution Control Cost Manual. In June 2016, the EPA provided a notice of availability of two chapters of the Air Pollution Control Cost Manual that are part of Section 4 – Nitrogen Oxide Controls: Chapter 1 – Selective Non-Catalytic Reduction and Chapter 2 – Selective Catalytic Reduction. 81 Fed. Reg. 38702.

Ambient Air Monitoring. In July 2016, the EPA provided a notice of designation for ambient air quality reference and equivalent methods. Specifically, the EPA designated a new reference method for measuring concentrations of SO_2, and four new equivalent methods for measuring concentrations of PM_{10}, $PM_{2.5}$, and $PM_{10\text{-}2.5}$ in ambient air. 81 Fed. Reg. 45284.

Clean Air Act Grant. In May 2016, the EPA provided notice of, and requested comments on, a proposed determination concerning the reduction in expenditures of non-federal funds for the South Coast Air Quality Management District (AQMD) in support of its continuing air program for 2015. Once final, this determination will permit the South Coast AQMD to receive grant funds for 2016 from the EPA. 81 Fed. Reg. 31565.

Federal and State Operating Permit Programs. In June 2016, the EPA provided notice of a proposed rule to remove the affirmative defense provisions for emergencies found in the regulations for state and federal operating permit programs. The provisions are being removed because they are inconsistent with the enforcement structure of the Clean Air Act (CAA) and recent court decisions. 81 Fed. Reg. 38645.

Mobile Sources Technical Review Subcommittee. In May 2016, the EPA provided notice of a mobile sources technical review subcommittee meeting on June 16, 2016. The meeting agenda included discussion of current topics and activities being conducted by EPA's Office of Transportation and Air Quality. 81 Fed. Reg. 29262.

Motor Vehicle Pollution Control Standards. In August 2016, the EPA provided notice of a public hearing and opportunity to comment on the California Air Resources Board's (ARB) amendments to its on-highway heavy-duty vehicle and engine regulation. Specifically, ARB amended its: (i) in-use compliance program to align with the EPA's program in terms of measurement allowances during on-road testing; (ii) 2007 and subsequent model year regulation; and (iii) truck idling requirements to clarify certain exemptions. 81 Fed. Reg. 52678.

NAAQS Attainment Designations. In May 2016, the EPA provided notice of determinations for areas that are currently classified as marginal for the 2008 ozone National Ambient Air Quality Standard (NAAQS). Specifically, in California: (i) Calaveras County, Chico, and the San Francisco Bay area attained the 2008 ozone NAAQS by the attainment date; (ii) San Luis Obispo received a 1-year attainment date extension; and, (iii) Imperial County, Kern County, Mariposa County, Nevada County and San Diego County failed to attain the 2008 ozone NAAQS by the attainment date. 81 Fed. Reg. 26697.

In May 2016, the EPA also provided notice of a proposed rule determining that the San Joaquin Valley nonattainment area had attained the 1-hour ozone NAAQS based on the most recent three-year period (2012-2014) of data. The preliminary data for 2015 are consistent with continued attainment of the standard in the San Joaquin Valley. 81 Fed. Reg. 31206. In July 2016, the EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 46608.

In July 2016, the EPA provided notice of a final rule to determine that the South Coast air quality planning area of California has attained the 1997 annual and 24-hour $PM_{2.5}$ NAAQS based on the 2011-13 monitoring period. All data available since that time period indicates that the area is consistent with continued attainment. 81 Fed. Reg. 48350.

In August 2016, the EPA provided notice of a final rule concerning requirements that agencies have to meet as they implement the current and future NAAQS for $PM_{2.5}$. Specifically, the rule provides details on meeting the statutory State Implementation Plan (SIP) requirements that apply to areas designated nonattainment for any $PM_{2.5}$ NAAQS. 81 Fed. Reg. 58009.

National Emission Standards for Hazardous Air Pollutants (NESHAPs). In May 2016, the EPA provided notice of, and requested comments on, proposed amendments to the NESHAP for Site Remediation. The proposed amendments would remove certain exemptions and applicability requirements. 81 Fed. Reg. 29821. In June 2016, the EPA provided notice of a 30-day extension to the comment period for the proposed rule. 81 Fed. Reg. 41282.

In May 2016, the EPA also provided notice of an action denying a petition for reconsideration of a final rule, published on March 18, 2015, concerning amendments to the NESHAP for Off-Site Waste and Recovery Operations based on a residual risk and technology review. 81 Fed. Reg. 30182.

In May 2016, the EPA additionally provided notice of denying in part and granting in part petitions for reconsideration of the final NESHAP for Brick and Structural Clay Products Manufacturing, and the final NESHAP for Clay Ceramics Manufacturing. 81 Fed. Reg. 31234.

In June 2016, the EPA provided notice of a direct final rule to amend the NESHAP for Secondary Aluminum Production. This rule amends the previously published final rule with corrections and clarifications, as well as providing an additional option for new round top furnaces. 81 Fed. Reg. 38085. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 38122.

In June 2016, the EPA additionally provided notice of an extended comment period for NESHAP: Applications and Program Updates. 81 Fed. Reg. 41507.

In July 2016, in response to two petitions for reconsideration, the EPA provided a notice of reconsideration of its final rule establishing a NESHAP for the Ferroalloys Production source category. The EPA will consider three issues raised in the petitions, and requested comments on same. 81 Fed. Reg. 45089.

In July 2016, the EPA also provided notice of a final rule amending the NESHAP for Petroleum Refineries. The amendments include changes to certain compliance dates, as well as technical clarifications and corrections to the NESHAP and New Source Performance Standard (NSPS). 81 Fed. Reg. 45232.

In August 2016, the EPA provided notice of a final action denying petitions for reconsideration of the final rule titled "Reconsideration of Certain Startup/Shutdown Issues: NESHAP from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electricity Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units" originally published in November 2014. 81 Fed. Reg. 52346.

In August 2016, the EPA also provided notice of a final rule clarifying the compliance date for the NESHAP for Aerospace Manufacturing and Rework Facilities. 81 Fed. Reg. 51114. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 51145.

In September 2016, the EPA provided notice of a final decision concerning a reconsideration for the NESHAP for Area Sources: Industrial, Commercial, and Institutional Boilers. The final decision provides that EPA is: (i) retaining the subcategory and separate requirements for limited-use boilers; (ii) amending three reconsidered provisions; (iii) making minor changes to the definitions of startup and shutdown; and (iv) addressing technical corrections and clarifications. 81 Fed. Reg. 63112.

Near Road NO_2 Minimum Monitoring Requirements. In May 2016, the EPA provided notice of a proposed rule to revise the minimum monitoring requirements for near-road NO_2 monitoring by removing the existing requirements for near-road NO_2 monitoring stations in areas with smaller populations. The proposed rule is based on current near-road NO_2 monitoring data that indicates air quality levels are well below the NAAQS for the oxides of nitrogen. 81 Fed. Reg. 30224.

New Source Performance Standards. In June 2016, the EPA provided notice of a final rule amending the NSPS for the Oil and Natural Gas Sector emission standards for new, reconstructed, and modified sources. The amendments will improve implementation of the current NSPS, and

the additions will set standards for both GHG and VOCs. 81 Fed. Reg. 35824. In August 2016, the EPA provided notice of a denial of petitions for reconsideration concerning the Oil and Natural Gas Sector NSPS. 81 Fed. Reg. 52778.

New Unit Set-Asides for the 2016 Compliance Year. In August 2016, the EPA provided notice of emission allowance allocations to certain units under the new unit-set aside provision of the Cross-State Air Pollution Rule federal implementation plans and responded to objections to preliminary calculations. The final allocations are unchanged from the preliminary calculations. 81 Fed. Reg. 50630.

Nonroad Engine Pollution Control Standards. In August 2016, the EPA provided notice of a public hearing and opportunity to comment on ARB's amendments to its off-highway recreational vehicle regulation. The amendments establish new evaporative emission standards and associated test procedures for 2018 and subsequent model years. 81 Fed. Reg. 52684.

Outer Continental Shelf (OCS) Air Regulations. In June 2016, the EPA provided notice of a proposed rule to update a portion of the OCS Air Regulations pertaining to the requirements for OCS sources for which Ventura County Air Pollution Control District (APCD) is the designated corresponding onshore area. The proposed rule will regulate emissions from OCS sources in accordance with the requirements onshore. 81 Fed. Reg. 39607.

Particulate Matter Integrated Science Assessment for Health and Welfare Effects. In May 2016, the EPA provided notice of webinar workshops to evaluate initial draft materials for the Particulate Matter Integrated Science Assessment for Health and Welfare Effects. The workshops were held on June 9, June 13, June 20 and June 22, 2016. 81 Fed. Reg. 29262.

Performance Specification 18 and Procedure 6. In May 2016, the EPA provided notice of a direct final rule to make several minor technical amendments to the performance specifications and test procedures for hydrogen chloride (HCl) continuous emission monitoring systems (CEMS) and the quality assurance procedures for HCl CEMS used for compliance determination at stationary sources. 81 Fed. Reg. 31515. The EPA also provided notice of a proposed rule regarding same. 81 Fed. Reg. 31577. In August 2016, in response to adverse comments, the EPA withdrew the portion of the direct final rule related to the revisions of Procedure 6. 81 Fed. Reg. 52348.

Protection of Stratospheric Ozone. In May 2016, the EPA provided a notice of availability of a revised list of programs from its Section 608 Technician Certification programs approved to provide the technician certification exam. The revised list reflects the removal of programs that were revoked and those that voluntarily withdrew. 81 Fed. Reg. 29243.

In May 2016, the EPA also provided notice of a 14-day extension for the comment period on the proposed "Protection of Stratospheric Ozone: Proposed New Listings of Substitutes; Changes of Listing Status; and Reinterpretation of Unacceptability for Closed Cell Foam Products under the Significance New Alternatives Policy Program; and Revisions of Clean Air Action Section 608 Venting Prohibition for Propane." 81 Fed. Reg. 31222.

In May 2016, the EPA additionally provided notice of a determination of acceptability expanding the list of acceptable substitutes pursuant to the EPA Significant New Alternatives Policy program in the refrigeration and air conditioning sector. 81 Fed. Reg. 32241.

Protection of Visibility. In May 2016, the EPA provided notice of amendments to the CAA for state plans for protection of visibility in mandatory Class I federal areas. The amendments would continue steady environmental progress while addressing administrative aspects of the program. 81 Fed. Reg. 26942. Later that month, the EPA provided notice of a June 1 public hearing concerning same. 81 Fed. Reg. 29243. In July 2016, the EPA provided a notice of an extended comment period. 81 Fed. Reg. 43180.

Regional Haze State Implementation Plans. In July 2016, the EPA provided notice of, and requested comments on, a draft guidance document titled "Draft Guidance on Progress Tracking Metrics, Long-Term Strategies, Reasonable Progress Goals and Other Requirements for Regional Haze State Implementation Plans for the Second Implementation Period." 81 Fed. Reg. 44608.

Source Determination. In June 2016, the EPA provided notice of a final rule to revise regulations applicable to permitting of stationary sources of air pollution under the New Source Review (NSR) and Title V programs of the CAA for sources in the oil and natural gas sector. The revisions include clarification of the term "adjacent" when used to determine the scope of a "stationary source," and the scope of a "major source." 81 Fed. Reg. 35622.

State Implementation Plan. In May 2016, the EPA:

1. Provided notice of a final rule withdrawing a May 22, 2014 final action approving an SIP revision that addressed contingency measure requirements for the 1997 annual and 24-hour NAAQS for $PM_{2.5}$ in the San Joaquin Valley, and disapproving the related SIP submission. These final actions are in response to a decision from the U.S. Court of Appeal for the Ninth Circuit. 81 Fed. Reg. 29498.

2. Provided notice of a direct final rule concerning approval of revisions to the Eastern Kern APCD portion of the California SIP. The revisions concern administrative changes of a previously approved regulation and emissions of VOCs in aerospace assembly and coating operations and in metal, plastic, and pleasure craft parts and products coating operations. 81 Fed. Reg. 30484. The EPA also provided notice of a proposed rule regarding same. 81 Fed. Reg. 30509.

3. Provided notice of a proposed rule to approve and conditionally approve revisions to the San Joaquin Valley area portion of the SIP. The revisions consist of an update to: (i) the Motor Vehicle Emissions Budgets for NO_x and VOCs for the ozone nonattainment area; (ii) the NO_x and $PM_{2.5}$ standard for the $PM_{2.5}$ nonattainment area; and, (iii) the NO_x and PM_{10} standard for the PM_{10} maintenance area. 81 Fed. Reg. 31212.

4. Provided notice of a proposed rule concerning five permitting rules submitted as part of a revisions to the Northern Sonoma County APCD portion of the California SIP. The submitted revisions are intended to update the applicable SIP and address certain

deficiencies. The EPA proposes limited approval and limited disapproval of two rules, approval of three rules, and the repeal of three rules. 81 Fed. Reg. 31567.

5. Provided notice of a rule revising the format for materials submitted by the State of California that are incorporated by reference into the California SIP. The revision will primarily affect the "identification of plan" section, as well as the format of the SIP materials that will be available for public inspection. 81 Fed. Reg. 33397.

In June 2016, the EPA:

1. Provided notice of findings concerning the permitting of $PM_{2.5}$ emissions from major sources in areas designated nonattainment for the 2006 $PM_{2.5}$ NAAQS. Specifically, ARB made a NSR SIP submission for the El Dorado County AQMD, but did not make the necessary NSR SIP submission for the Yolo-Solano AQMD. 81 Fed. Reg. 36803.

2. Provided notice of a direct final rule to approve revisions to the Yolo-Solano AQMD and Eastern Kern APCD portions of the California SIP. The revisions concern, respectively, the definition of VOCs, and emissions of VOCs from the surface coating operations of wood products. 81 Fed. Reg. 39211. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 39236.

3. Provided notice of a final rule to approve a revision to the California SIP consisting of certain state regulations establishing standards and other requirements relating to the control of emissions from new on-road vehicles and engines. 81 Fed. Reg. 39424.

In July 2016, the EPA:

1. Provided notice of a direct final rule to approve a revision to the El Dorado County AQMD portion of the California SIP. Specifically, the EPA approved a local emergency episode plan that describes actions that El Dorado County AQMD must take in the event of dangerously high ambient ozone concentration levels. 81 Fed. Reg. 47300. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 47324.

2. Provided notice of a direct final rule to approve rescissions from the Mojave Desert AQMD portion of the California SIP, as it applies to rules approved into the SIP for the Riverside County APCD and San Bernardino County APCD. The revisions concern superseded NSR rules. 81 Fed. Reg. 47302. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 47324.

3. Provided notice of a final rule for revisions to the Eastern Kern APCD portion of the California SIP. The EPA is finalizing a limited approval and limited disapproval of revisions concerning VOCs emitted from motor vehicle and mobile equipment refinishing operations. 81 Fed. Reg. 48346.

In August 2016, the EPA:

1. Provided notice of a final rule for revisions to the Bay Area AQMD portion of the California SIP. The EPA is finalizing limited approval and limited disapproval to the revisions consisting of updates to rules governing the issuance of permits for stationary sources. 81 Fed. Reg. 50339.

2. Provided notice of a direct final rule to approve revisions to the Placer County APCD and Ventura County APCD portions of the California SIP. The revisions concern NO_x and CO emissions from stationary gas turbines, boilers, steam generators, and process heaters. 81 Fed. Reg. 50348. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 50416.

3. Provided notice of a direct final rule approving revisions to the Modoc County APCD portion of the California SIP. The revisions concern administrative and procedural requirements to obtain preconstruction permits that regulate emission sources. 81 Fed. Reg. 50362. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 50427.

4. Provided notice of a final rule partially approving and partially disapproving revisions to the Sacramento Metropolitan AQMD portion of the California SIP. The action concerns Reasonably Available Control Technology (RACT) requirements for the 1997 8-hour ozone NAAQS. 81 Fed. Reg. 53280.

5. Provided notice of a final rule to approve and conditionally approve revisions to the San Joaquin Valley portion of the California SIP. The revisions consist of updating the Motor Vehicle Emissions Budgets for NO_x and VOCs for the ozone nonattainment area, and for NO_x and PM_{10} for the PM_{10} maintenance area. 81 Fed. Reg. 53294.

6. Provided notice of a final rule of limited approval and limited disapproval of a creditable emission reduction demonstration submitted by the San Joaquin Valley portion of the California SIP. The SIP submittal demonstrates that certain state incentive funding programs have achieved specific amounts of reductions in emissions of NO_x and $PM_{2.5}$ by 2014 that can be used as credit toward an emission reduction commitment in the California SIP. 81 Fed. Reg. 53300.

7. Provided notice of a proposed rule of limited approval and limited disapproval of revisions to the Butte County AQMD portion of the California SIP. The revisions concern the NSR permitting program for new and modified sources of air pollution. 81 Fed. Reg. 55402.

8. Provided notice of a final rule approving elements of the SIP revisions submitted to address requirements for the 2006 $PM_{2.5}$ NAAQS in the San Joaquin Valley Moderate $PM_{2.5}$ nonattainment area. The EPA disapproved interpollutant trading ratios for nonattainment NSR permitting purposes identified in the submission. 81 Fed. Reg. 59876.

In September 2016, the EPA provided notice of a proposed rule to approve a revision to the Great Basin Unified APCD portion of the California SIP. The revisions concerns PM emissions at Owens Lake, California. 81 Fed. Reg. 62849.

Title V Permitting Program. In August 2016, the EPA provided notice of its intent to revise its regulations to streamline and clarify processes related to submission and review of Title V petitions. The proposed regulations would increase stakeholder access and understanding of the petition process, and aid the EPA's review of petitions. 81 Fed. Reg. 57822.

True Minor Sources in Indian Country. In June 2016, the EPA provided notice of finalizing a federal implementation plan that applies to new true minor sources and minor modifications at existing true minor sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector that are locating or expanding in Indian reservations or other areas of Indian country over which an Indian tribe, or the EPA, has demonstrated the tribe's jurisdiction. 81 Fed. Reg. 35944.

Volatile Organic Compounds. In August 2016, the EPA provided notice of a direct final rule to revise the regulatory definition of VOCs to add 1, 1, 2, 2-Tetrafluoro-1-(2, 2,2-trifluoroethoxy) ethane to the list of compounds excluded from the regulatory definition because this compound makes a negligible contribution to tropospheric ozone formation. 81 Fed. Reg. 50330. The EPA provided notice of a proposed rule concerning same. 81 Fed. Reg. 50408.

ATTORNEYS FEES

Recent Court Rulings

The Court of Appeal for the Sixth District of California held labor expenses for attorneys and paralegals who prepared the administrative record were recoverable as expenses. No Toxic Air, Inc. v. Lehigh Southwest Cement Company, 1 Cal. App.5th 1136 (2016).

No Toxic Air, Inc. ("No Toxic Air") filed a petition for a writ of mandate challenging the County of Santa Clara's resolution that the mining operations of Lehigh Southwest Cement Company and Hanson Permanente Cement (collectively, "Lehigh") were a legal nonconforming use. After the trial court denied the petition, Lehigh sought to recoup its costs for using attorneys and paralegals to assemble the administrative record. No Toxic Air filed a motion to strike Lehigh's labor costs, and the trial court granted the motion on that issue.

The issue on appeal was whether a prevailing party was responsible for the costs associated with the preparation of the administrative record. California Code of Civil Procedure section 1094.5(a) provides, "[i]f the expense of preparing all or any part of the record has been borne by the prevailing party, the expense shall be taxable as costs."

The appellate court analyzed Otay Ranch, L.P. v. County of San Diego, which the Fourth District Court of Appeal of California decided after the trial court's decision to deny Lehigh's costs. In Otay Ranch, the court held the reasonable and necessary costs of labor for attorneys to prepare the administrative record were recoverable because labor costs are otherwise recoverable, and

there was no reason to distinguish between costs borne by a public agency and a private law firm retained by a public agency. Although Otay Ranch was a CEQA action, the court in No Toxic Air found the rational equally applicable and held reasonable labor costs for attorneys and paralegals to prepare the administrative record were recoverable expenses.

Legislative Developments

No Summaries or updates this quarter.

Regulatory Updates

No Summaries or updates this quarter.

CEQA

Recent Court Rulings

California Supreme Court rules that an agency's decision to rely on Public Resources Code section 21166 for a proposal to modify a project for which environmental review was previously performed is reviewed for substantial evidence, rather than as a question of law; Court also upholds CEQA Guideline authorizing addenda to negative declarations. *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937

In 2006-2007, the San Mateo Community College District (District) adopted a negative declaration and approved a facilities master plan for the College of San Mateo campus. The plan called for demolishing certain buildings and renovating others. In 2011, the District approved a plan to demolish the "Building 20 complex," which had formerly been slated for renovation, and to construct a parking lot and install landscaping; other buildings that had previously been planned for demolition would now be restored instead. The District prepared an addendum to its 2006-2007 negative declaration. The "Friends" objected, citing the impact of demolishing the Building 20 complex on a garden located there. When the District approved the revisions to the plan, the Friends sued. The trial court granted the writ. The District appealed. The First District affirmed. The Supreme Court granted the District's petition for review.

The District had prepared the addendum based on its view that the proposal to demolish the Building 20 complex had previously undergone CEQA review. The District had therefore performed its review in accordance with Public Resources Code section 21166. The Friends argued that, where an agency performs supplemental review under section 21166, the court must first decide, as a threshold matter, whether the proposal is a modification of a previously approved project, or must be analyzed as an entirely new project. In *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, the Third District Court of Appeal had held that this threshold issue was a question of law, such that the agency's decision was entitled to no deference. The First District had followed *Save Our Neighborhood*'s formulation in concluding the District had violated CEQA.

The Supreme Court rejected this approach as unworkable. As the Court stated, "[the Friends'] approach would assign to courts the authority — indeed, the obligation — to determine whether an agency's proposal qualifies as a new project, in the absence of any standards to govern the inquiry. … [¶] … [T]o ask whether proposed agency action constitutes a new project, purely in the abstract, misses the reason why the characterization matters in the first place." Thus, "for purposes of determining whether an agency may proceed under CEQA's subsequent review provisions, the question is not whether an agency's proposed changes render a project new in an abstract sense…. [Citation.] Rather, under CEQA, when there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations 'turn[] on the value of the new information to the still pending decision making process.' [Citation.] If the original environmental document retains some informational value despite the proposed changes, then the agency proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document because of the involvement of new, previously unconsidered significant environmental effects.**"** (Footnotes omitted.)

Whether a previous analysis retains value to consider the impacts of revisions to the project "is a predominantly factual question." For this reason, the "substantial evidence" test applies. "We expect occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so; 'a court should tread with extraordinary care' before reversing an agency's determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decision making process. [Citation.]"

The Friends argued that, in any event, the District had violated CEQA because section 21166 expressly refers only to situations in which the agency had previously certified an environmental impact report (EIR), rather than (as in this case) adopted a negative declaration. The Friends thus argued that CEQA Guidelines section 15162 – which extends the rules regarding supplemental review to negative declarations – was invalid. The Court disagreed, finding that the Resources Agency acted reasonably in adopting a guidelines imposing some limitations on post-approval environmental review, even for those projects initially approved via negative declaration.

Whether the previous document was an EIR or a negative declaration has implications for how the agency applies the rules governing supplemental review; "the substantial evidence standard prescribed by CEQA Guidelines section 15162 requires an agency to prepare an EIR whenever there is substantial evidence that the changes to a project for which a negative declaration was previously approved might have a significant environmental impact not previously considered in connection with the project as originally approved…. It therefore does not permit agencies to avoid their obligation to prepare subsequent or supplemental EIRs to address new, and previously unstudied, potentially significant environmental effects. So understood, CEQA Guidelines section 15162 constitutes a valid gap-filling measure as applied to projects initially approved via negative declaration, including the project at issue in this case."

Finally, the Friends argued that the District could not rely on section 21166 because the Facilities Master Plan and accompanying negative declaration were akin to a plan or program, rather than to a specific project. The Court disagreed, noting that the District's negative declaration

was expressly designed to serve as a project-level analysis, and could not be characterized as a first-tier document.

The Supreme Court reversed and remanded to the Court of Appeal to consider the merits of the district's addendum and approval of the building demolition and parking lot project. The Court of Appeal had not previously reached the merits because of its conclusion that the District could not rely on section 21166.

Sixth District finds county complied with SMARA and CEQA in approving reclamation plan for existing quarry. *Bay Area Clean Environment v. Santa Clara County* (2016) 2 Cal.App.5th 1197.

The 3,510-acre "Permanente Quarry" started producing limestone and aggregate in the early 1900s. In 2006, the Department of Conservation concluded that the quarry was violating SMARA because slope instability issues had not been properly addressed, and because downstream selenium levels in Permanente Creek were elevated. In 2011, the mine operator filed an application to amend its reclamation plan. The county prepared and certified an EIR and approved the plan. The petitioner sued. The trial court denied the petition. The petitioner appealed. The Sixth District affirmed.

The Court concluded that the record supported the county's finding that the reclamation plan complied with SMARA with regard to water quality. The reclamation plan called for filling the pit. Studies showed selenium discharge would initially rise during reclamation, but then fall once the pit was filled and covered. The record also showed that the project's impacts to red-legged frogs, who might be harmed by selenium-laced water flowing downstream in the creek, were mitigated to the extent possible, although impacts to the frog remained possible because the effectiveness of the adopted mitigation measures—proposed treatment, stormwater controls, and the like—were uncertain.

The petitioner argued the county had violated CEQA because the EIR failed to analyze the cumulative impact of the reclamation plan together with a new South Quarry pit that the operator had proposed in an earlier application. The Court disagreed, noting that the South Quarry pit was not reasonably foreseeable because the operator had withdrawn the application for the new pit. Similarly, the county had not engaged in improper "piece-meal" review because the amendment to the reclamation plan was a stand-alone project that did not depend on the future approval of the South Quarry pit.

The petitioner argued that substantial evidence did not support the county's findings regarding impacts on the red-legged frog. The EIR concluded the reclamation pan would have no direct impacts on the frog. The EIR also found that increased selenium runoff in the creek during reclamation would have "significant and unavoidable" impacts on aquatic life, which presumably included the frog. The court concluded that substantial evidence supported both conclusions. No frogs had been found on the site. The record showed that the adopted measures to control interim water quality would reduce impacts, although their efficacy was uncertain. The court rejected the petitioner's argument that the county had to adopt a statement of overriding considerations directed specifically to the frog.

Finally, the court affirmed the trial court's decision to grant the mine operator's motion to augment the record. The document added to the record consisted of an e-mail exchange between a biological consultant and the Department of Fish and Wildlife. An earlier report indicating that the red-legged frog was present in a pond within the project boundary. The e-mail exchange stated that the earlier report contained a typographical error regarding how ponds were labeled; the consultant stated that, in fact, he had not observed red-legged frogs in an on-site pond. The Court concluded the e-mail exchange could be included in the record under Public Resources Code section 21167.6, subdivision (e)(10), because it addressed the presence or absence of the frog in the reclamation area, and was relied upon by the consultants who prepared the biological study for the EIR.

On remand from California Supreme Court, First District narrows applicability of BAAQMD's CEQA Guidance but rules thresholds are not facially invalid. *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2016) 2 Cal.App.5th 1067

In 2010, the Bay Area Air Quality Management District (BAAQMD) adopted thresholds of significance for various air pollutants, and CEQA Guidelines providing guidance to Bay Area agencies regarding proper analysis of a project's air pollutant impacts. Among other things, the guidelines established thresholds to determine whether the future residents or users of a proposed project – "receptors" – would be harmed by toxic air pollution from a nearby freeway or other existing source. The California Building Industry Association (CBIA), concerned that the guidance would discourage infill, sued. In 2015, the California Supreme Court held that CEQA "does not generally require an agency to consider the effects of existing environmental conditions on a proposed project's future users or residents." (*California Building Industry Assn. v. Bay Area Quality Management Dist.* (2015) 62 Cal.4th 369, 392.) The Supreme Court remanded the case back to the First District to determine whether the "receptor thresholds" adopted by the BAAQMD ran afoul of this principle.

The Court agreed with BAAQMD that the receptor thresholds may be valid in the following instances: (1) when an agency decides voluntarily to use the thresholds on its own projects; (2) when considering whether a project may worsen existing conditions and therefore exacerbate health risks to future residents or users; (2) during CEQA review of school projects, which statutorily require such analysis; and (4) when analyzing housing development projects under CEQA exemption statutes. The Court declined to speculate regarding whether a city or county might rely on the thresholds to determine a project's consistency with its general plan. Because there were circumstances in which, consistent with the Supreme Court's ruling, the receptor thresholds might lawfully be used, they were not invalid on their face. While not facially invalid, the First District held—consistent with the Supreme Court's ruling—that the receptor thresholds could not be used for their primary purpose: to assess the effect of existing environmental conditions on future residents or users of a project. As the Court summarized, "[t]he Receptor Thresholds are simply numbers indicating when a project will ordinarily pose a risk to human health that will be deemed environmentally significant for CEQA purposes. CEQA requires or allows such an analysis with respect to the receptors of certain projects at various junctures in the environmental review process, but does not require such an analysis in other contexts. The Receptor Thresholds may be used by lead agencies to the extent permissible under CEQA, but any effort by an agency to require an EIR, mitigating measures, or other CEQA review

under the Receptor Thresholds when one is not authorized would be subject to a strong legal challenge." (2 Cal.App.4th at p. 1088.) The Court also rejected BAAQMD's argument that a writ was inappropriate, finding that a writ was necessary to direct BAAQMD to narrow the applicability of its guidelines in view of the Supreme Court's ruling. The Court also directed the trial court to reconsider whether CBIA was entitled to attorneys' fees in view of its success on its challenge to the thresholds.

Sixth District holds "substantial evidence" test governs review of local agency's determination whether old wooden rail trestle is a historic resource under CEQA. *Friends of the Willow Glen Trestle v. City of San Jose* (2016) 2 Cal.App.5th 457

The Willow Glen Trestle is a wooden railroad bridge built in 1922. The City of San Jose bought the trestle and, in 2013, proposed to demolish and replace it with a new steel structure as a component of the city's trail system. The city determined the cost of restoring the wooden trestle, and of replacing it with a new steel structure, were roughly the same, although the steel structure would cost less to maintain and would present less of a fire hazard. The city circulated an initial study. Citing previous inventories, the initial study concluded the trestle was not an historic resource, but was instead a typical example of such construction. Local architects and historians submitted comments disagreeing with that conclusion. The city council adopted a negative declaration and approved the project. The "Friends" sued. The trial court granted the writ. The city appealed.

"The key dispute in this case," according to the Court, "concerns the identification of the standard for judicial review of a lead agency's determination that a project will not have an adverse impact on a 'historical resource.'" (2 Cal.App.5th at p. 463.) "The issue before this court concerns the process for determining whether the [t]restle is a historic resource. The actual question of whether the [t]restle is or is not a historic resource is not a question for this court or any court." (*Ibid*., fn. 9.)

The standard of review turned on the language of Public Resources Code section 21084.1, which defines historical resources for purposes of CEQA. This section provides that a resource may be presumed historical, if it meets certain criteria, unless a preponderance of the evidence demonstrates that it is not historical. Where a resource is not presumptively historical, an agency has discretion to decide whether the resource is or is not a historic resource. Thus, under the plain meaning of the statute, even if a resource falls within one of the "presumptive" categories in the statute, the agency could still overcome that presumption with a preponderance of the evidence. Given that formulation, the standard of review logically must be whether substantial evidence supports the lead agency's decision, not whether a fair argument can be made to the contrary. If the "substantial evidence" test applied to presumptive resources, then the same, deferential standard of review must apply to an agency's discretionary decision to find a resource to be historic, even though the resource does not fall within a presumptive category. CEQA Guidelines section 15064.5, subdivision (a), which implement section 20184.1, similarly provides that the lead agency's decision as to whether the object at issue is a "historic resource" must be upheld if supported by substantial evidence. Based on this determination, the Court found that the Legislature could not have intended that a lead agency's discretionary decision to identify a resource as historical would be subject to the less deferential, fair-argument standard of review

than a decision regarding a resource presumed to be historical. The Court noted that its holding was consistent with two decisions issued by the Fifth District: *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039 and *Citizens for Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340.

The Court remanded the matter to the trial court for reconsideration of its decision in light of the proper "substantial evidence" standard of review.

First District finds CEQA petition time barred when filed more than 180 days after agency issued permit, even though agency did not provide notice of its decision, and operations under the permit occurred outside of the public's gaze. *Communities for a Better Environment v. Bay Area Air Quality Management Dist.* (2016) 1 Cal.App.5th 715.

In July 2013, the Bay Area Air Quality Management District (BAAQMD) issued what it regarded as a ministerial permit authorizing Kinder Morgan to alter its existing rail-to-truck facility in the City of Richmond to transload Bakken crude oil. BAAQMD modified permit conditions and, in February 2014, issued a permit to operate the facility. Communities for a Better Environment (CBE) sued, alleging the permit was not ministerial and required an environmental impact report. BAAQMD and Kinder Morgan moved to dismiss. Because BAAQMD had not filed a "notice of exemption" in July 2013, the 180-day statute of limitations applied. (Pub. Resources Code, § 21167, subd. (d).) BAAQMD and Kinder Morgan argued CBE missed the 180-day deadline. The trial court dismissed the petition. CBE appealed.

CBE argued the 180-day statute did not commence in July 2013 because it did not discover, and could not reasonably discover, the accrual of its cause of action at that time, citing *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929. There, the Supreme Court interpreted "the date of commencement of the project" to mean "commencement" of the project approved by the lead agency and analyzed under CEQA. Because the project had changed significantly, the petitioners could bring an action within 180 days of when they knew or reasonably should have known that the project commenced differed from the project as approved. (See also *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429.) Both of these cases, however, involved circumstances in which the triggering date for commencing the statute of limitations did not occur. In this case, by contrast, the triggering date – approval of the project in July 2013 – happened more than 180 days before CBE filed its petition. There was no way to amend the petition to address this problem. For this reason, the trial court appropriately dismissed the petition. The Court was sympathetic to CBE's plight, given that BAAQMD did not issue notice of its permit, and Kinder Morgan's operations were not visible to the public. Nevertheless, the Court concluded the plain language of section 21167(d) compelled its conclusion.

Second District, applying *Berkeley Hillside* test, upholds city's reliance on categorical exemption to approve car wash. *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809.

The City of Redondo Beach approved a conditional use permit for construction of a car wash and coffee shop on a vacant lot adjacent to existing homes. The city found the project qualified for the "Class 3" categorical exemption, which applies to "new, small facilities or

structures." (CEQA Guidelines, § 15303.) Neighbors sued. The trial court denied the petition. The neighbors appealed.

The neighbors argued the project did not fall within the "Class 3" exemption. The exemption applies to "construction and location of limited numbers of new, small facilities or structures" and "installation of small new equipment and facilities in small structures." "Examples of this exemption include but are not limited to: . . . [¶] (c) A store, motel, office, restaurant or similar structure not involving the use of significant amounts of hazardous substances, and not exceeding 2500 square feet in floor area. In urbanized areas, the exemption also applies to up to four such commercial buildings not exceeding 10,000 square feet in floor area on sites zoned for such use if not involving the use of significant amounts of hazardous substances where all public services and facilities are available and the surrounding area is not environmentally sensitive." (CEQA Guidelines, § 15303, subd. (c), italics added.)

The neighbors argued the car wash did not fit within the definition of "commercial buildings." The Court disagreed, noting that the list in subdivision (c) is illustrative, and that the subdivision also refers to "similar structure[s]." On the issue of size, the Court found that, because the project was in an "urbanized area," the size limit was 10,000 square feet instead of 2,500; the project's 4,080 square feet was well under the limit. The Court found that there was no evidence that the project would "involve the use of significant amounts of hazardous substances" and thus fell within the categorical exemption.

The neighbors argued the "unusual circumstances" exception meant the categorical exemption did not cover the project. The Court applied the two tests adopted by the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086. Under the first test, the court determines whether there are unusual circumstances under the substantial evidence standard, and, if unusual circumstances are found, "whether there is a reasonable possibility of a significant effect on the environment due to unusual circumstances" under the fair argument standard. The second test requires the challenger to establish unusual circumstances by showing that the project *will* have a significant effect on the environment.

In applying the first test, the Court found that presence of other car washes in the surrounding area, and the fact that the site had been a car wash previously, indicated that the circumstances were not unusual. Common operational effects, like noise, traffic, and parking do not constitute unusual circumstances in and of themselves. Nor was there anything unusual about the proximity of residences to a car wash. Thus, substantial evidence supported the city's conclusion that the circumstances were not unusual. For this reason, there was no reason to reach the "fair argument" prong of the first test.

The Court found that, under the second test from *Berkeley Hillside*, the neighbors failed to meet their burden under that test as well. The neighbors argued that the project would have a significant effect on the environment because operating a car wash would violate the city's noise ordinance. But studies showed the project could comply, and the city included a condition of approval requiring follow-up monitoring to confirm that noise would not exceed the limits in the noise ordinance. The neighbors also claimed that the project would have a significant adverse effect on traffic because the design of the car wash would cause backups within the property that

could spill off the property and create safety hazards. The Court concluded, however, that the flow of cars within the property was not "traffic" as defined by CEQA. Moreover, the applicant's traffic expert stated that on-site vehicles could be managed to avoid spillover.

Because neither of the *Berkeley Hillside* tests had been satisfied, the Court upheld the city's conclusion that the project was exempt from CEQA. The Court also upheld the city's findings in approving the use permit.

On remand from Supreme Court's "Newhall Ranch" decision, Second District concludes that it lacks authority to retain jurisdiction or to supervise compliance with writ. *Center for Biological Diversity v. Department of Fish and Wildlife* (2016) 1 Cal.App.5th 452.

In *Center for Biological Diversity v. Department of Fish and Wildlife* (2015) 62 Cal.4th 204, the California Supreme Court held that the EIR prepared for "Newhall Ranch" did not support the conclusion that the project would not have a significant impact with respect to State policy concerning greenhouse gas (GHG) emissions. The Supreme Court also ruled the Department of Fish and Wildlife (DFW) did not have authority to issue a permit allowing "take" of a fully-protected fish species. The Supreme Court remanded the matter to the Court of Appeal.

On remand, DFW and the developer asked the Second District to issue its own writ of mandate to DFW and to retain jurisdiction to supervise compliance. The developer and DFW argued that the California Supreme Court's opinion and the language of Public Resources Code section 21168.9 provided the appellate court with discretion to take this approach. They also argued that the general principle of expedient resolution to CEQA litigation favored allowing the appellate court to issue its own writ.

The Court looked first to the plain language of section 21168.9, finding some ambiguity in the statute's use of the term "appellate court" because courts of appeal do have original mandate jurisdiction in some cases. But the Court found nothing in the legislative history of section 21168.9 to suggest an intent that appellate courts have general authority to issue writs of mandate. Moreover, in 1984, when the Legislature adopted section 21168.9, the practice was for petitions for writs of mandate to be filed in the superior courts, and no statute provided appellate courts with authority to hear direct CEQA challenges at that time, with the exception of challenges against the Public Utilities Commission (which were, and remain, subject to challenge directly with the Supreme Court). Further, the Code of Civil Procedure—then and now—limits an appellate court to affirming or reversing and modifying the lower court's judgment. The Court found nothing to suggest that the Legislature, in adopting section 21168.9, intended to alter this procedure. Finally, section 21168.9, subdivision (b), specifically states that the trial court retains jurisdiction to ensure compliance with the writ. The court therefore remanded the matter to the trial court, and directed the trial court to "proceed in compliance with section 21168.9."

The Court noted that on remand, at a minimum, the trial court would have to set aside the EIR with respect to the GHG analysis and mitigation measures authorizing the "take" of the stickleback fish species. Whether to enjoin all development, or set aside the entire EIR, was for the trial court to decide in the first instance. The Court further observed: "One of the issues, changing the bridge design over the Santa Clara River so *no* threespine unarmored stickleback are

taken, may be a comparatively uncomplicated engineering decision. But the other issue, the greenhouse gas emission question may be very complicated. (See *Center for Biological Diversity*, *supra*, 62 Cal.4th at pp. 225-231.) It is speculatively injudicious for us to decide these matters and that is why the scope of our remittitur is narrowly drawn." (1 Cal.App.5th at p. 469.)

First District interprets SB 375 as requiring CARB and regional planning agencies to meet emission reduction targets through regionally-developed land-use and transportation strategies that are independent of existing statewide clean technology mandates. *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966.

In 2008, the Legislature adopted the "Sustainable Communities and Climate Protection Act" (SB 375). In 2010, as directed by SB 375, the California Air Resources Board (CARB) issued greenhouse gas (GHG) emission reduction targets for the San Francisco Bay Area. The Bay Area Metropolitan Transportation Commission and the Association of Bay Area Government's (collectively, the Agencies) prepared an EIR and approved a plan – "Plan Bay Area" – designed to meet these targets. The "Bay Area Citizens" (Citizens) criticized the plan, and submitted a competing plan that (unlike the Agencies' plan) counted on GHG emission reductions already expected from previous State-wide requirements. When the Agencies nevertheless adopted their plan, Citizens sued. The trial court denied the petition. Citizens appealed.

Citizens argued that the Agencies failed to comply with CEQA by incorrectly assuming that SB 375 compelled the Agencies to ignore the GHG emissions reductions that would result as a consequence of statewide mandates when assessing strategies to meet CARB's emissions reductions targets. The Court looked to the plain meaning and purpose of the statute and found that because the emissions reductions from the statewide mandates are projected to dwarf those achieved by SB 375, the whole statute would be superfluous if the planning agencies were simply allowed to cite the expected reductions from preexisting initiatives. Further, CARB's State-wide "Scoping Plan" adopted under Assembly Bill 32 repeatedly emphasized that the regional land use and transportation strategies were distinct from the statewide mandates. Although CARB was required to take the statewide mandates into account when setting targets under SB 375, the statute did not require any specific approach. Thus, CARB had discretion to instruct regional planning agencies to exclude consideration of reductions expected from statewide mandates. CARB made this instruction clear when it approved Plan Bay Area, even though the plan excluded reductions from statewide mandates.

With respect to the EIR, the Court found that Citizens' arguments were based on this same misinterpretation of SB 375. The Agencies were not required to consider Citizens' proposed alternative plan that relied on statewide mandates because, as discussed above, the alternative plan did not comply with SB 375. Nor did the EIR ignore statewide mandates. Consideration of the New Vehicle Emissions Standards and the Low Carbon Fuel standard were included when determining whether implementation of the Plan would result in a net increase in emissions and whether the Plan would impede the goals of AB 32. Citizens' attack on the EIR thus consisted of an attack on the substance of the plan itself.

First District rules a city cannot cure a defect in a certified EIR by preparing an addendum to plug the gap while litigation challenging the EIR is pending. *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256.

The City of Ukiah prepared and certified an environmental impact report (EIR) for a proposed Costco and approved the project. A local unincorporated association (Citizens) sued. The trial court denied the petition. Citizens appealed.

CEQA requires that an EIR address whether a project would result in the wasteful, inefficient, and unnecessary consumption of energy. Although the EIR mentioned energy impacts throughout, the EIR did not contain a separate section devoted to energy impacts analysis. After the city certified the EIR and approved the project, and while the litigation was pending, the Third District Court of Appeal ruled that an EIR for a shopping center was inadequate because it did not contain a stand-alone energy analysis tracking CEQA Guidelines Appendix F. (*California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173.) The city's EIR was similarly deficient. The city attempted to remedy this problem by preparing an addendum to the EIR. Over Citizens' objections, the trial court read the two documents together and concluded the energy analysis was adequate.

The Court reversed. Finding that the EIR's analysis of energy was "clearly inadequate" in light of the Third District's decision, the Court held that the city could not remedy this defect by preparing an addendum. CEQA Guidelines section 15164, which allows the preparation of addenda, assumes the previously certified EIR was adequate and does not allow retroactive correction of an inadequate EIR. Thus, the Court directed the city to set aside its project approval and certification of the EIR until recirculation of the energy analysis. The Court offered no opinion on the adequacy of the addendum.

Fourth District upholds negative declaration for Dollar General Store in a rural community, finding that the record did not contain a "fair argument" of the potential for urban decay. *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677

San Bernardino County adopted a mitigated negative declaration approving a 9,100 square-foot retail store. The intended occupant was Dollar General. The Joshua Tree Downtown Business Alliance, a group of local business owners, challenged the project on several grounds: (1) failure to adequately consider the project's potential to cause urban decay; (2) failure to complete an EIR based on substantial evidence supporting a fair argument that the project would cause urban decay; (3) inconsistency with various economic goals and policies incorporated in the general plan; and (4) failure to disclose the intended occupant's identity. The trial court granted the petition based on its determination that the record contained a "fair argument" regarding the potential for urban decay, and denied the Alliance's other claims. The developer appealed. The Alliance cross-appealed.

With respect to urban decay, the Alliance argued the county had refused to even consider whether the project's economic effects might lead to urban decay. The court disagreed, noting that the county's initial study had considered the issue, and simply found that no evidence in the record supported such a link. The court further held that lay opinion regarding economic impacts

did not qualify as substantial evidence. A business owner and lawyer provided extensive comments on the project's potential to cause competition that would drive existing retail stores out of business, leading to urban decay. But her comments were not backed by studies, surveys or other facts. Nor did her expertise extend to economics. The county had discretion to discount her lay opinion as lacking credibility and therefore falling short of substantial evidence that urban decay might result.

The Alliance argued that the Dollar General project could not be reconciled with various Community Plan policies. Citing *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, the Alliance claimed the "fair argument" standard of review applied with respect to such claims because the county had relied on a negative declaration. The Court disagreed, noting that the "fair argument" standard applied only insofar as the project was inconsistent with plan policies aimed at avoiding significant effects on the environment. Where, as here, the policies were economic development goals, the traditional, "abuse of discretion" standard applied with respect to claims that the project was inconsistent with those goals. These policies committed the county to "support" and "encourage" small, compatible, independent businesses, to "discourage" regional retail businesses, and to avoid big-box retail. These policies were, by their terms, open to interpretation. Moreover, the project, while larger than existing businesses, was neither a big-box nor a regional magnet. The project's size adhered to zoning standards regarding floor-area ratios, lot coverage and setbacks. Under these circumstances, the county had not abused its discretion in finding the project to be consistent with the Community Plan.

Fourth District find no evidence supporting finding of shopping center's consistency with General Plan policy requiring on-site generation of electricity; Court also strikes down GHG analysis and finds that city should have recirculated EIR. *Spring Valley Lake Association v. City of Victorville* (2016) 248 Cal.App.4th 91.

The "Tamarisk Marketplace Project" was a 215,000-square foot retail center anchored by a Wal-Mart. The City of Victorville prepared and certified an EIR. The Spring Valley Lake Association (Association) sued. The trial court granted in part the petition. Both sides appealed.

First, one of the policies in the city's General Plan provided that all new commercial or industrial development had to generate electricity on site to the maximum extent feasible. The project was designed to be "solar ready." Whether photovoltaic panels would be installed atop the center would be determined in the future, depending on whether such panels would be cost effective. The EIR explained that this uncertainty was due to the evolving landscape for tax credits and energy costs, and the inability to forecast feasibility months or years ahead of time. The Court held, however, that the record contained no evidence to support the conclusion that it was infeasible to generate electricity on site. Rather, the EIR's discussion merely described factors that played a role in determining feasibility, without reaching a conclusion. Similarly, the record did not address whether other sources of on-site electricity, such as wind power, were feasible. Wal-Mart argued that, even if the project were not consistent with this policy, inconsistency with a particular aspect of the General Plan did not mean the city abused its discretion in finding consistency as a whole. The Court rejected this argument, characterizing the policy at issue as specific, mandatory and fundamental.

Second, turning to the EIR, the city concluded the project would not have a significant impact with respect to greenhouse gas (GHG) emissions. In reaching this conclusion, the city relied on the project's compliance with a General Plan policy requiring the project to exceed the Title 24 Building Energy Efficiency Standards for Residential and Nonresidential Buildings by 15 percent. The EIR, however, did not show the project would comply with this standard. In one place, the EIR stated that the project would achieve a minimum of 14 percent increased efficiency over Title 24 Standards. In other places, including the technical reports underpinning the EIR's air quality analysis, the EIR stated the project would only be a minimum of ten percent more efficient than Title 24 Standards. The Court found that, at most, the record showed that the project might comply with the General Plan policy, not that it *would* comply. For this reason, the city's conclusion that the project would have no significant air quality impacts from GHG emissions was not supported by substantial evidence.

Third, the Court agreed with the Alliance that the city had not adopted all the findings required by Government Code section 66747. Although the statute is, on its face, couched in the negative – the city or county must deny a tentative map if certain findings are made – the Court found that, consistent with an Attorney General opinion, the city was required to affirmatively address all of the topics covered by section 66747 before approving the map.

Fourth, the Alliance argued that, as a result of revisions that occurred after the city had released the Draft EIR, the city violated CEQA by failing to recirculate the document for a second round of review. The Court agreed. The revisions to the traffic and biological analyses did not require recirculation, because the revisions merely expanded upon information already in the Draft EIR, and did not result in new impacts or mitigation measures. Other revisions, however, did require recirculation. The city added to the Final EIR information analyzing the project's consistency with general plan air quality policies that had inadvertently been omitted from the Draft EIR. Noting that the public did not have a meaningful opportunity to comment on this information, the Court found this information disclosed a substantial adverse effect, and therefore triggered the obligation to recirculate the Draft EIR. Second, after the city circulated the Draft EIR, the applicant substantially revised the project's storm water management plan. Although no new impacts were identified, the Final EIR included 350 pages of technical reports explaining the revised design. As the Court reasoned: "Given their breadth, complexity, and purpose, the revisions to the hydrology and water quality analysis deprived the public of a meaningful opportunity to comment on an ostensibly feasible way to mitigate a substantial adverse environmental effect." (248 Cal.App.4th at pp. 108-109.)

Fourth District upholds EIR for groundwater recovery project, rejects challenges to designation of lead agency and to EIR's objectives and project description. *Center for Biological Diversity v. County of San Bernardino* (2016) 247 Cal.App.4th 326.

Cadiz, Inc. owned land in the Cadiz and Fenner Valleys in San Bernardino County. Cadiz proposed to install 34 wells on its property. The wells would pump an average of 50,000 acre-feet of groundwater per year for 50 years, transport that water via pipeline to the Colorado River Aqueduct, and deliver that water to project participants, among them the Santa Margarita Water District (District). The District prepared and certified an EIR and approved the project. The Center

for Biological Diversity and other petitioners (collectively, CBD) sued. The trial court denied the petition. CBD appealed.

CBD argued the District was not the proper lead agency under CEQA because the county had to approve the project before pumping could begin. The Fourth District disagreed. San Bernardino had the most far-reaching authority over groundwater pumping, but the District had greater responsibility over the project as a whole, which was to be carried out by both a private party and the District working in tandem. Under such circumstances, the District qualified as a lead agency under CEQA Guidelines section 15051, subdivisions (a) and (b). Moreover, the District and the county had entered into an agreement assigning the District the role of "lead agency," an approach authorized by section 15051, subdivision (d).

CBD argued that the EIR was misleading and inaccurate with regard to the description of the project objectives, the time frame for pumping, and the total amount of water that would be extracted. The Court noted that, according to the EIR, the project's fundamental purpose was to "save substantial quantities of groundwater" that were currently underutilized or lost to evaporation. CBD's attempt to narrow further this objective, as a means of claiming that the project could only capture groundwater lost to evaporation, was unpersuasive. Nor did the EIR overstate the amount of water that would be saved from evaporation, given the basic mechanics of how the project would work. Although CBD was correct that the amount of water saved from evaporation was only a fraction of the water to be pumped, that did not mean the EIR's objectives were misleading.

CBD argued the project description was misleading because, although the EIR described the project as lasting only 50 years, under several circumstances the project might extend beyond 50 years. The Court disagreed. That the project might be extended in order to compete water deliveries did not mean the EIR was inaccurate, since the overall amount of water to be delivered would remain the same. If the participants decided to extend the project, that would require separate CEQA review. The possibility of an extension was too speculative to require its analysis now, as part of this EIR.

Finally, the Court found that the EIR's description of the rate and total amount of groundwater withdrawal was sufficiently defined to not be misleading, and was consistent with agreements amongst the parties and with the capacity constraints of the infrastructure to be used.

Fourth District holds that county approval of MOU mapping out process for development of groundwater management plan was not a "project" under *Save Tara* test. *Delaware Tetra Technologies, Inc. v. County of San* Bernardino (2016) 247 Cal.App.4th 352.

Cadiz, Inc. owned land in the Cadiz and Fenner Valleys in San Bernardino County. Cadiz proposed to install 34 wells on its property. The wells would pump an average of 50,000 acre-feet of groundwater per year for 50 years, transport that water via pipeline to the Colorado River Aqueduct, and deliver that water to the Santa Margarita Water District and others. The county entered into a memorandum of understanding (MOU) with Cadiz, the Santa Margarita Water District and the Fenner Valley Mutual Water Company (the project operator) to map out a process for completing the project. Delaware Tetratech Technologies (DTT) operated brine mining

facilities at dry lakes in the valleys. DTT was concerned that the project would negatively impact is operations. DTT sued, arguing the county should have completed review of the project prior to entering into the MOU. The trial court denied the petition. DTT appealed.

Whether the MOU was a "project" was a question of law reviewed de novo. DTT argued that, because the MOU was a necessary step in approving the project, the county was required to complete an EIR prior to approving the MOU. The Court disagreed. The Court noted that the county retained full discretion to approve or disapprove the project despite executing the MOU. In this respect, the MOU differed from the development agreement at issue in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. The Court instead analogized the MOU to the "term sheet" held not to be a project in *Cedar Fair L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150. According to the Court, "[t]he [MOU] establishes a process for completing the Plan, and provides that after the Plan is completed and approved, the [c]ounty retains full discretion to consider the final EIR and then to approve the Project, disapprove it, or require additional mitigation measures or alternatives. The [MOU] further makes clear that it is subject to modification, depending on mitigation measures necessitated by CEQA" or the county's groundwater management ordinance. (247 Cal.App.4th at p. 361.) The record made clear that the MOU did not bind the county to any particular course of action with respect to the project. Instead, the MOU merely established a framework to complete the groundwater management plan and accompanying EIR. In particular, the county retained discretion to disapprove the plan upon its completion, in which case there would be no project. Thus, "the [MOU] does not foreclose alternatives or mitigation measures. It does not commit the [c]ounty to a particular course of action that will cause an environmental impact. The [c]ounty retained full discretion over the Project despite its execution of the [MOU]. Therefore, the [MOU] could be executed by the [c]ounty without conducting a full environmental review." (247 Cal.App.4th at p. 366.)

Fifth District holds that a real party in interest can recover costs incurred in reimbursing agency for preparing record at petitioner's request. *Citizens for Ceres v. City of Ceres* (2016) 3 Cal.App.5th 237.

Citizens for Ceres (Citizens) filed a petition for writ of mandate under CEQA challenging the City of Ceres' approval of a Wal-Mart "super-store" to replace an existing Wal-Mart. At Citizens' request, the city prepared the record, through its outside counsel. Wal-Mart subsequently reimbursed the city $48,889.71 for the city's cost of preparing the record. The trial court denied the petition. Wal-Mart filed a memorandum of costs in hopes of recovering the money it had paid to the city. Citizens filed a motion to tax costs, arguing that the *city* could have recovered the cost of preparation of the record, but Wal-Mart could not. The trial court granted Citizens' motion and disallowed Wal-Mart's record-related costs, citing *Hayward Area Planning Association v. City of Hayward* (2005) 128 Cal.App.4th 176. Citizens appealed the denial of the writ, and Wal-Mart cross-appealed on the motion to tax ruling. In the unpublished portion of the decision, the Fifth District affirmed the trial court's denial of the writ. The published portion of the decision addressed the motion to tax costs.

Public Resources Code section 21167.6 provides three options for preparation of the administrative record in a CEQA action: (i) the agency can prepare the record; (ii) the plaintiff can prepare the record subject to the agency's certification; or (iii) the agency and the plaintiff can

agree on a different procedure. The First District Court of Appeal in *Hayward Area Planning* held that prevailing parties are entitled to seek an award of the cost of preparing an administrative record only when the record is prepared in one of these three ways. Thus, *Hayward Area Planning* held that a real party in interest cannot recover record-related costs when the petitioner directs the agency to prepare the record, and the agency, without obtaining the petitioner's consent, delegates that task to the real party interest. Here, however, the city prepared the record, at Citizens' request. Wal-Mart, having reimbursed the city, applied to recover costs under Code of Civil Procedure sections 1032 and 1033.5. Nothing in section 21167.6 limited Wal-Mart's recovery of those costs under such circumstances, so long as the record was prepared in one of the three permissible ways. To the extent the *Hayward Area Planning* decision suggested that a real party in interest could never seek to recover its record-related costs, even where the costs were incurred solely as a result of reimbursing the city for its record-related costs, the Fifth District disagreed. The Court remanded the matter back to the trial court to consider whether the claimed costs were reasonable.

Fourth District holds that City ordinance prohibiting mobile marijuana dispensaries merely restated existing prohibition and therefore was not a CEQA "project." *Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265.

In 2007, the City of Upland adopted a negative declaration and approved an ordinance stating that "[n]o medical marijuana dispensary . . . shall be permitted in any zone within the city." In 2013, the city, without performing further CEQA review, adopted a new ordinance, which added a new chapter to the municipal code expressly stating that mobile dispensaries "are prohibited" in the city. The Union of Medical Marijuana Patients, Inc. (UMMP) sued, asserting that the 2013 ordinance was a "project" for purposes of CEQA because it would have foreseeable effects on the environment, resulting from increased travel by residents outside the city to obtain marijuana and increased cultivation within the city. The trial court denied the petition. UMMP appealed.

The Fourth District concluded the 2013 ordinance was not a "project." The 2013 ordinance "merely restates the prohibition on mobile dispensaries that was first imposed by the 2007 ordinance" (245 Cal.App.4th at p. 1273), and therefore would not cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. UMMP argued that the 2007 ordinance was solely a land-use regulation that did not regulate mobile activities. The Court disagreed, noting that (1) the language of the 2007 ordinance did not support this interpretation, (2) the 2007 ordinance was codified in the zoning code was not dispositive, (3) the city had the authority to regulate both land uses and other conduct and activities through its police power, and (4) the city could enforce a violation of the 2007 ordinance by a mobile dispensary, through an action for public nuisance.

The Court also held that, even if the 2013 ordinance did not restate the prohibition established by the 2007 ordinance, it still was not a project because the record contained no evidence showing a link between the 2013 ordinance and impacts on the environment. Rather, the impacts cited by UMMP were "based on layers of speculation" (245 Cal.App.4th at p. 1275) as to how many people in the city used medical marijuana dispensaries, their frequency of use, their use of mobile dispensaries, whether they would respond to the ordinance by growing their own marijuana, and whether small-scale cultivation (if it occurred) would have any impacts. As a

matter of common sense, these concerns were too speculative to amount to evidence of reasonably foreseeable impacts.

Fourth District holds that City ordinance regulating location and operation of cooperatives to cultivate medical marijuana is not a "project" under CEQA. *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2016) – Cal.App.5th – [slip op. dated October 14, 2016]

State law – the Medical Marijuana Program Act – provides cities and counties with authority to regulate the location and operation of facilities to cultivate medical marijuana. The City of San Diego proposed an ordinance regulating where such facilities could be located, and establishing various standards they would have to meet. The Union of Medical Marijuana Patients (UMMP) submitted letters objecting to the ordinance. UMMP stated the ordinance was a "project" under CEQA, and would lead to environmental effects by shutting down existing cooperatives, inducing private cultivation, and obliging patients to hunt far and wide for weed. The city adopted the ordinance without performing CEQA review. UMMP sued. The trial court denied the petition. UMMP appealed.

UMMP argued that the ordinance operated as a zoning ordinance and, as such, the ordinance was necessarily a "project" under Public Resources Code section 21080, subdivision (a). The Court rejected such a "bright-line" test, finding that the statutory definition of "project" (§ 21065) also requires that the proposal must have the potential to "cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." As the Court noted, "under the CEQA Guidelines, the enactment and amendment of a zoning ordinance is a project *only if* that action *also* creates 'a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.'" (Citing CEQA Guidelines, § 15378.)

Next, the Court considered whether, as a matter of law, the enactment of the ordinance "may cause . . . a reasonably foreseeable indirect physical change in the environment." (Pub. Resources Code, § 21065.) UMMP cited three potential physical changes to the environment that were a reasonably foreseeable consequence of enacting the ordinance: (1) increased travel, resulting in air pollution and traffic; (2) increased building development with impacts on the environment; and (3) increased indoor cultivation of marijuana, with attendant environmental impacts. The Court rejected this argument. The record contained no evidence that, upon passage of the ordinance, it would become more burdensome for patients to travel to medical marijuana cooperatives. Before the city adopted the ordinance, the city contained no legally operating cooperatives. Although some cooperatives may have been operating illegally, the record contained scant data on the subject, and there was no evidence to show that the ordinance would somehow reduce the number of illegal cooperatives. Rather, the ordinance would, if anything, likely increase the number of cooperatives "by affirmatively allowing the *legal* establishment of the cooperatives in the [c]ity where none existed before." No evidence supported the claim that illegal cooperatives in convenient locations would be shuttered, leading to the establishment of legal cooperatives in inconvenient locations. For the same reason, the record contained no evidence to indicate that patients would give up on cooperatives, and grow their own, an assumption that "rests on pure speculation."

UMMP argued the ordinance would lead to constructing new buildings to house the cooperatives, which in turn had the potential for significant effects. Whether new buildings would be needed, however, was a matter of speculation. Moreover, because each collective required a use permit, the impacts could be studied at the time at the time the permit was sought. Studying the impacts now, in the abstract, would amount to premature speculation.

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

Aircraft Greenhouse Gas Emissions. In August 2016, the EPA provided notice of a final rule finding that GHGs from certain classes of aircraft engines are contributing to air pollution that may be endangering public health. The finding is made specifically to carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. 81 Fed. Reg. 54421.

Evaluating Urban Resiliency to Climate Change. In June 2016, the EPA provided notice of, and requested comments on, a draft document titled "Evaluating Urban Resilience to Climate Change: A Multi-Sector Approach." The document describes an assessment tool to help cities identify areas of resilience and vulnerability to climate change impacts including example case studies. 81 Fed. Reg. 40302.

Light Duty Vehicle GHG Emissions and CAFE Standards. In July 2016, the EPA provided notice of, and requested comments on, a midterm evaluation draft Technical Assessment Report for Model Year 2022-2025 Light Duty Vehicle GHG Emissions and Corporate Average Fuel Economy (CAFE) for Light-Duty Vehicles prepared jointly with the National Highway Traffic Safety Administration and ARB. 81 Fed. Reg. 49217.

Motor Vehicle Pollution Control Standards. In August 2016, the EPA provided notice of a public hearing and opportunity to comment on ARB's amendments to its GHG emissions regulation for new 2014 and subsequent model year on-road medium- and heavy-duty engines and

vehicles. The amendments align California and federal GHG emission standards and test procedures. 81 Fed. Reg. 52680.

Renewable Fuel Standard Program. In May 2016, the EPA announced a June 9, 2016 public hearing for the proposed rule "Renewable Fuel Standard Program: Standards for the 2017 and Biomass-Based Diesel Volume for 2018." 81 Fed. Reg. 33169.

In May 2016, EPA also announced proposed annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that would apply to all motor vehicle gasoline and diesel produced or imported in the year 2017. 81 Fed. Reg. 34778.

Standards of Performance. In May 2016, the EPA acknowledged receipt of 6 petitions for reconsideration of the final Standards of Performance for GHG Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units. The EPA provided a notice of denial for five of the petitions, and deferred action on the issue of treatment of biomass. 81 Fed. Reg. 27442.

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.

CULTURAL 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

Endangered Species Act Compensatory Mitigation Policy. In September 2016, the FWS provided notice of, and requested comments on, a draft Endangered Species Act Compensatory Mitigation Policy. The draft new policy is needed to implement recent mitigation policies concerning planning and to improve consistency in the use of compensatory mitigation. 81 Fed. Reg. 61031.

Burke's Goldfields. In June 2016, the FWS announced availability of a Recovery Plan for the Burke's goldfields plant species of the Santa Rosa Plain. The plan includes recovery objectives and criteria, and specific actions necessary to achieve removal of the species from the Federal Lists of Endangered and Threatened Wildlife and Plants. 81 Fed. Reg. 39945.

California Tiger Salamander. In June 2016, the FWS announced availability of a Recovery Plan for the Sonoma County Distinct Population Segment of the California Tiger Salamander species of the Santa Rosa Plain. The plan includes recovery objectives and criteria, and specific actions necessary to achieve removal of the species from the Federal Lists of Endangered and Threatened Wildlife and Plants. 81 Fed. Reg. 39945.

Candidate Conservation Agreements. In May 2016, the FWS provided notice of proposed amendments to the regulations concerning enhancement of survival permits associated with Candidate Conservation Agreements with Assurances. The amendments include the addition of the term "net conservation benefit" and the elimination of references to "other necessary properties." 81 Fed. Reg. 26769. That same day, the FWS provided notice of, and requested comments on, a draft revised policy regarding same. 81 Fed. Reg. 26817.

Coastal California Gnatcatcher. In August 2016, the FWS announced a 12-month finding on a petition to remove the coastal California gnatcatcher from the Federal List of Endangered and Threatened Wildlife. After review of the best information available, the U.S. FWS found that delisting is not warranted at this time. 81 Fed. Reg. 59952.

Eagle Lake Rainbow Trout. In July 2016, the FWS provided notice of a 12-month finding on a petition to list the Eagle Lake rainbow trout as an endangered or threatened species. After a review of the best information available, U.S. FWS found that the listing is not warranted at this time. 81 Fed. Reg. 43972.

Endangered and Threatened Wildlife and Plants Lists. In August 2016, the FWS provided notice of a final rule amending the format of the Lists of Endangered and Threatened Wildlife and Plants to reflect current practices and standards that will make the regulations and Lists easier to understand. 81 Fed. Reg. 51549.

Lassic Lupine. In September 2016, the FWS provided notice of its review of a petition to list the Lassics lupine as endangered. The FWS responded to the petition stating that an emergency listing was not necessary; however, the information presented in the petition indicates that the listing may be warranted, and requested additional information for a further review. 81 Fed. Reg. 63160.

Joshua Tree. In September 2016, the FWS provided notice of its review of a petition to list the Joshua tree as threatened. The FWS responded to the petition stating that an emergency listing was not necessary; however, the information presented in the petition indicates that the listing may be warranted, and requested additional information for a further review. 81 Fed. Reg. 63160.

Marbled Murrelet. In August 2016, the FWS provided notice of a final determination that the critical habitat for the marbled murrelet as designated in 1996 and revised in 2011, meets the statutory definition of critical habitat. 81 Fed. Reg. 51348.

Mountain Yellow-Legged Frog. In August 2016, the FWS provided notice of a final rule to designate critical habitat for the northern distinct population of the Mountain Yellow-Legged Frog in certain counties of California. 81 Fed. Reg. 59045.

Prioritizing Status Reviews. In July 2016, the FWS provided notice of a final methodology for prioritizing status reviews and accompanying 12-month finds on petitions for listing species. The methodology is intended to be used in addressing outstanding workloads and to provide transparency as to how priority is established. 81 Fed. Reg. 49248.

San Fernando Valley Spineflower. In September 2016, the FWS provided notice of a proposed rule to list the San Fernando Valley spineflower plant species as threatened. The FWS also provided notice that this document serves as the 90-day and 12-month findings on two petitions to list the species as endangered. 81 Fed. Reg. 63454.

San Miguel Island Fox. In August 2016, the FWS provided notice of a final rule to remove the San Miguel Island Fox from the Federal List of Endangered and Threatened Wildlife. The action is based on the best available information that indicates that threats to the species have been eliminated or reduced to a point that no longer meets the definition of an endangered or threatened species. 81 Fed. Reg. 53315.

Santa Rosa Island Fox. In August 2016, the FWS provided notice of a final rule to remove the Santa Rosa Island Fox from the Federal List of Endangered and Threatened Wildlife. The action is based on the best available information that indicates that threats to the species have been eliminated or reduced to a point that no longer meets the definition of an endangered or threatened species. 81 Fed. Reg. 53315.

Santa Cruz Island Fox. In August 2016, the FWS provided notice of a final rule to remove the Santa Cruz Island Fox from the Federal List of Endangered and Threatened Wildlife. The action is based on the best available information that indicates that threats to the species have been eliminated or reduced to a point that no longer meets the definition of an endangered or threatened species. 81 Fed. Reg. 53315.

Santa Catalina Island Fox. In August 2016, the FWS provided notice of a final rule to reclassify the Santa Catalina Island Fox from an endangered species to a threatened species. The action is based on the best available information that indicates that threats to the species have been reduced to a point that warrants a reclassification. 81 Fed. Reg. 53315.

Sebastopol Meadowfoam. In June 2016, the FWS announced availability of a Recovery Plan for the Sebastopol meadowfoam plant species of the Santa Rosa Plain. The plan includes recovery objectives and criteria, and specific actions necessary to achieve removal of the species from the Federal Lists of Endangered and Threatened Wildlife and Plants. 81 Fed. Reg. 39945.

Sierra Nevada Yellow-Legged Frog. In August 2016, the FWS provided notice of a final rule to designate critical habitat for the Sierra Nevada Yellow-Legged Frog in certain counties in California. 81 Fed. Reg. 59045.

Sonoma Sunshine. In June 2016, the FWS announced availability of a Recovery Plan for the Sonoma sunshine plant species of the Santa Rosa Plain. The plan includes recovery objectives and criteria, and specific actions necessary to achieve removal of the species from the Federal Lists of Endangered and Threatened Wildlife and Plants. 81 Fed. Reg. 39945.

Yosemite Toad. In August 2016, the FWS provided notice of a final rule to designate critical habitat for the Yosemite Toad in certain counties in California. 81 Fed. Reg. 59045.

ENERGY

Recent Court Rulings

First District Court of Appeal concludes that dispute between electricity producer and utility that purchased electricity from producer over interpretation of purchase and sale agreement (PPA) was subject to arbitration and that arbitrator's award should be enforced. Panoche Energy Center v. Pacific Gas and Electric Company, 1 Cal.App.5th 68 (July 1, 2016).

Electricity producer and utility engaged in lengthy negotiations over the PPA, during which time, the California Legislature considered legislation regarding reduction of greenhouse gas emissions. The producer and utility had a long-running dispute over which of them was required to bear the costs of complying with AB 32's greenhouse gas emission reduction mandate. The utility invoked the PPA's arbitration clause to seek a declaration of its obligations under the PPA regarding the greenhouse gas emission compliance costs. The electricity producer unsuccessfully moved to dismiss the arbitration and the arbitrators concluded that the PPA placed the costs of compliance on the producer. The producer then sought review of the award in court and the court vacated the arbitrator's award.

The utility appealed, urging that the arbitrator's award should be reinstated. On appeal, the electricity producer argued that the dispute over the PPA was not ripe given the on-going legislation over greenhouse gas emissions and thus was not subject to arbitration. Alternatively, the electricity producer contended that subsequent legislation had mooted the appeal.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Clean Energy Incentive Program (CEIP). In June 2016, the EPA provided notice of a proposed rule for design details of the CEIP. The CEIP is an optional program that states may adopt to incentivize certain early emission reduction projects under the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 81 Fed. Reg. 42940. In August 2016, the EPA provided notice of a 60-day extension to the comment period for same to allow for tribal consultation in response to the proposed rule. 81 Fed. Reg. 59950.

ENVIRONMENTAL LAW

Recent Court Rulings

The First District Court of Appeal affirmed, finding the seller breached the land purchase contract, resulting in millions of damages. Schellinger Bros. v. Cotter, 2 Cal.App.5th 984 (2016).

Schellinger Brothers ("Schellinger") sued Cotter for breaching a purchase contract to sell Schellinger a 21-acre tract of land in Sebastopol, California. The trial court entered a money judgment for approximately $2,855,000 in favor of Schellinger and an order for costs and fees. Cotter appealed.

Cotter alleged the trial court: (1) misinterpreted the contract by permitting Schellinger to waive a final recorded subdivision map as a condition of closing; (2) erred in finding Cotter breached the contract; and (3) erred in concluding Schellinger's damages were the proximate result of Cotter's breach. The court affirmed.

Cotter argued Schellinger did not waive the express condition of recordation of a final subdivision map. The court, however, found Cotter's failure to raise the issue at trial precluded him from raising it on appeal. The court also found the trial court held Schellinger waived the two-year limitation to record the map, not the map itself.

On the issue of breach, the disparity in evidentiary summaries in the parties' briefs was so great, the court summarily rejected Cotter's argument substantial evidence did not support the trial court's finding. Moreover, Cotter's agent built an unauthorized trench that jeopardized wetland areas, decreasing the property's value constituting a violation of the contract's prohibition against

waste. Cotter failed to pay taxes on the property for thirteen years—more waste, and he failed to secure necessary lot line adjustments. He tried to sell the property to a third party and later offered to give the property to the city. In short, the court found Cotter wrecked the project for Schellinger.

The correct measure of damages included expenses Schellinger properly incurred in preparing to enter the land and consequential damages. California Civil Code section 3306 allows consequential damages for the breach of an agreement to convey real property. Unlike general damages, consequential damages are recoverable if they were communicated to or should have been known by the breaching party. Cotter knew Schellinger intended to commercially develop the land, which would require considerable dealings with the city to obtain the necessary approvals. As such, these costs were losses foreseeable by Cotter. Schellinger produced admissible oral testimony regarding the extent of its damages at trial, evidence the court found substantial. The court, therefore, affirmed and awarded Schellinger its costs on appeal.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FEES/TAXES

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.

FOREST 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.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Hazardous Chemical Reporting Regulation. In June 2016, the EPA provided notice of a final rule to amend its hazardous chemical reporting regulations due to changes in the Occupational Safety and Health Administration Hazard Communication Standard. The amendments include revisions to the existing hazard categories for hazardous chemical inventory form reporting, and listing reporting under sections 311 and 312 of the Emergency Planning and Community Right-to-Know Act. 81 Fed. Reg. 38104.

Hazardous Waste Management System. In June 2016, the EPA provided notice of an extended comment period on the tentative denial of a petition to revise the Resource Conservation and Recovery Act corrosivity hazardous waste characteristic regulation. 81 Fed. Reg. 37565.

In July 2016, the EPA provided notice of, and requested comments on, a proposed rule concerning user fees for the electronic hazardous waste manifest system being established under the Hazardous Waste Electronic Manifest Establishment Act. The fees are required in order for the EPA to recover its costs of developing and operating the national e-Manifest system. In addition, the EPA is proposing amendments to the regulations governing the use of electronic hazardous waste manifests. 81 Fed. Reg. 49071.
In August 2016, in response to a partial vacatur ordered by the Court, the EPA provided notice of a final rule to extend the compliance deadlines for certain inactive coal combustion residuals surface impoundments. 81 Fed. Reg. 51802. The EPA provided notice of a proposed rule regarding same. 81 Fed. Reg. 51838.

National Priorities List (NPL). In September 2016, the EPA provided notice of a final rule to add ten sites to the General Superfund section of the NPL. The NPL provides known or threatened releases of hazardous substances, pollutants or contaminants throughout the U.S. and guides the EPA in determining which sites warrant further investigation. 81 Fed. Reg. 62397.

In September 2016, the EPA provided notice of a proposed rule to add eight sites to the General Superfund section of the NPL. 81 Fed. Reg. 62428.

Pesticides. In May 2016, the EPA announced receipt of several initial filings of pesticide petitions requesting the establishment or modification of regulations for residues of pesticide chemicals in or on various commodities. 81 Fed. Reg. 31581.

In June 2016, the EPA provided a notice of, and requested comments on, a draft Pesticide Registration Notice titled "Guidance for Pesticide Registrants on Pesticide Resistance Management Labeling." This draft document provides guidance for registrants to follow when developing resistance management information to include on their pesticide labels. 81 Fed. Reg. 35766. In August 2016, the EPA provided notice of a 30-day extension for the comment period regarding same. 81 Fed. Reg. 51880.

In June 2016, the EPA also provided a notice of, and requested comments on, a draft Pesticide Registration Notice titled "Guidance for Herbicide Resistance Management Labeling, Education, Trailing, and Stewardship." This draft document provides guidance on the Agency's approach to addressing herbicide-resistant weeds. 81 Fed. Reg. 35767. In August 2016, the EPA provided notice of a 30-day extension for the comment period regarding same. 81 Fed. Reg. 51880.

In June 2016, the EPA additionally provided notice of, and requested comments on, a draft Pesticide Registration Notice titled "Determination of Minor Use under Federal Insecticide, Fungicide, and Rodenticide Act, section 2(ll)." The draft document would provide guidance to the registrant as to how the EPA determines a "minor use." 81 Fed. Reg. 38704. In August 2016, the EPA provided notice of a 30-day extension for the comment period regarding same. 81 Fed. Reg. 54576.

Toxic Chemicals. In June 2016, the EPA provided notice of a proposed rule to add a hexabromocyclododecane (HBCD) category to the list of toxic chemicals. The EPA is proposing to add this chemical category because it meets the Emergency Planning and Community Right-to-Know Act section 313(d)(2)(B) and (C) toxicity criteria. The EPA believes that HBCD should be classified as a persistent, bioaccumulative, and toxic chemical and assigned a 100-pound reporting threshold. 81 Fed. Reg. 35275.

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

The California Supreme Court has held that precondemnation environmental and geological testing, for purposes of assessing whether private property would need to be condemned to construct a new water transport tunnel, did not violate the constitutional protections of the takings clause so long as the procedure was reformed to allow for a jury trial. *Property Reserve, Inc. v. Superior Court* (2016) 1 Cal.5th 151.

The State Department of Water Resources (Department) undertook to investigate the feasibility of constructing a new tunnel or canal in the Delta as a means of delivering freshwater to southern California. As preliminary steps, the Department sought to conduct geological and environmental studies on more than 150 private parcels which, in the future, the state may seek to acquire through eminent domain. The proposed environmental testing activities consisted of mapping and surveys relating to plant and animal species, habitat, soil conditions, hydrology, cultural and archeological resources, utilities and recreational uses. The proposed geological activities consisted of drilling deep holes or borings to determine subsoil conditions, and refilling the holes once drilling and retraction of soil was complete. The Department proceeded through the statutory procedure in the Eminent Domain Law relating to precondemnation entry and testing. Civ. Proc. Code sec. 1245.010-1245.060. Section 1245.010 provides, "Subject to requirements of this article, any person authorized to acquire property for a particular use by eminent domain may enter upon property to make photographs, studies, surveys, examinations, tests, soundings, borings, samplings, or appraisals or to engage in similar activities reasonably related to acquisition or use of the property for that use."

The Department filed petitions in superior court seeking an order granting it authority to enter the properties and undertake the studies. After trial, the superior court issued an order authorizing the Department to enter the properties to conduct the environmental studies, under specific conditions, and setting forth a schedule designating by property size the amount of probable compensation that the Department was required to deposit prior to entering any property. However, the court denied the Department's request to conduct the geological studies. The court held that those studies could only be commenced after prosecution of a classic condemnation action. Both the landowners and the Department appealed, and the court of appeal upheld the denial of the request to conduct geological testing and reversed the court's grant of authority to conduct environmental testing.

The questions in the Supreme Court were whether (1) the geological testing activities were a taking, (2) the environmental activities were a taking, and (3) if so, whether the precondemnation entry and testing statutes provided a constitutionally valid eminent domain proceeding for the activities.

The Court held there was no need to answer the first two questions because even assuming the activities did constitute a taking, the procedure established by the precondemnation statutes satisfies the requirements of the state takings clause when the procedure is "reformed" to comply with the jury trial requirement of that clause. As a preliminary matter, the Court held, on the basis of extensive legislative history, that the language of the current precondemnation entry and testing statutes does not limit the listed activities to activities that are only "innocuous or superficial," and instead encompasses the type and degree of precondemnation testing at issue here. The Court held the precondemnation procedure was constitutionally sufficient with regard to the environmental testing activities because the superior court's order did not grant the Department a "blanket temporary easement" over the landowners' properties requiring a classic condemnation action. Even if the superior court's order were to grant a "temporary easement" for the environmental testing, the precondemnation statute satisfied the requirements of the state takings clause so long as it is reformed to provide a property owner the option of obtaining a jury trial on the measure of damages. Furthermore, the environmental testing did not require a classic condemnation action because, unlike an earlier version of the precondemnation statute, the current statute authorizes entry and testing that may result in actual damage or substantial interference with the owner's possession or use only if the public entity first (1) seeks and obtains a properly limited court order prior to undertaking precondemnation activities; (2) deposits into court, prior to entry or testing, an amount likely to cover any loss as result of activities; and (3) pays damages to the property owner to compensate for any injury or substantial interference with the owner's possession or use. Thus the procedure extends to an owner the same protections embodied in the constitution, whether or not an entity's proposed precondemnation activities actually rise to the level of a taking or damaging of property. As to the geological borings, the Court held that they could not properly be characterized as a permanent occupation, and thus a taking requiring a classic condemnation action, because the Department would not retain any possession over the fillings.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

PLANNING AND ZONING

Recent Court Rulings

Fifth District cites deference due to city's interpretation and application of policies in its general plan, and rejects challenge to shopping center abutting residential subdivision. *Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9

A developer applied to amend the City of Modesto's General Plan and zoning ordinance to authorize a 170,000 square-foot shopping center on an 18-acre parcel. The city initially prepared an initial study concluding the project was within the scope of the Master EIR prepared for the General Plan. Neighborhood opposition emerged. The city responded by preparing an EIR, and

by recirculating the EIR to revise the traffic analysis in light of comments from the neighbors' traffic engineer. The city ultimately certified the EIR and approved the project. The neighbors sued. The trial court denied the petition. The neighbors appealed.

The neighbors argued the city abused its discretion in finding the project consistent with "Neighborhood Plan Prototype" (NPP) policies in the city's General Plan. The NPP policies applied to the site. These policies authorized a shopping center, but the project was larger than envisioned under the NPP, which called for a "neighborhood shopping center" of seven to nine acres. City staff characterized these policies as flexible guidance, rather than mandatory development standards, citing the city's history of approving other shopping centers larger than the maximum end of the range authorized by the NPP. The neighbors disagreed, noting that because the city had retained the NPP through several General Plan updates, these standards were not an "outmoded relic." The Court deferred to the city's characterization of the NPP as general guidance consistent with the city's practice, rather as than rigid development standards that could not be exceeded.

First District holds "substantial evidence" test applies to challenge to subsequent mitigated negative declaration for expansion of Buddhist retreat center. *Coastal Hills Rural Preservation v. County of Sonoma* (2016) 2 Cal.App.5th 1234

The Tibetan Nyingma Meditation Center has operated a monastery and retreat center in Cazadero since 1975. In 2004, the Center purchased an additional property, which it designated the Ratna Ling Retreat Center. Ratna Ling uses the presses to print Buddhist texts for shipment to Tibet to replace texts destroyed by the Chinese government. In 2004, 2008 and 2012, Sonoma County adopted mitigated negative declarations (MNDs) and approved various expansion at the Center. In 2014, Ratna Ling applied for a third multiple-use permit, and the county adopted a subsequent MND to the 2004 and 2008 MNDs, superseding the 2012 MND. The 2014 subsequent MND analyzed Ratna Ling's application to make permanent four storage tents for its printing-press operation, and to construct a new six-bedroom residence and up to eight tent cabins. Coastal Hills Rural Preservation (CHRP) sued. The trial court denied the petition. CHRP appealed.

CHRP argued that the county violated the California Constitution's prohibition against the establishment of a religion. The court declined to reach the issue because CHRP had failed to raise the issue with the county.

CHRP argued that the project was inconsistent with the county's general plan and zoning code. The county plan designated the site for "resources and rural development" (RRD). The county had discretion to find that the printing press and storage facilities were consistent with this designation because the Center was a non-profit, and its sales of texts were longstanding and ancillary to its operation. That the use was controversial did not mean the county abused its discretion.

CHRP argued that the "fair argument" standard of review applied to its attack on the subsequent MND. The court disagreed, finding that because the county had prepared the MND under Public Resources Code section 21166, the substantial evidence test applied.

Applying this test, the court found that substantial evidence supported the county's conclusion that any fire risks posed by the storage tents were adequately mitigated: inspections of the existing tents resulted in recommendations to upgrade the sprinkler system, and to maintain an on-site fire engine staffed with volunteers; the tent covers met applicable fire protection standards; and defensible space surrounded each tent. The county's Hazard Mitigation Plan was not effective until October 25, 2011, well after the storage tents were permitted and constructed, and therefore was inapplicable. The county did not improperly defer mitigation when it required Ratna Ling to coordinate with the fire district and comply with the fire marshal's recommendations because the mitigation simply granted the county the right to impose new, stricter requirements if deemed necessary.

Finally, CHRP argued that the county engaged in impermissible spot zoning. The court disagreed because CHRP did not raise this issue with the county, and because nothing in the record suggested that the county had authorized Ratna Ling to engage in uses that other parcels with the same designation could not.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

PROPOSITION 65

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.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Eagle Permits. In May 2016, the FWS provided notice of a proposed rule to revise the eagle nonpurposeful take permit regulations and eagle nest take regulations from 2009. The proposed amendments include: (i) changes to permit issuance criteria and duration; (ii) definitions; (iii) compensatory mitigation standards; (iv) criteria for nest removal permits; (v) permit application requirements; and, (vi) fees. 81 Fed. Reg. 27934.

Habitat Conservation Planning Handbook. In June 2016, the FWS provided notice of, and requested comments on, a draft revision to the joint FWS and National Marine Fisheries Service Habitat Conservation Planning Handbook. The Handbook describes requirements, procedures, and guidance for permit issuance and conservation-plan development. 81 Fed. Reg. 41986.

Migratory Bird Hunting. In May 2016, the FWS provided notice of a proposed rule concerning special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2016-2017 migratory bird hunting season. 81 Fed. Reg. 34226.

In June 2016, the FWS provided notice of a proposed rule to establish hunting regulations for certain migratory game birds for the 2017-18 hunting season. The proposed rule: (i) provides the regulatory schedule; (ii) announces meeting; (iii) describes proposed regulatory alternatives for the proposed regulatory alternatives for the 2017-18 duck hunting seasons; and, (iv) requests proposals from Indian tribes that wish to establish special migratory game bird hunting regulations. 81 Fed. Reg. 38050. In August 2016, the FWS provided notice of a supplement to the proposed rule providing regulatory alternatives for the 2017-18 duck hunting season, announcing related meetings, and providing recommendations resulting from March meetings. 81 Fed. Reg. 53391.

In July 2016, the FWS provided notice of a final rule prescribing the hunting seasons, hours, areas, and daily bag and possession limits for migratory game birds. Taking of migratory birds is prohibited unless specifically provided for by annual regulations. This rule permits the taking of designated species during the 2016-17 season. 81 Fed. Reg. 48647.

Mitigation Policy. In May 2016, the FWS provided notice of a re-opened comment period for its revisions to the Service Mitigation Policy. Comments will be accepted through June 13, 2016. 81 Fed. Reg. 29575.

Refuge-Specific Hunting and Sport Fishing. In June 2016, the FWS proposed to: (i) add one national wildlife refuge (NWR) to the list of areas open for hunting; (ii) increase the hunting activities available at 12 other NWRs; (iii) open one refuge to fishing; and (iv) add pertinent refuge-specific regulations for other NWRs that pertain to migratory game bird hunting, big game hunting, and sport fishing for the 2016-17 season. 81 Fed. Reg. 45789.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Municipal Solid Waste Landfills. In May 2016, the EPA provided notice of a final rule, effective November 10, 2016, which revises the maximum permit term for Municipal Solid Waste Landfill units operating under Research, Development and Demonstration permits. Under the new rule, the number of permit renewals is increased to six, for a total permit term of up to 21 years. 81 Fed. Reg. 28720.

In August 2016, the EPA provided notice of a final rule for a new subpart that updates the Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills. Based on changes since the guidelines originated, the EPA determined it is appropriate to make revisions to account for changes to the population of landfills and the results of an analysis of the timing and methods for reducing emissions. 81 Fed. Reg. 59275.

In August 2016, the EPA also provided notice of a final rule for a new subpart that updates the Standards of Performance for Municipal Solid Waste Landfills that will reduce emissions of landfill gas. Based on changes since the guidelines originated, the EPA determined it is appropriate to make revisions to account for changes to the population of landfills and the results of an analysis of the timing and methods for reducing emissions. 81 Fed. Reg. 59331.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

2016 Effluent Guidelines Program Plan. In June 2016, the EPA provided notice of, and requested comments on, the preliminary 2016 Effluent Guidelines Program Plan (Plan). The

preliminary Plan identifies new or existing industrial categories selected for effluent guidelines or pretreatment standards and provides a schedule for their development. 81 Fed. Reg. 41535.

Aquatic Life Ambient Estuarine/Marine Water Quality Criteria for Copper – 2016. In July 2016, the EPA provided notice of, and requested comments on, the draft Aquatic Life Ambient Estuarine/Marine Water Quality Criteria for Copper – 2016. The recommended criteria will be beneficial for water quality standards for the protection of aquatic life in and around coastal harbors and marinas where sources of copper are most commonly identified. 81 Fed. Reg. 49982.

Clean Water Act (CWA) Tribal Provision. In May 2016, the EPA provided notice of a final interpretive rule that concludes that section 518 of the CWA includes express delegation of authority by Congress to Indian tribes to administer regulatory programs over entire reservations, subject to the eligibility requirements. This reinterpretation streamlines the process for applying for treatment of Indian tribes in a similar manner as states. 81 Fed. Reg. 30183.

Contaminants in Drinking Water. In July 2016, the EPA provided notice of a final rule, effective July 19, 2016, approving alternative test methods for the analysis of contaminants in drinking water and determining compliance with national primary drinking water regulations. 81 Fed. Reg. 46839.

Effluent Limitations Guidelines. In June 2016, the EPA provided notice of a final CWA regulation that establishes pretreatment standards for the Oil and Gas Extraction Point Source Category. The final rule would prevent the discharge of pollutants in wastewater from onshore unconventional oil and gas extraction facilities to publicly owned treatment works. 81 Fed. Reg. 41845.

Forest Road Discharges. In July 2016, the EPA provided notice of its decision that no additional regulations are needed to address stormwater discharges from forest roads under the CWA. This action is in response to a court requirement for the EPA to consider same. 81 Fed. Reg. 43492.

Health Advisories (HA). In May 2016, the EPA provided a notice of availability of an update to the lifetime HAs for perfluorooctanoic acid and perfluorooctain sulfonate. Specifically, the HA is 0.07 parts per billion in drinking water. EPA's HAs identify a concentration level at or below a point when adverse health effects are not anticipated to occur. 81 Fed. Reg. 33250.

National Pollutant Discharge Elimination System (NPDES). In May 2016, the EPA provided notice of a proposed rule to revise the NPDES regulations to: (i) eliminate regulatory and application form inconsistencies; (ii) improve permit documentation, transparency and oversight; (iii) clarify existing regulations; and, (iv) remove outdated provisions. 81 Fed. Reg. 31344.

In September 2016, the EPA provided notice of a final rule concerning the NPDES Electronic Reporting Rule. The rule requires regulated entities and state and federal regulators to use existing, available information technology to electronically report data required by the NPDES permit program in lieu of paper reports. 81 Fed. Reg. 62395.

Protective Action Guide. In June 2016, the EPA provided notice of, and requested comments on, draft additions to the 2013 revised interim Protective Action Guides and Planning Guidance for Radiological Incidents to provide guidance on drinking water. The guides assist in making radiation protection decisions during emergencies. 81 Fed. Reg. 37589.

Selenium in Freshwater. In July 2016, the EPA provided a notice of availability of a final updated CWA section 304(a) recommended national chronic aquatic life criterion for selenium in fresh water. The 2016 recommendation reflects the latest scientific information, which indicates that selenium toxicity to aquatic life is primarily based on organisms consuming selenium-contaminated food rather than direct exposure to selenium dissolved in water. 81 Fed. Reg. 45285.

Selenium in San Francisco Bay. In June 2016, the EPA provided notice of a proposed rule to revise the current federal CWA selenium water quality criteria for the San Francisco Bay and Delta to ensure that the criteria are set at levels that protect aquatic life and aquatic-dependent wildlife, including federally listed threatened or endangered species. 81 Fed. Reg. 46030. In September 2016, the EPA provided notice of a 45-day comment period extension for same. 81 Fed. Reg. 63158.

Stormwater Management. In May 2016, the EPA announced availability of "Stormwater Management in Response to Climate Change Impacts: Lessons from the Chesapeake Bay and Great Lakes Regions." The document describes insights gained from workshops to address climate change in stormwater adaptation efforts. 81 Fed. Reg. 31633.

WATER RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

National Wetland Condition Assessment 2011 Final Report. In May 2016, the EPA provided notice of availability of EPA's report on the National Wetland Condition Assessment 2011. The report includes information on how the survey was implemented, what the findings are on a national and ecoregional scale, and future actions. 81 Fed. Reg. 30300.

Federal Summaries

Supreme Court

The California Supreme Court has held that certain federal laws do not pre-empt California's moratorium on suction dredge mining in a river located on federal lands. People v. Rinehart (August 22, 2016) 1 Cal.5th 652.

In the case, the defendant was convicted in a Superior Court bench trial on stipulated facts of using a vacuum and suction dredge equipment without a permit and possessing such equipment within 100 yards of waters closed to the use of that equipment. The Court of Appeal reversed the trial court, and the State sought and was granted review.

The California Supreme Court framed the issue as a conflict arising from the competing desires to exploit and to preserve the state's natural treasures, including gold, waters and wildlife, and forests and coastlines. The State asserted it may, in pursuit of protecting fish habitats and the quality of the state's waterways, temporarily ban a particular method of gold mining pending adoption of suitable regulations. The Defendant asserted that such method was the only practicable method and federal law promoting mining on federal land preempts the state's contrary legislation.

The Supreme Court concluded that the state's moratorium is not preempted, and that the federal laws relied upon by the Defendant do reflect a congressional intent to afford prospectors secure possession of, and in some instances title to, the places they mine. But while Congress sought to protect miners' real property interests, it did not go further and guarantee to them a right to mine that is immunized from exercises of the state's police power. On that basis, the Court reversed the Court of Appeal.

The United States Supreme Court has held that a standalone jurisdictional determination made by the U.S. Army Corps of Engineers pursuant to the Clean Water Act constitutes a "final agency action" that is reviewable under the Administrative Procedure Act. *United States Army Corps of Engineers v. Hawkes Co., Inc., et al.* (2016) 136 S.Ct 1807

Three peat mining companies sought to mine a 530-acre parcel that contained wetlands, and sought a Section 404 permit under the Clean Water Act from the U.S. Army Corps of Engineers (Corps) for that purpose. As part of the permitting process, the Corps issued a "jurisdictional determination" (JD) which stated that the property was subject to the Clean Water Act because its wetlands had a "significant nexus" to the Red River of the North. The companies attempted to challenge the JD at the administrative level, and when those efforts failed they sought judicial review of the JD pursuant to the Administrative Procedure Act (APA).

At issue was whether the JD constituted a "final agency action for which there is no other adequate remedy" that could be reviewed by a court under the APA. The district court had resolved the issue in the negative and dismissed the mining companies' action for lack of jurisdiction, but the Eight Circuit Court of Appeals reversed the district court. Before the Supreme Court, the Corps

argued that the JD was not a final agency action, and even if it was other available alternatives precluded review under the APA.

The Supreme Court held that the JD was a final agency action because it marked the consummation of the Corps' decisionmaking process with respect to jurisdiction over the property, and because it would result in legal consequences – the need for the mining companies to either obtain a permit before engaging in certain activities on their property, or face liability under the Clean Water Act for failing to do so. The Court also held that the other alternatives suggested by the Corps – that the companies either act without a Clean Water Act permit and challenge the need for a permit in the resulting enforcement action, or complete the permit application process and challenge the results if necessary – were not adequate substitutes for an APA action. Such alternatives would expose the mining companies to costs and risks of civil and criminal liability that would be avoided by allowing the companies to challenge the decision that found the Clean Water Act applicable in the first place.

United States Court of Appeals

Recent Court Rulings

Southern District of New York Enjoins Enforcement of 8.646 billion Ecuadorian judgment against Chevron Corporation *Chevron Corp. v. Donziger*, No. 14-0826(L), 14-0832(C), slip op. (2nd Cir. Aug. 8, 2016)

Plaintiff Chevron Corporation alleged that Defendants Steven Dozinger, Dozinger's law firm, and his clients obtained a $8.646 billion judgment against Chevron Corporation in Ecuador for environmental and human rights violations committed during oil exploration activities in Ecuador from the 1960s to 1990s through bribery, coercion, and fraud. Chevron Corporation sought relief from the judgment under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 – 1968 ("RICO") as well as under New York common law. Defendants appealed from a judgment from the Southern District of New York that found that Defendants had committed bribery, coercion and fraud and enjoined enforcement of the $8.646 billion judgment in the United States and imposing a constructive trust on any property traceable to the Ecuadorian judgment.

Defendants challenged the district's court's judgment based upon Article III standing, international comity, judicial estoppel, lack of legal authority for the granting of equitable relief, and lack of personal jurisdiction.

The Second Circuit upheld the district court's judgment, finding that 1) Plaintiff Chevron had suffered an injury due to Defendants fraudulent behavior and therefore has standing under Article III; 2) Plaintiff Chevron was not judicially estopped by a previous forum non conveniens agreement from asserting that the subsequent judgment in Ecuador was procured by fraud; 3) equitable relief is avaible under RICO; 4) international comity did not bar the injunction against enforcement of the Ecuadorian judgment only applied within the United States; 5) equitable relief was available under New York common law; and 6) that the trial court had personal jurisdiction over the Ecudorian Defendants under New York's long-arm statute.

The First Circuit Court of Appeals has held that a private plaintiff under the Clean Water Act could not rely on late-submitted expert testimony, failed to prove defendant's discharge of pollution where discharge came from other, "mingled" sources, and was responsible for defendants' attorneys' fees as a result of its "frivolous" suit. Paolino v. JF Realty, LLC, 830 F.3d 8 (1st Cir. 2016)

Defendants operated an auto recycling business on land immediately abutting Plaintiff's property. In 2005 and 2007, the Rhode Island Department of Environmental Management (RIDEM) issued notices requiring Defendants to install stormwater controls and pollution discharge elimination systems. Defendants obtained the required permits and built the systems. After unsuccessful administrative claims that the systems discharged polluted stormwater onto their property and into navigable waters, Plaintiffs filed suit under the citizen suit provision of the Clean Water Act. Plaintiffs submitted two expert witness disclosures before the court's deadline but attempted to supplement one of them more than three months after the deadline, and after Defendants had filed a summary judgment motion. The court rejected the late testimony, ruled for Defendants, and awarded Defendants nearly $112,000 in attorneys' fees under the CWA's "frivolous" standard.

The questions on appeal were whether the district court erred in excluding the late-submitted evidence, and whether the district court's judgment was against the great weight of evidence.

The court held that the exclusion of the disclosure was not abuse of discretion. Rather, it easily passed the applicable five-factor test to determine the propriety of excluding expert testimony: (1) the history of the litigation, (2) the sanctioned party's need for the evidence, (3) that party's justification for the late disclosure, (4) the opponent's ability to overcome the late disclosure's effects, and (5) the late disclosure's impact on the court's docket. Plaintiffs had "repeatedly" missed deadlines and were not precluded from submitting all their evidence by the court's deadline. Defendants "substantially" relied on Plaintiffs' timely disclosure in drafting their summary judgment motion. The exclusion did not amount to an improper "de facto dismissal" because the expert whose disclosure was untimely submitted was still allowed to testify. On the merits, the court held Plaintiffs had not met their burden to prove that storm water contained pollutants because other evidence showed that discharges came from a variety of "mingled" sources, not directly from Defendants' property. The court also noted that RIDEM had long been closely involved vis-à-vis Defendant's property and thus there was no need for citizen enforcement. Finally, the court upheld the fee award as proper under the CWA's "frivolous" standard because Plaintiffs had refused to acknowledge the well-documented environmental alleviation efforts by RIDEM and demonstrated an overall "lack of diligence" throughout the litigation.

The Fourth Circuit Court of Appeals has held that the U.S. Army Corps of Engineers, in issuing a permit under section 404 of the Clean Water Act, is not required to consider the relationship between proposed surface coal mining and health effects on neighboring communities because the Corps' jurisdiction is not over surface mining itself but rather the associated discharge of fill into waters. U.S. Ohio Valley Environmental Coalition, Inc. v. U.S.

Army Corps of Engineers, 828 F.3d 316 (4th Cir., 2016).

A coal mining company proposed to remove 6.8 million tons of coal from a 724-acre area in West Virginia and applied for permits under the Surface Mining Control and Reclamation Act of 1977 (SMCRA) as well from the U.S. Army Corps of Engineers under section 404 of the Clean Water Act (CWA). During the Corps' review, Plaintiffs submitted studies demonstrating an adverse relationship between surface coal mining and public health in nearby communities. Nonetheless the Corps issued the federal permits on the basis of an environmental assessment (EA) under the National Environmental Policy Act (NEPA), and found that the relationship between surface coal mining and public health is "not within the purview of the Corps' regulatory authority, but [is] considered by the [state] during the SMCRA permitting process." The Plaintiffs sued under the CWA and the Administrative Procedure Act (APA), arguing that NEPA required the Corps to consider the health impacts and that the Corps, in issuing the section 404 permit, failed to consider available evidence. The district court granted the company's and Corps' motions for summary judgment, finding the Corps properly determined that the proposed action's health effects were outside its scope of review. Plaintiffs appealed.

The question on appeal was whether the Corps violated NEPA by failing to analyze the studies Plaintiffs submitted suggesting a connection between surface coal mining and public health.

The court held that the Corps properly interpreted its scope of review and did not act arbitrarily and capriciously by declining to analyze the actions' health impacts. The Corps' regulations provide that in conducting NEPA analysis, the Corps need only address the "impacts of the specific activity requiring a [section 404] permit and those portions of the entire project over which the [Corps] has sufficient control and responsibility to warrant Federal review" - i.e., when the environmental effects of the overall project are "essentially products of the Corps' permit action." Because the federal government, under SMCRA, has delegated to states the responsibility of issuing permits for surface coal mining, the Corps has no jurisdiction to authorize mining itself. Thus the Corps properly limited its review to only those environmental effects associated with the specific discharge of fill material authorized at the proposed mine site. Furthermore, under section 401 of the CWA, the state issued a certification that the proposed mine would not cause a violation of state water quality standards, which are developed with human health effects in mind. Last, the court held that, although the Corps' regulations for implementing section 404 of the CWA prohibit issuance of a permit that would cause or contribute to "significantly adverse effects on human health or welfare," and also require the Corps to conduct a "public interest review" of the proposed action, these provisions do not require the Corps to study effects of activities beyond the proposed discharge into waters of the U.S.

The Third Circuit Court of Appeals, invoking its original jurisdiction, has held that state permits issued by New Jersey and Pennsylvania as a condition of FERC's approval of an interstate natural gas pipeline were properly issued, and that the court of appeals has original jurisdiction under the Natural Gas Act to hear such claims. Delaware Riverkeeper Network v. Pennsylvania Department of Environmental Protection, 833 F.3d 360 (3d Cir., 2016)

In September 2013, Transco applied to the Federal Energy Regulatory Commission

(FERC) to construct approximately 30 miles of natural gas pipeline "loops," to increase flow efficiency, and upgrade turbines at four compressor stations as part of a pipeline project crossing New Jersey and Pennsylvania. FERC, which pursuant to the Natural Gas Act has exclusive authority over the transport of natural gas in interstate commerce, conditioned its approval on Transco's obtaining various state and federal permits from each state. While New Jersey has assumed authority to issue section 404 permits under the Clean Water Act (CWA) for discharge of fill into waters of the U.S., in Pennsylvania the U.S. Army Corps of Engineers retains jurisdiction to issue section 404 permits; in both states, issuance of a 404 permit also requires issuance of a section 401 water quality certification by the state. In August 2014, FERC completed its environmental assessment (EA) of the project under the National Environmental Policy Act (NEPA) and gave its conditional approval in December 2014. Transco obtained the required permits in New Jersey by April 2015 and began construction in the state in May 2015. In Pennsylvania, FERC authorized Transco to proceed with construction in the state after Transco had obtained the state permits by July 2015. Plaintiffs originated their lawsuits in the court of appeals, challenging each state's issuance of the permits on which FERC's approval relied.

Questions before the court of appeals were (1) whether the court had original subject matter jurisdiction to hear the claims; (2) whether the petitions were moot because construction had already been completed; and (3) whether the state agency actions were shielded under the Eleventh Amendment. The court also considered the merits of the states' issuance of the permits.

The court held that the provision of the Natural Gas Act conferring original jurisdiction on courts of appeals over certain state and federal permitting actions for interstate natural gas pipelines applied because the state agencies acted "pursuant to federal law" in issuing the permits to Transco. The water quality certification issued by Pennsylvania, and the section 404 equivalent permit issued by New Jersey (as well as other New Jersey state permits placing conditions on the section 404 equivalent permit), could not exist without federal law and are integral elements in the regulatory scheme established by the CWA. Furthermore, under the Natural Gas Act, the only state actions that could be taken pursuant to federal law, and thus properly begun in the court of appeals, are state actions taken under the Clean Air Act and the CWA. The court also held that the petitions were not moot because even if construction were complete, the court could still require the states to monitor mitigation outcomes after completion of mitigation. Third, the court held the Eleventh Amendment did not bar the petitions because the states' voluntary participation in the regulatory schemes of the Natural Gas Act and CWA constituted a waiver of sovereign immunity. Last, the court held that neither state acted arbitrarily or capriciously in issuing the permits on which the FERC approval relied. The New Jersey permits had provided sufficient opportunity for public comment, adequately analyzed the proposed project and alternatives, had not defined the project purpose so narrowly as to improperly preclude consideration of less environmentally damaging, practicable alternatives, and considered the appropriate factors in conducting the required public interest analysis. Although the Pennsylvania water quality certification was issued before the state had reviewed an EA prepared as part of the application, plaintiffs failed to demonstrate any resulting harm because it was undisputed the state had to review an EA before any construction began. The plaintiffs' claim that the water quality certification was issued before a proper wetlands classification was completed lacked merit because the state was not required to review the project's effect on wetlands before issuing the water quality certification. Finally, the plaintiffs' claim that Pennsylvania improperly authorized

construction by issuing the water quality certification was unavailing because only FERC, not the state, has authority to authorize construction of interstate natural gas facilities.

Ninth Circuit Court of Appeals

Recent Court Rulings

The U.S. Court of Appeals for the Ninth Circuit held the U.S. Bureau of Land Management's environmental review of the impact of a wind-energy development on sage-grouse was inadequate under the National Environmental Policy Act. *Oregon Natural Desert Ass'n v. Jewell*, 823 F.3d 1258 (9th Cir. 2016).

The U.S. Bureau of Land Management ("BLM") approved construction of the Echanis Wind Energy Project (the "Project") on Steens Mountain in Harney County, Oregon. The Project included forty to sixty-nine wind turbines and a transmission line. The easement for the transmission line crossed public lands administered by the BLM, so the Project was subject to environmental review under the National Environmental Policy Act ("NEPA").

The BLM's Final Environmental Impact Statement ("FEIS") acknowledged the potential conflict between the Project and sage-grouse winter foraging habits, but no surveys were conducted to determine whether sage-grouse were present at the Project site during winter. Rather, the BLM assumed, based on surveys of nearby sites, no grouse used the Project site during winter.

After the BLM issued the FEIS, the Oregon National Desert Association sued, challenging environmental review of the Project under NEPA. The district court granted BLM summary judgment. The Ninth Circuit reversed. The primary issue was whether the BLM failed to assess baseline conditions at the Project site.

Some grouse were found at one the nearby sites in winter. The court found, therefore, the BLM should have assumed grouse were present, not absent, at the Project site in winter. The wind-swept character of the site—the aspect of the Project ideal for generating wind energy—suggested it could be good winter habitat for grouse, as wind would blow snow off sagebrush for grouse to eat. And scientists recommended the BLM conduct winter surveys of the site, and if not, assume grouse were present during the winter. Although courts owe deference to the BLM when undertaking scientific analysis, deference does not excuse the BLM from insuring the accuracy of its analysis, a NEPA requirement. Moreover, the BLM's errors impeded informed decision-making and public participation. In short, had the BLM assumed the Project site provided winter habitat for sage grouse, the Project would not go forward at the planned location. Environmental mitigation measures could not correct faulty data analysis nor mitigate the effect on informed decision-making and public participation. The court, therefore, reversed the district court's entry of summary judgment.

The U.S. Court of Appeals for the Ninth Circuit held that a smelter owner-operator could not be held liable for air emissions under CERCLA if the substances emitted into the air later settle on another property. *Pakootas v. Teck Cominco Metals, Ltd.* (2016) 9th Cir. No. 15-35228.

Plaintiffs filed a lawsuit against Teck Cominco Metals, Ltd. (Teck), the owner of a smelter located north of the Canada-U.S. border in British Columbia. The initial claims were based on Teck's alleged dumping of hazardous substances into the Columbia River. Plaintiffs alleged those hazardous substances traveled down the river into the U.S. and settled at the Upper Colombia River (UCR) site in Washington. Plaintiffs sought leave to amend the complaint to add another claim under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Plaintiffs alleged that Teck was also emitting hazardous substances into the air. Plaintiffs asserted that those substances traveled through air into the U.S. and later settled at the UCR site causing land and water contamination. Teck moved to dismiss on the ground that CERCLA does not impose liability for releasing air emissions that are transported by air into land or water.

The issue was whether an owner of a smelter that releases air emissions through a smokestack can be said to have arranged for the "disposal" under section 9607(a)(3) of CERCLA.

The Ninth Circuit held that an owner of a smelter is not liable under CERCLA for emissions into the air that settle onto land or water and result in contamination. The court noted that CERCLA does not provide its own definition for "disposal" instead it cross references Resource Conservation and Recovery Act (RCRA) definition of disposal. In reaching the decision, the court relied on a Ninth Circuit decision interpreting "disposal" under RCRA, which held that emitting particles from locomotives in rail yards into the air and allowing those particles to be transported through the air onto land or water did not constitute "disposal" under RCRA. The court was also bound by a Ninth Circuit en banc decision holding that the term "deposit" under CERCLA is similar to placement and does not include "chemical or geologic processes or passive migration." The Ninth Circuit reversed the District Court's denial of defendant's motion to dismiss, finding that because defendant could not be said to have arranged for the "disposal" of hazardous substances that were emitted by the smelter into the air, the owner-operator therefore could not be held liable for cleanup costs and natural resource damages under 42 U.S.C. section 9607(a)(3).

The U.S. Court of Appeals for the Ninth Circuit held that National Indian Gaming Commission's approval of a gaming ordinance without conducting an environmental review did not violate NEPA because there was an irreconcilable statutory conflict between NEPA and the Indian Gaming Regulatory Act. *Jamul Action Committee v. Chauduri* (2016) 9th Cir. No. 15-16021.

The Jamul Indian Village, a federally recognized Indian tribe, was building a gaming casino in Jamul, California since 1990's. The Tribe had enacted an ordinance for casino gaming in Jamul, which the National Indian Gaming Commission (NIGC) approved. Years later the Tribe redesigned the proposed project and prepared a revised gaming ordinance. In 2013, NIGC approved the revised gaming ordinance for the redesigned project. Site preparation and construction began in 2014. Plaintiffs, a group of tribal members and organizations, opposed the casino and filed a lawsuit to halt the construction.

In September 2013, plaintiffs sued NIGC alleging that NIGC violated the National Environmental Policy Act (NEPA) when it approved the gaming ordinance without conducting an environmental review required by NEPA. In January 2015, Plaintiffs filed a motion for a writ of

mandamus under the Administrative Procedure Act (APA) requesting the district court to direct NIGC to comply with NEPA and prepare an environmental impact statement.

The district court determined that NEPA review was not required because NIGC's approval of the gaming ordinance was not a "major federal action" and therefore NEPA did not apply. The district court denied motion for writ of mandamus under APA holding that NIGC's approval did not constitute "major federal action" under NEPA and as such defendants were not required to comply with NEPA requirement to prepare an environmental impact statement (EIS).

The Ninth Circuit affirmed the district court's denial of the petition but on different grounds. The Ninth Circuit held that, even if the approval constituted a major federal action, NIGC was not required to prepare an EIS because there was an irreconcilable statutory conflict between NEPA and IGRA. The court has previously recognized two circumstances where an agency does not need to comply with NEPA: if it would create an irreconcilable statutory conflict with a substantive statute, or if a substantive statute displaces NEPA's procedural requirements. The court explained that an irreconcilable conflict exists when a statute imposes a mandatory time period for agency action, and that time period is too short to prepare an EIS. IGRA requires the agency to approve a gaming ordinance within 90 days and preparing an EIS is assumed to take at least 360 days. The court further noted that NEPA regulations also confirm that and EIS cannot be completed in 90 days. The Ninth Circuit affirmed the district court's decision on the grounds that there was an irreconcilable conflict between NEPA and IGRA.

The U.S. Court of Appeals for the Ninth Circuit upheld BLM's decision to grant a right of way to construct a wind project. *Protect Our Communities Foundation v. Jewell* (2016) 9th Cir, No. 14-55666.

Bureau of Land Management's (BLM) granted Tule Wind, LLC. (Tule) a right-of-way on federal lands to construct and operate a wind energy facility (project) in the McCain Valley in San Diego County. Tule's original proposal included 128 wind turbines. In December 2010, BLM released a draft environmental impact statement (EIS) for public comment. BLM modified the proposal eliminating thirty-three of the proposed turbines and repositioning several turbines to reduce certain impacts. In October 2011, BLM issued a final EIS which included the modifications. In December 2011, BLM granted published a record of decision granting the right of way for the project. BLM expressly conditioned its right-of way-grant on Tule's implementation of the mitigation measures and monitoring programs described in the EIS.

Plaintiffs, a group of environmental organizations, filed a lawsuit challenging BLM's decision to grant the right of way, seeking an injunction under the Administrative Procedure Act (APA) for violations of National Environmental Policy Act (NEPA), Migratory Bird Treaty Act (MBTA), the Bald and Golden Eagle Protection Act (Eagle Act).

The district court granted defendant's motion for summary judgment on all claims. The district court held that the final EIS sufficiently described the project and goals, properly reviewed alternatives, and contained reasonable mitigation measures. The court held that the final EIS complied with NEPA by taking a "hard look" at the environmental impacts of the project. The court further held that BLM was not required to ensure that MBTA and Eagle Act permits are

obtained prior to issuing the right-of-way. Plaintiffs appealed. The Ninth Circuit affirmed the district court and held that BLM is not liable under NEPA, MBTA, Eagle Act, or APA in the decision to approve a right-of-way to Tule to construct a wind project.

The Ninth Circuit found that BLM properly reviewed alternatives, explaining that BLM reviewed all feasible alternatives, which included five alternatives and a no-action alternative, and acted within discretion in dismissing the distributed generation alternative due to feasibility issues. The Ninth Circuit found that mitigation measures were sufficient and contained adequate detail. The court explained that the EIS included a comprehensive set of mitigation measures based on scientific research and studies, and incorporated a detailed protection plan prepared by the Fish and Wildlife Service outlining additional measures to protect bird species. The Ninth Circuit agreed with the district court's determination that the final EIS complied with NEPA by taking a "hard look" at the environmental impacts including noise and electromagnetic voltage, impacts on bird species, and greenhouse gas emissions.

The Ninth Circuit also held that MBTA does not impose "attenuated secondary liability on agencies like BLM that act in a purely regulatory capacity, and whose regulatory acts do not directly or proximately cause the "take" of migratory birds." The court provided that BLM acted to authorize construction on public lands, and did not cause a "take" of migratory birds without a permit.

The U.S. Court of Appeals for the Ninth Circuit reversed the district court's dismissal holding that NPS decision to undertake NAGPRA inventory process constituted final agency action within the meaning of APA and that the district court had jurisdiction to consider the claim. *Navajo Nation v. US Dep't of the Interior* (2016) 9th Cir. No. 13-15710.

Between 1931 and 1990 The National Park Service (NPS) removed 303 sets of remains and objects from the Navajo Reservation and holds these objects in its collection at the Western Archeology Conservation Center in Arizona. The Navajo Nation has lived in the Chelly Canyon for thousands of years and to this day consider it sacred ground. In 1849 the U.S. and Navajo Nation entered into a treaty giving jurisdiction over Navajo Nation to U.S. government. In 1864 the federal government forcefully removed the Navajo from their lands, which included the Chelly Canyon. Years later the government allowed the Navaro to return and entered into another treaty to end hostilities and to establish the boundaries of the Navajo Reservation, which included all of the Chelly Canyon. The treaty provided that the Navajo Reservation was for the "exclusive use and occupation of the Indians." In 1960, Congress enacted the Antiquities Act which gave federal agencies authority to examine, excavate, and gather archeological objects. In 1979, Congress enacted the Archaeological Resources Protection Act (ARPA) establishing permit requirements for excavation and removal of archeological resources. ARPA distinguishes between public lands and tribal lands. Under ARPA, excavation on tribal lands requires consent of the tribe and archaeological resources removed from tribal lands remain the property of the Indian tribe. In 1990, Congress enacted the Native American Graves Protection Act (NAGPRA), which requires any federal agency that has possession over Native remains to conduct an inventory process of the items and identify the cultural affiliation of each item. Once identified the agency must "expeditiously return" the items to the Indian tribe upon request.

NPS began the NAGPRA process for remains and objects removed from Chelly Canyon. In 1996 Navajo Nation wrote a letter to NPS objecting to the NAGPRA inventory process and asserting ownership of the remains within Chelly Canyon. In December 2011, Navajo sued NPS claiming that NPS's refusal to return the remains and objects violated the Treaty of 1849, the Treaty of 1868, NAGPRA, ARPA, the Administrative Procedure Act (APA), and the Fifth Amendment. The district court, holding that there was no final agency action under APA, dismissed the suit as barred by sovereign immunity. Navajo Nation appealed.

The Ninth Circuit held that NPS's decision to apply NAGPRA to the remains constituted final agency action and established jurisdiction. The court applied the Bennett standard and found that the decision to apply NAGPRA was the consummation of the decision-making process regarding which statute would apply, and determined Navajo's ownership rights in the remains and objects, and legal consequences flowed from the decision. The court concluded that the Bennett standard was met and therefore NPS's decision was final agency action, subject to review.

The Ninth Circuit also held that the issue of NAGPRA application is fit for review and that Navajo Nation has exhausted all available administrative remedies. The Ninth Circuit reversed the district court's order and remanded for review of Navajo's claims.

The Ninth Circuit Court of Appeals has held that the Endangered Species Act ("ESA") provision requiring U.S. Fish & Wildlife Service ("FWS") to issue an Incidental Take Statement ("ITS") if a Biological Opinion concludes action likely to result in Incidental Taking applies only to animals, not plants. *Center for Biological Diversity v. Bureau of Land Management* (9th Cir., August 15, 2016) 2016 WL 4269899.

In the case, plaintiffs brought action against the Bureau of Land Management ("BLM") and FWS alleging that the BLM's proposal to expand access for off-road vehicle recreation in Imperial Sand Dunes Special Recreation Management Area ("ISD Management Area") violated various federal laws, including the Clean Air Act, ESA, and National Environmental Policy Act. The U.S. District Court for the Northern District of California entered summary judgment in BLM's favor and plaintiffs appealed.

The current litigation, which has been ongoing for over a decade, originates from BLM's decision to reopen land within the ISD Management Area to off-road vehicle use -- specifically, BLM's adoption of a Resource Area Management Plan ("RAMP") that kept closed approximately 35,000 acres of wilderness and critical habitat for the Peirson's milkvetch plant, a threatened species under the ESA, but opened over 127,000 acres to off-road vehicle use. As part of the analysis undertaken in connection with adoption of the RAMP, BLM had prepared an Environmental Impact Statement ("EIS") analyzing the RAMP and consulted with FWS under the ESA.

On appeal, plaintiffs argued that the Biological Opinion issued by FWS was deficient because it did not include an ITS for the Peirson's milkvetch, and the plain language of the ESA requires an ITS for plants rather than for just fish and wildlife. Plaintiffs also renewed claims that BLM failed to comply with the Clean Air Act, NEPA, and the Administrative Procedure Act by failing to evaluate properly the impacts of the RAMP on air quality.

As to plaintiff's first claim, the Court concluded, following a lengthy statutory interpretation discussion, that when read in context "the text of the statute is clear: the Endangered Species Act does not require Biological Opinions to contain Incidental Take Statements for threatened plants." With respect to BLM's air quality analysis, among the arguments raised, plaintiffs took issue with BLM's assumptions regarding the number of individuals who will visit the Management Area and how an average visitor will spend his time recreating. To this the Court responded, "We are confident that [plaintiff] could demonstrate persuasively numerous ways in which BLM's emissions analysis could be improved. Mere differences in opinion, however, are not sufficient ground for rejecting the analysis of agency experts. [Citation omitted.] Because BLM's assumptions regarding visitation were supported by substantial evidence, they deserve deference." For these reasons, and others explained by the Court, the decision of the district court was affirmed.

The Ninth Circuit Court of Appeals has held that the National Marine Fisheries Service ("NMFS") properly considered a fish harvester and processor's present participation in the subject fishery and its dependence upon the fishery in limiting the total share of allowable catch. *Pacific Dawn LLC v. Pritzker* (9th Cir., August 3, 2016) 2016 WL 4120688.

In the case, a fish harvester and fish processor, who were subject to a fishery management program that limited their share of total allowable catch of Pacific whiting, filed suit against NMFS alleging that it failed to consider relevant factors under the Magnuson-Stevens Act ("MSA") and the Groundfish Management Plan in selecting a qualifying period for determining the harvester's participation in the fishery, as a factor in establishing fishing quotas. The U.S. District Court for the Northern District of California granted NMFS summary judgment, and the fish harvester and processor appealed.

On appeal, plaintiffs challenged the NMFS decision to calculate the amount of their initial share based on their participation in the fishery prior to 2003 and 2004 rather than on their much greater participation in the years immediately before 2010, when the regulations implementing the program were issued. The Court held that NMFS properly considered the harvesters' and processors' participation in the fishery, and their dependence upon the fishery, as required by the MSA. Because NMFS considered the required factors and made a reasonable decision to use the 2003 and 2004 dates, its decision was not arbitrary or capricious, and the Court affirmed the district court ruling. The Court also held that the harvester and processor waived argument that NMFS violated national standards requiring that allocation of fishing privileges be fair and equitable by failing to raise the arguments before the district court.

The Ninth Circuit Court of Appeals has reversed a U.S. District Court ruling, and held that a fishing group's Administrative Procedure Act ("APA") challenge to termination of a sea otter translocation program accrued on the date U.S. Fish & Wildlife Service ("FWS") made the decision to terminate the program, not the date of rulemaking espousing FWS authority to terminate the program, and, therefore, plaintiffs suit is timely. *California Sea Urchin Commission, et al v. Bean* (9th Cir., July 12, 2016) 828 F.3d 1046.

In the case, plaintiff commercial fishing groups filed a complaint in U.S. District Court alleging that the FWS violated its statutory authority by terminating a translocation program for the southern sea otter. The district court dismissed the complaint, concluding that it constituted a facial challenge to a 1987 regulation and, thus, was untimely. Plaintiffs appealed to the Court of Appeals.

On appeal, the Ninth Circuit reversed. The court ruled that to be a final agency action subject to judicial review under the APA, an agency decision must meet two criteria; first, the action must be the consummation of the agency's decisionmaking process, not merely a tentative or interlocutory decision, and second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow. In this case, the applicable statute of limitations began to run on the date FWS made the decision to terminate the translocation program, not the date of rulemaking espousing the FWS authority to terminate the program. Both the decision to terminate the program and FWS's rule were final agency actions subject to judicial review under the APA, but it was termination of the program, rather than the rule, that caused the alleged injury. As such, plaintiffs' challenge to the agency action terminating the translocation program was timely and, on remand, the district court should decide if there is merit to plaintiffs' position that FWS was without authority to terminate the program in the first instance.

The Ninth Circuit Court of Appeals has held that the State of Washington, by building and maintaining barrier culverts that reduced the state's salmon population, violated its obligation to Indian tribes under the Stevens Treaties of 1854 and 1855. United States v. Washington, 827 F.3d 836 (9th Cir. 2016).

Under the Stevens Treaties of 1854 and 1855, the Indian tribes of the Pacific Northwest relinquished large areas of land west of Cascades and north of the Columbia River drainage in exchange for the guaranteed "right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory," both on and off reservation. In the late 1970s, the U.S. Supreme Court held the treaties gave the tribes the right to take up to fifty percent of harvestable fish in the treaty area, subject to the right of non-treaty fishers to do the same. The Court interpreted the fishery clause as promising perpetual protection for the tribes' fish supply, not merely their share of the fish. In a second phase of the 1970s litigation, the Ninth Circuit held that the question whether the fishery habitat must be protected from human-caused environmental degradation must be resolved in the context of "particularized disputes." In 2001, under the district court's continuing jurisdiction, the tribes filed a "request for determination" asserting the state was violating the treaties by building culverts that prevented salmon from returning from the sea to spawning grounds, and smolt from moving downstream. The U.S. joined the tribes' request, seeking a declaration that the treaties imposed a duty on the state to refrain from degrading the fishery resource through construction of culverts. Both tribes and the U.S. sought a permanent injunction requiring the state to fix its offending culverts. The state counterclaimed against the U.S., seeking a declaration that the U.S. had violated its duty to the tribes under the treaties, and an injunction requiring the U.S. to fix its culverts in the state. The district court dismissed the counterclaim and granted summary judgment in favor of the tribes and the U.S., holding the treaties imposed a duty on the state to refrain from building culverts that hinder fish passage and diminish fish populations. The court issued an injunction in 2013 requiring the state to fix certain culverts by October 2016, correct others within 17 years, and replace the rest at the end of their natural life.

The state appealed.

The questions on appeal were whether (1) the Stevens Treaties imposed a duty to refrain from building culverts; (2) the state's waiver defense against the U.S. was properly overruled; (3) the counterclaim was properly dismissed; and (4) the injunction was proper.

The Ninth Circuit held that the treaties imposed a clear duty on the states not to construct or maintain culverts that diminished fish populations. Properly construing any ambiguity in the treaties in favor of the tribes, the court held that the treaties were intended to assure the tribes that there would always be an adequate supply of fish, such that the state was precluded from diminishing or destroying the fish runs. The facts presented in the lower court established that the culverts blocked roughly 1,000 linear miles of streams suitable for salmon habitat and if removed or replaced would result in production of several hundred thousand additional mature salmon. The court additionally held that any failure by the U.S. to intervene during culvert construction, which purportedly caused the state to believe its culverts were not in violation of the treaties, did not constitute a "waiver" of the U.S.'s claims because the U.S. may not abrogate a treaty with tribes except through an Act of Congress. Third, the court held that the state's counterclaim against the U.S. was properly dismissed because the counterclaim was not the kind of claim to which the U.S. is presumed to have waived its sovereign immunity – the counterclaim did not (1) arise from the same transaction or occurrence as the plaintiff's suit, (2) seek monetary relief of the same nature, or (3) seek an amount no higher than the plaintiff's claim. Rather, the counterclaim was for injunctive relief. Nor did the state have standing to bring its counterclaim, as any violation of the treaties by the U.S. would have violated the rights of the tribes rather than the state. Finally, the court upheld the injunction on the grounds that because the injunction was tailored narrowly based on the available evidence, including studies generated by the state, it was not overbroad; the state's estimates of the cost of complying with the injunction were not supported by evidence; and principles of federalism did not preclude the court from issuing an injunction to enforce the treaties.

Ninth Circuit deferred to United States Environmental Protection Agency's (EPA) of Clean Air Act (CAA) in connection with a State Implementation Plan (SIP) approval to uphold EPA's approval of Arizona's Five Percent Plan, but would not defer to EPA interpretation that was contrary to Clean Air Act's plain language. *Bahr v. U.S. EPA*, ___ F.3d ___, 2016 WL 4728040 (9th Cir. Sept. 12, 2016).

Congress designated Maricopa County in Arizona as a non-attainment area for meeting the national primary ambient air quality standard (NAAQS) for airborne particulate matter, or PM-10. In 2012, Arizona submitted a revision to its SIP for PM-10, known as the Five Percent Plan because it proposed a five percent annual reduction for PM-10. The Five Percent Plan asserted that Arizona had met the NAAQS; proposed contingency measures; and proposed that certain exceedances should be excluded from the NAAQS calculation because they were exceptional events. The EPA approved the Five Percent Plan.

Petitioners sought review of the EPA's Final Rule approving the Five Percent Plan. Petitioners argued that the plan did not include best available control measures (BACM) and most stringent control measures (MSM), improperly excluded 135 exceedances of the air emission

standard from consideration, and incorrectly approved measures as contingency measures even though they had already been implemented.

The Ninth Circuit held that the EPA's decision not to require an updated demonstration of BACM and MSM in the Five Percent Plan was not an abuse of discretion because the EPA's interpretation was not contrary to the CAA's express language. The Ninth Circuit also deferred to the EPA's interpretation of whether exceedances qualified as exceptions because the EPA provided a reasoned explanation for its decision which did not directly conflict with its standards. But the Ninth Circuit concluded that the EPA approved its discretion in approving certain contingency measures because those measures had already been implemented. The Court held that the CAA was clear that contingency measures were actions to be taken in the future and thus measures that had already been implemented could not be contingency measures under the CAA.

Ninth Circuit upholds the United States Environmental Protection Agency's (EPA) grant of a prevention of significant deterioration (PSD) permit for construction of a new biomass-burning power plant at a lumber mill. *Helping Hand Tools v. USEPA*, ___ F.3d ___, 2016 WL 4578364 (9th Cir. Sept. 9, 2016).

Sierra Pacific Industries filed an application for a PSD permit with EPA to construct a cogeneration unit that would burn biomass fuels to operate existing lumber dry kilns at its lumber mill. Under the Clean Air Act (CAA), Sierra Pacific Industries was required to demonstrate that its proposed facility would utilize the best available control technology (BACT) for every pollutant subject to CAA regulation, through a five-step, top-down approach. The EPA granted the PSD permit after a supplemental BACT for greenhouse gas emissions.

The Petitioners challenged the EPA's issuance of the PSD permit. Petitioners argued that the EPA was required to consider solar power and a greater natural gas mix as clean fuel control technologies in the BACT analysis. The Petitioners also challenged the EPA's greenhouse gas BACT analysis.

In an issue of first impression, the Ninth Circuit held that the EPA reasonably concluded that consideration of solar or increased natural gas was not required because using solar or increased natural gas would disrupt the purpose of the project, necessitate redesign of the facility and would thus "redefine the source." The Court explained that in the BACT analysis, EPA was not required to consider control alternatives that would "redefine the source." The Court found that EPA had taken the requisite "hard look" at the purpose of the proposed facility or project. Further, the Court upheld the EPA's greenhouse gas BACT analysis, noting that the EPA's interpretation of its own guidance was entitled to deference because the interpretation was thorough, rational and consistent with prior practice.

The Ninth Circuit Court of Appeals found that the National Marine Fisheries Service failed to meet the mitigation standards of the Marine Mammal Protection Act when it permitted the U.S. Navy's use of Low Frequency Active sonar. *Natural Resources Defense Council, Inc., et al. v. Pritzker, et al.* (9th Cir. 2016) 828 F.3d 1125

The Marine Mammal Protection Act (MMPA) was enacted to prevent marine mammal populations from "diminishing beyond the point at which they cease to be a significant functioning element in the ecosystem." It broadly prohibits "take" of marine mammals, but also provides several exceptions to the general take prohibition. In 2012, the National Marine Fisheries Service (NMFS) authorized incidental take resulting from the U.S. Navy's routine training, testing, and use of Low Frequency Active (LFA) sonar during routine military operations pursuant to one of the exceptions listed in the MMPA. NMFS's Final Rule set forth several measures to mitigate the effects of LFA sonar on marine mammals, including measures requiring the Navy to shut down or delay operations when marine mammals are known to be present, and limiting the use of LFA sonar in certain areas.

The issue before the Ninth Circuit was whether NMFS's authorization of take incidental to LFA sonar use complied with the MMPA and, more specifically, whether the mitigation measures achieved the "least practicable adverse impact" on marine mammals. The district court had granted summary judgment in favor of the defendants, finding that the mitigation measures incorporated into the Final Rule satisfied the MMPA's standard that the permitted activity have the "least practicable adverse impact" on marine mammals. Plaintiffs appealed to challenge the district court's conclusion regarding the mitigation measures.

The Ninth Circuit reversed the district court. It found that NMFS had not adequately analyzed whether the impact to marine mammals resulting from LFA sonar use would be reduced to the least level practicable by the measures. Reviewing the evidence, the court found that the available facts did not support a conclusion that the measures achieves the "least practicable adverse impact" standard, and remanded the matter to the district court.

The Ninth Circuit Court of Appeals has held that a change in operation of a federal facility is not "major" for the purposes of the National Environmental Protection Act when the resulting operations remain within the range originally available to the operating agency. *Idaho Conservation League v. Bonneville Power Administration* (9th Cir. 2016) 826 F.3d 1173

The Albeni Falls dam lies on the Pend Oreille River, a tributary to the Columbia River and forms Lake Pend Oreille. The dam is operated to serve several purposes, including flood protection, power generation, and wildlife conservation. In 2011, the U.S. Army Corps of Engineers (Corps) and the Bonneville Power Administration, which manage the dam's operations and power sales, respectively, decided to change the manner in which they operated the dam during winter months: during the period of 1997-2011, the dam had been operated so as to keep levels in Lake Pend Oreille constant during winter months, but going forward the dam would be operated in a manner that would result in fluctuating winter lake levels.

Pursuant to the National Environmental Protection Act (NEPA) the agencies prepared an environmental assessment (EA), but because the EA concluded that the change in operations would have no significant environmental impact, they did not prepare an environmental impact statement (EIS). The Petitioner challenged the decision to move forward and sought an order requiring the agencies to prepare an EIS. A key issue was whether the decision constituted a "major federal action," as NEPA only requires an EIS when a proposed federal action is "major."

The Ninth Circuit found that the change in operations was not a "major" federal action. Under prior case law, an action involving a change in operation of a federal facility is not major if the post-change operations remain within the range originally available to the managing agency. The court noted that the dam had been operated to maintain consistent winter lake levels from 1997-2011, but also that prior to 1997 the dam had often been operated in a manner that resulted in fluctuating winter lake levels. In other words, the "change" in operation did not change the status quo, but was a part thereof. Accordingly, the decision did not require the preparation of an EIS.