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RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from January 1 through March 31, 2015. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar can be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.

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

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

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

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STATE OF CALIFORNIA SUMMARIES
AIR QUALITY

Recent Court Rulings

The First District Court of Appeal, Division 4, has ruled that the California Air Resources Board's (CARB) standards-based definition of "additional" greenhouse gas (GHG) reductions was within its authority under the Global Warming Solutions Act (the Act), and a project that commenced before the Board's Cap-and-Trade program was adopted can satisfy the Act's definition of "additional" GHG reductions. *Our Children's Earth Foundation v. California Air Resources Board* (February 23, 2015) 234 Cal.App.4th 870.

In the case, petitioner brought action against CARB for declaratory, injunctive, and writ relief challenging the Board's compliance with the Act. Petitioner alleged that one component of the Cap-And Trade program, which affords offset credits for voluntary reductions in GHG emissions, violates the Act by failing to ensure that these credited reductions are "in addition to" any GHG emission reduction that is otherwise required by law or that would otherwise occur. The Superior Court denied the petition and the petitioner appealed. On appeal, the First District affirmed, ruling that the evidence in the administrative record substantially supported the many policy decisions that the CARB Board had to make in order to formulate protocols that complied with the requirements of the Act by implementing and enforcing the Board's interpretation of the additionally requirement; and petitioner failed to demonstrate that any action the Board took was arbitrary or capricious.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Air Emissions Reporting Requirements. In February 2015, the U.S. Environmental Protection Agency (USEPA) finalized changes to the USEPA's emission inventory reporting requirements. This action lowered the threshold for reporting lead (Pb) emissions sources as point sources, eliminated the requirement for reporting emissions from wildfires and prescribed fires, and replaced a requirement for reporting mobile source emissions with a requirement for reporting the input parameters that can be used to run the USEPA models that general emissions estimates. See 80 Fed.Reg. 8787.

Area Designations. In January 2015, the USEPA:

(1) Proposed to reclassify the San Joaquin Valley moderate nonattainment area as a serious nonattainment area for the 1997 fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS), based on the USEPA's determination that the area could not practically attain the NAAQS by the applicable attainment date of April 5, 2015. See 80 Fed.Reg. 1482.

(2) Proposed to reclassify the San Joaquin Valley area as a serious nonattainment area for the 2006 $PM_{2.5}$ NAAQS, based on the USEPA's determination that the area could not practically attain this standard by the applicable attainment date of December 31, 2015. See 80 Fed.Reg. 1816.

(3) Provided notice of a final rule that established air quality designations for most areas in the U.S. for the 2012 primary annual $PM_{2.5}$ NAAQS. See 80 Fed.Reg. 2206.

National Ambient Air Quality Standards (NAAQS). In January 2015, the USEPA announced that, based on its review of the air quality criteria and the existing NAAQS for lead (Pb), it is proposing to retain the current standards, without revision. See 80 Fed.Reg. 278.

In March 2015, the USEPA established a final rule for implementing the 2008 ozone NAAQS that was promulgated on March 12, 2008. See 80 Fed.Reg. 12264.

National Emission Standards for Hazardous Air Pollutants (NESHAPs). In January 2015, the USEPA announced its reconsideration of and a request for public comment on issues that were raised in petitions for reconsideration concerning the February 1, 2013 amendments to the NESHAPs for industrial, commercial, and institutional boilers. See 80 Fed.Reg. 2871.

In February 2015, the USEPA:

(1) Announced it was taking direct final action to amend the NESHAPs for Polyvinyl Chloride and Copolymers Production Area Sources. This direct final rule withdraws the total non-vinyl chloride organic hazardous air pollutant process wastewater emission standards for new and existing polyvinyl chloride and copolymers area sources. See 80 Fed.Reg. 5938.

(2) Provided a notice of availability of Version 4 of the CAP88-PC model, which may be used to demonstrate compliance with the NESHAP applicable to radionuclides. See 80 Fed.Reg. 7461.

(3) Proposed amendments to the NESHAP for Aerospace Manufacturing and Rework Facilities to address the results of the residual risk and technology review, and to correct errors and deficiencies identified during the review of these standards. See 80 Fed.Reg. 8392.

In March 2015, the USEPA:

(1) Finalized the residual risk and technology review conducted for the Off-Site Waste and Recovery Operations source category regulated under the NESHAPs. See 80 Fed.Reg. 14248.

(2) Provided notice of a final rule regarding the November 19, 2014 proposed amendments for certain reporting requirements in the NESHAP: Coal and Oil Fired Electric Steam Generating Units (Mercury and Air Toxics Standards) rule. See 80 Fed.Reg. 15510.

New Source Performance Standards (NSPS). In January 2015, the USEPA announced it was granting reconsideration on four provisions of the 2013 NSPS for commercial and industrial solid waste incineration units. See 80 Fed.Reg. 3018.
In March 2015, the USEPA:

(1) Proposed to revise various regulations to require affected facilities to submit specified air emissions data reports to the U.S. EPA electronically and to allow affected facilities to maintain electronic records of these reports. See 80 Fed.Reg. 15100.

(2) Announced it was taking final action to revise the NSPS for New Residential Wood Heaters and to add a new subpart: Standards of Performance for New Residential Hydronic Heaters and Forced-Air Furnaces. See 80 Fed.Reg. 13672.

(3) Proposed a new definition of "low pressure gas well." The USEPA also proposed to amend the NSPS to remove provisions concerning storage vessels connected or installed in parallel and to revise the definition of "storage vessel." See 80 Fed.Reg. 15180.

Protection of Stratospheric Ozone. In January 2015, the USEPA published a final rule regarding the protection of stratospheric ozone. This rule extended the laboratory and analytical use exemption for the production and import of class I ozone-depleting substances through December 31, 2021. See 80 Fed.Reg. 3885.

Regulatory Definition of Volatile Organic Compounds (VOCs). In February 2015, the USEPA proposed to amend the regulatory definition of VOCs under the Clean Air Act. The proposed action would remove recordkeeping, emissions reporting, photochemical dispersion modeling and inventory requirements related to the use of t-butyl acetate (tertiary butyl acetate or TBAC) as a VOC. See 80 Fed.Reg. 6481.

National Ambient Air Quality Standards ("NAAQS").

State Implementation Plan ("SIP") Revisions.

In January 2015, the USEPA:

(1) Proposed to approve SIP revisions submitted to address the 2006 24-hour $PM_{2.5}$ NAAQS in the San Joaquin Valley's moderate nonattainment area. The USEPA also proposed to disapprove inter-pollutant trading ratios identified for nonattainment new source review permitting purposes. See 80 Fed.Reg. 1816.

(2) Announced it was taking final action to approve a revision to the Ventura County Air Pollution Control District (VCAPCD) portion of the SIP concerning reasonably available control technology (RACT) requirements under the 2008 8-hour ozone NAAQS. See 80 Fed.Reg. 2016.

(3) Announced it was taking direct final action to approve revisions to the South Coast Air Quality Management District (SCAQMD) and VCAPCD portions of the SIP concerning volatile organic compounds (VOC) emissions from petroleum refinery coking operations, and sulfur dioxide (SO_2) primary emissions from stationary combustion sources. See 80 Fed.Reg. 2609.

(4) Took final action to approve SIP revisions that provide for attainment of 1997 8-hour ozone NAAQS in the Sacramento Metro nonattainment area. See 80 Fed.Reg. 4695.

In February 2015, the USEPA:

(1) Published a final rule stating that it is revising the requirements for SIP submittal. Specifically, the USEPA is providing states or air agencies with an option to submit SIPs, including any necessary supporting documents, using their new electronic SIP (eSIP) submission system, which is web-based. See 80 Fed.Reg. 7336.

(2) Took direct final action to approve revisions to the Placer County Air Pollution Control District (PCAPCD) and San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portions of the SIP concerning VOC emissions from gasoline transfer into stationary storage containers, delivery vessels and bulk plants, and gasoline transfer into vehicle fuel tanks. See 80 Fed.Reg. 7345.

(3) Proposed a limited approval and limited disapproval of revisions to the Butte County Air Quality Management District's (BCAQMD) portion of the SIP concerning VOC, oxides of nitrogen (NO_x) and particulate matter emissions from open burning. See 80 Fed.Reg. 7556.

(4) Announced it was taking direct final action to approve revisions to the SJVUAPCD portion of the California SIP concerning NO_x and particulate matter emissions from boilers, steam generators and process heaters. See 80 Fed.Reg. 7803.

(5) Proposed to approve a revision to the SCAQMD portion of the SIP that pertains to SCAQMD Rule 1325: Federal $PM_{2.5}$ New Source Review Program. See 80 Fed.Reg. 8251.

In March 2015, the USEPA:

(1) Took direct final action to approve revisions to the Sacramento Metropolitan Air Quality Management District (SMAQMD) and SCAQMD portions of the SIP concerning particulate matter emissions from residential wood burning and particulate matter air pollution control devices. See 80 Fed.Reg. 13495.

(2) Announced it was taking final action to approve certain revisions to the Monterey Bay Unified Air Pollution Control District portion of the SIP and to disapprove certain other revisions concerning rules governing the issuance of permits for stationary sources, including review and permitting of minor sources, and major sources and major modifications under Part C of Title I of the Clean Air Act. See 80 Fed.Reg. 15899.

(3) Took direct final action to approve revisions to the PCAPCD and VCAPCD portions of the SIP concerning VOC emissions from the surface coating of plastic parts and products, metalworking fluids, and direct-contact lubricants. See 80 Fed.Reg. 16289.

(4) Proposed requirements that state, local and tribal air agencies would have to meet as they implement the current and future $PM_{2.5}$ NAAQS. See 80 Fed.Reg. 15340.

Tier 3 Motor Vehicle Emissions and Fuel Standards. In February 2015, the USEPA took direct final action on several amendments involving technical clarifications for different mobile source regulations. These amendments include corrections to the Tier 3 motor vehicle emission and fuel standards, revision of test procedures and compliance provisions for non-road spark-ignition engines, and permissible design approaches for portable fuel containers. See 80 Fed.Reg. 9078.

Trial Implementation Plans. In January 2015, the USEPA proposed to revise the boundaries of the Southern California air quality planning areas to designate the reservation of the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation as a separate air quality planning area for the 1997 8-hour ozone NAAQS. The USEPA also proposed to approve the Tribe's tribal implementation plan for maintaining the 1997 ozone standard within the Pechanga Reservation through 2025. Lastly, the USEPA proposed to grant the Tribe's request to re-designate the Pechanga Reservation ozone nonattainment area to attainment for the 1997 ozone standard. See 80 Fed.Reg. 436.

Workshop Notice. In January 2015, the USEPA's Office of Research and Development's Air, Climate, and Energy (ACE) program announced it was organizing a workshop on Ultrafine Particulate Matter (UFP) metrics and research. The workshop was held on February 11-13, 2015. See 80 Fed.Reg. 2414.

ATTORNEYS FEES

Recent Court Rulings

No Summaries or updates this quarter.

Legislative Developments

No Summaries or updates this quarter.

Regulatory Updates

No Summaries or updates this quarter.

CEQA

Recent Court Rulings

California Supreme Court establishes test for determining whether the "unusual circumstances" exception applies to a categorical exemption. *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086.

Homeowners in the Berkeley hills applied to demolish their house, and to construct a new, two–floor, 6,478 square-foot house with an attached, 3,394 square-foot, ten-car garage on a steep lot in a heavily wooded area. The City concluded the proposed project fell within the Class 3 (new construction of small structures) and Class 32 (infill) categorical exemptions. Neighbors hired an engineer, who submitted letters stating the grading required would destabilize the slope and could cause landslides during an earthquake. The homeowners' engineer submitted a report stating the neighbors' engineer had misread the plans. The City approved the proposed project, relying on the categorical exemptions. The trial court denied the petition. The Court of Appeal reversed. The Supreme Court granted a petition for review, reversed and remanded.

The majority opinion, authored by Justice Chin, focuses on judicial review of an agency determination whether a project falling within a categorical exemption is subject to the "unusual circumstances" exception under CEQA Guidelines section 15300.2, subdivision (c), such that the agency cannot rely on the exemption. Under the two-part test adopted by the Court, the lead agency must first determine whether the project involves "unusual circumstances"; the court reviews this determination under the "substantial evidence" standard of review. Second, if the lead agency determines that unusual circumstances exist, then the lead agency must consider whether the proposed activity may have a significant environmental effect; the court reviews this determination under the "fair argument" standard of review. Both prongs of the test must be satisfied for the exception to apply.

The majority acknowledged that evidence that the project *will* have a significant effect tends to show that some circumstance of the project is unusual. The majority also explained that in considering the first part of the test, the lead agency has "discretion to consider conditions in the vicinity of the proposed project."

The Court remanded the matter to the Court of Appeal to apply the appropriate test to the City's determination that the "unusual circumstances" exception did not negate its reliance on the categorical exemptions.

Justice Liu issued a concurring opinion, in which Justice Werdegar joined. Justice Liu agreed with the Court's decision to reverse and remand, but disagreed with the Court's interpretation of the "unusual circumstances" exception. According to Justice Liu, "'unusual circumstances' and 'significant effects' have invariably traveled together." Thus, the phrase "unusual circumstances" in section 15300.2, subdivision (c), "simply describes the nature of a project that, while belonging to a class of projects that typically have no significant environmental effects, nonetheless may have such effects." Justice Liu thus concluded that the standard of review is li limited to whether substantial evidence supports a fair argument that the project will have significant environmental effects.

Fourth District rules San Diego County violated CEQA by adopting Climate Change Action Plan that failed to follow through on adopted mitigation measures. *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152.

In 2011, San Diego County certified a program EIR and adopted an update to its General Plan. The county also adopted mitigation measure CC-1.2. The measure stated the county would prepare a climate change action plan (CAP) establishing greenhouse gas (GHG) emissions reduction targets and deadlines, together with measures to achieve specified reductions by 2020. Another measure stated the county would, using its CAP, revise its guidelines for determining whether a project's GHG emissions would be significant. The county adopted findings stating that these measures would place the county on a trajectory to achieve the GHG emission reductions consistent with those called for by Executive Order No. S-3-05.

The county then prepared the CAP. The CAP did not, however, place the County on track to reduce GHG emissions in a manner called for by the Executive Order. In addition, the CAP acknowledged that, after 2020, GHG emissions would increase. The CAP also included significance thresholds for GHG emissions that would streamline the review of later projects. In June 2012, over the objections of the Sierra Club, the county approved the CAP. The county also adopted an "addendum" to the General Plan Update program EIR. The Sierra Club sued. The trial court granted the petition. The county appealed.

The Court of Appeal (Justice Nares, joined by Justice McConnell, with Justice Huffman concurring in the result) affirmed.

The county argued the Sierra Club missed the statute of limitations because it filed its CEQA challenge more than 30 days after the county certified the program EIR and adopted the General Plan Update. The court concluded the lawsuit was timely because it attacked the CAP and addendum, not the underlying program EIR.

On the merits, the court held the county failed to proceed in a manner required by law by going forward with the CAP and thresholds project despite the express language of mitigation measure CC-1.2, which required the CAP to include detailed GHG emissions reduction targets and deadlines. The CAP's strategies were framed as recommendations, rather than requirements; as such, the strategies were illusory. The CAP also improperly relied on unfunded programs to achieve the required emissions reductions. The CAP's transportation section did not include an analysis of the county's own operations, and the record contained contradictory statements about the programs within the county's control. In adopting the CAP, the county did not commit to implement any particular programs, or cite to evidence supporting its belief that others would participate in the programs to the extent necessary to achieve the claimed reductions. According to the court, recommending potential GHG reduction strategies was not synonymous with implementing them.

The county also erred by assuming the CAP and thresholds project was the same project as the General Plan Update. The General Plan Update program EIR had not analyzed the CAP as a plan-level document that could itself facilitate further development by streamlining the review of GHG emissions for later projects. By failing to consider the environmental impacts of the CAP

and thresholds, the court noted, the county abdicated its responsibility to consider mitigation measures and alternatives proposed by the Sierra Club and others. At the same time, the county's own analysis acknowledged the CAP did not comply with Executive Order No. S-3-05, in that the analysis shows that GHG emissions would increase after 2020 – an impact that the General Plan Update program EIR had not addressed. Although the county argued that post-2020 analysis was speculative, the county acknowledged that other agencies had performed such analysis.

Fourth District rules the City of San Diego did not violate CEQA in determining that a coastal permit and revegetation plan for storm drain improvements was categorically exempt. *CREED-21 v. City of San Diego* (2015) 234 Cal.App.4th 488

In 2010, the city issued an emergency permit to repair a failed storm drain. The emergency permit included a condition requiring the department carrying out the repairs to obtain a permanent coastal permit and to implement a revegetation plan. The city approved the permit and revegetation plan, relying on the "common sense" exemption and two categorical exemptions. CREED sued. The trial court granted the petition. The city appealed.

CREED argued that, in reviewing the revegetation plan, the city was required to consider the physical setting of the area as it existed in 2007, before the city had initially proposed to repair the storm drain system, and before the emergency work had disturbed the site. In finding the project exempt, the city had analyzed the project against conditions that existed in 2010, after the emergency work had been carried out. By that time, the site consisted of disturbed, bare dirt, and the only effect of the project would be to revegetate the site, and thus improve its condition. The court held that, for CEQA purposes, the relevant issue was the impact of the plan as of 2010, since the environmental setting had already been affected by the intervening emergency work. The city was not required to ignore that intervening work in analyzing the impacts of the revegetation plan. That the emergency work had been performed without CEQA review was immaterial, since the propriety of that work under CEQA was unchallenged, and the statute of limitations had expired with respect to challenging the city's approval of the emergency work.

The court found the record contained substantial evidence supporting the city's determination that the project fell within the common sense exemption provided by CEQA Guidelines section 15061, subdivision (b)(3). That exemption applies where there is no possibility that the activity in question may have a significant effect on the environment. Because the revegetation plan would indisputably improve the site's physical conditions, the plan would not cause an adverse impact on the environment. The court added that the revegetation plan would also be exempt under the Class 1 exemption for existing facilities, which encompasses repair to existing topographical features. CREED failed to satisfy its burden of showing that the "unusual circumstances" exception applied to override the exemption. The record did not contain substantial evidence that the revegetation plan might have significant environmental effects. Nor did the record indicate that the topography of the site, which consisted of steep slopes, or the nature of the revegetation plan, was "unusual." CREED argued the city violated its right to due process by not timely disclosing a document under the California Public Records Act. The document consisted of an "initial study" prepared by city staff. The city did not provide the document to CREED until after the city council hearing on CREED's administrative appeal. Nevertheless, the city did not violate CREED's right to due process. The initial study represented just once piece of

evidence supporting the city's decision. The basis for the city's exemption determination was discussed at the council hearing. The staffer who prepared the initial study was present at the hearing and explained the basis for his exemption determination. CREED received sufficient notice and an opportunity to be heard.

Finally, CREED argued the city's appeal fee was unreasonable and unlawful. The city had assessed three appeal fees of $100 each. The trial court had ruled the fee was unauthorized. The city sought judicial notice of a city ordinance establishing a fee schedule. The trial court ruled the request for judicial notice was untimely. The court of appeal declined to disturb the trial court's ruling, while acknowledging the general principle that agencies have discretion to require fees to be paid in connection with an administrative appeal.

Third District holds the City of Sacramento did not prematurely commit to an arena project by entering into a nonbinding term sheet with the Sacramento Kings or by engaging in land acquisition through eminent domain before the EIR process was complete; the court further determined that the EIR included an appropriate range of alternatives and adequately analyzed traffic and safety impacts. *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549

The Sacramento city council approved a "term sheet" setting forth financial terms for an agreement with the new owners of the Sacramento Kings, a professional basketball franchise, to construct a new arena in downtown Sacramento. The Legislature adopted Senate Bill 743, which included Public Resources Code section 21168.6 providing for expedited judicial review of any challenges to the EIR prepared for the arena. In May 2014, the city certified an EIR and approved the arena. Petitioners sued and sought a preliminary injunction to stop demolition of the buildings where the arena would be located. The trial court denied the preliminary injunction. The Court of Appeal affirmed, ruling that petitioners failed to satisfy the requirements for a preliminary injunction, and that SB 743's provisions requiring expedited review were not unconstitutional. (*Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837.) In October 2014, the trial court denied the petition. Petitioners appealed.

The court considered, and rejected, each of petitioners' arguments. First, petitioners argued the city pre-committed to the project, before completing the CEQA process, by (1) approving the term sheet, (2) coordinating public relations efforts, (3) acquiring land, and (4) forgiving a loan in order to secure uncontested rights to a nearby parking lot. The court disagreed, holding that the city was allowed to engage in land acquisition for its preferred site before finishing its EIR under CEQA Guidelines section 15004 and Public Resources Code section 21168.6.6. The evidence of a coordinated PR strategy was equivocal, and in any event did not show pre-commitment. The term sheet was non-binding, merely established parameters for further negotiations, and expressly reserved to the city the option of walking away from the deal. Nothing in the record linked the loan forgiveness to the arena.

Second, petitioners argued the EIR should have analyzed an alternative consisting of remodeling the team's existing arena. The EIR had analyzed a "no project" alternative involving continued use of the existing, suburban arena. The EIR also analyzed an alternative consisting of constructing a new arena on this same site, rather than downtown. The city found that neither

alternative satisfied the city's objective of rejuvenating the downtown area. The "remodel" alternative proposed by petitioners suffered from the same defect, so the city had ample reason to decline to analyze it.

Third, petitioners argued the EIR's traffic analysis was defective because it did not examine the project's impact on congestion on Interstate 5, which skirted the downtown site. The EIR disclosed existing problems with the nearby section of I–5 at peak traffic times as well as how the downtown arena project would worsen traffic congestion. The EIR reached the conclusion that levels of service would—at times—reach the worst rating given by Caltrans for traffic flow. Even with proposed mitigation measures, the City acknowledged the adverse impact of the project on I–5 traffic would be significant and unavoidable. Petitioners argued the EIR should have also analyzed "mainline" I–5 traffic ranging from Canada to Mexico. The court disagreed, stating that the City was not required to separately study the effect on interstate motorists who will be impacted in the same way as other, local motorists sharing the same section of I–5. The court also noted the EIR did account for mainline traffic because it used the sampling data of mainline freeway traffic collected by Caltrans.

Fourth, petitioners also argued the city's traffic study was deficient because the EIR understated the number of persons who would surround the downtown arena. The city's estimate of crowd size included a national survey of similar entertainment and sports facilities as well as review of crowd sizes during the existing arena's history, ruling that the city did not err "in declining to speculate that the same games played a few miles away would suddenly and inexplicably draw large crowds of persons who would not watch the game but simply mill about in the winter nighttime."

Fifth, petitioners argued the EIR should have analyzed post-event crowd safety and potential for violence, arguing the EIR both understated the number of persons who can be expected to congregate around the downtown arena as well as their proclivities toward drunken violence. The court ruled that the argument focused on a social issue for which no environmental effect was described.

Finally, regarding petitioners' attempt to augment the administrative record, the court held that their challenge to the trial court's denial of their Public Records Act request seeking over 62,000 emails related to communications between the city and the NBA was not properly before the court. Denial of such a request is reviewed only by petition for writ of mandate, not direct appeal. The court also held that petitioners forfeited their argument regarding the introduction of certain additional materials because they failed to offer any meaningful analysis of the issue.

First District holds that the Department of Forestry complied with CEQA in issuing a Nonindustrial Timber Management Plan authorizing logging on 615 acres in Mendocino County. *Center for Biological Diversity v. California Dept. of Forestry and Fire Protection* (2014) 232 Cal.App.4th 931

A "Nonindustrial Timber Management Plan" (NMTP) is a long-term plan for sustained yield timber production utilized by owners of less than 2,500 acres of timberland and whose focus is not manufacturing forest products. An NTMP functions as the equivalent of an EIR.

In October 2008, the Bower family submitted a proposed NTMP to Cal Fire seeking authorization for timber harvesting activities northeast of Gualala in Mendocino County. In particular, Cal Fire approved, and the California Department of Fish and Wildlife (DFW) did not object to, logging activity on a 17-acre section that CDFW identified as a Late Succession Forest Stand (LSFS). This LSFS was considered potential functional nesting habitat for a threatened seabird, the marbled murrelet, although there was no history of murrelet actually nesting in the area. Following a pre-harvest inspection, a forester concluded the LSFS had only marginal potential for marbled murrelet occupation. A revised NTMP submitted in 2009 required retention of several large-diameter trees to benefit wildlife. Cal Fire issued responses to public comments on the NTMP and approved the document, concluding that large wildlife trees were being preserved, and species largely dependent on late seral habitat features would not be adversely impacted. CDFW did not oppose this conclusion. The Center for Biological Diversity (CBD) sued. The trial court denied the petition. CBD appealed.

CBD argued Cal Fire failed to analyze the cumulative effect of the loss of LSFS, characterizing the stand as the last remaining LSFS in the watershed. In CBD's view, retaining a few large trees would not provide functioning nesting habitat. CBD pointed to two unconfirmed reports of murrelets in the assessment area. Cal Fire had noted in response, however, that these were marine sitings, rather than terrestrial sitings. Moreover, Cal Fire had followed published guidance in assessment biological impacts. Cal Fire also concluded that LSFS was too scattered in the area to provide continuity in habitat. The court characterizing CBD's contentions as disagreements over the evidence—parties drawing "dramatically differing conclusions from the same record." The calculations and comparisons CBD attempted to make, even if accurate, did not offer a complete description of the resulting environment. Cal Fire was entitled to choose between differing expert opinions. CBD had the burden to show that there was no substantial evidence in the record to support Cal Fire's findings. CBD did not carry that burden.

CBD claimed Cal Fire should have recirculated the NTMP based on "significant new information" added prior to certification. CBD cited to a 2009 one-page memorandum from a Cal Fire biologist recommending additional protective measures for large tree retention. Each of the biologist's recommendations were addressed in additional mitigation measures. The court found that the memo disclosed no new environmental impacts nor any substantial increase in the severity of an impact. The mitigation measures added in response to the memo were discussed in a second review, in which petitioners participated, and were accepted eight days prior to the close of the public comment period.

CBD's claim under the California Endangered Species Act failed because Cal Fire found that implementation of the plan, as mitigated, would not result in take, jeopardy, or adverse modification of habitat in violation of the CESA. That finding was supported by substantial evidence.

CBD argued CDFW abused its discretion by failing declining to oppose Cal Fire's decision. The court concluded, however, that an NTMP is reviewed only under Code of Civil Procedure section 1094.5; for this reason, CBD did not have a traditional mandamus claim, under

section 1085, against CDFW. CDFW had discretion to decide whether to oppose Cal Fire's decision to approve the NTMP. The court saw no basis to second guess that exercise of discretion.

Fifth District upholds Fresno County's decision to approve reclamation plan for aggregate mine, concludes county had discretion to appropriate mitigation for loss of farmland. *Friends of the Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105

An applicant sought county approval of a reclamation plan to develop an aggregate mine and related processing plants on a 1,500-acre site in Fresno County. Mining and production activities would eventually occupy about 900 acres of the site; the remaining acreage would continue to support orchards. The county certified an EIR and approved the project. The petitioners appealed the county's decision to the State Mining and Geology Board (SMGB). SMGB granted the appeal and remanded the reclamation plan to the county. The county, in turn, revised the reclamation plan. Meanwhile, petitioners sued. The trial court denied the petition. Petitioners appealed.

First, petitioners argued that, by remanding the county's approved reclamation plan, SMGB set aside or nullified the original reclamation plan. The court disagreed. Under the Surface Mining and Reclamation Act (SMARA), the SMGB did not have authority to block the reclamation plan; rather, under the statute, the SMGB's sole remedy was to remand the reclamation plan back to the lead agency to reconsider its decision. The SMGB could also step on and take over for the lead agency, but the SMGB had not done that in this instance, so the county remained the lead agency. For that reason, the SMGB's decision did not nullify the county's certification of the EIR or approval of the project.

Second, petitioners argued the mitigation measures adopted by the county to address the project's impact on farmland were inadequate. The EIR acknowledged that about 600 acres of farmland would be permanently lost over the course of 100-year life of the project. The EIR recommended, and the county adopted, three mitigation measures to address this impact: (1) keeping the land in agricultural use until the land is converted to mining activities; (2) maintaining 602 acres as an on-site agricultural buffer zone; and (3) reclaiming mined cells to agriculture as soil becomes available for this purpose. These measures would reduce the impact to farmland, although it remained significant and unavoidable due to the net loss of farmland. Commenters proposed a further measure: requiring the applicant to acquire conservation easements at ratios of 1:1 or 2:1. The Final EIR responded that soils at the site were relatively rocky and unproductive; that reclaimed farmland would have higher value due to the removal of cobbles and gravel; that the buffer would assure 1:1 preservation during the life of the project; and that as much of the site would be reclaimed for agriculture as would be feasible (approximately 240 acres). The response noted that the county had not adopted a farmland mitigation program, and that requiring conservation easements was not required. Petitioners argued that was not enough, and claimed easements were required, citing *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230. There, the First District had held that agricultural conservation easements may be appropriate mitigation for the direct loss of farmland, and that the county had erred by taking the position that such easements were legally infeasible. In the court's view, petitioners misread *Masonite* as holding that easements were legally required. In the court's view, Masonite instead meant that easements could not be categorically ruled out. Here, the county had considered whether to require

the applicant to acquire easements, but it had instead adopted three other measures, and explained the basis for its decision. That was enough.

Second District rules Ventura County violated CEQA by approving relocation of a medical building without performing adequate supplemental review; neighbors' CEQA lawsuit was timely because the county's analysis made no mention of the building's increased height. *Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429

In 1993, the Ventura County Board of Supervisors certified an EIR and approved a five-story ambulatory care clinic on the county's Medical Center campus. The 1993 EIR stated the building would be up to 75 feet tall. The county did not construct the building. In 2005, the board decided to relocate the building a few hundred feet northwest of the original location, and to move forward with construction. The county prepared an addendum to the 1993 EIR and filed a notice of determination (NOD). Neither the addendum nor the NOD indicated the height of the relocated building. In 2008, construction commenced. A nearby resident asked a construction worker about the presence of a rig on the site; he was told the relocated clinic would be 90 feet tall. A coalition of neighbors, seeking to protect their sweeping views of the ocean, sued. The neighbors sought a preliminary injunction, which was denied. The county completed the building; its height was 90 feet. The trial court granted the petition. The county appealed.

The county argued the neighbors missed the 30-day statute of limitations to challenge the addendum, citing *Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32. Under the county's view, the statute had to be filed within 30 days of the posting of the NOD for the addendum, a deadline the neighbors missed by roughly three years. The county claimed the addendum described accurately the relocation of the clinic, and explained why this relocation would not result in new or more significant impacts than were described in the 1993 EIR.

The court rejected this argument as "nonsense." The addendum had not identified the increase in height of the building, from a maximum of 75 feet (in the 1993 EIR) to 90 feet (as built). The 30-day statute did not commence with the posting of the NOD because it, too, did not say anything about the increased height of the building. Because the addendum and NOD were silent on this issue, a 180-day statute of limitations commenced in May 2008, when the neighbors were first informed of the building's increased height. The neighbors filed before the 180-day period expired. The court of appeal therefore affirmed the trail court's order that the county prepare a supplemental EIR focusing on the visual impacts of the taller building in its new location.

Third District rules Department of Fish and Wildlife's program EIR for its statewide fish hatchery and stocking enterprise complied with CEQA; court also rules that the department violated the Administrative Procedure Act (APA) by adopting three mitigation measures that were underground regulations. *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214

The California Department of Fish and Wildlife operates 14 trout hatcheries and 10 salmon and steelhead hatcheries throughout the state, stocking fish at close to 1,000 locations each year. After CEQA's enactment, the hatching and stocking enterprise was found categorically exempt

from complying with CEQA. Subsequently, concerns arose regarding the enterprise's impact on native and wild animals due to predation and genetic hybridization. To address these concerns, the Department developed aquatic biodiversity management plans and hatchery genetic management plans. The Center for Biological Diversity (CBD) sued the Department in 2006. The trial court agreed that the enterprise was not categorically exempt from CEQA because it likely caused significant environmental impacts. The trial court ordered the Department to prepare an EIR. The Department prepared a program EIR/environmental impact statement pursuant to that decision and to additionally comply with NEPA. The EIR analyzed the statewide hatchery and stocking enterprise, as well as three other programs, including the Fishing in the City Program (providing fishing opportunities in urban areas), and the Private Stocking Permit Program (authorizing fish stocking by private aquaculture facilities in private and public lakes and ponds). The Department selected operations from 2004 to 2008 as the baseline and identified more than 200 impacts on biological resources. The EIR proposed a number of mitigation measures to lessen these impacts, and laid out three project alternatives. The EIR did not consider closing the hatcheries or eliminating trout stocking as alternatives. CBD sued. The trial court denied the petition. CBD appealed.

First, the Third District addressed the EIR's level of analysis. The CEQA Guidelines do not specify the level of analysis required to be performed in a program EIR. Rather, the Guidelines require an EIR to provide sufficient information in light of what is reasonably feasible. The court found the EIR satisfied that standard. The document reviewed and analyzed the hatchery and stocking enterprise specifically and comprehensively, but within reason, providing for further environmental review where warranted. Given the nature and statewide scope of the project and the consistency of its impacts across the state, the court found the analysis adequate to serve as a program EIR that also operated as project EIR. No additional site-specific environmental review was required given the agency's determination that site-specific impacts were sufficiently addressed in the program EIR, and there were no new impacts. Indeed, that is the function of a program EIR.

Second, the court found the EIR did not impermissibly defer formulation of mitigation measures, as it provided sufficient performance standards for future mitigation to meet. The court noted that the rule prohibiting deferred mitigation prohibits loose or open-ended performance criteria. Here, in contrast, the EIR's performance standards were sufficient to inform the Department what it had to do and accomplish, and committed the Department to mitigating impacts before proceeding with the enterprise. The performance standards were sufficient to ensure the aquatic biodiversity management plans would mitigate impacts in mountain lakes to insignificance. The Department also relied upon federal regulations to develop mitigation measures for impacts on anadromous fish.

Third, the court held that the Department properly used the existing enterprise as the environmental baseline. The court rejected the Center's contention that the EIR must use the existing environmental conditions—absent the project—as the baseline. Although the origin of present conditions may interest enforcement agencies, such information is irrelevant to CEQA baseline determinations. The CEQA baseline must include existing conditions even when those conditions have never been reviewed and are unlawful. Furthermore, despite using the existing enterprise as the baseline, the EIR described, as much as reasonably possible, the impacts

hatcheries and stocking have had statewide on the environment from the enterprise's inception more than a century ago, and proposed mitigation for those continuing impacts.

Fourth, the court held the EIR considered an adequate range of alternatives. For the no project alternative, the EIR considered the baseline project: continuation of the existing enterprise without making any changes. The court upheld this decision, noting that where the EIR is reviewing an existing operation or changes to that operation, the no project alternative is the existing operation; it is a factually based forecast of the environmental impacts of preserving the status quo. The court rejected CBD's argument that the no project alternative should have been the elimination of the stocking enterprise, stating that the EIR is not the approval of a new program, but review of an ongoing one. The Department was not required to analyze the alternative scenario of discontinuing its hatchery and production enterprise, as it had no legal authority to implement a no-stocking alternative.

Finally, turning to CBD's claims under the APA, the court concluded that three mitigation measures imposed by the Department were underground regulations, i.e., regulations adopted without complying with the notice and procedure requirements imposed by the APA. The mitigation measures at issue were: MM BIO-226 (Implement Private Stocking Permit Evaluation Protocol), MM BIO-229 (Require and Monitor Invasive Species Controls at Private Aquaculture Facilities), and MM BIO-233b (Implement Private Stocking Permit Evaluation Protocol). The court found that the measures fell within the definition of a "regulation" and were not exempt from APA requirements. The court rejected the Department's argument that MM BIO-226 was exempt as a regulation relating "only to the internal management of the state agency," and that MM BIO-229 and MM BIO-233b were exempt as regulations that embody the "only legally tenable interpretation of a provision of law." In particular, the court concluded that MM BIO-226 required the Department to "perform a new duty" and MM BIO-229 imposed on a "class of persons a new affirmative duty." The fact that the Department adopted these measures in order to comply with CEQA did not change their character as statewide regulations; the Department therefore had to comply with the APA before it adopted them.

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

U.S. GHG Emissions and Sinks. In February 2015, the USEPA issued a notice of availability of a draft document and request for comments for the Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2013. See 80 Fed.Reg. 9718.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CULTURAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Native American Heritage Commission (NAHC) Conflicts. In February 2015, notice was given that the NAHC proposed amendments to its conflict-of-interest code. The purpose of these amendments is to implement the requirements of Sections 87300 through 87302, and 87306 of the Government Code. The NAHC proposed to amend its conflict-of-interest code to include employee positions that involve the making or participation in the making of decisions that may foreseeably have a material effect on any financial interest, as set forth in subdivision (a) of Section 87302 of the Government Code. See Cal. Reg. Notice Register 2015, Vol. No. 9-Z, p. 334.

ENDANGERED SPECIES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Flat-Tailed Horned Lizard. In March 2015, notice was given that the California Fish and Game Commission (CFGC), at its February 12, 2015 meeting in Sacramento, California, accepted for consideration the petition submitted to list the flat-tailed horned lizard as an endangered species pursuant to Section 2074.2(a)(2) of the Fish and Game Code. The flat-tailed horned lizard is now declared a candidate species as defined by Section 2068 of the Fish and Game Code. See Cal. Reg. Notice Register 2015, Vol. No. 10-Z, p. 410.

Baker's Larkspur. In January 2015, the U.S. Fish and Wildlife Service (USFWS) announced the availability of the Draft Recovery Plan for Baker's Larkspur for public review and comment. See 80 Fed.Reg. 1659.

Mexican Wolf. In January 2015, the USFWS determined the endangered status of the Mexican Wolf, and revised the List of Endangered and Threatened Wildlife by making a separate entry for the Mexican wolf. See 80 Fed.Reg. 2488. That same month, the USFWS revised the regulations regarding the nonessential experimental population of the Mexican wolf. See 80 Fed.Reg. 2512, 4807.

Modoc Sucker. In February 2015, the USFWS announced the reopening of the public comment period on their February 13, 2014 proposed rule to remove the Modoc sucker from the List of Endangered and Threatened Wildlife. See 80 Fed.Reg. 8053.

Island Fox. In March 2015, the USFWS announced the availability of the final recovery plan for the four subspecies of island fox. The four subspecies include: the San Miguel Island fox, the Santa Rosa Island fox, the Santa Cruz Island fox, and the Santa Catalina Island fox. With the publication of this notice, the USFWS also initiated status reviews of these four subspecies. See 80 Fed.Reg. 12521.

Green Sea Turtle. In March 2015, the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), and USFWS provided notice of a proposed rule regarding listing of green sea turtles as a threatened species. The agencies proposed to remove the current range-wide listing and, in its place, list eight distinct population segments (DPSs) as threatened and three as endangered. The agencies also proposed to apply existing protective regulations to the DPSs. See 80 Fed.Reg. 15272.

ENERGY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

2016 Building Energy Efficiency Standards. In February 2015, the California Energy Commission (CEC) provided notice of its proposal to adopt changes to the Building Energy Efficiency Standards contained in the CCR Title 24, Part 6 (California Energy Code), and associated administrative regulations in Chapter 10 of Part 1. The proposed amended standards are called the "2016 Building Energy Efficiency Standards" and will go into effect on January 1, 2017 if adopted. The proposed standards take a crucial step in meeting the 2020 and 2030 zero net energy goals; if adopted, they will advance new residential buildings closer to achieving California's goal of having all new residential buildings be zero net energy by 2020. See Cal. Reg. Notice Register 2015, Vol. No. 7-Z, p. 268.

2016 CALGreen Efficiency Standards. In February 2015, notice was given that the CEC proposed to adopt changes to the Building Energy Efficiency Standards contained in the California Green Buildings Standards Code, CCR, Title 24, Part 11 (also known as CALGreen). The proposed amended standards, if adopted, will go into effect on January 1, 2017. The amendments proposed as a part of this rulemaking are solely to the voluntary provisions in Appendices 4 and 5. See Cal. Reg. Notice Register 2015, Vol. No. 7-Z, p. 278.

Appliance Efficiency Regulations. In February 2015, the CEC provided notice of a public hearing to receive public comment on the proposal to amend efficiency standards in several distinct areas: water efficiency standards for toilets, urinals, and faucets; energy efficiency standards for dimming ballasts; and, labeling standards for replacement air filters in heating and ventilation systems, and heat-pump water-chilling packages. See Cal. Reg. Notice Register 2015, Vol. No. 7-Z, p. 259.

Disclosure Requirements for Nonresidential Buildings. In February 2015, the CEC proposed to amend CCR Title 20, section 1682(c). The proposed amendment changes the date after which the disclosure requirement of Public Resources Code Section 25402.10 applies to covered nonresidential buildings with total gross square footage measuring 5,000 square feet and up to 10,000 square feet from July 1, 2014 to July 1, 2016. The purpose of this rulemaking is to adopt the emergency regulation on a permanent basis. See Cal Reg. Notice Register 2015, Vol. No. 7-Z, p. 253.

Enforcement Procedures for the Renewables Portfolio Standard. In March 2015, the CEC proposed to modify existing regulations establishing enforcement rules and procedures for the

Renewables Portfolio Standard (RPS) for local publicly owned electric utilities under Article 16 (commencing with Section 399.11) of Chapter 2.3 of Part 1 of the Public Utilities Code. The CEC will hold a public hearing for consideration and possible adoption of the 45-day language on the following date and time: June 10, 2015, beginning 10 a.m. See Cal. Reg. Notice Register 2015, Vol. No. 13-Z, p. 494.

Pennycress Oil in Biofuel Production. In March 2015, the USEPA invited comment on its analysis of the GHG emissions attributable to the production and transport of *Thlaspi arvense* ("pennycress") oil feedstock for use in making biofuels such as biodiesel, renewable diesel, and jet fuel. Based on its analysis, the USEPA anticipates that biofuels produced from pennycress oil could qualify as biomass-based diesel or advanced biofuel if typical fuel production process technologies are used. See 80 Fed.Reg. 15002.

FEES/TAXES

Recent Court Rulings

Santa Clara Valley Water District complied with the Santa Clara County Water District Act and Article XIII D of the California Constitution when imposing groundwater production fees and spending the proceeds in a discretionary manner not necessarily related to groundwater services and projects. *Great Oaks Water Company v. Santa Clara Valley Water District* (2015) Cal.App.4th, 2015/h035260.

In 1951, the State of California created the Santa Clara Valley Water District (the "District") by adopting the Santa Clara County District Act (the "District Act"). Section 26 of the District Act empowers the District to levy fees on the production of groundwater within specified "zones" and requires the District to spend such fees exclusively on the following: 1) costs of facilities which import water into the District and benefit the zones; 2) costs of purchasing water to import into the zones; 3) costs of facilities which conserve water in the zones; and 4) to pay off bonds and other debt incurred for the purposes of 1, 2, and 3. On April 9, 2005, the District approved groundwater production charges ("Charges") for two zones for the 2005-2006 water year. Great Oaks operates numerous groundwater production wells in both zones and sells most of the produced water to third parties.

Great Oaks filed suit against the District on November 22, 2005 alleging, amongst other things, that the District violated the District Act by improperly setting the Charges and spending the proceeds on projects not authorized under §26 of the District Act, and that the District violated the procedural requirements of Article 13D of the California Constitution, which requires voter ratification and notice-and-hearing procedures prior to levying fees upon rights incidental to property ownership. On February 2, 2010, the trial court ruled in favor of Great Oaks and issued a judgment against the District awarding Great Oaks "a refund of groundwater charges in the amount of $4,623,095.52 plus interest." The District appealed.

The Sixth District, in an opinion by Justice Rushing, overturned the trial court's ruling and remanded the case for further deliberations. The issues presented to the Court were whether the District adopted the 2005-2006 Charges in compliance with Article 13D and whether the trial court

had applied the correct standard of review when finding the District's actions in setting the Charges and spending the proceeds violated the District Act. In overturning the trial court's ruling concerning Article 13D, the Court determined the following: 1) the 2005-2006 Charges were "property related" charges subject to the notice-and-hearing and voter ratification requirements of Article 13D because the right to extract groundwater is a right incident to property ownership; 2) that the Charges were for a "water service" as defined under Proposition 218, and as such, exempt from the voter ratification requirement of Article 13D; and 3) the District's procedures prior to adopting the Charges satisfied Article 13D's notice-and-hearing requirement. In overturning the trial court's ruling concerning §26 of the District Act, the Court determined that the District's methodology for calculating the rates for the Charges and in deciding how to allocate the proceeds were quasi-legislative acts requiring the "arbitrary and capricious" standard of review. The trial court did not apply this standard of review and improperly substituted its own judgment for the District's on those two quasi-legislative acts. The Court stated that the evidence presented to the trial court could not sustain a finding that "the District's actions were arbitrary, capricious, or unsupported by evidence." Importantly, the Court found nothing improper in the District's methodology for setting the Charges and that §26 of the District Act permitted the District to expend groundwater revenues on surface water treatment and distribution and not exclusively on groundwater related projects.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Working Forest Management Plan. In January 2015, the California State Board of Forestry and Fire Protection (Board) provided notice of a public hearing to be held on Wednesday, March 4, 2015, regarding several proposals. Among the proposals, the Board sought to adopt regulations to make specific the use of a Working Forest Management Plan (WFMP) and a Working Forest Harvest Notice pursuant to provisions of the Public Resources Code. See Cal. Reg. Notice Register 2015, Vol. No. 3-Z, p. 107.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Notice of Intent to Recertify: Hazardous Waste Environmental Technology. In March 2015, the California Environmental Protection Agency, Department of Toxic Substances Control (DTSC) provided notice of its intent to recertify the following hazardous waste environmental treatment technology: Scigen Neutralex Technology (Neutralex). This technology is for treating aqueous formaldehyde in 10% neutral buffered Formalin waste resulting from histopathology tissue specimen preservation and automated processor activities. Even though the DTSC is currently not certifying any new treatment technology or accepting applications into the certification program, it is considering this recertification because Scigen treatment technology has already been certified and because, according to Scigen, Scigen treatment technology has not changed: in design, formulation, or its operation. Review of product uses indicates the product is performing as certified. See Cal. Reg. Notice Register 2015, Vol. No. 10-Z, p. 408.

Lead-Based Paint Programs. In January 2015, the USEPA proposed minor revisions to the 2008 Lead Renovation, Repair, and Painting (RRP) rule and the 1996 Lead-based Paint (LBP) Activities rule. The USEPA proposed to eliminate the requirement that renovator refresher training have a hands-on component. The USEPA also proposed to remove jurisdiction-specific certification and accreditation requirements under the LBP Activities rule. In addition, the USEPA proposed to add clarifying language to the requirements for training providers under both the RRP and LBP Activities rules. See 80 Fed.Reg. 1873.

National Oil and Hazardous Substances Pollution Contingency Plan (NCP). In January 2015, the USEPA proposed to amend the requirements in Subpart J of the NCP that govern the use of dispersants, other chemical and biological agents, and other spill mitigating substances when responding to oil discharges into the waters of the U.S. See 80 Fed.Reg. 3380.

INSURANCE COVERAGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

LAND USE

Recent Court Rulings

The appellate court affirmed the trial court's ruling that held that a property owner is liable for stormwater flooding of adjacent property by allowing the drainage channel to be blocked with debris. *Contra Costa County v. Pinole Point Properties, LLC* (2015) ___ Cal.App.4th ___.

Contra Costa County owns and operates a drainage system that is connected to a drainage channel on adjacent property owned by Pinole Point Properties (Pinole Point). After experiencing storm-related flooding, nearby homeowners sued the County for flood damages to their homes. The County cross-complained against Pinole Point for negligence, nuisance, indemnity, and injunctive relief. The county claimed that the flooding was caused by Pinole Point's failure to maintain the drainage channel clear of obstruction and debris. Pinole Point cross-complained against the County for negligence and inverse condemnation. The County and Pinole Point settled with the homeowners and proceeded on their claims against each other. The trial court ruled in favor of the County and against Pinole Point. Pinole Point appealed.

The trial court determined that the drainage channel was a natural watercourse and applied the reasonableness test established in *Keys v. Romley* (1966) 64 Cal.2d 396 and *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327. The trial court found that the County's conduct was reasonable, and that Pinole Point's failure to maintain the drainage channel was "entirely unreasonable" in light of its knowledge of the need to maintain the drainage channel to prevent flooding. The trial court awarded damages and ordered Pinole Point to clear and maintain the drainage channel.

On appeal, Pinole Point claimed is that it had no legal duty to take affirmative action to remove debris or maintain the drainage channel because it did not create the obstruction. The court of appeal rejected this claim based on prior water law cases that establish that every property owner has a duty to act reasonably in maintaining their property to prevent damage to adjacent properties. The court further explained that liability can be based on an omission if the failure to act was unreasonable. The court determined that Pinole Point had a legal duty to maintain a natural watercourse and keep it clear of debris to prevent flooding.

The question of reasonableness is a question of fact determined by the trial court and, on appeal, will be upheld unless the finding was not supported by substantial evidence. The evidence at trial included the following facts. When Pinole Point purchased the property, the drainage channel was clearly visible and was kept functional and clear of debris by the previous owner. Pinole Point did not maintain the drainage channel and overtime it became obstructed with trees, bushes, debris, and sediment. The County had repeatedly notified Pinole Point warning that the surrounding area would flood if no action is taken. Based on the record, the court concluded there was substantial evidence to support the trial court's findings that Pinole Point's conduct was unreasonable and that the County's conduct was reasonable.

The court of appeal affirmed the trial court's judgment, holding that the trial court properly applied the reasonableness test and its findings were supported by substantial evidence. The court also affirmed that the County is not liable for inverse condemnation and that the trial court acted within its discretion in issuing a mandatory injunction.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

PROPOSTITION 65

Recent Court Rulings

First District Upholds Averaging For Determining "Safe Harbor Levels" For Exposures To Proposition 65 Listed Chemicals. *Environmental Law Foundation v. Beech-Nut Nutrition Corp., et al* (March 17, 2015, A139821) __ Cal. App.4th __.

Environmental Law Foundation filed a complaint against Beech-Nut Nutrition Corporation and other food manufacturers, distributors, and retailers alleging elevated levels of lead in food products, including baby foods, fruit juice, packaged peaches, pears, and fruit cups, sold, and or distributed in California. The trial court ruled in favor of Beech-Nut and the other defendants, finding that the levels of lead in the products did not exceed Proposition 65 safe-harbor levels.

Environmental Law Foundation appealed the trial court ruling, challenging the trial courts interpretation of Proposition 65 safe-harbor regulations allowing defendants to average lead test results over multiple lots and over time based upon the reasonably anticipated rate of exposure for an individual to a given medium.

Environmental Law Foundation argued that the trial court should have evaluated the lead levels of individual products rather than averaging lead levels across lots of a particular product to determine whether lead levels in the products exceeded safe harbor levels. Environmental Law Foundation also argued that the trial court should have measured exposure to lead based upon the exposure to a product over a single day, rather than the 14-day period adopted by the trial court as the relevant pattern and duration of exposure to determine whether or not lead levels exceeded safe harbor levels.

The Court of Appeal affirmed the trial court ruling, rejecting Environmental Law Foundation's and the California Office of Environmental Health Hazard Assessment's interpretation of Proposition 65 regulations, and finding that levels of exposure caused by products under Proposition 65 may be determined based upon averaging over lots and over time on a case-by-case basis.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Bisphenol A (Female Reproductive Toxicity). In February 2015, OEHHA announced the Developmental and Reproductive Toxicant Identification Committee (DARTIC) meetings scheduled for May 7 and May 21, 2015. At these meetings, bisphenol A (BPA) will be considered for possible listing based on female reproductive toxicity by the DARTIC. DARTIC will also consider whether BPA has been clearly shown by scientifically valid testing according to generally accepted principles to cause female reproductive toxicity. See Cal. Reg. Notice Register 2015, Vol. No. 8-Z, p. 320.

In March 2015, OEHHA also announced the extension of the public comment period regarding the hazard identification materials for BPA. OEHHA extended the public comment period until 5 p.m., Monday, April 20, 2015. See Cal. Reg. Notice Register 2015, Vol. No. 12-Z, p. 466.

List of Proposition 65 Chemicals. For the most current list of Proposition 65 chemicals known to the State to cause cancer or reproductive toxicity, please see Cal. Reg. Notice Register 2015, Vol. No. 13-Z, p. 504.

Listings by Reference to the Labor Code. In February 2015, OEHHA provided notice of additional changes to proposed section 25904 to Title 27 of the California Code of Regulations, which addresses chemical listings by reference to California Labor Code section 6382(b)(1). The OEHHA also augmented the administrative record for the proposed regulation. See Cal. Reg. Notice Register 2015, Vol. No. 9-Z, p. 364; see also Vol. No. 6-Z, p. 329.

Newly Added Chemicals. In January 2015, OEHHA added mitoxantrone hydrochloride to the list of chemicals known to the State to cause cancer for the purposes of Proposition 65, effective January 23, 2015. With this action, the chemical is now listed under Proposition 65 as causing reproductive toxicity (developmental endpoint) and cancer. See Cal. Reg. Notice Register 2015, Vol. No. 4-Z, p. 162.

In March 2015, OEHHA provided notice that it was adding (effective March 27, 2015) beta-myrcene to the list of chemicals known to the State to cause cancer for purposes of Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 13-Z, p. 502.

In March 2015, OEHHA also provided notice that, effective August 3, 2015, atrazine, propazine, simazine, des-ethyl atrazine (DEA), des-isopropyl atrazine (DIA) and 2, 3-diamino-6-chloro-s-triazine (DACT) will be added to the list of chemicals known to the State to cause reproductive toxicity for purposes of Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 13-Z, 503.

No Significant Risk Level. In January 2015, the OEHHA provided notice to adopt a No Significant Risk Level (NSRL) of 146 micrograms per day for diisononyl phthalate (DINP). See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 62.

In January 2015, OEHHA also provided notice of a public hearing after receiving a request that OEHHA grant a safe use determination (SUD) for the use of DINP in vinyl flooring products. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 66.

Notice of Intent to List. In February 2015, OEHHA provided notice of its intent to list styrene as known to the State to cause cancer under Proposition 65. See Cal. Reg. Notice Register 2015, Vol. No. 9-Z, p. 366.

OEHHA Website. In January 2015, OEHHA provided notice of its intention to add section 25205 to CCR Title 27. This regulation would establish the framework for a website operated by OEHHA that would provide consistent, understandable information to the public about potential exposures to Proposition 65 listed chemicals. See Cal. Reg. Notice Register 2015, Vol. No. 3-Z, p. 121.

"Right to Know." In January 2015, OEHHA provided notice of its proposed repeal of the current Article 6 regulations and adoption of new regulations in Article 6 of CCR Title 27. These new regulations would further the "right-to-know" purposes of the statute and provide more specific guidance on the content of safe harbor warnings for a variety of exposure situations, and corresponding methods for providing those warnings. It also would add a specific section to the regulations addressing the relative responsibilities for providing warnings for businesses in the chain of commerce versus retail sellers of a given product. See Cal. Reg. Notice Register 2015, Vol. No. 3-Z, p. 118.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Amendments to the Ban on Use of Lead Ammunition When Taking Wildlife. In January 2015, CFGC provided notice of proposed amendments to various regulatory standards in CCR Title 14 relating to the prohibition on the use of lead projectiles and ammunition using lead projectiles for the take of wildlife with firearms. Perhaps most significantly, with the proposed addition of section 250.1, CFGC will add new requirements in the statewide non-lead mandate pursuant to Section 3004.5 of the Fish and Game Code that will be phased in over three time periods. See Cal. Reg. Notice Register 2015, Vol. No. 3-Z, p. 114.

Central Valley Salmon Sport Fishing. In January 2015, CFGC proposed to amend CCR Title 14, subsections (b)(5), (b)(68), and (b)(156.5) of section 7.50, relating to Central Valley Salmon Sport Fishing. The current sport fishing regulations allow for salmon fishing in the American,

Feather, and Sacramento rivers. New Chinook salmon bag and possession limits were proposed in the American, Feather, and Sacramento rivers. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 40.

Dreissenid Mussels. In January 2015, the California Department of Fish and Wildlife (CDFW) provided notice of the proposal to adopt regulations regarding Dreissenid mussels. The purpose of the proposed regulations it to address: (1) establishment of a program to permit the possession of dead dreissenid mussels; (2) deadlines and reporting requirements for control plans for water supply systems infested with dreissenid mussels; (3) deadlines and reporting requirements for prevention programs at reservoirs open to the public; (4) the process for quarantining conveyances when CDFW, or other state agencies acting on its behalf, determines the conveyance has the potential to spread dreissenid mussels; and (5) procedure and appeal processes for imposing an administrative penalty for violations of Fish and Game Code Sections 2301 and 2302 and the proposed regulations or related orders. The proposed regulations provide CDFW with the ability to verify that the control and prevention of dreissenid mussels is taking place throughout the State and provides a process to impound conveyances which may be carrying mussels. See Cal. Reg. Notice Register 2015, Vol. No. 4-Z, p. 148.

Klamath River Sport Fishing. In January 2015, CFGC provided notice of proposed amendments to CCR Title 14, subsections (b)(91.1) and (b)(195) of section 7.50, relating to Klamath River sport fishing. The proposed changes affect season, bag, and possession limits. See Cal. Reg. Notice Register 2015, Vol. No. 4-Z, p. 151.

Mammal Hunting Regulations for the 2015-2016 Season. In January 2015, CFGC provided notice of the proposal to amend various CCR Title 14 regulations relating to mammal hunting for the 2015-2016 season. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 25.

Pacific Halibut Sport Fishing Regulations. In January 2015, CFGC provided notice of its proposal to amend CCR Title 14, sections 28.20 and 28.95, relating to Pacific halibut sport fishing regulations for consistency with federal rules. The proposed regulatory changes modify regulations to allow Pacific halibut to be managed under a quota management system to allow for timely conformance of federal fisheries regulations and in-season changes. The benefits of the proposed regulations are consistency with federal regulations, the sustainable management of California's Pacific halibut resources, and the health and welfare of anglers. See Cal. Reg. Notice Register 2015, Vol. No. 4-Z, p. 154.

Pacific Bluefin Tuna Daily Bag Limit and Tuna Filet Procedures. In January 2015, CFGC provided notice of the proposed amendments to CCR Title 14, section 27.65(b) and 28.38(b), relating to Pacific Bluefin tuna daily bag limit and tuna filet procedures for consistency with federal rules. The proposed regulations decrease the Pacific blue fin tuna daily bag limit from 10 to two fish. Pacific Bluefin tuna was declared overfished and a decreased bag limit is expected to reduce the recreational catch by 30 percent for 2015 and 2016. The proposed regulations would modify the fillet regulations to require tuna filleted on any boat or brought ashore as fillets south of Point Conception to fillet in a manner that allows for identification of the species of tuna. See Cal. Reg. Notice Register 2015, Vol. No. 4-Z, p. 157.

Pacific Halibut Sport Fishing Regulations. In January 2015, CFGC provided notice of its proposal to amend CCR Title 14, sections 28.20 and 28.95, relating to Pacific halibut sport fishing

Migratory Bird Permits. In March 2015, the USFWS announced a final ruling removing two regulations that set forth certain depredation orders for migratory birds (50 C.F.R. §§21.42 and 21.45). This rule becomes effective April 24, 2015. See 80 Fed.Reg. 15689.

National Wildlife Refuge System. In January 2015, the USFWS announced the finalization of a policy to implement a strategic approach to the growth of the National Wildlife Refuge System. The policy prioritizes acquisitions within existing refuge boundaries, expansion of existing refuges, and establishment of new refuges. It also focuses protection measures on priority conservation features. See 80 Fed.Reg. 2119.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Definition of Solid Waste. In January 2015, the USEPA announced that it was publishing a final rule that revised several recycling-related provisions associated with the definition of "solid waste" used to determine hazardous waste regulation under Subtitle C of the Resource Conservation and Recovery Act (RCRA). These revisions affect certain types of hazardous secondary materials that are currently conditionally excluded from the definition of "solid waste" when reclaimed. See 80 Fed.Reg. 1694.

WATER RESOURCES

Recent Court Rulings

Second District Upholds Higher Groundwater Extraction Charges For Urban Uses. *City of San Buenaventura v. United Water Conservation District* (March 17, 2015, B251810) __ Cal. App.4th __.

United Water Conservation District raised groundwater pumping charges for urban groundwater extractor City of San Buenaventura after expiration of a settlement agreement with the City that allowed the City to pay the same water rates as nearby agricultural groundwater users . After expiration of the settlement agreement, the Conservation District raised the City's groundwater pumping charges to three times those of nearby agricultural groundwater extractors

based upon Section 75594 of the California Water Code which authorizes ground water charges for agricultural use to be "less than three times" for charges for urban use. The City sued. The trial court found in favor of the City and awarded a partial refund of the groundwater pumping charges to the City. Both the Conservation District and the City appealed.

The City challenged the constitutionality of the groundwater pumping charges, arguing that 1) the groundwater pumping charges were unconstitutional as they are property-related fees or taxes and therefore subject to Propositions 218 or 13, 2) the charges exceeded the reasonable costs of maintaining the groundwater supply, and 3) that the cost of maintaining the ground water supply was not allocated fairly in proportion to the City's use of ground water resources.

The Court of Appeal reversed the trial court decision, finding that the Conservation District's groundwater pumping charges were fair and reasonable in relation to the City's use of groundwater resources and that the groundwater pumping charges were neither property-related fees nor taxes.

U.S. Supreme Court Awards Upholds Special Master's Disgorgement Award and Denial of Injunctive Relief for Exceeding Water Allocations Under Republican River Compact. *Kansas v. Nebraska, et al,* No. 126 (U.S. Feb. 24, 2015).

In 1943, Congress approved the Republican River Compact, an agreement between Kansas, Nebraska and Colorado to apportion water originating in the Republican River Basin. In 2007, Kansas petitioned the U.S. Supreme Court, which has original jurisdiction over this dispute due to it arising under an interstate compact, for monetary and injunctive relief against the State of Nebraska for substantially exceeding its water allocation under the Republican River Compact and subsequent settlement agreements.

The Court appointed a Special Master who determined that Nebraska knowingly failed to comply with its obligations under the Republican River Compact, and recommended to the Court that Nebraska be ordered to disgorge an additional $1.8 million in benefits from exceeding its water allocation, on top of 3.7 million dollars in actual damages that Nebraska already agreed to pay to Kansas. The Special Master also denied Kansas' request for injunctive relief, and recommended that the water accounting procedures under the Compact be amended to no longer charge Nebraska for importing water. Both States objected to portions of the Special Master's recommendation.

The Court upheld the Special Master's recommendations. The Court found that in acting under its original jurisdiction to adjudicate interstate compacts, the Court was not strictly bound by the terms of an interstate compact and could invoke equitable principles to devise solutions to address interstate compact violations, especially in light of the Court's equitable apportionment power over interstate waters.

Invoking equitable principles, the Court adopted the Special Master's recommendation that Nebraska pay actual damages as well as partially disgorge its economic benefits derived from exceeding its water allocation, since "actual damages in a compact case may be inadequate to deter an upstream State from ignoring its obligations." The Court refused to award injunctive relief

against Nebraska, finding that there was "no cognizable danger of recurrent violations" in light of Nebraska's recent efforts to come into compliance with the Compact.

Finally, the Court adopted the Special Master's recommendation to amend the Compact's accounting procedures to no longer charge Nebraska for importing water, finding that the deficiencies in the accounting procedures "distort[ed] the States' intended apportionment of interstate waters" and was "required to avert an outright breach of the Compact . . . . [as it would] deprive Nebraska of its compact rights." Justice Kagan delivered the majority opinion, with Kennedy, Ginsburg, Breyer and Sotomayor joining. Justice Roberts, Justice Scalia, and Justice Thomas concurred and dissented in part.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Certification Procedures for Vapor Recovery Systems. In March 2015, the California Air Resources Board (CARB) provided notice of a public hearing to consider amendments to certification procedures for vapor recovery systems at gasoline dispensing facilities (GDFs). The public hearing will be conducted on April 23-24, 2015. The proposed amendments would affect CCR Title 17, sections 94010, 94011, 94016, and 94017. The proposed amendments to the certification procedures would: (1) adopt new performance standards and specifications for nozzles used at non-retail GDFs that have been excluded by the air districts from Phase II vapor recovery, because they fuel a fleet of newer vehicles that process gasoline vapors on-board the vehicles (on-board refueling vapor recovery or ORVR); (2) amend requirements to allow for the continued use of pre-Enhanced Vapor Recovery Phase I systems on certain aboveground storage tanks until the end of the useful life of those systems, thereby improving cost-effectiveness while achieving emission reductions in areas where they are most needed; and (3) clarify existing requirements for manufacturers of vapor recovery equipment used on underground storage tanks, aboveground storage tanks, and ORVR fleet fueling facilities. See Cal. Reg. Notice Register 2015, Vol. No. 10-Z, p. 401.

Adoption of Evaporative Emissions Control Requirements for Spark-Ignition Marine Watercraft. In January 2015, CARB provided notice of a public hearing to consider the adoption of evaporative emission control requirements for spark-ignition marine watercraft. The primary purpose of this proposed regulation is to set more stringent evaporative emission standards than those adopted by the U.S. Environmental Protection Agency (U.S. EPA). The proposed regulation also includes provisions for certification, labeling, enforcement, and recall. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 8.

Commercialization of Alternative Diesel Fuels. In January 2015, CARB provided notice of a public hearing to consider the proposed regulation on the commercialization of motor vehicle alternative diesel fuels (ADF). The ADF regulation is intended to provide a pathway for emerging diesel fuel substitutes to enter the commercial market in California, to manage and minimize

environmental and public health impacts and to preserve the emissions benefits derived from the ARB motor vehicle diesel regulations. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 13.

Low Carbon Fuel Standard (LCFS). In January 2015, CARB provided notice of a public hearing to consider an update to the low carbon fuel standard intended to reduce, on a full-fuel, life cycle basis, the carbon intensity of transportation fuels in California. The proposed regulatory action would reduce the average carbon intensity of transportation fuels used in California by 10 percent by the year 2020, compared to 2010. This would be accomplished by requiring specified providers of transportation fuels used in California to meet an incrementally lower carbon intensity standard in each subsequent year. See Cal. Reg. Notice Register 2015, Vol. No. 1-Z, p. 45.

Air Toxics Hot Spots Program Risk Assessment Guidance Manual. In March 2015, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of its release of a final document, *Air Toxics Hot Spots Program Risk Assessment Guidelines, Guidance Manual for the Preparation of Risk Assessments* (Guidance Manual), February 2015. This Guidance Manual has been developed by OEHHA, in conjunction with CARB, for use in implementing the Air Toxics Hot Spots Program (Health and Safety Code Section 44360 et seq.). The Guidance Manual underwent public review and was peer reviewed and approved by the Scientific Review Panel on Toxic Air Contaminants. See Cal. Reg. Notice Register 2015, Vol. No. 10-Z, p. 410.

Streams and Wetlands. In January 2015, the USEPA announced the availability of the final report titled, "Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence" (EPA/600/R-14/474F). The purpose of this report was to summarize the current understanding about the connectivity and mechanisms by which streams and wetlands affect the physical, chemical and biological integrity of downstream waters. See 80 Fed.Reg. 2100.

WATER QUALITY

Recent Court Rulings

Court of Appeal upholds Regional Water Quality Control Board's Basin Plan Amendment establishing non-point source TMDLs based upon the concentration of pollutants found in the lake bed sediment of Lake McGrath. *Conway v. State Water Resources Control Bd.* (2015), Cal.App.4th, No. B252688.

Lake McGrath (the "Lake") is located in the southern end of McGrath State Beach Park in Oxnard. It is a terminal lake, meaning it has no outlets. The Lake receives large amounts of agricultural run off and has been identified as a polluted receiving water body under the Clean Water Act due to concentrations of pesticides and polychlorinated byphenyls. The Regional Water Quality Control Board ("Regional Board") adopted a Basin Plan Amendment establishing total maximum daily loads ("TMDLs") for two sources of pollution affecting the Lake: 1) concentrations of pollutants entering the lake from a drainage ditch; and 2) concentrations of pollutants found in the Lake bed sediments. Only the sediment based TMDL was at issue in this case. The Regional Board set a 14-year deadline for achieving the TMDLs and listed all landowners within the Lake's watershed as "cooperative parties" who must enter into a

Memorandum of Agreement ("MOA") with the Regional Board setting forth the means of achieving the TMDLs within the 14-year deadline.

Several of the landowners listed as "cooperative parties" filed a petition for writ of mandate seeking to vacate the Regional Board's Basin Plan Amendment. The Petitioners presented two major arguments. First, they posited that the TDML could not be based upon the concentration of pollutants found in the Lake bed sediments because 1) a TDML can only regulate movement of pollutants into a receiving water and sediments are not part of a receiving water; and 2) federal regulations define a "load" as a pollutant that is introduced into a receiving water, not already present beneath the water. The Court disagreed. The Court found that the Lake waters and Lake bed sediments "form a single physical environment," and together, compose the receiving waters of the Lake. Moreover, the Court noted that the federal regulations provided the Regional Board with the discretion to set a TMDL for the Lake based upon pollution concentrations in the Lake bed sediments. The Court opined that the Regional Board's decision to do so was reasonable because the Lake has no outlets, meaning that the pollutants found in the sediment would not be removed by water flowing through the Lake causing pollutants in the Lake bed sediments to be a chronic source of pollution if not remediated.

The Petitioners secondarily argued that the sediment based TMDL violated California Water Code §13360(a), which bars the Regional Board from dictating a specific form of compliance for a waste discharge requirement, because dredging the Lake was the only possible way to comply with the TMDL within the 14 year deadline. The Court rejected this argument by declaring that Water Code §13360(a) does not apply to TMDLs because §13360(a) only applies to specific "orders" from a Regional Board, and the sediment based TMDL does not order the Petitioners to do anything in particular. In fact, the Court noted that the means of remediating the Lake bed sediments were to be negotiated during the MOA process, making the Petitioners argument regarding dredging as the only feasible form of remediation premature.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Drinking Water Public Health Goal. In February 2015, OEHHA announced the publication of the updated Public Health Goal (PHG) for perchlorate in drinking water and the availability of the final technical support document for this PHG. See Cal. Reg. Notice Register 2015, Vol. No. 9-Z, p. 365.

California Drinking Water Program. In February 2015, the USEPA provided notice informing the public that the California Drinking Water Program has been transferred from the California Department of Public Health to the California State Water Resources Control Board. See 80 Fed.Reg. 7865.

Clean Water Act – Analysis of Effluent. In February 2015, the USEPA proposed changes to the pollutant analysis methods that are used by industries and municipalities to analyze the chemical,

physical, and biological components of wastewater and other environmental samples that are required by regulations under the Clean Water Act. See 80 Fed.Reg. 8956.

Federal Summaries

Supreme Court

The U.S. Supreme Court has reversed and remanded a U.S. Court of Appeals Eleventh Circuit decision, ruling that the term "tangible object" within the meaning of the Sarbanes-Oxley Act covers objects that one can use to record or preserve information, and disposal of undersized fish did not involve a tangible object for purposes of the Act. *Yates v. United States* (February 25, 2015) 135 S.Ct. 1074.

In the case, petitioner Yates was a ship captain who was found by a federal agent to have caught undersized red grouper fish in violation of federal conservation regulations, and instructed by the federal agent to keep the fish segregated until the ship returned to port. Instead, Yates told a crew member to throw the undersized fish overboard. Thereafter, Yates was convicted of impeding a federal investigation by knowingly altering, destroying, mutilating, concealing, covering up, falsifying, or making a false entry in any record, document, or "tangible object" in violation of 18 U.S. Code section 1519. Yates also was convicted under section 2232(a) for destroying or removing property to prevent seizure. Yates did not contest his section 2232(a) conviction, but he maintained that fish are not trapped within the term "tangible object," as that term is used in section 1519.

The Supreme Court agreed. It reversed the judgment and remanded the case, finding that a "tangible object" within the meaning of section 1519 is one used to record or preserve information, and fish do not meet such criteria.

United States Court of Appeals

Recent Court Rulings

The Hopi Tribe was unable to recover damages against the United States to cover the costs of replacing arsenic poisoned groundwater with alternative sources of fresh drinking water because the Hopi Tribe was unable to identify any statute or regulation imposing a duty upon the United States to provide fresh drinking water. *The Hopi Tribe v. United States* (2015), No. 2014-5018.

The Hopi Tribe, a federally recognized tribe, have occupied a reservation in northern Arizona since settling there pursuant to a 1882 Executive Order (the "Executive Order") that was subsequently codified by Congress in the Act of 1958 (the "Act"). The public water distribution system on the Hopi reservation relies almost exclusively upon groundwater aquifers. The water being distributed to five communities within the Hopi reservation contains unsafe arsenic levels

exceeding the federal maximum of 10 micrograms/liter. Arsenic is a naturally occurring toxic chemical found in certain rock and soil formations.

The Hopi Tribe filed suit against the United States in the Court of Federal Claims alleging that the U.S. has a fiduciary duty to provide the Hopi reservation with adequate drinking water and seeking damages to cover the costs of providing safe, alternative sources of fresh water for the five affected communities. The Court of Federal Claims dismissed the suit for lack of subject-matter jurisdiction. The Hopi Tribe appealed. The issue presented to the Court of Appeals was whether the Federal Court of Claims had jurisdiction over the Hopi Tribe's claims pursuant to the Indian Tucker Act, through which Congress waived sovereign immunity for any claim brought by a federally recognized tribe "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States..." 28 U.S.C. §1491(a)(1).

In upholding the lower court's dismissal, the Court of Appeals applied the following two-part test for determining jurisdiction under the Indian Tucker Act: 1) first, the claimant must identify substantive law imposing a fiduciary duty upon the federal government and allege that the government breached its duty; and 2) if the claimant satisfies part one, the court shall determine if the controlling substantive law requires compensation for damages sustained as a result of the government's breach. Here, the Court found that the Hopi Tribe could not satisfy the first part of the jurisdictional test because no substantive law, including the Executive Order and the Act, imposed a fiduciary duty on the U.S. to provide the Hopi reservation with adequate water. The Court specifically noted that the clause in the Act declaring the Hopi reservation lands "to be held by the United States in trust for the Hopi Indians" is merely "bare trust language" insufficient to impose a specific fiduciary duty to manage water resources on the Hopi reservation. The Court also found that the *Winter* Doctrine, which prevents third parties from diverting water from or contaminating water flowing onto Indian reservations, did not apply because there was no third party interference with the arsenic laced water, as the arsenic was naturally occurring in the groundwater.

Ninth Circuit Court of Appeals

Air Quality

Recent Court Rulings

The U.S. Court of Appeals, Ninth Circuit, has ruled that the federal Clean Air Act's anti-backsliding provision does not clearly indicate whether the Environmental Protection Agency (EPA) could approve alternate pollution controls if National Ambient Air Quality Standards (NAAQS) were strengthened, and the EPA's interpretation of the anti-backsliding provision was reasonable. *Natural Resources Defense Council, et al. v. United States Environmental Protection Agency* (March 11, 2015) 779 F.3d 1119.

In the case, plaintiffs petitioned for review of the EPA's approval of the South Coast Air Quality Management District's Rule 317 as a revision to California's State Implementation Plan

(SIP) for the Clean Air Act (CAA). EPA approved the rule pursuant to section 172(e) of the CAA after finding that the pollution controls it imposes are "not less stringent than" section 185 of the CAA, which requires that major stationary sources of pollution in severely polluted areas pay fees for their emissions. The Ninth Circuit denied the petition on the following bases:

As the CAA itself does not specify a standard of review, the Court of Appeals reviews any regulations promulgated in connection with the CAA under the standard prescribed by the Administrative Procedure Act; that is, the court reviews the record to ensure that the agency decision is founded on a reasoned evaluation of the relevant factors, and may not rubberstamp administrative decisions that are inconsistent with a statutory mandate or that frustrate the congressional policy underlying the subject statute.

The anti-backsliding provision of the CAA does not clearly indicate whether EPA could approve, as part of a SIP, alternate pollution controls that were "not less stringent" than the controls already in effect if the NAAQS were strengthened, rather than relaxed and, thus, EPA's construction of the statute was entitled to deference.

In this case, the EPA's interpretation of the provision was reasonable textually and as a matter of policy and Congressional intent; the interpretation was consistent with EPA's previous interpretation; there was no language in the CAA restricting the application of the provision; the interpretation promoted air quality by allowing EPA and the states to better tailor SIPs in response to new scientific results; and the interpretation did not give EPA unfettered discretion in approving programs.

The U.S. Court of Appeals, Ninth Circuit, has ruled that the District Court lacked subject matter jurisdiction under the federal Clean Air Act (CAA) to review a final action by the U.S. Environmental Protection Agency (EPA). *California Dump Truck Owners Assn. v. Nichols* (March 3, 2015) 778 F.3d 1119.

In the case, a dump truck owners' trade association brought action against the California Air Resources Board (CARB) to enjoin enforcement of CARB's truck and bus regulation for reduction of emissions of pollutants from heavy-duty diesel-fueled vehicles. Plaintiff alleged that the regulation was pre-empted by federal law. The parties filed cross motions for summary judgment, and the U.S. District Court for the Eastern District of California dismissed the action on the basis that the court lacked subject matter jurisdiction.

The trade association appealed to the Ninth Circuit, which affirmed that the district court lacked subject matter jurisdiction under the CAA to review final actions by the EPA. Under the CAA, invalidation of an EPA-approved SIP may only occur in the federal appellate courts on direct appeal from the Administrator's decision. Moreover, jurisdiction under the provision of the CAA allowing challenges to final agency action only by petition to the Court of Appeals is not established solely by the allegations on the face of the complaint but, instead, the provision channels review of final EPA action exclusively to the courts of appeal, regardless of how the grounds for review are framed.

The State Implementation Plan's (SIP) effectiveness in attaining the EPA's National Ambient Air Quality Standards (NAAQS) was directly tied to its enforceability by CARB and would be vitiated if such enforcement were enjoined. The preemption claim effectively challenged EPA's legal determination that federal law did not prohibit the regulation, and proceeding with the action would undercut the special judicial review process created by Congress for challenging federally-approved SIP measures and could result in potentially inconsistent or redundant interpretations of federal law by different courts and the EPA.

Forest Resources

Recent Court Rulings

Hazardous Waste/ Materials

Recent Court Rulings

In a case that addresses how costs should be allocated in CERCLA contribution actions, the Ninth Circuit Court of Appeals has remanded a decision regarding claims for contribution to the district court. *AmeriPride Services, Inc. v. Texas Eastern Overseas, Inc.*, No. 12–17245 (9th Cir. 2015)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), allows private parties to sue for cost recovery when they have incurred "necessary costs of response" that are consistent with the national contingency plan (NCP) and, in turn, for a responsible party who has incurred liability CERCLA to bring an action for contribution against any other potentially responsible party. The lawsuit arose from PCE contamination of soil at a site near Sacramento that affected wells owned by the California–American Water Company (Cal–Am) and property owned by Huhtamaki Foodservices, Inc. (Huhtamaki), which sued AmeriPride Services Inc. (AmeriPride), the then-owner of the site. AmeriPride filed a contribution action against Texas Eastern Overseas, Inc. (TEO), which had assumed the liabilities of the company that had initially released PCE into the soil. AmeriPride settled the suits by Cal-Am and Huhtamaki. In the action against TEO, AmeriPride filed a motion for summary judgment, seeking to hold TEO liable for AmeriPride's response costs und to have TEO's counterclaim dismissed. After ruling that TEO was liable for AmeriPride's response costs as a matter of law under CERCLA, the district court set a bench trial to resolve remaining issues, including the equitable allocation of response costs between TEO and AmeriPride. Before the bench trial, TEO filed a motion requesting that AmeriPride be required to prove that its settlements with Huhtamaki and Cal–Am were for necessary costs of response incurred consistent with the NCP. The district court denied the motion and ultimately entered judgment against TEO on the cost allocation issue.

On appeal, the Ninth Circuit panel addressed three arguments by TEO: (1) that the district court applied the wrong method to determine how the costs should be allocated between settling and non-settling parties; (2) that the district court erred in calculating the amount subject to equitable apportionment because it did not determine whether AmeriPride's settlements were solely for response costs incurred consistent with the NCP and set the date on which prejudgment

interest started accruing bases on equitable considerations rather than CERCLA's statutory requirements; and (3) that that the district court erred when it assigned TEO's causes of action against its insurers to AmeriPride pursuant to section 708.510 of the California Code of Civil Procedure (CCP).

The Ninth Circuit concluded, with respect to the issues listed above, (1) that it could not determine whether the district court abused its discretion in allocating response costs because the district court had not explained its methodology for complying with the provision of CERCLA that authorizes contribution actions; (2) that a court is not free to exercise its discretion in determining the methodology for calculating contribution awards in CERCLA actions but must apply the provisions of the statute authorizing cost recovery, 42 U.C.S § 9607(a), and the statute authorizing contribution actions, 42 U.S.C. § 9613(f)(1); and (3) that the district court erred in assigning TEO's XXX claims to AmeriPride because section 708.510 of the CCP permits assignment of a right to payment, and a cause of action for damages is personal property under California law, not a type of payment. The panel vacated the district court's judgment and remanded the action to the district court.

The Fourth District Court of Appeals has issued an opinion that clarifies when an entity may be held liable as an "arranger" under CERCLA. *Consolidation Coal Company v. Georgia Power Company,* No. 13-1603 (4th Cir. 2015)

Ward Transformer Company ("Ward") purchased used, obsolete, or damaged electrical transformers and reconditioned or repaired them for resale. Ward obtained some of the transformers involved from Georgia Power and Savannah Electric and Power Company (Savannah Electric). Its reconditioning and repair operations resulted in PCB contamination at the North Carolina site it used for the operations, which became a CERCLA site. Several entities that had contributed to cleanup costs sued Georgia Power (which by that point had acquired Savannah Electric), alleging that under CERCLA it was liable as an "arranger" – one of the categories of parties potentially responsible for cleanup costs. They argued that Georgia Power "arranged for disposal of" PCBs through its sales of used transformers to Ward and was liable for the Savannah Electric transformers as the successor in interest to that entity. Georgia Power moved for summary judgment, and the district court granted the motion.

To determine whether summary judgment was proper, the Fourth District addressed whether there was evidence that Georgia Power or Savannah Electric qualified as arranging for disposal (or, in other words, intending to dispose) of the transformers and thus could be liable for contribution as arrangers under CERCLA. The Fourth District applied what are known as the "Pneumo Abex" factors in determining whether arranger liability existed: (1) whether the parties intended that the materials were to be reclaimed before reuse, (2) the value of the materials sold, (3) the usefulness of the materials in the condition in which they were sold, and (4) the state of the product at the time of transferal. The court also considered whether intent to dispose could be inferred from Georgia Power or Savannah Electric's knowledge that Ward might spill PCBs while rebuilding the transformers.

Applying the Pneumo Abex factors, a 2-1 majority of the Fourth District panel concluded that the plaintiffs failed to show that there was a genuine factual dispute regarding whether Georgia

Power or Savannah Electric sold the transformers with the intent to dispose of them. Accordingly, the majority found that the district court had not erred in awarding summary judgment to those parties and affirmed the district court's judgment.

NEPA

Recent Court Rulings