State Bar of California

ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from April, May and June, 2013. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also 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 Rachel Cook, Michael Haberkorn, Arielle Harris, David Levy, Whit Manley, Danielle K. Morone, Joseph D. Petta, Stephen Velyvis, John Epperson, and Amy Lawrenson for their contributions to this issue of the Update.

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No updates this quarter.

Regulatory Updates

Fish and Game Commission. In May 2013, the Fish and Game Commission (Commission) proposed to amend Section 665, of Title 14 of the California Code of Regulations, relating to meeting procedures; this action was proposed in furtherance of the Commission's compliance with AB 2609 (2012), which requires the Commission to adopt rules to govern its business practices and processes by July 1, 2013. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 657.

Public Utilities Commission. In May 2013, the Public Utilities Commission (PUC) proposed to amend its Rules of Practice and Procedure, as set forth in Division 1, Chapter 1 of Title 20 of the California Code of Regulations, in order to reflect changes in the PUC's administration, and provide consistency between the rules and greater clarity. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 20-Z, p. 759.

Agency Contact Information. In June 2013, the U.S. Fish and Wildlife Service (FWS) updated the names, addresses and contact information for its regional offices located in Title 50 of the Code of Federal Regulations. For more information, see 78 Fed.Reg. 35149.

Cumulative Risk Assessment. In May 2013, the U.S. Environmental Protection Agency (EPA) requested information and citations on approaches and methods for the planning, analysis, assessment and characterization of cumulative risks to human population and the environment. For more information, see 78 Fed.Reg. 25440.

Environmental Justice. In May 2013, EPA announced the availability of *Actions that EPA Regional Offices Are Taking to Promote Meaningful Engagement in the Permitting Process by Overburdened Communities*, and *Promising Practices for Permit Applicants Seeking EPA-Issued Permits: Ways to Engage Neighboring Communities*. For more information, see 78 Fed.Reg. 27220. That same month, EPA also made available a document entitled, *Technical Guidance for*

Assessment Environmental Justice in Regulatory Analysis. For more information, see 78 Fed.Reg. 27235, 29284.

Title VI. In April 2013, EPA made two policy papers available for public review and comment: (i) *Title VI of the Civil Rights Act of 1964: Adversity and Compliance with Environmental Health-Based Thresholds*; and, (ii) *Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*. For more information, see 78 Fed.Reg. 24739.

AIR QUALITY

Recent Court Rulings

Fifth District Court of Appeal strikes down the California Air Resources Board's approval of nation's first "low carbon fuel standard" regulations, but allows regulations to remain in place while CARB cures CEQA violations. *POET, LLC v. State Air Resources Board* (2013) 217 Cal.App.4th 1214

In April 2009, the California Air Resources Board adopted a resolution approving regulations establishing "low carbon fuel standards" (LCFS) for purposes of reducing the State's greenhouse gas emissions, as required by the California Global Solutions Act of 2006 (Assembly Bill 32). The regulations consisted of "early action" aimed at reducing the carbon content of transportation fuels used in California. The resolution designated CARB's executive officer as the "decision maker" assigned to respond to certain remaining environmental issues. The board gave the executive officer authority to modify and adopt the regulations, but did not provide the officer with the option of declining to implement them.

The plaintiffs in the case included POET, LLC, which produces corn ethanol in the Midwest. POET challenged the regulations, claiming CARB violated CEQA during the adoption process. The trial court denied the petition. The plaintiffs appealed.

As a threshold matter, the Court of Appeal concluded CARB's actions were subject to CEQA. CARB contended that, because it operates a certified regulatory program, CARB is required to follow only the procedures set forth in regulatory program. The Court disagreed. Certified regulatory programs are exempt from CEQA's procedural requirements regarding preparation of negative declarations and EIRs under Public Resources Code section 21080.5, which provides that a state agency's preparation of environmental documents under its own regulatory program may serve as the functional equivalent of an EIR. The Court noted, however, that this exemption is narrow and such regulatory programs remain subject to "CEQA's broad policy goals and substantive standards," including the timing of environmental review and approval of projects.

The Court concluded that approval of the project under CEQA occurred when the CARB's decision-making body (the board) approved the resolution in April 2009. CARB argued approval did not occur until the executive officer took final action on the regulations the following year. The Court applied *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (*Save Tara*) as "the leading case regarding the application of the definition of 'approval' under CEQA Guidelines section 15352." The *Save Tara* Court articulated a general test for determining the

point at which agency action on a proposed project necessitates CEQA review. *Save Tara* involved a condition requiring post-approval EIR certification in an agreement to convey property. The Fifth District extended the *Save Tara* test to "projects undertaken by public agencies under certified regulatory programs." The Court held that the board's 2009 approval of the LCFS regulations constituted "approval," based on the clear language in numerous board documents, as well as the practical effects of the action.

From there, the Court concluded CARB violated CEQA because it did not complete the environmental review process under its certified regulatory program until after the board had adopted the resolution. This "premature approval" decided a controversial issue involving carbon intensity values assigned to ethanol produced from corn based on the indirect effects of converting land to corn production. CARB, in delegating subsequent environmental review authority to the executive officer, had denied the officer the authority to modify this aspect of the regulations. That violated CEQA.

The Court also held the CARB "violated a fundamental policy of CEQA" by improperly delegating responsibility for completing the environmental review process to its executive officer. "For an environmental review document to serve CEQA's basic purpose of informing governmental decision makers about environmental issues, that document must be reviewed and considered by the same person or group of persons who make the decision to approve or disapprove the project at issue." This principle "applies with equal force whether the environmental review document is an EIR or documentation is prepared under a certified regulatory program."

The Court further held that the CARB violated CEQA when it deferred formulating mitigation measures for NOx emissions from biodiesel fuel. Courts have recognized an exception to the general rule prohibiting the deferral of the formulation of mitigation measures under CEQA Guidelines section 15126.4, subdivision (a)(1)(B). Under this exception, an agency must commit to "specific performance criteria for evaluating the efficacy of the measures implemented." In this case, the Court held that CARB's statement that future rules would "establish specifications to ensure there is no increase in NOx" did not provide objective performance criteria.

The Court directed the trial court to issue a writ of mandate compelling CARB to set aside its approval of the LCSF regulations. The Court also exercised its discretion under Public Resources Code section 21168.9, however, and allowed the LCSF program to remain in place pending CARB's "diligent" efforts to comply with CEQA. The Court concluded that "the environment will be given greater protection" if the program were left in place while CARB addresses the problems identified by the Court.

Legislative Developments

No updates this quarter.

Regulatory Updates

Off-Highway Recreational Vehicles. In June 2013, the Air Resources Board (ARB) announced that it would be conducting a public hearing (on July 25, 2013) to consider the adoption of new

test procedures to measure evaporative emissions from off-highway recreational vehicles (OHRV) and expand evaporative emission control requirements, including certification, labeling, enforcement, anti-tampering, recall, and use restrictions. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 23-Z, p. 836.

Vapor Recovery Systems. In June 2013, ARB announced that it would be conducting a public hearing (on July 25, 2013) to consider the adoption of amendments to its Certification and Test Procedures for Vapor Recovery Systems at Gasoline Dispensing Facilities and Cargo Tanks. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 23-Z, p. 845.

California State Implementation Plan (SIP). The U.S. Environmental Protection Agency (EPA) issued a number of regulatory notices pertaining to various California air districts, as summarized below:

- *Antelope Valley AQMD*: (i) direct final action approving emission statements (78 Fed.Reg. 21545); (ii) direct final action approving revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 25011); (iii) proposed approval of revisions concerning continuous emissions monitoring systems and SOx emissions (78 Fed.Reg. 45114); and,
- *Butte County AQMD:* (i) direct final action to approve revisions concerning VOC, NOX, and PM emissions from residential wood burning devices (78 Fed.Reg. 21540, 21582); and,
- *Imperial County APCD*: (i) final approval of revisions concerning regulation of inhalable PM from sources of fugitive dust, such as unpaved roads and disturbed soils in open and agricultural areas; and,
- *Monterey Bay Unified APCD*: (i) direct final action to approve rule rescissions that address public records (78 Fed.Reg. 21545); and,
- *Sacramento Metropolitan AQMD*: (i) direct final action to approve revisions concerning VOC, NOX, and PM emissions from residential wood burning devices (78 Fed.Reg. 21540, 21582); (ii) final redesignation of the Sacramento area as attainment for purposes of the 2006 24-hour $PM_{2.5}$ NAAQS (78 Fed.Reg. 42018); (iii) proposed approval of redesignation of the Sacramento area as attainment for purposes of the 24-hour PM_{10} NAAQS, PM_{10} maintenance plan, and associated motor vehicle emissions budgets and attainment year emissions inventory (78 Fed.Reg. 44494); and,
- *San Diego County APCD*: (i) direct final action to approve revisions concerning VOC emissions from surface coating of aerospace vehicles and components and from wood products coating operations (78 Fed.Reg. 21537, 21580); (ii) final approval re-designating San Diego County as in attainment with the 1997 ozone NAAQS and related approval of the maintenance plan, inventories and motor vehicle emissions budgets (78 Fed.Reg. 33230); (iii) direct final action to approve revisions concerning VOC emissions from architectural coatings (78 Fed.Reg. 37130, 37176); and,
- *Santa Barbara County APCD*: (i) direct final action to approve revisions concerning VOC emissions from surface coating of aerospace vehicles and components and from wood products coating operations (78 Fed.Reg. 21537, 21580); (ii) direct final action to approve revisions concerning VOC and NOx emissions from gas-fired fan-type central furnaces, small water heaters, and the transfer and dispensing of gasoline (78 Fed.Reg.

21542, 21581); (iii) direct final action approving the definition of terms (78 Fed.Reg. 21545); (iv) direct final action approving revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 25011); and,

- *South Coast AQMD*: (i) proposed to re-designate the Los Angeles-South Coast Air Basin as attainment for purposes of the 1987 PM_{10} NAAQS (78 Fed.Reg. 20868); (ii) proposed to approve PM_{10} maintenance plan and the associated motor vehicle emissions budgets (78 Fed.Reg. 20868); (ii) direct final action to approve revisions concerning VOC and NOx emissions from gas-fired fan-type central furnaces, small water heaters, and the transfer and dispensing of gasoline (78 Fed.Reg. 21542, 21581); (iv) finalize approval of revisions concerning VOC emissions from municipal solid waste landfills and dairies (78 Fed.Reg. 30768); (v) proposed approval of revisions to address contingency measure requirements for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS (78 Fed.Reg. 37741, 37719); (vi) proposed approval of revisions concerning VOC, NOx, and PM emissions from open burning and wood-burning devices (78 Fed.Reg. 37757); (vii) proposed to re-designate the Los Angeles-South Coast Air Basin as attainment for purposes of the 24-hour PM_{10} NAAQS and approve the related maintenance plan, motor vehicle emissions budgets and attainment year emissions inventory; and,
- *Ventura County APCD*: (i) direct final action approving revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 25011).

Federal Reference Methods (FRMs). In July 2013, EPA established a new FRM for measuring lead in total suspended particulate matter collected from ambient air. The existing FRM for lead also was designated as a new Federal Equivalent Method (FEM). For more information, see 78 Fed.Reg. 40000.

National Ambient Air Quality Standards (NAAQS). In May 2013, EPA announced the availability of the *Draft Plan for Development of the Integrated Science Assessment for Nitrogen Oxides – Health Criteria*, which was prepared as part of the review of the primary (health-based) NAAAQS for NO_2. For more information, see 78 Fed.Reg. 26026.

In May 2013, EPA solicited information capable of assisting with the integrated science assessment for the Sox NAAQS, specifically asking for recent research studies that have been published, accepted for publication, or presented at a public scientific meeting. For more information, see 78 Fed.Reg. 27387.

In June 2013, EPA issued a proposed rule pertaining to implementation of the 2008 ozone NAAQS, and specifically a range of SIP requirements for that NAAQS. Also covered by the proposed rule are the revocation of the 1997 ozone NAAQS and anti-backsliding requirements that would apply upon revocation. For more information, see 78 Fed.Reg. 34178, 34964, 44485.

National Emissions Standards for Hazardous Air Pollutants (NESHAPs). In April 2013, EPA proposed chromium and particulate matter (for metals) standards for wool fiberglass gas-fired glass-melting furnaces at area sources, and added those sources to the category list in the

Urban Air Toxics Strategy. The EPA also proposed to amend the existing major source rules for Mineral Wool and Wool Fiberglass. For more information, see 78 Fed.Reg. 22370.

In April 2013, EPA took direct final action to approve updates to the Code of Federal Regulations delegation tables to reflect the current delegation status of NESHAPs in California. For more information, see 78 Fed.Reg. 25185, 25242.

In April 2013, EPA took direct final action on the revised new source numerical standards in the Mercury and Air Toxics Standards NESHAP, and made certain technical corrections to the NESHAP. EPA did not take any action with respect to the requirements applicable during periods of startup and shutdown. For more information, see 78 Fed.Reg. 24073.

In June 2013, EPA issued a final rule amending the NESHAPs for heat exchange systems at petroleum refineries. For more information, see 78 Fed.Reg. 37133.

In June 2013, EPA re-opened the comment period on the requirements and definitions related to periods of startup and shutdown in the NESHAPs for coal- and oil-fired electric utility steam generating units. For more information, see 78 Fed.Reg. 38001.

New Source Performance Standards (NSPS). In April 2013, EPA announced proposed amendments to the NSPS for the oil and natural gas sector as a result of the agency's reconsideration of certain issues related to implementation of storage vessel provisions. The amendments also would correct inadvertent technical errors. For more information, see 78 Fed.Reg. 22126.

In April 2013, EPA took direct final action to approve updates to the Code of Federal Regulations delegation tables to reflect the current delegation status of NSPS in California. For more information, see 78 Fed.Reg. 25185, 25242.

In April 2013, EPA took direct final action on the definitional and monitoring provisions in the Utility NSPS, and made certain technical corrections to the NSPS. EPA did not take any action with respect to the startup and shutdown provisions related to the PM standard. For more information, see 78 Fed.Reg. 24073.

In May 2013, EPA published a final rule pertaining to the NSPS for hospital/medical/infectious waste incinerators. For more information, see 78 Fed.Reg. 28052.

In June 2013, EPA re-opened the comment period on the requirements and definitions related to periods of startup and shutdown in the NSPS for fossil-fuel-fired electric utility, industrial-commercial-institutional, and small industrial-commercial-institutional steam generating units. For more information, see 78 Fed.Reg. 38001.

Nonroad Engines. In May 2013, EPA granted ARB's request for authorization to implement California's emission standards and accompanying enforcement procedures for in-use nonroad yard trucks and auxiliary engines used in two-engine sweepers, as found in ARB's *Regulation to Reduce Emissions of Diesel Particulate Matter, Oxides of Nitrogen and Other Criteria*

Pollutants from In-Use Heavy-Duty Diesel-Fueled Vehicles. For more information, see 78 Fed.Reg. 31536.

In June 2013, EPA confirmed that amendments promulgated by ARB to its airborne toxic control measure for in-use diesel-fueled transport refrigeration units are within the scope of an existing authorization issued by the EPA. For more information, see 78 Fed.Reg. 38970.

North American Industry Classification System (NAICS) Codes. In July 2013, EPA took direct final action on updates to the list of NAICS codes subject to reporting under the Toxics Release Inventory to reflect the Office of Management and Budget 2012 NAICS revision. For more information, see 78 Fed.Reg. 42875, 42910.

Protection of Stratospheric Ozone. In April 2013, EPA proposed to amend regulations promulgated as part of the National Recycling and Emission Reduction Program under Section 608 of the Clean Air Act. EPA specifically proposed to exempt certain refrigerant substitutes from the prohibition on venting, release and disposal, based on current evidence that such actions do not pose a threat to the environment. For more information, see 78 Fed.Reg. 21871.

In April 2013, EPA published a final rule pursuant to its Significant New Alternatives Policy program, by which it listed C7 Fluoroketone as an acceptable substitute, subject to narrowed use limits, for ozone-depleting substances used as streaming agents in the fire suppression and explosion protection sector. For more information, see 78 Fed.Reg. 24997.

In July 2013, EPA authorized uses that qualify for the 2013 critical use exemption, and specified the amount of methyl bromide that may be produced or imported for those uses. EPA also amended the regulatory framework to remove certain requirements related to the sale of pre-phase out inventory for critical uses. For more information, see 78 Fed.Reg. 43797.

Reporting Requirements. In June 2013, EPA proposed to amend existing emission inventory reporting requirements, including lowering the current threshold for reporting lead sources as point sources. For more information, see 78 Fed.Reg. 37164.

Section 111 List. In May 2013, EPA announced its denial of a petition to add coal mines to the Clean Air Act Section 111 list of stationary source categories. For more information, see 78 Fed.Reg. 26739.

Tier 3 Standards. In April 2013, EPA solicited public comment on the proposed rule for Tier 3 motor vehicle emission and fuel standards. For more information, see 78 Fed.Reg. 20881.

In May 2013, EPA proposed to establish more stringent vehicle emissions standards and reduce the sulfur content of gasoline beginning in 2017, as part of a systems approach to addressing the impacts of motor vehicles and fuels on air quality and public health. These proposed standards are intended to harmonize with California's Low Emission Vehicle program, thereby creating a federal vehicle emissions program that would allow automakers to sell the same vehicles in all 50 states. For more information, see 78 Fed.Reg. 29816.

Urban Buses. In July 2013, EPA granted ARB's request for a waiver of preemption for emission standards and related procedures contained in its urban bus regulations as they affect 2002 and later model years. For more information, see 78 Fed.Reg. 44112.

Volatile Organic Compounds (VOCs). In April 2013, and due to the receipt of adverse comment, EPA withdrew a direct final rule published on February 15, 2013 that excluded *trans* 1-chloro-3,3,3-trifluoroprop-1-ene from the definition of VOCs, on the basis that the compound makes a negligible contribution to tropospheric ozone formation. For more information, see 78 Fed.Reg. 23149.

ATTORNEY'S FEES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

CEQA

Recent Court Rulings

Fifth District Court of Appeal rules that the pre-approval exchange of documents between the lead agency and the applicant waives privileges that might otherwise apply with respect to excluding those documents from the record of proceedings. *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889

Wal-Mart applied to the city for land-use approvals necessary to build a 300,000-square-foot shopping center to be anchored by a 200,000 square-foot "superstore." The city certified an EIR and approved the project. The "citizens" sued. The city prepared a draft index to the record of proceedings. The citizens objected, noting that the draft index did not contain any documents exchanged between Wal-Mart and the city. The city responded that all such communications had been between counsel for the city and for the developer and, as such, were privileged. The city provided a privilege log, but maintained there was no obligation to do so. Following motions and roughly seven months of skirmishing, the trial court upheld the city's assertion of the attorney/client and work-product privileges as to the omitted documents. The citizens filed a writ seeking immediate review of the trial court's ruling. The Court of Appeal issued a stay.

The citizens argued that Public Resources Code section 21167.6, subdivision (e), supersedes all evidentiary privileges. The citizens noted that language identifying the required contents of the record was subject to the introductory clause at the beginning of this section: "notwithstanding any other provision of law." That language, according to the citizens, meant that the categories

of documents listed in the statute had to be included in the record, even if those documents were otherwise privileged under some other law. The Court disagreed, stating the Legislature did not intend to abrogate all privileges for purposes of compiling CEQA administrative records.

The Court then addressed whether the attorney/client and work-product privileges may apply to documents shared between the lead agency and the developer – that is, whether the "common interest" doctrine applies such that sharing documents in this manner does not constitute a waiver of these privileges. Prior to approving the project, the lead agency is presumed to be neutral, and focused solely on CEQA compliance. Under CEQA, the agency must remain open to mitigation measures or alternatives, including the "no project" alternative. Indeed, an agency violates CEQA by committing to a project before the CEQA process is completed. "[T]he lead agency's obligation not to commit to the project in advance, but instead to carry out an environmental review process and create environmental documents that reveal the project's impacts without fear or favor, and only then make up its mind about project approval, means the agency cannot have an interest, prior to project approval, in producing a legally defensible EIR or other environmental document that supports the applicant's proposal. At the same time, of course, the applicant's primary interest in the environmental review process is in having the agency produce a *favorable* EIR that will pass legal muster. These interests are fundamentally at odds. [¶] The relationship between a lead agency and project applicant is unique. Before project approval, the agency must *objectively judge* whether the project as proposed is environmentally acceptable and therefore must make a decision about *whether* it will align itself with the applicant in part, in whole, or not at all. Only after approving the proposal can the agency be said to join forces with the applicant. There may be, and typically are, extensive communications between them, but they cannot yet be said to be 'on the same side.' Before project approval, therefore, the agency does not have even partially common interests with the applicant. The nature of its interest is held in abeyance until it decides whether to approve the project."

That does not mean an agency cannot be favorably disposed towards a project from the outset. Nor does it mean that the agency and the applicant are prohibited from working together on the preparation of CEQA documents. It does mean, however, that the interests of the agency and the developer are fundamentally different, such that "preapproval disclosure of communications by one to the other waives any privileges the communications may have had." Allowing the attorney/client privilege to apply would "encourage[e] strategizing between a private applicant and a government agency to meet a future challenge by members of the public to a decision in favor of the applicant" at a time when "the agency has not, and legitimately could not, have yet made that decision." Similarly, "[t]he purpose of the attorney work-product doctrine is to allow attorneys to advise and prepare without risk of revealing their strategies to the other side or of giving the other side the benefit of their efforts. Before completion of environmental review, the agency cannot have as a legitimate goal the secret preparation, in collaboration with the applicant, of a legal defense of a project to which it must be still uncommitted."

The Court acknowledged its decision was inconsistent with *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217, to the extent that decision is construed as applying to the pre-approval exchange of documents.

The Court concluded the city and Wal-Mart waived the attorney-client and the work-product privileges with respect to communications they shared with each other before the city approved the project. After project approval, by contrast, their interests were aligned in defending the record; for this reason, the common-interest doctrine meant that sharing the documents did not waive an otherwise applicable privilege.

Fourth District Court of Appeal defers to a city council's determination that a project was consistent with a residential designation approved in 1973, notwithstanding intervening planning documents that mistakenly stated the property was designated as open space. *Orange Citizens for Parks and Recreation v. Superior Court* (2013) 217 Cal.App.4th 1005

The dispute involved a 51-acre parcel developed as a nine-hole golf course and tennis club. In 1973, the city council adopted a specific plan for "Orange Park Acres," a 1,700 +/- acre area straddling the city and Orange County. The resolution approving the plan accepted a recommendation to designate the parcel for open space and low-density residential uses (one unit/acre). The text and land-use map, however, were never amended to reflect this designation; instead, they referred to the site as "open space/recreation," and thus contemplated its continued use as a golf course. Subsequent planning documents encompassing the site referred both to the General Plan and to the Specific Plan. The ambiguity in permitted land uses persisted, however. In particular, it was unclear whether zoning designations merely reflected the property's existing, established use, or whether those designations reflected he council's intent that only open space/recreation uses were permitted (notwithstanding the 1973 resolution).
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n 2007, the owner of the golf course applied for a General Plan amendment, development agreement, rezone and subdivision map. The application sought to subdivide the golf course into 39 one-acre lots and related, equestrian uses. In 2009, the city released a draft EIR on the proposal. The EIR described the proposal as inconsistent with the existing land-use designations for the site, and stated the applicant wanted to redesignate the site as "Estate Residential." Based on a letter from the developer's attorney, the City Attorney reviewed the site's history, and concluded the project was consistent with the 1973 designation; the city attorney speculated the 1973 decision had simply been forgotten, but was still valid. The owner still wanted to amend the maps so they would reflect this history. The citizens disagreed with the city attorney's analysis, and opposed the amendment. In June 2011, the city council certified the EIR and approved the project. In taking this action, the council took the position that its General Plan amendment of maps and text was merely designed to reaffirm the land-use designation approved in 1973.

The citizens circulated a resolution challenging the resolution amending the General Plan. The referendum qualified for the ballot. The developer sued, seeking to prevent the referendum from going to a public vote. The citizens counter-sued. The trial court ruled the "open space" designation on city land-use maps was inaccurate, because it did not reflect the 1973 decision. Thus, the 2011 General Plan amendment did not seek to change this designation. The trial court ordered the city to take the referendum off the ballot. The citizens sought, and were granted, writ review. In November 2012, the referendum appeared on the ballot. The voters defeated the measure, and thus nullified the General Plan amendment.

On appeal, the Court saw three potential outcomes. First, the citizens argued the General Plan designated the property as "open space." Under this view, the project needed a General Plan amendment. Because the voters overturned the city council's resolution amending the plan, the project could not go forward. Second, the city and developer, by contrast, argued the General Plan amendment was unnecessary because, as of 1973, the General Plan already allowed estate residential uses. For this reason, the outcome of the vote was irrelevant. Although "clerical errors" intervened, the city council never voted affirmatively to change this decision. Third, the Court could conclude that the General Plan was so muddled that its internal inconsistencies could not be reconciled absent an amendment (which the voters defeated).

The Court found that there was ample basis for reasonable persons to dispute the General Plan, its contents, and the consistency of the project with those contents. The land-use policy had been established in 1973, and then (apparently) forgotten, until it was rediscovered in 2009. The city council's approval of the project in 2011 reflected that forgotten history. Although the city council adopted updated General Plans in 1983 and 2010, and those updated General Plans showed the site as "open space," the city council acted within its discretion in concluding that these intervening General Plans were not intended to supersede the 1973 specific plan.

The citizens argued this outcome meant a city could have two general plans: one made generally available to the public, and another "secret" plan to "trot out" to defeat a referendum challenging a project proposed by a favored developer. The Court disagreed, noting that the confusion dated back to 1973, and the record contained no evidence of the city's bad faith.

The citizens argued that, in any event, the General Plan was internally inconsistent, since (in light of the outcome of the election) the plan designated the property for two different uses that had no longer been tidied up by the council resolution. Indeed, in adopting the resolution, the council had conceded that some tidying up was needed, but had been blocked by the referendum. But that did not mean the General Plan was internally inconsistent. "That the erroneous information remains in the Policy Map because of the referendum does not alter the reasonableness of the [c]ity [c]ouncil's conclusion that the open space designation is an error and not a substantive inconsistency . . . ."

The Court of Appeal reversed the trial court's judgment, insofar as it sought to prevent the referendum vote from going forward. In any event, that portion of the trial court's judgment had been stayed, so the vote had gone forward in any event.

First District rules that an EIR was deficient for failing to consider the use of agricultural conservation easements and in-lieu fees to mitigate the conversion of farmland caused by a mining project. *Masonite Corporation v. County of Mendocino* (2013) 218 Cal.App.4th 230

In 2008, Granite Construction Company applied to Mendocino County for a conditional use permit to develop a sand and gravel quarry on 65.3 acres – 45 of them classified as "prime farmland" – approximately one mile north of Ukiah. Most of the site was cultivated as a vineyard. Granite proposed reclaiming the area as open space after the mining operations had ceased. Reclaiming the land for agriculture was infeasible. The EIR identified the permanent loss of prime farmland as a significant and unavoidable impact. The county certified the EIR,

approved the project, and adopted a statement of overriding considerations. Masonite, an adjoining property owner, sued. The trial court denied the petition. Masonite appealed.

The EIR concluded, and the county found, that no mitigation was possible to offset the loss of 45 acres of prime farmland. Masonite submitted comments stating the impact could have been mitigated by the acquisition of conservation easements on offsite properties, or by paying an "in-lieu" fee to fund such acquisitions. The State Department of Conservation submitted comments stating that an agricultural easement would offset the loss of farmland. The department also noted that, because the loss of farmland is felt beyond just the surrounding area, comparable replacement land did not need to be adjacent to the site. The county responded that an easement was not legally feasible in this case because an easement addresses only the indirect and cumulative effects of farmland conversion, and does not replace on-site resources. According to the county, indirect and cumulative impacts of farmland conversion occur when a project affects neighboring agricultural uses by increasing the speculative land value and farming costs due to land use incompatibilities and nuisance problems. The county felt that this risk was absent here because the nearest active agricultural operation was across the Russian River (a natural barrier). The Court ruled that, because the county had found the mitigation to be legally infeasible, the finding was subject to de novo review. According to the Court, an agency's conclusion that mitigation is infeasible is entitled to deference under the substantial evidence standard if infeasibility is based on economic, environmental, social, and technological factors. In this case, "[b]ecause the County decided that [easements] were not a legally feasible means to mitigate the loss of farmland at the [p]roject site, it never investigated whether [easements] were economically feasible, and there is no evidence to review."

The Court noted that, if agricultural lands were preserved through conservation easements at a 1:1 ratio, then at least half the agricultural land in the region would be preserved. Furthermore, the preservation of substitute resources would comport with the CEQA Guidelines' definition of "mitigation" in section 15370, subdivision (e). Case law on the use of conservation easements as mitigation for biological resources, the common usage of agricultural easements as mitigation by local governments, and the Legislature's policy to preserve agricultural land also influenced the court's decision. The Court concluded that agricultural easements are legally feasible mitigation measures. For this reason, the county had to explore the economic feasibility of such easements in a supplemental EIR.

The Court also required the county to consider the economic feasibility of in-lieu fees as an alternative to a conservation easement. The county had rejected the idea in the EIR as legally infeasible because the county's lack of a comprehensive farmland mitigation program legally precluded it from accepting in-lieu fees. The Court was unconvinced, noting that third parties were available that could accept the in-lieu fees for conservation programs, and then use those fees to buy easements.

Sixth District finds CEQA action barred by 30-day statute of limitations established by Government Code section 65457; CEQA's 35-day statute for exempt projects did not apply. *May v. City of Milpitas* (2013) 217 Cal.App.4th 1307

In 2008, the city certified a program EIR for its "Transit Area Specific Plan." In 2011, a 732-unit condominium project was proposed within the area covered by the specific plan. On

November 1, 2011, the city adopted a resolution approving the condominium project. The city's resolution stated the project was exempt from CEQA review because the project was consistent with the 2008 specific plan. On November 3, 2011, the city filed a Notice of Exemption for the project. On December 7, 2011, petitioners sued. The city and developer demurred on the ground that the action was time-barred by the 30-day statute of limitations under Government Code section 65457, subdivision (b), and CEQA Guidelines section 15182. The trial court sustained the demurrer. The petitioners appealed.

The Court concluded the 30-day statute of limitations in Government Code section 65457 applied. Enacted in 1984, Government Code section 65457 provides an exemption from CEQA for residential development projects that are consistent with a specific plan for which an EIR was certified after January 1, 1980. The exemption is qualified; it provides that a supplemental EIR for the specific plan must be prepared if any event listed in Public Resources Code section 21166 triggers the need for supplemental review. Under subdivision (b) of Government Code section 65457, where a public agency approves a project using the exemption in section 65457, a legal challenge alleging that a supplemental EIR for the relevant specific plan was required must be filed within 30 days of the agency's decision to "carry out or approve the project." This limitations period is mirrored in CEQA Guidelines section 15182, subdivision (e).

The Court found that the city's resolution factually invoked Government Code section 65457's exemption and that the petition essentially alleged that a supplemental EIR for the 2008 specific plan is required because substantial changes to the circumstances had occurred and new information had come to light. Although neither the resolution nor the notice of exemption expressly referenced section 65457, the Court concluded that the resolution invoked section 65457's exemption because it stated that the project was "consistent with the certified EIR for the Transit Area Specific Plan." The Court also found that the resolution's reference to CEQA Guidelines section 15168, subdivision (c)(2), implied that the city had concluded no events listed in Public Resources Code section 21166 had occurred. Similarly, the Court found that the resolution's reference to CEQA Guidelines section 15061, subdivision (b)(3), reflected the City's conclusion that the residential development project would not cause any new environmental effects. The Court found that the 30-day statute of limitations under subdivision (b) of section 65457 had started running upon the city's decision to approve the project on November 1, 2011. Consequently, the trial court properly sustained the demurrer because the action filed was filed more than 30 days later.

The petitioners argued their petition sought a "free-standing EIR" or a mitigated negative declaration, not a supplement to the 2008 EIR. The Court disagreed, noting that one purpose of section 65457 is to excuse residential development projects from having to do a "free-standing EIR" or negative declaration if they are consistent with an approved specific plan.

The Court also concluded that the 35-day statute of limitations established by Public Resources Code section 21167, subdivision (d), did not apply. The exemption provided under the Government Code was not among those listed or adopted under Public Resources Code section 21084, and thus was not among those addressed section 21167. The same was true with respect to the exemption established by CEQA Guidelines section 15061, and corresponding 35-day statute of limitations established by 15112, subdivision (c)(2). To the extent any conflict existed

between the statute of limitations in Government Code section 65457 and the statutes of limitations in CEQA, the later-enacted and more specific statute of limitations controlled. Because Government Code section 65457 and Public Resources Code section 21167 both apply to CEQA challenges, they are equally specific to CEQA claims. Therefore, because Government Code section 65457 was enacted after Public Resources Code section 21167, the statute of limitations in section 65457 prevailed.

First District Court of Appeal rejects claim that a city violated CEQA by committing to a community center/affordable housing project prior to certifying an EIR. *Neighbors for Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540

San Francisco certified an EIR and approved a community center and affordable housing project. Neighbors opposed the project because they believed it was too large for the site. In the subsequent litigation, the neighbors argued the City's CEQA process was a sham exercise because the city had already committed to the project. The trial court rejected this argument. The neighbors appealed.

The Court's analysis focused on applying the test for "approval" of a project adopted by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Under that test, the Court must determine whether, as a matter of law, the agency has taken actions such that, "as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project." (45 Cal.4th at p. 139.)

The neighbors argued that, under the *Save Tara* test, the city "pre-approved" the project before completing the CEQA process. In particular:

(1) The city loaned the project $788K. The loan provided money for legal expenses, administrative overhead, design work, and environmental review. The Court concluded, however, that providing money for such pre-development work did not constitute "approval." The money was for pre-development activities, not to construct the project itself. The loan stated the city was not committed to the project. The city's ability to recoup the loan did not depend on approving the project; rather, the loan was secured by the property, and financial information showed the center had the wherewithal to pay the money back even if the project did not go forward.
(2) As a condition of accepting the loan, the center agreed to be subject to a deed of trust requiring the site to be used for affordable housing. This commitment was not enough, by itself, to constitute "approval."
(3) The project relied on a density bonus under Government Code section 65915. To qualify for this bonus, the city had to approve a special use district increasing the maximum height of buildings on the site from 40 feet to 55 feet. A member of the Board of Supervisors introduced an ordinance to make this change. The Board ultimately approved the ordinance. The neighbors argued the Supervisor's introduction of the ordinance for Board consideration was legislative action that itself

constituted "approval." The Court rejected this argument, noting that only a majority of the Board could approve an ordinance.

(4) The record included notes from meetings, during which city staff stated the Supervisor supported the project. Internal e-mails suggested the Mayor's office was involved in moving the proposal forward. Other documents consisted of flyers and e-mails seeking to rally support; these flyers and e-mails, however, were sent by the center, not by the city. Under the *Save Tara* test, these isolated indications of support did not amount to approval.

First District Court of Appeal reverses trial court, and upholds EIR for proposed desalination plant. *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614

In 2003, the Marin Municipal Water District (district) proposed building a desalination plant adjacent to San Pablo Bay. The district carried out a pilot program, circulated draft and final EIRs, and, in 2009, certified the EIR and approved the project. The alliance sued. The trial court granted the petition. The district appealed.

The trial court had ruled the EIR was inadequate in ten respects. The Court of Appeal reversed the trial court on all ten issues. Specifically:

- The project included constructing three large water storage tanks on prominent ridge tops. The EIR concluded that one of these tanks would not have a significant visual impact due to the topography of the site. The Court ruled the EIR, which included visual simulations and other information about the site, supported this conclusion.
- This tank was located in an area designated as open space in the County General Plan. The EIR acknowledged the inconsistency of this use in an open-space area. To mitigate this impact, the district adopted a measure requiring the acquisition of an equal amount of open space elsewhere in the area. The Court upheld this measure.
- The EIR concluded the other two tanks, on a different ridge, would result in significant visual impacts that were unavoidable. The district committed to develop and implement a landscaping plan that "would identify success metrics such as survival and growth rates for the plantings." The Court found the measure provided sufficient information regarding the required contents of the landscaping plan.
- The EIR included an analysis of seismic risks to the plant. The analysis summarized seismic hazards in the area, and concluded compliance with building codes would address these hazards. That sufficed.
- The trial court had ruled the EIR did not contain an adequate discussion of the frequency of shock-chlorination treatments that would be used to clean the plant's reverse-osmosis membranes, and the risks associated with these treatments. The EIR described the shock-chlorination process, its frequency, and measures that would be taken to avoid accidental releases. That was enough.
- The EIR included an analysis of the risk that marine organisms would become entrained at the plant's pumps. As part of this analysis, the district performed sampling of marine life in San Pablo Bay. The California Department of Fish and Game and NOAA Fisheries had criticized this sampling as too sparse to estimate the

plant's impacts. The EIR had responded that the sampling was sufficient to support the district's conclusion that entrainment impacts would not be significant. The Court held that this difference of opinion did not mean the EIR was inadequate. The Court also noted that this sampling was not the only data relied upon by the district to characterize the project's impacts on marine life.

- The project's intake would be located on a reconstructed existing pier. That required driving up to 75 concrete piles into the bay. To address noise impacts to aquatic species, the adopted a mitigation measure that required the district to consult with NOAA Fisheries and to install "bubble curtains" or similar devices if evidence emerged that the pile driving was harming fish. The Court upheld this measure.
- The trial court had ruled that the EIR's discussion of energy impacts was inadequate because it did not discuss a particular alternative—the use of green energy credits to mitigate energy impacts. The Court of Appeal held, however, that because the EIR had found that the energy impacts would be insignificant, there was no requirement to discuss mitigation measures.
- The EIR's greenhouse gas emissions analysis concluded that the project would not interfere with Marin County's goal to reduce GHG emissions by 15 percent. In addition, the district committed to energy only from renewable sources. The Court held that no mitigation was required for GHG emissions because the EIR did not find this impact would be significant. Even so, the record contained substantial evidence showing the feasibility of adhering to this commitment.
- Finally, the Final EIR included an analysis of a new alternative, which combined conservation with increased imports importing additional water via pipeline from the Russian River in order to address the district's projected shortfall in supply. The Court ruled the inclusion of this alternative did not trigger the need to recirculate the Draft EIR. The Draft EIR had already analyzed in detail an alternative focusing on increased conservation. The record also contained substantial evidence supporting the district's conclusion that increased importation from the Russian River was infeasible.

  The trial court had upheld the adequacy of the EIR on 19 other issues. The alliance did not file a cross appeal, however, so the Court of Appeal did not reach these other issues. The Court of Appeal remanded the matter to the trial court with directions to deny the petition.

Fifth District Court of Appeal rules that a county planning commission violated the Brown Act by failing to list, as a distinct item on its agenda, consideration of adopting a negative declaration for a proposed subdivision. *San Joaquin Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167

The county planning commission posted an agenda including as an item the proposed approval of a subdivision to divide 380 acres into nine parcels ranging in size from 40 to 54 acres. The agenda did not state the commission would also be considering whether to adopt a mitigated negative declaration in connection with that proposal. At the hearing, the commission both adopted the negative declaration and approved the subdivision. The center submitted a letter objecting to the failure to include the negative declaration on the commission's agenda, and asking the commission to "cure and correct" this error by rescinding and reconsidering its

decision. The commission refused. The center appealed the commission's decision to the board of supervisors. While the appeal to the board was pending, the center sued, alleging violations of the Brown Act and CEQA. The county demurred on the ground that the agenda complied with the Brown Act, and the center had not exhausted its remedies on its CEQA claim.

While the demurrer was pending, the board granted the administrative appeal and directed the commission to reconsider the project based on a revised agenda that specifically referenced action on the negative declaration. The commission did so, re-adopted the negative declaration and reapproved the project. The county's reply memorandum in support of its demurrer pointed out these facts, and asked the trial court to dismiss because the alleged Brown Act violation had been cured. The trial court overruled the demurrer. Roughly five months later, "in an ironic reversal of positions," the center moved for a judicial determination that the county had "cured and corrected" the alleged Brown Act violation, and the county – which had previously taken that very position – opposed the motion. The reversal of the parties' position arose out of the potential for an award of attorneys' fees under a "catalyst" theory under Code of Civil Procedure section 1021.5. The trial court denied the motion.

Following a trial on the writ petition, the trial court ruled: (1) the commission violated the agenda requirements of the Brown Act, (2) following the board's direction, the commission cured and corrected the Brown Act violation, and (3) the center's CEQA claim was also corrected by the commission's later action, and was therefore moot. The trial court's judgment stated the center "prevailed" for purposes of costs and fees. The county appealed.

The Brown Act provides that, at least 72 hours before a regular meeting, a local agency's decision-making body must "post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting. . . ." (Gov. Code, § 54954.2, subd. (a)(1).) The body cannot consider any item not listed on the agenda.

The Court of Appeal held the commission violated this requirement. The adoption of the mitigated negative declaration was a distinct "item of business," and was not subsumed by consideration of the subdivision map itself. As an "individual item of business," the adoption of the proposed mitigated negative declaration "had to be expressly disclosed on the agenda; it was not sufficient for the agenda to merely reference the project in general." Here, the agenda made no mention of the mitigated negative declaration, or otherwise referred to CEQA. Based on this determination, the trial court's judgment correctly concluded that the center prevailed and was entitled to bring a motion for attorneys' fees.

Sixth District Court of Appeal upholds a county's decision to cancel Williamson Act contracts and to approve a use permit for a large solar facility. *Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503

A solar company proposed to construct a 4,885-acre solar farm in Panoche Valley in rural San Benito County. The valley is grazing land west of Interstate 5. The company applied for a use permit. Because some parcels were subject to Williamson Act contracts, the company also applied to the county to cancel the contracts. The county prepared an EIR. The EIR's analysis included a smaller alternative, encompassing roughly 3,202 acres; the alternative avoided land

containing the highest concentrations of protected species. The county certified the EIR and approved the project. A coalition of environmental groups sued. The trial court denied the petition. The coalition appealed.

The coalition argued the county violated the Williamson Act when it approved cancellation of the agricultural preserve contracts. Under the act, an agency can approve cancellation only if the agency adopts certain findings, and substantial evidence supports those findings. The findings adopted by the county in this case included determinations that (1) other public concerns substantially outweigh the objectives of the Williamson Act, and (2) there is no proximate, non-contracted land that is both available and suitable for the proposed use.

For the first finding, the Court concluded that substantial evidence supported the county's finding that the public interest in renewable energy substantially outweighed the purpose of the Williamson Act. This evidence included Legislative findings and statutes committing the state to move towards renewable forms of energy. The solar farm incrementally advanced those goals. The company committed to removing the panels after the termination of the project, which would enable agricultural activities to resume.

For the second finding, the coalition argued that non-contracted land suitable for a solar farm was available nearby. This land, however, was located roughly 60 miles away, in Fresno and Kings Counties. The solar company had approached the owner to reach agreement to use this land, but no agreement had been reached. Some of the land was under Williamson Act contract. Taken together, these facts supported the Board of Supervisors' finding that no non-contracted, proximate land was available for use as a solar farm.

The coalition argued the county violated CEQA in adopting findings that the site in Fresno/Kings Counties was infeasible. The county had rejected this alternative site on the ground that it was located in different counties, and for this reason there was no way to know whether the counties would approve a solar farm there. Other evidence indicated that permitting the alternative site would take much longer to accomplish, that the site might not be available, and that San Benito County would not reap the jobs or other benefits that the project would provide if located in Panoche Valley. The Court concluded substantial evidence supported the county's finding. Under CEQA, that the alternative site is located outside the agency's boundaries is not determinative; nevertheless, "whether or not an alternative site is located within the boundaries of a [c]ounty is certainly a factor that may be considered when determining a project's feasibility. The fact that there was not only evidence that the [alternative site] was not within the boundaries of the [c]ounty's jurisdiction, but that there was a private party that possessed most of the lands, is ample evidence supporting the infeasibility of the [alternative site]."

The coalition challenged the EIR's analysis of biological impacts. The Court rejected this challenge. Although the California Department of Fish and Wildlife (CDFW) expressed concern about the potential for "take" of a listed lizard species, the county incorporated CDFW's recommendations into its adopted mitigation measures. These measures did not constitute impermissible deferral; rather, the measures called for pre-construction surveys for sensitive species, and described the actions that had to be taken (e.g., relocation, buffer zones) if sensitive species were found. Other measures required the solar company to enhance habitat, and to

record conservation easements, on nearby ranchland to compensate for the loss of habitat for federal listed species. CDFW had misgivings, but the record contained substantial evidence that the mitigation lands had high value for the target species, and that the adopted mitigation ratios would be sufficient to avoid impacts to these species.

The EIR concluded the project would result in the conversion of agricultural land. The county adopted a mitigation measure requiring the solar company to establish agricultural conservation easements on specified amounts of rangeland or high-value agricultural land. Another measure required the company to disassemble the solar farm and to restore the site at the end of the project's useful life. Another measure required the company to offset the loss of cattle grazing land by introducing sheep grazing. The coalition argued this measure was insufficient because it would not create additional agricultural land to compensate for what would be lost. The Court rejected this argument, stating that the county's obligation was not to "net out" the impact to agricultural land, but simply to reduce the impact to insignificant levels. The adopted measures did that.

Finally, the Court held that substantial evidence supported the county's findings concerning the effectiveness of mitigation measures, the infeasibility of alternatives, and extent to which the project would help California meet its renewable energy goals.

Fourth District upholds county's adoption of ordinance banning plastic shopping bags based on categorical exemption. *Save the Plastic Bags Coalition v. County of Marin* (2013) 218 Cal.App.4th 209

In 2011, Marin County adopted an ordinance banning certain retail businesses from dispensing plastic bags. The ordinance also required retailers to charge five cents per paper bag. The ordinance applied in unincorporated areas of the county and affected approximately 40 retailers. Among other things, the county relied on a master environmental assessment prepared by Green Cities California, which reported that up to two-thirds of the District of Columbia's consumers shifted to reusable bags after the district imposed a plastic bag ban combined with a five-cent charge for paper bags. In adopting the ordinance, Marin County determined the ordinance was exempt from CEQA review under the categorical exemptions set forth in CEQA Guidelines sections 15307 (class 7) and 15308 (class 8). Generally, classes 7 and 8 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource. Save the Plastic Bag Coalition sued, arguing the county should have prepared an EIR. The trial court denied the petition. The coalition appealed.

The Court of Appeal affirmed. In its view, the coalition's challenge in this case was weaker than its unsuccessful challenge in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155. The Court puzzled over the coalition's unsupported contention that the county could not apply a categorical exemption to the ordinance as a legislative action. The Court also held that the ordinance withstood even the less deferential standard of review regarding whether the use of a categorical exemption was precluded by unusual circumstances.

The coalition argued the *Manhattan Beach* decision stands for the proposition that CEQA requires an EIR for any plastic bag ban in (1) a city or county larger than Manhattan Beach, and (2) smaller cities and counties based on cumulative impacts. The Court rejected the coalition's argument based on its view that the Supreme Court "simply recognized there may be circumstances when more comprehensive environmental review will be required if . . . a plastic bag ban will result in a significant increase in paper bag use."

The Court noted that Marin County's ban would likely result in an even smaller increase in paper bag use than Manhattan Beach's ban. First, the county's ordinance only applied to about 40 stores, far fewer than over 200 affected stores in Manhattan Beach. Second, the county ordinance included a charge for paper bags, whereas the Manhattan Beach ban did not, thus increasing the incentive for consumers to switch to reusable bags. If anything, these differences reinforced the conclusion that the environmental impacts of the county's ordinance would be insignificant.

The coalition argued the Class 7 and Class 8 exemptions are available only to regulatory agencies implementing regulations as authorized by preexisting state law or ordinance. The Court disagreed. The Court found that the county properly exercised its police powers under the California Constitution. Because the coalition failed to directly address whether substantial evidence supported the exemptions, the coalition waived that issue.

Fourth District Court of Appeal strikes down negative declaration for high school stadium lighting project, and rules that the school district must prepare an EIR to address parking impacts caused by nighttime football games. *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013

In 2008, the voters approved a $2.1 bond issue to build and rehabilitate schools in the San Diego area. In 2010, the district proposed to renovate the football field at an existing high school. The renovations included installing stadium lighting and a public address system. The district circulated an initial study and proposed mitigated negative declaration. In January 2011, the district adopted the negative declaration and approved the project. In May 2011, the district adopted a resolution exempting the project, and others, from the City of San Diego's zoning code under Government Code section 53094. The taxpayers sued. The trial court denied the petition. The taxpayers appealed.

The taxpayers argued the 2008 ballot measure did not list, and therefore did not authorize the use of bond proceeds for, new stadium lighting. Based on the language of the ballot measure, the Court agreed the ballot measure did not list stadium lighting in the projects to be funded. For this reason, bond proceeds could not be used for that purpose. The Court also held the taxpayers had standing to bring this claim.

The taxpayers argued the district violated CEQA by adopting a mitigated negative declaration. First, the taxpayers argued the initial study was too vague about the number of evening events that would occur. The initial study estimated that the installation of night lighting would result in up to 15 evening events per year. The initial study also stated "a few more events" – playoff games, practices and the like – were "possible." The Court held this description was not impermissibly vague. Nothing in CEQA required the district to place an express cap on

nighttime events. If the district carried out substantially more events, it would have to perform supplemental review.

The taxpayers argued the record contained a "fair argument" the installation of field lighting would have a significant impact on the aesthetics of the neighborhood. The initial study included a technical report evaluating the glare that the lighting system would cause. That report estimated the luminescence caused by the lighting taking into account landscaping installed as part of the project, analyzed the extent to which the lighting would spill into adjacent neighborhoods, and applied a significance threshold in footcandles for measuring such glare. The technical report concluded the impact on neighborhoods would be insignificant due to the design of the system, the small number of events, and limits on the duration of events. The Court ruled the record did not contain a "fair argument," citing the report's conclusions regarding the de minimus nature of glare at nearby houses. In particular, the record did not contain substantial evidence that persons living nearby would be significantly deprived of sleep. The record contained general complaints from community members, but that was not enough to create a fair argument.

The taxpayers claimed the initial study did not provide an adequate description of the historic character of the surrounding neighborhood, or the extent to which the lighting system would negatively affect that character. The taxpayers cited draft maps and plans describing a proposed historic district adjacent to the high school. Nothing in the record indicated, however, that the city had every designated the area as an historic district. Even if there were such a district, the record did not contain substantial evidence showing that installing the field lights would have a substantial adverse impact on its historic character.

The taxpayers argued the record contained a "fair argument" that the project would have an adverse impact on traffic and parking. The initial study included a traffic study; the study concluded the project's impacts on traffic and parking would be less than significant. The district received extensive comments from neighbors criticizing the study and expressing concern about the neighborhood's inability to handle overflow parking in the evening. The Court ruled the district's approach to parking and traffic was inadequate. Specifically:

- The traffic study did not include any baseline information on attendance at the high school's existing, daytime games. That information was essential to support the district's estimate of attendance at evening games.
- Instead, the traffic study derived attendance estimates from five other high schools in the district. The methodology was defective, however, because it did not explain how those five schools were chosen, and why three other high schools in the area were excluded. The study also failed to correlate these estimates with actual game attendance data at the high school itself. The district also erred by estimating only average attendance, and by ignoring peak attendance.
- The study concluded that, although the project included increased parking at the school, there was still a shortfall of 174 parking spaces. The study concluded off-site, on-street parking would make up this shortfall. The study included no information on the reservoir of available off-street parking spaces in the neighborhood. Absent this

information, the district erred by concluding that no significant parking impact would result.

- The district argued that the unavailability of parking is a social, not environmental, impact, citing *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656. The Court rejected this view, stating: "cars and other vehicles are physical objects that occupy space when driven and when parked. Therefore, whenever vehicles are driven or parked, they naturally must have some impact on the physical environment. The fact that a vehicle's impact may only be temporary (e.g., only so long as the vehicle remains parked) does not preclude it from having a physical impact on the environment around it. Therefore, as a general rule, we believe CEQA considers a project's impact on parking of vehicles to be a physical impact that could constitute a significant effect on the environment." In addition, the unavailability of adequate parking could lead to secondary effects, such as traffic congestion or air pollution.
- Observations from neighborhood residents constituted a "fair argument" that the project could have a significant impact on parking. Those comments included statements from residents that school parking was inadequate, that nighttime football games would exacerbate spillover into the neighborhood, and that residents would have to hunt for on-street parking as a result.
- The record contained a fair argument of significant traffic congestion. That evidence consisted of residents' letters pointing to significant traffic problems during past events at the stadium, particularly along narrow residential streets surrounding the stadium. The evidence indicated that attendance at night-time games would increase, suggesting that existing traffic problems would grow worse.
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The Court ruled that, before moving forward with the project, the district had to prepare an EIR to examine parking and traffic issues.

The taxpayers argued the trial court erred by dismissing its claims under Government Code section 53094. That section provides that a school district may exempt itself from the local jurisdiction's zoning ordinance. The district adopted such a resolution for 12 proposed high school projects (including the project to install lights at the stadium). The Court held the taxpayers failed to show the district provided inadequate notice of its intent to adopt this resolution. The district board's resolution was not overbroad in encompassing stadium lighting.

The taxpayers argued the district board's resolution under section 53094 was itself a "project" under CEQA. The Court disagreed, holding that the resolution was not a "project" because it did not commit the district to a definite course of action, or constitute "approval" of any of the 12 proposed high school projects listed in the resolution; rather, the sole impact of the resolution was to exempt the district form the city's zoning ordinance. Instead, the district could carry out its CEQA responsibilities in the context of each of the 12 listed projects (as it had done – albeit erroneously – for the stadium lighting project).

Finally, the taxpayers argued the trial court erred in dismissing their claim seeking injunctive relieve to force the district to reconsider its approval of the stadium lighting project in light of the city's zoning ordinance. When the district adopted the exemption resolution, however, its effect

was to enable the project to proceed, notwithstanding its inconsistency with the zoning ordinance. The Court of Appeal upheld the trial court's decision to dismiss that claim.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

CLIMATE CHANGE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

GHG and Fuel Efficiency. In June 2013, the U.S. Environmental Protection Agency (EPA) and the National Highway Traffic Safety Administration (NHTSA) took direct final action to correct provisions in their respective Medium- and Heavy-Duty Greenhouse Gas Emissions and Fuel Efficiency final rules, as previously issued on September 15, 2011. For more information, see 78 Fed.Reg. 36370, 36135.

GHG Reporting Rule. In April 2013, EPA withdrew a direct final rule, previously published in February 2013, regarding the deadline by which owners or operators of facilities subject to the petroleum and natural gas systems source category of the reporting rule are required to submit requests for use of best available monitoring methods. For more information, see 78 Fed.Reg. 19605. However, in May 2013, EPA then issued a final rule revising the same deadline, without changing any other requirements. For more information, see 78 Fed.Reg. 25392.

In April 2013, EPA also proposed to amend a table in the reporting rule's General Provisions in order to reflect revised global warming potentials for certain greenhouse gases, and add global warming potentials for certain fluorinated greenhouse gases not currently listed in the table. EPA further proposed confidentiality determinations for the reporting of new or substantially revised data elements contained in these proposed amendments. For more information, see 78 Fed.Reg. 19802.

In April 2013, EPA announced the availability of and solicited comments on the global warming potentials for certain fluorinated greenhouse gases and fluorinated heat transfer fluids. For more information, see 78 Fed.Reg. 20632.

COASTAL RESOURCES

Recent Court Rulings

The Fourth District, Division One has ruled that a City's properly enacted nuisance abatement ordinance is not within the California Coastal Commission's appellate jurisdiction; however, the City was first required to show that the nuisance abatement ordinance was legitimately adopted and not a pretext for avoiding coastal program obligations. *City of Dana Point v. California Coastal Commission* (2013) 217 Cal.App.4th 170.

The dispute in this case centered around a large parcel of coastal land in the City of Dana Point, situated between a new public park and a public beach access, which was to be developed with 125 luxury oceanfront home sites. Trails linking the two public areas ran through the residential development parcel. In 2004, the California Coastal Commission (Commission) approved the development and the City's proposed amendment to its local coastal program, but disallowed any gates or other impediments to public beach access, and required any limitations on hours of use to be subject to a coastal development permit. In 2010, the City adopted an ordinance establishing limited hours of operation and installing pedestrian gates on the premise that public nuisance conditions existed in the area of the beach access trails. Three days later, the Commission issued a notice of appeal period for the ordinance, and, following a hearing, concluded that the City's ordinance was not exempt from the Coastal Act, and therefore required a coastal development permit.

The City filed an action in Orange County Superior Court contending that the Commission lacked jurisdiction over the City's power to declare, prohibit, or abate nuisances. Surfrider Foundation, a nonprofit organization, then filed a separate action contending that the Commission had jurisdiction, and moreover, that the City lacked a rational basis for adopting the ordinance. The trial court consolidated the two actions and transferred the matter to San Diego County Superior Court. The trial court agreed with the City that the Commission lacked jurisdiction to limit the City's nuisance abatement power or to proceed with an appeal of the ordinance, but also found in favor of Surfrider, holding that the City had acted arbitrarily and capriciously and failed to support their nuisance declaration or the ordinance's manner of abatement with record evidence. All parties appealed, and the issues presented were: (1) whether the Commission had appellate jurisdiction over the enactment of the nuisance abatement ordinance; and (2) whether the trial court could issue mandamus relief without first determining whether the nuisance abatement ordinance was legitimately adopted and/or a pretext for avoiding the City's coastal program obligations.

The Court of Appeal concluded that the Commission's determination that a coastal development permit was required was invalid, stating that nothing in the Commission's administrative regulations granted it appellate jurisdiction to consider whether a local government's nuisance abatement ordinance requires a permit. However, the court also found that the trial court erred by not first determining whether the City was acting properly within the scope of its nuisance abatement powers when enacting the ordinance. The case was remanded to the trial court for a determination of whether the City exercised its nuisance abatement powers in good faith, and did not do so as a pretext for avoiding its obligations under its own local coastal program. Based on the remand order, the appeals in the related Surfrider case were held in abeyance pending a final resolution of the City's case against the Commission. The decision also included a dissent from

Justice Benke, stating that the City's ordinance was presumptively valid, and that the City was not required to establish its validity because it had not been challenged by the Commission. Justice Benke concluded that the trial court's judgment in the City's case should have been affirmed, and the merits of the Surfrider case should have been addressed directly.

The Fourth District Court of Appeal has affirmed a trial court ruling upholding California Fish and Game Commission regulations creating the Marine Protected Areas and Marine Managed Areas in the North Central Coast study region. *Coastside Fishing Club. v. California Fish and Game Commission* (April 15, 2013) 215 Cal.App.4th 397.

In the case, Coastside Fishing Club ("Coastside") sought a writ of mandate directing the Fish and Game Commission ("Commission") to vacate its regulations creating the Marine Protected Areas ("MPAs") and Marine Managed Areas ("MMAs") in state waters of an area of the Pacific Ocean known as the North Central Coast study region. Coastside contended the Commission acted beyond its statutory authority in adopting the regulations. The trial court denied the petition both on the grounds Coastside failed to exhaust its administrative remedies, and on the merits. On appeal, the Fourth District concluded the trial court erred in applying the doctrine of exhaustion of administrative remedies, but correctly ruled that the Commission acted within its statutory authority in adopting the regulations.

As to exhaustion, the Commission argued that the action is barred because the Administrative Procedure Act ("APA"), Government Code § 11346.9, required it to hear, evaluate and respond to any challenges brought during the administrative hearings on the proposed regulations, and Coastside actively participated in the rulemaking process without raising any objection to the Commission's procedure or authority to adopt MPAs. In rejecting the argument, the Court explained that it had found "no authority for the proposition that the public comment and response-to-comment requirements of the APA constitute an administrative remedy that must be exhausted before challenging the validity of an administrative regulation in a judicial action or proceeding." (In this respect, the Court distinguished the APA from the California Environmental Quality Act, Pub. Resources Code § 21177.) Nevertheless, the Court went on to rule that even if the APA's public comment procedure did constitute an adequate administrative remedy for a claim that an administrative regulation was adopted without statutory authority, it concluded that the "alternative judicial remedy" exception to the exhaustion requirement allowed Coastside to pursue its judicial challenge to the regulations notwithstanding its failure to pursue that administrative remedy.

As to the merits, the Court explained there were two discrete issues: (1) whether the Commission had statutory authority to designate MPAs (i.e., adopt the regulations) before the conclusion of the Marine Life Protection Act's ("MLPA") master plan process; and (2) whether the Commission lacked statutory authority to adopt the regulations without prior review by the Coordinating Committee, a body established to review proposals for new or amended MMAs. As to the first issue, the Court rejected Coastside's arguments, concluding that the trial court correctly ruled that Fish and Game Code section 2861, subdivision (c), expressly authorized the Commission to designate MPAs before completion of the master plan process.

As to the second issue, although the applicable statute provides that the Coordinating Committee "shall review proposals for new or amended MMAs" (Marine Managed Areas Improvement Act, Pub. Resources Code, § 36800), it was undisputed that there was no Coordinating Committee review of the MMA proposals that became the disputed regulations. Nonetheless, after a lengthy discussion, the Court ultimately concluded that invalidating the regulations on the ground they did not undergo pre-adoption Coordinating Committee review is "not necessary to promote the statutory purpose of such review, or the broader statutory objectives of implementing a coordinated network of MPAs and MMAs." "When the object of a statutory provision is to serve a public purpose, 'the provision may be held directory or mandatory as will best accomplish that purpose.' [Citation omitted.] The ultimate object of Coordinating Committee review under section 36800 is to further the Improvement Act's broader goal of implementing a coordinated and consistent system of MMAs for the public good. In our view, this public purpose…and the related public purpose of the MLPA are far better served by our holding the Coordinating Committee review requirement to be directory than they would be if we were to hold the [] regulations invalid on the ground they were not subjected to Coordinating Committee review before adoption."

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

5-Year Reviews. In April 2013, the U.S. Fish and Wildlife Service (FWS) provided notice of its (i) initiation of 5-year status reviews for 18 animal species and 38 plant species in California and Nevada, and (ii) completion of 5-year status reviews for 27 species in California and Nevada. For more information, see 78 Fed.Reg. 19510.

Buena Vista Lake Shrew. In July 2013, FWS designated critical habitat for the Buena Vista Lake shrew; in total, approximately 2,485 acres in Kings and Kern counties were designated. For more information, see 78 Fed.Reg. 39836.

Chimpanzees. In June 2013, FWS proposed to list all chimpanzees, whether wild or in captivity, as endangered. This proposal constitutes FWS' 12-month finding on a petition to list the species. For more information, see 78 Fed.Reg. 35201.

Franciscan Manzanita. In June 2013, FWS announced the re-opening of the public comment period on the proposed critical habitat designation for the Franciscan Manzanita, as well as the availability of the draft economic analysis and required determinations section. FWS also modified the critical habitat designation proposal by correcting a mapping area and adding approximately 73 acres within two additional units in the City and County of San Francisco. For more information, see 78 Fed.Reg. 38897.

Lost River Sucker and Shortnose Sucker. In April 2013, FWS announced the availability of the final revised recovery plan for Lost River sucker and shortnose sucker, two endangered fish species found in only a few lakes and reservoirs in the upper Klamath Basin and Lost River sub-basin. For more information, see 78 Fed.Reg. 22556.

Mountain Yellow-Legged Frog. In April 2013, FWS proposed to designate 89,637 acres of critical habitat for the northern distinct population segment of the mountain yellow-legged frog in Fresno and Tulare counties. For more information, see 78 Fed.Reg. 24516. FWS also proposed to list this species as threatened. For more information, see 78 Fed.Reg. 24472. See also 78 Fed.Reg. 43122.

Munz's Onion. In April 2013, FWS published its final critical habitat designation rule for Munz's onion; in total, approximately 98.4 acres in Riverside County fall within the boundaries of the designation. FWS also announced that it would not be designating any critical habitat for San Jacinto Valley crownscale. For more information, see 78 Fed.Reg. 22626.

Northern Spotted Owls. In July 2013, FWS announced the availability of the final environmental impact statement for the experimental removal of barred owls to benefit threatened northern spotted owls. For more information, see 78 Fed.Reg. 44588.

San Clemente Island Lotus and Paintbrush. In July 2013, FWS reclassified the San Clemente Island lotus and San Clemente Island paintbrush from endangered to threatened, due to substantial improvement in the plants' status. For more information, see 78 Fed.Reg. 45406.

San Jacinto Valley Crownscale. In April 2013, FWS announced that it would not be designating any critical habitat for San Jacinto Valley crownscale. For more information, see 78 Fed.Reg. 22626.

Sierra Nevada Yellow-Legged Frog. In April 2013, FWS proposed to designate 1,105,400 acres of critical habitat for the Sierra Nevada yellow-legged frog in Butte, Plumas, Lassen, Sierra, Nevada, Placer, El Dorado, Amador, Calaveras, Alpine, Mariposa, Mono, Madera, Tuolumne, Fresno and Inyo counties. For more information, see 78 Fed.Reg. 24516. FWS also proposed to list this species as threatened. For more information, see 78 Fed.Reg. 24472. See also 78 Fed.Reg. 43122.

Wolves. In June 2013, FWS proposed to remove the gray wolf from the list of endangered and threatened wildlife, but maintain the endangered status for the Mexican wolf by listing it as a subspecies. For more information, see 78 Fed.Reg. 35664. That some month, FWS related

proposed to revise the existing nonessential experimental population designation of the Mexican wolf under Section 10(j) of the ESA. For more information, see 78 Fed.Reg. 35719.

Yosemite Toad. In April 2013, FWS proposed to designate 750,926 acres of critical habitat for the Yosemite toad in Alpine, Tuolumne, Mono, Mariposa, Madera, Fresno and Inyo counties. For more information, see 78 Fed.Reg. 24516. FWS also proposed to list this species as threatened. For more information, see 78 Fed.Reg. 24472. See also 78 Fed.Reg. 43122.

ENERGY

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Protective Action Guides for Radiological Incidents. In April 2013, the U.S. Environmental Protection Agency (EPA) proposed updates to its *Manual of Protective Action Guides and Protective Actions for Nuclear Incidents*. As proposed, the guidance would (i) apply to incidents other than just nuclear power plant accidents, (ii) update radiation dosimetry and dose calculations, and (iii) incorporate late phase guidance. For more information, see 78 Fed.Reg. 22257.

Regulation of Fuels and Fuel Additives. In June 2013, EPA proposed to amend three separate sets of regulations relating to fuels: (1) renewable fuels standard (RFS2) program regulations; (2) E15 misfueling mitigation regulations; and, (3) survey requirements for the ultra-low sulfur diesel (ULSD) program. For more information, see 78 Fed.Reg. 36042.

FEES/TAXES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Northern Spotted Owl Protection Measures. In May 2013, the State Board of Forestry and Fire Protection proposed to amend existing Forest Practice Rules pertaining to the protection of Northern Spotted Owls; the action was proposed in response to a petition for rulemaking filed by the Environmental Protection Information Center. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 20-Z, p. 731.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

Legislative Developments
No updates this quarter.

Regulatory Updates

Contingency Plans. In May 2013, the Office of Spill Prevention and Response within the Department of Fish and Wildlife proposed to amend Section 820.01, of Title 14 of the California Code of Regulations, relating to Drills and Exercise Requirements for Oil Spill Contingency Plans. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 20-Z, p. 733653.

Lead in Public and Commercial Buildings. In May 2013, the U.S. Environmental Protection Agency (EPA) reopened a public comment period on matters concerning renovation, repair, and painting activities in public and commercial buildings, and whether such activities create lead-based paint hazards requiring regulation under the Toxic Substances Control Act. For more information, see 78 Fed.Reg. 27906.

INSURANCE COVERAGE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

LAND USE

Recent Court Rulings

The Sixth District Court of Appeal held that the proper standard of review for a city's inclusionary housing ordinance is as an exercise of the police power and thus the question for the court is whether the ordinance is reasonably related to the city's legitimate public purpose of ensuring an adequate supply of affordable housing. *California Building Industry Association v. City of San Jose* (2013) 216 Cal. App. 4th 1373.

The California Building Industry Association challenged the City of San Jose inclusionary housing ordinance. The Association sought a declaration that it was invalid and an injunction against the City applying it against the Association's members projects. The Association argued that the ordinance constituted an exaction, and thus that it should be treated as such.

The trial court treated the case as a takings claim, and applied the standard of review for such a claim. Specifically, the trial court sought to determine whether the City could show an adequate nexus between the ordinance and the "deleterious public impacts of new residential development." The trial court determined the City could not show such a nexus existed, in part because new residential development does not have such deleterious impacts.

The Court of Appeal reversed. The Court of Appeal held that the inclusionary housing ordinance is an exercise of the City's police power. Therefore, the appropriate question is whether the ordinance bears a rational relationship to the City's authority to protect the public health, safety and welfare. The Court of Appeal described the many references in the Government Code to the shortage of housing and the shortage of affordable housing, and to the Code's requirements that City's act via their General Plans and zoning authority to address those issues. The court found this to be substantial evidence that the City's action to increase the supply of affordable housing is a valid exercise of the City's police power. The court also held that the ordinance is not mitigation for any specific impact or loss attributable to a specific project, but rather is a general policy action to address a genuine public issue. Finally, the court held that the trial court had improperly put the burden on the City to demonstrate the validity of the ordinance, whereas the burden properly lies with the challenger, who must demonstrate its invalidity. Accordingly, the court found for the City and remanded the case to the trial court for further proceedings consistent with this direction.

The Second District Court of Appeal held that public employees' tort immunity under the Government Tort Claims Act applies even where an employees' actions involve misrepresentations motivated by actual fraud, corruption, or actual malice. *Freeny v. City of San Buenaventura* (2013) 216 Cal. App. 4th 1333.

Robert and Linda Freeny worked with the staff of the City of San Buenaventura for three years to design a 44-unit senior living facility. After the City's Planning Commission granted the Freenys a conditional use permit, a group of 35 people living near the proposed facility appealed the Planning Commission's decision to the City Council. Following a public hearing, the City Council approved the neighbors' appeal on a five-to-two vote. The City Council found the

facility incompatible with the existing residential neighborhood and told the Freenys to "rethink the entirety of the project". The City Council denied the permit without prejudice and invited the Freenys to submit a redesigned project.

The Freenys sued the City and the five City Council members who voted against the permit. The Freenys sought an order compelling the City to approve the permit or a new hearing before the City Council in addition to compensatory and punitive damages for fraud, misrepresentation, and elder abuse due to the Freenys' age. The City claimed the Freenys failed to exhaust their administrative remedies since the City Council disapproved the permit without prejudice. The Freenys claimed further exhaustion was futile and the trial court agreed. The City also defended that the California Government Tort Claims Act conferred immunity from tort liability on the City Council members for their decision to reject the permit. The Freenys claimed this immunity did not extend to decisions motivated by actual fraud, corruption or actual malice. The trial court disagreed.

On appeal, the Second District affirmed. The Court held that the Freenys did not fail to exhaust their administrative remedies. The Court explained that the Freenys only needed to show that the City Council ruled on the permit, they did not need to reapply with a redesigned project to exhaust their remedies. The Court reasoned that requiring applicants to vet an entirely different project would allow exhaustion to become a tool to forestall judicial review indefinitely. The Court also affirmed that the City Council members, and thus the City, were immune from tort damages for their legislative denial of the Freenys' permit application. The Court explained that public employees' tort immunity for legislative decision-making under the Government Tort Claims Act applies even when that decision making is alleged to involve misrepresentations motivated by actual fraud, corruption or actual malice. The Court reasoned that a rule hinging tort immunity on whether legislators made misrepresentations motivated by actual fraud, corruption, or actual malice would put legislators motives front and center and would put judges in the uncomfortable position of questioning the wisdom of legislative decisions through tort litigation.

The First District Court of Appeal held that Napa County's density bonus ordinance unlawfully conflicted with state law by requiring a higher percentage of affordable units than state law required. *Latinos Unidos Del Valle De Napa Y Solano v. County of Napa (2013)* 217 Cal. App. 4th 1160.

California's Bonus Density Law provides that, when a developer agrees to construct at least ten percent of total units in a housing development as lower income housing, the city or county shall grant the developer a "density bonus" to increase the density of the development above the allowed limit under local zoning law. In 2010, Napa County amended its local density bonus ordnance to provide that developers must include twenty percent moderate income housing in a development project to receive a density bonus. Shortly thereafter, Latinos Unidos Del Valle De Napa Y Solano, a nonprofit public benefit corporation, sued the County.

Among other claims, Latinos Unidos argued that the County's density bonus law conflicts with the state Density Bonus Law and discriminates against low income persons, Latinos, and individuals with disabilities. Latinos Unidos sought a writ of mandate to compel the County to

comply with state and federal law along with declaratory and injunctive relief. Latinos Unidos claimed that the ordinance violated a mandatory duty imposed on counties to award a density bonus when a developer agrees to build affordable housing. The County argued that the state Density Bonus Law implies that counties have digression to set the minimum requirement for a density bonus. The County also claimed that, even if the ordinance violated state law, it was "saved" by the provision of the County municipal code that provides that state law shall supersede where the municipal code conflicts with state law. The trial court found in favor of the County on all claims.

On appeal, the First District affirmed in part and reversed in part. The Court held that that the County ordinance was void to the extent it requires a developer to dedicate a larger percentage of its units to affordable housing than required by the state Density Bonus Law. The Court explained that the state Density Bonus Law imposes a clear and unambiguous mandatory duty on municipalities to award a density bonus when the developer agrees to dedicate a certain percentage of the overall units in a development to affordable housing. The Court also held that the savings provision in the municipal code did not save the ordinance because it did nothing more than state a truism that state law prevails over conflicting local law. As such, the Court remanded and ordered issuance of a writ of mandate requiring removal of the higher requirement under the ordinance.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

PROPOSITION 65

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Delistings. In May 2013, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of its removal of *bisphenol A* (BPA) from the list of chemicals known to the State to cause cancer or reproductive toxicity effective April 19, 2013. The delisting action was rendered in response to a preliminary injunction issued in the *American Chemistry Council v. OEHHA* action, pending in Sacramento County (Case No. 34-2013-00140720). For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 672. OEHHA relatedly withdrew its proposal to adopt a specific regulatory level having no observable effect for BPA. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 691.

In July 2013, OEHHA announced that it is no longer considering *tetraconazole* for listing as a chemical known to the State to cause cancer; the listing previously was proposed – in December 2011 – under the authoritative bodies listing mechanism, based on findings presented in a publication issued by the U.S. Environmental Protection Agency that have since been changed. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 27-Z, p. 992.

List of Chemicals. For the most current list of chemicals known to the State to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2013, Vo1. No. 30-Z, p. 1099.

Listings. In April 2013, OEHHA provided notice of its intent to list *clomiphene citrate* as known to the State to cause cancer; the action was proposed under the "formally required to be labeled or identified" listing mechanism. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 14-Z, p. 549. That listing proposal was finalized and deemed effective on May 24, 2013. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 21-Z, p. 776.

In June 2013, OEHHA provided notice of its intent to list *emissions from combustion of coal* as known to the State to cause cancer; the action was proposed under the authoritative bodies listing mechanism. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 23-Z, p. 850. This listing was finalized and became effective on August 7, 2013. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 30-Z, p. 1118.

In July 2013, OEHHA announced that – effective July 5, 2013, *hydrogen cyanide* and *cyanide salts* have been added to the list of chemicals known to the State to cause reproductive toxicity under the authoritative bodies listing mechanism. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 27-Z, p. 992.

In July 2013, OEHHA provided notice of its intent to list the following chemicals as known to the State to cause cancer pursuant to the Labor Code mechanism: *chloral*; *chloral hydrate*; *1,1,1,2-tetrachloroethane*; and, *trichloroacetic acid*. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 30-Z, p. 1119.

Reference Exposure Levels. In June 2013, OEHHA solicited public comments on a draft document describing revised Reference Exposure Levels (RELs) for *benzene*. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 25-Z, p. 945.
In July 2013, OEHHA provided notice of its adoption of acute and 8-hour RELs and a revised chronic REL for *1,3-butadiene*. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 30-Z, p. 1097.

PUBLIC RECORDS

Recent Court Rulings

The California Supreme Court has held that GIS-formatted parcel data is not exempt from disclosure under the Public Records Act when it can be disclosed without any accompanying computer software. *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157.

Sierra Club requested Orange County's disclosure of a computer database created using geographic information system ("GIS") software. The County refused to disclose the database under the Public Records Act ("PRA") because it claimed that the database was computer software, specifically a "computer mapping system," and thus exempt from disclosure under Government Code Section 6254.9(b). The trial court denied a petition for writ of mandate, finding that the County's software and data were sufficiently intertwined that they both were covered by the PRA's "computer mapping system" exemption. The court of appeal affirmed.

The Supreme Court granted Sierra Club's petition for review on the question whether the County's database, despite being in a GIS file format, is a public record that must be disclosed in that format pursuant to the PRA.

The Supreme Court reversed the court of appeal. While the term "computer mapping system" was ambiguous, the ordinary meaning of "computer software" (Gov. Code § 6254.9(a)) supported petitioner's argument that the database was not covered by the exemption. The statute's legislative history was inconclusive and thus did not alter the Court's conclusion regarding the statute's interpretation. The Court resolved "any remaining doubts" by reference to the interpretive guidelines in article I, section 3, subdivision (b)(1) of the California Constitution, requiring that a statute affecting the public's right of access to public records "be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." The Court also cited case law holding that all public records are subject to disclosure unless the Legislature has expressly provided to the contrary. Here, the Legislature had not clearly exempted databases in a GIS file format from disclosure. As the County did not argue that the database was otherwise exempt, the Court ordered the County to produce the database in any electronic format in which it held the requested information.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

RESOURCE CONSERVATION

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Abalone. In May 2013, the Fish and Game Commission (Commission) proposed to amend Section 29.15, of Title 14 of the California Code of Regulations, relating to Abalone; this action was proposed in response to the Commission's adopted guidelines set forth in the *Abalone*

Recovery and Management Plan (2005). For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 711.

Commercial Fishing. In May 2013, the Commission proposed to amend Sections 190 and 195, of Title 14 of the California Code of Regulations, relating to Commercial Fishing Activity Reports and Commercial Passenger Fishing Vessel Logbooks. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 653.

Depredation. In May 2013, the Commission proposed to amend Section 401 and repeal Section 480, of Title 14 of the California Code of Regulations, relating to Depredation Permit Application and Bobcat Depredation. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 655.

Falconry. In June 2013, the Department of Fish and Wildlife (DFW) proposed to promulgate new regulations for the practice of falconry. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 24-Z, p. 880.

Instream Suction Dredge Mining. In May 2013, DFW denied the petitions of the Center for Biological Diversity and Western Mining Alliance to initiate rulemaking for section dredging, which presently is prohibited by statute. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 691.

Mountain Lion Carcasses. In July 2013, DFW proposed to adopt a regulation that would implement and make specific Fish and Game Code Section 4800 through a permitting modification related to possession of mountain lion carcasses or mountain lion parts/products; and, to make consistent and clarify the overall permitting requirements for the possession of same. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 28-Z, p. 1031.

Off-Highway Motor Vehicle Recreation. In June 2013, the Department of Parks and Recreation (DPR) proposed to amend Sections 4970.00 through 4970.26, of Title 14 of the California Code of Regulations, pertaining to the Off-Highway Motor Vehicle Recreation Grants and Cooperative Agreements Program. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 25-Z, p. 929.

Trails. In June 2013, DPR proposed to adopt regulations pertaining to trail uses and users on trails in the State Park System, and what tools may be used and under what circumstances in Cultural Preserves and Natural Preserves. These regulations also would clarify that permanent structures and installations are allowed in wilderness and preserves where necessary for natural or cultural heritage protection. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 26-Z, p. 966.

Aquatic Invasive Species. In July 2013, the U.S. Fish and Wildlife Service (FWS) announced the availability of two draft documents for public review: *Voluntary Guidelines to Prevent the Introduction and Spread of Aquatic Invasive Species: Recreational Activities*, and *Voluntary Guidelines to Prevent the Introduction and Spread of Aquatic Invasive Species: Water Gardening*. For more information, see 78 Fed.Reg. 39310.

Eagle Conservation Plan Guidance. In May 2013, FWS announced the availability of the *Eagle Conservation Plan Guidance: Module 1 – Land-based Wind Energy, Version 2*. For more information, see 78 Fed.Reg. 25758.

Migratory Birds. In April 2013, FWS proposed to establish annual hunting regulations for certain migratory game birds for the 2013-2014 season. For more information, see 78 Fed.Reg. 21200, 35844 in May 2013, FWS made available a final supplemental environmental impact statement pertaining to the issuance of annual regulations permitting the hunting of migratory birds. For more information, see 78 Fed.Reg. 32686.

In May 2013, the U.S. Environmental Protection Agency (EPA) also proposed to revise the regulations that allow control of depredating birds in some counties in California. The proposal specifies the counties in which this order would be effective, better identifies those species that may be taken under the order, adds a requirement that landowners attempt non-lethal control, adds a requirement for use of non-toxic ammunition, and revises the required reporting. For more information, see 78 Fed.Reg. 27927.

SOLID WASTE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

May 13, 2011 Notice. In May 2013, the Office of Administrative Law confirmed that a complete petition challenging the Department of Resources Recycling and Recovery's (CalRecycle) "Additional Items of Note" in a document titled "Notice of May 13, 2011 to all Certified Recycling Centers" as an underground regulation was received. On April 26, 2013, CalRecycle notified the Office of Administrative Law that the document had been rescinded; therefore, no further action on the petition is required. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 21-Z, p. 786.

Recycling Center Daily Load Limits. In May 2013, CalRecycle proposed to adopt amendments to Subchapter 6, Chapter 5, Division 2 of Title 14 of the California Code of Regulations regarding the reduction of load limits for empty beverage containers and reporting of 250-pound aluminum transactions. For more information, see Cal. Reg. Notice Register 2013, Vol. No. 18-Z, p. 659.

WATER QUALITY

Recent Court Rulings

No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Effluent Limitations. In April 2013, the U.S. Environmental Protection Agency (EPA) proposed changes to the effluent limitations guidelines and standards for the Construction and Development point source category. The proposed changes would withdraw the numeric discharge standards, and modify several of the non-numeric provisions of the existing rule. For more information, see 78 Fed.Reg. 19434.

In June 2013, EPA proposed to strengthen the controls on discharges from certain steam electric power plants by revising technology-based effluent limitations guidelines and standards for the Steam Electric Power Generating point source category. For more information, see 78 Fed.Reg. 34432, 41907.

Hydraulic Fracturing. In April 2013, EPA extended its deadline for the submittal of data and scientific literature regarding the potential impacts of hydraulic fracturing on drinking water resources until November 15, 2013. For more information, see 78 Fed.Reg. 25267.

National Pollutant Discharge Elimination System (NPDES) General Permits. In April 2013, EPA Region 9 finalized the NPDES Vessel General Permit, thereby authorizing discharges incidental to the normal operation of non-military and non-recreational vessels greater than or equal to 79 feet in length. The permit is effective on December 19, 2013. For more information, see 78 Fed.Reg. 21938.

In June 2013, EPA amended its regulations to remove language added by the 2006 NPDES Pesticides Rule that exempted the application of pesticides from NPDES permit requirements in two circumstances. This amendment was made in response to a 2009 Sixth Circuit Court of Appeals decision that vacated the 2006 NPDES Pesticides Rule. For more information, see 78 Fed.Reg. 38591.

Water Quality Standards. In April 2013, EPA took final action to withdraw certain human health and aquatic life water quality criteria applicable to waters of California's San Francisco Bay. For more information, see 78 Fed.Reg. 20252.

WATER RESOURCES

Recent Court Rulings

The Third District has held that the rule of exclusive concurrent jurisdiction applies only where the issues in the cases are "substantially the same," and only until all necessarily-related matters are resolved. The court further upheld denial of a motion for change of venue on the grounds that the declaratory and injunctive relief sought did not implicate

real property interests or individual water rights pursuant to Code of Civil Procedure § 397. *County of Siskiyou v. Superior Court* (2013) 217 Cal.App. 4th 83.

Environmental groups, as real parties in interest, filed a petition for a writ of mandate in Sacramento County Superior Court, seeking to halt the issuance of well-drilling permits for nonadjudicated groundwater within the Scott River sub-basin in Siskiyou County. Real parties alleged the County of Siskiyou (County) and the State Water Resources Control Board (Board) failed to manage certain groundwater resources that were interconnected with the Scott River in a manner consistent with the public trust doctrine. Due to a 1980 decree issued by the Siskiyou Superior Court that adjudicated "all surface water rights in the Scott River stream system" and "all rights to ground water that is interconnected with the Scott River," real parties limited their prayer for relief to "groundwater not previously adjudicated within the Scott River sub-basin."

The County filed a demurrer to the action, contending that Siskiyou Superior Court had exclusive jurisdiction over the case by virtue of its 1980 decree, and the fact that the court reserved jurisdiction to review or modify the decree. In the alternative, the County moved to change venue pursuant to Code of Civil Procedure § 392, which requires actions involving real property rights or interests to be tried in the county superior court where the property is located. The trial court overruled the demurrer, holding that the 1980 decree was limited to groundwater within a delineated geographic area and denied the motion to change venue on the grounds that real parties' petition alleged injury to usufructuary water rights, rather than injury to real property. The County petitioned for writ of mandate. Issues presented on appeal were: (1) whether the rule of exclusive concurrent jurisdiction required the case be transferred to the court that issued the 1980 decree; and (2) whether the change of venue motion should be granted pursuant to Code of Civil Procedure § 392.

The Court of Appeal reviewed the "highly practical" rule of exclusive concurrent jurisdiction – which provides jurisdiction to the court that first asserts it in a matter where two or more courts possess concurrent subject matter jurisdiction over the case – and determined it "is not a permanent, immutable grant of jurisdiction in the first court over everything even remotely connected to the subject matter." Rather, the first court retains exclusive jurisdiction only until all necessarily related matters are resolved. In this case, the court found that the public trust doctrine claims were not "substantially the same" as those adjudicated in the 1980 decree, and therefore were not subject to that court's reserved jurisdiction. Additionally, the court found that venue was proper in Sacramento County pursuant to Code of Civil Procedure § 397 and not trumped by § 392, which applies to certain types of action involving real property. Because real parties were seeking declaratory and injunctive relief regarding the County and Board's regulatory authority, the Court found that the case did not implicate real property interests or individual water rights. Therefore, the writ of mandate was denied and the trial court's decision upheld.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

FEDERAL SUMMARIES

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Ninth Circuit Court of Appeals

ENDANGERED SPECIES

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WATER RESOURCES

Recent Court Rulings

The Ninth District Court of Appeals has ruled that contaminated utility poles in contact with general stormwater runoff did not constitute "point sources" of discharge and were not "associated with industrial activity" within the meaning of the Clean Water Act, and PCP-based wood preservatives in utility poles were not automatically considered "solid waste" for purposes of the Resource Conservation and Recovery Act. *Ecological Rights Foundation v. Pacific Gas and Electric Company* (2013) 713 F.3d 502.

Environmental organizations filed suit against utility companies alleging that their utility poles discharged PCP-based wood preservative into the environment in violation of the federal Clean Water Act (CWA) and Resource Conservation and Recovery Act (RCRA). They claimed that rain falling on and around defendants' utility poles becomes contaminated by wood preservative which his then carried by storm runoff into the San Francisco Bay, its tributaries and adjacent wetlands. The district court dismissed the action for failure to state a claim without leave to amend, resulting in an appeal.

Issues presented on appeal were: (1) whether generalized runoff allegations could constitute a "point source" discharge within the meaning of CWA; (2) whether utility poles allegedly

contaminated with wood preservative that could seep into runoff were "point sources" under CWA; (3) whether stormwater runoff from utility poles were "associated with industrial activity" within the meaning of CWA; and (4) whether PCP-based wood preservative that escaped the utility poles through normal wear and tear was automatically "solid waste" within the meaning of RCRA.

The Ninth Circuit found that allegations of generalized stormwater runoff do not establish a point source discharge unless the stormwater is "discretely collected and conveyed to waters of the United States," which was not specifically alleged in the complaint. The court declined to find that the solid wood utility poles themselves were "conveyances" or "point sources" based on a review of case law, which resulted in three categories of recognized point sources: (1) things specifically identified in CWA, (2) things constructed for the express purpose of storing pollutants or moving them from one place to another, or (3) undisputed point sources. The utility poles did not fit into any of these categories. Plaintiffs also contended that the defendants' utility poles discharged directly into waters of the United States, or runoff from the poles collected in conveyances which then discharged into waters of the United States; however, the court found these arguments had not been raised in the district court and were thereby waived. The court cited four reasons why runoff from utility poles was not associated with industrial activity: (1) utility poles did not fit within the EPA's definitions for conveyances or industrial facilities; (2) utility poles did not fall within the Standard Industrial Classification codes used to define industrial activities; (3) the EPA specifically rejected including major powerline corridors in the definition of "industrial activity;" and (4) reading utility poles to be conveyances would result in a broad expansion of the term with potentially absurd results. Finally, with respect to RCRA, the court looked to legislative history to interpret the statutory definition of "solid waste," and determined that the key was whether a manufactured product has served its intended purpose and was no longer wanted by the consumer. Here, the escaping wood preservative at issue was neither a manufacturing waste, nor had it been "discarded" based on its similarity to pesticides or munitions. Finally, the court looked to other EPA studies and policies on PCP-based wood preservatives to hold that "the more tenable reading of RCRA" would not automatically define it to be "solid waste," but left the door open to an allegation that dangerous accumulations of PCP could result in a RCRA violation.

Ninth Circuit affirms District Court decision and rejects California Water Districts' Administrative Procedure Act and Federal Tort Claims Act claims seeking to compel the United States Department of the Interior to provide necessary drainage facilities or pay money damages. *Firebaugh Canal Water District v. United States*, 712 F.3d 1296 (9th Circuit, April 5, 2013).

The Central Valley Project ("CVP") is the nation's largest federal reclamation project and consists of an interconnected system of dams, reservoirs, levees, canals, pumping stations, hydropower plants and other infrastructure that collects water from mountain ranges in northern California (*e.g.*, Sierra Nevada, Klamath Mountains and California Coast Ranges) and transports and distributes it south throughout California's vast Central Valley. The United States Bureau of Reclamation ("the Bureau") is the agency within the Department of the Interior charged with administering the CVP, construction for which began in the late 1930's. In 1960, Congress passed the San Luis Act, authorizing the construction and operation of the San Luis Unit

("SLU") as an integral part of the CVP with an additional dam, reservoir, canals and related facilities to furnish water to irrigate approximately 500,000 acres of land in Merced, Fresno, and Kings Counties, California. Those "related facilities," specifically, the outlets, channels and other facilities necessary to meet the drainage requirements of the SLU, are at the heart of the dispute in this case because while Congress conditioned construction of the SLU on the provision of facilities to meet the SLU's drainage requirements, the lionshare of the planned drainage facilities have not been constructed.

In 2000, the Ninth Circuit Court of Appeals issued its decision in related litigation captioned *Firebaugh Canal Co. v. United States* ("*Firebaugh I*"), 203 F.3d 568, upholding the district court's decision by confirming that the SLU mandated the Bureau to provide an interceptor drain and that subsequent Congressional action did not eliminate the Bureau's duty to provide drainage but did give the Bureau authority to pursue drainage options other than the interceptor drain required by the SLU itself and remanded for further proceedings. Subsequently, the Bureau settled with all in-SLU landowners, leaving only the Firebaugh Canal Water District and the Central California Irrigation District (hereinafter collectively "Firebaugh") as the only remaining plaintiffs. The Bureau also publicly developed and ultimately selected/approved the preferred "in-valley" drainage alternative in 2007. That drainage project, however, was estimated to cost $2.69 billion, well above Congress' $429 million cap on construction costs, and Congress repeatedly refused the Bureau's requests to change legislation and increase the cap on construction costs necessary to fully implement the drainage plan. In response to the Bureau's alleged delay and Congress' inaction, Firebaugh amended its complaint to revise and add claims against the Bureau. The two claims at issue in this appeal involve Firebaugh's allegations that (1) the Bureau's failure to provide drainage constituted a trespass and nuisance, and sought damages under the Federal Tort Claims Act (the "FTCA" claim); and (2) the Bureau's failure to provide drainage was a final arbitrary action or unlawfully withheld/unreasonably delayed entitling Firebaugh to an order under the Administrative Procedure Act directing the Bureau to immediately implement drainage solutions (the "APA" claim). In 2004, the district court dismissed the FTCA claim and subsequently, on cross motions for summary judgment, the district court ruled in favor of the Bureau on the APA claim and Firebaugh appealed.

With respect to the FTCA claim, the Ninth Circuit held that the Bureau's provision of water to the SLU without providing drainage was not actionable under the FTCA. In doing so, the court addressed both the FTCA's private analog requirement in 28 U.S.C. section 2674 (i.e., whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred) as well as the Act's discretionary function exception in section 2680(a). Despite failing to find any California caselaw addressing the tort liability of private water suppliers for the downslope effects of the water they provide necessary to satisfy the private analog requirement, the Court assumed the existence of a private analog and moved on to analysis under the discretionary function exception. On that point, the Ninth Circuit explained that because the Bureau's actions in developing a drainage solution for the SLU clearly implicated considerations of environmental and economic policy as well as the fiscal limitations imposed by Congress, the Bureau's actions related to the provision of water and related drainage is a discretionary function and that the discretion places the Bureau's actions beyond the scope of the FTCA.

Finally, the Ninth Circuit similarly rejected Firebaugh's APA claim, holding that the San Luis Act did not require the Bureau to provide drainage outside the SLU and that the Bureau was neither withholding or unreasonably delaying the provision of drainage within the SLU. Relying on the U.S. Supreme Court's decision in *Norton v. Southern Utah Wilderness Alliance* (2004) 542 U.S. 55, the Ninth Circuit declared that in order for Firebaugh to prevail on its APA claim, it must show that the Bureau has failed to take a discrete action that it is legally required to take. The court then shot down both theories proffered by Firebaugh - that the Bureau was legally required to provide drainage to lands both within and outside the SLU. The court found that while section 1(a) of the San Luis Act required the Bureau to provide drainage facilities within the SLU, section 5 merely authorized the provision of drainage facilities outside the SLU. Thus, the Bureau was not legally required to provide such facilities outside the SLU and Firebaugh could not seek an order under the APA to require them. As for the provision of drainage facilities within the SLU (which all parties acknowledged was mandated by the San Luis Act), the court found that while Firebaugh's frustration with the pace of implementation of the Bureau's drainage solution was understandable the Bureau has developed a drainage project and sought appropriations but, ultimately, the pace of project implementation is ultimately up to Congress. Not to leave Firebaugh completely empty handed, the court did reiterate its holding from *Firebaugh I* that the Bureau is obliged to find a drainage solution and note that at some point Firebaugh may be able to demonstrate that the Bureau's actions were so sluggish that it abandoned its legal duty to provide drainage within the SLU.