State Bar of California
ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from January 1 through March 31, 2016. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar can be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.

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

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

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

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STATE OF CALIFORNIA SUMMARIES

AGENCY ADMINISTRATION

Recent Court Rulings

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Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

California Public Utilities Commission (CPUC). In January 2016, the CPUC provided notice of its intent to amend its Rules of Practice and Procedure as they relate to the availability of funds for the payment of an intervenor compensation award. The proposed amendment would require all new applicants to post a bond in an amount sufficient to pay all anticipated compensation awards. Cal. Reg. Notice Register 2016, No. 1-Z, p. 17.

Federal Assistance Nondiscrimination. In February 2016, the U.S. Environmental Protection Agency (U.S. EPA) provided notice a 30-day comment period extension, to March 12, 2016, for the proposed rule titled "Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency." 81 Fed. Reg. 6813.

Native American Policy. In January 2016, the U.S. Fish and Wildlife Service (U.S. FWS) provided notice of availability of a new Native American policy that carries out the United States' trust responsibility to Indian tribes by establishing a framework on which to base continued interactions with federally-recognized tribes and Alaska Native Corporations. This policy will replace the existing 1994 policy. 81 Fed. Reg. 4638.

AIR QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Aftermarket Diesel Particulate Filters. In February 2016, the California Air Resources Board (CARB) provided notice of an April 22, 2016 public hearing to consider approval of proposed amendments to California's regulation regarding aftermarket parts, and the proposed incorporated document titled "*California Evaluation Procedure for New Aftermarket Diesel Particulate Filters Intended as Modified Parts for 2007 through 2009 Model Year On-Road Heavy-Duty Diesel Engines*." Cal. Reg. Notice Register 2016, No. 10-Z, p. 336.

Ambient Air Monitoring. In January 2016, the U.S. EPA provided notice of a designation of a new equivalent method for measuring concentrations of coarse particulate matter (PM_{10}) in the ambient air. The new equivalent method for PM_{10} is an automated monitoring method utilizing a measurement principle based on sample collection by filtration and analysis by beta-ray attenuation. 81 Fed. Reg. 4294.

In March 2016, the U.S. EPA provided notice of a final rule revising the ambient air monitoring requirements for criteria pollutants. The amendments revise certain definitions, requirements, and procedures, and address other issues in the Ambient Air Quality Surveillance Requirements. 81 Fed. Reg. 17247.

Applicability Determination Index. In March 2016, the U.S. EPA provided notice of availability of applicability determinations, alternative monitoring decisions, and regulatory interpretations that the U.S. EPA has made under the new source performance standards, national emission standards for hazardous air pollutants, and/or the stratospheric ozone protection program. 81 Fed. Reg. 17697.

Cross-State Air Pollution Rule. In February 2016, the U.S. EPA provided notice of data availability and a final rule for allocations under the Cross-State Air Pollution Rule for the 2015 compliance year. 81 Fed. Reg. 7466.

In March 2016, the U.S. EPA provided notice of affirming and making permanent an interim amendment to the Cross-State Air Pollution Rule. The amendment corrects compliance deadlines that were revised as a result of a court action. 81 Fed. Reg. 13275.

Human Exposure Assessment. In January 2016, the U.S. EPA provided notice of a 45-day public comment period for the external review draft of the document titled "*Guidelines for Human Exposure Assessment*." 81 Fed. Reg. 774. In February 2016, the U.S. EPA provided notice of an extended comment period for same. 81 Fed. Reg. 7791.

Integrated Science Assessment for Oxides of Nitrogen. In January 2016, the U.S. EPA provided notice of availability of a final document titled "*Integrated Science Assessment for Oxides of Nitrogen—Health Criteria*." The document was prepared as part of the review of primary National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide. 81 Fed. Reg. 4910.

National Ambient Air Quality Standards (NAAQS). In January 2016, the U.S. EPA provided notice of a final action to reclassify the Los Angeles-South Coast Air Basin's Moderate nonattainment area as a Serious nonattainment area for the 2006 fine particulate matter ($PM_{2.5}$) NAAQS. As a result of the reclassification, California must submit nonattainment new source

review program revisions and a Serious area attainment plan no later than December 31, 2019. 81 Fed. Reg. 1514.

In February 2016, the U.S. EPA provided notice of its approval, conditional approval, and disapproval of State Implementation Plan (SIP) revisions submitted for the 1997 24-hour and annual $PM_{2.5}$ NAAQS in the San Joaquin Valley's Serious nonattainment area. The U.S. EPA is proposing to grant an extension of the Serious area attainment dates, and approve inter-pollutant trading ratios for use in transportation conformity analyses. 81 Fed. Reg. 6935.

In March 2016, the U.S. EPA provided notice of availability of its responses to certain state designation recommendations for the 2010 Sulfur Dioxide NAAQS. The U.S. EPA intends to make the final designation determinations for the areas of the country addressed by the responses by July 2, 2016. 81 Fed. Reg. 10563.

National Emission Standards for Hazardous Air Pollutants (NESHAPs). In February 2016, the U.S. EPA provided notice of proposed amendments to the NESHAP Refinery MACT 1 and Refinery MACT 2 regulations, and the new source performance standards (NSPS) for petroleum refineries. The proposed amendments would change certain compliance dates in Refinery MACT 1 and Refinery MACT 2, and make technical corrections and clarifications to the NESHAP and NSPS for petroleum refineries. 81 Fed. Reg. 6814.

In February 2016, the U.S. EPA also provided a notice of availability of the broadly applicable alternative test method approval decisions the U.S. EPA has made under, and in support of, NSPS and NESHAP. 81 Fed. Reg. 7092.

National Oil and Hazardous Substances Pollution Contingency Plan. In January 2016, the U.S. EPA provided notice of proposed revisions to the National Oil and Hazardous Substances Pollution Contingency Plan. The proposed revisions would align the Plan with the Department of Homeland Security's National Response Framework and National Incident Management System. 81 Fed. Reg. 3982.

Oil and Natural Gas Sector. In January 2016, the U.S. EPA provided notice of an extended comment period for the information request related to hazardous air pollutant emissions from sources in the oil and natural gas production and natural gas transmission and storage segments of the oil and natural gas sector. 81 Fed. Reg. 4239.

Portable Fuel Containers. In January 2016, CARB provided notice of a February 18, 2016 public hearing to consider adoption of proposed amendments to the portable fuel container regulation. The proposed amendments would: (i) require certification fuel to contain 10 percent ethanol; (ii) harmonize the certification and test procedures with those of the U.S. EPA; (iii) revise the certification process; and, (iv) improve the certification and test procedures. Cal. Reg. Notice Register 2016, Vol. 1-Z, p. 4.

Protection of Stratospheric Ozone. In February 2016, the U.S. EPA provided notice of a direct final rule to the stratospheric protection regulations to implement the International Trade Data System. The system would streamline transmission of required transactional data by allowing

electronic filing of same. 81 Fed. Reg. 6765. Later that month, the U.S. EPA also provided notice that there is no prior proposed rule for the direct final rule, and no further action will be taken provided no adverse comments are received. 81 Fed. Reg. 6824.

Risk Management Program. In March 2016, the U.S. EPA provided notice of a proposed rule to amend its Risk Management Program regulations, including changes to the accident prevention program requirements, regulatory definitions, and data elements submitted in risk management plans. These changes would improve chemical process safety, assist in planning and responding to accidents, and improve public awareness of chemical hazards at regulated sources. 81 Fed. Reg. 13637.

Small Containers of Automotive Refrigerant. In March 2016, CARB provided notice of an April 22, 2016 public hearing to consider adoption of the proposed amendments to the Regulation for Small Containers of Automotive Refrigerant. The amendments would clarify existing requirements, expand the scope of unclaimed container deposit money, and amend the certificate procedures. Cal. Reg. Notice Register 2016, Vol. 10-Z, p. 348.

State Implementation Plan (SIP). In January 2016, the U.S. EPA:

1. Provided notice of a partial approval and partial disapproval of revisions to the Sacramento Metropolitan Air Quality Management District (AQMD) portion of the California SIP. The revisions concern the District's demonstration regarding Reasonably Available Control Technology (RACT) requirements for the 1997 8-hour ozone NAAQS. 81 Fed. Reg. 2136.

2. Provided notice of a proposed rule to approve a SIP revision submitted to provide for attainment of the 1-hour ozone NAAQS in the San Joaquin Valley. Specifically, the U.S. EPA is proposing to find the emissions inventories to be acceptable, and approve several determinations and provisions. 81 Fed. Reg. 2140. Later that month, the U.S. EPA took final action and the rule became effective on February 19, 2016. 81 Fed. Reg. 2993.

3. Provided notice of a final rule to disapprove revisions to the South Coast AQMD portion of the California SIP concerning vehicle scrapping, employee trip reduction, and procedures for the hearing board regarding variances and subpoenas. The submitted South Coast AQMD rules are discretionary, and do not create a deficiency in the SIP. 81 Fed. Reg. 4889.

In February 2016, the U.S. EPA:

1. Provided notice of a proposed rule to approve revisions to the California Department of Pesticide Regulations portion of the California SIP. The revisions concern volatile organic compound (VOC) emissions from pesticides. 81 Fed. Reg. 6481.

2. Provided notice of a direct final rule to approve revisions to the Santa Barbara County Air Pollution Control District (APCD) portion of the California SIP concerning administrative and procedural requirements to obtain preconstruction permits which regulate emission

sources. 81 Fed. Reg. 6758. The U.S. EPA also provided notice of a proposed rule regarding same. 81 Fed. Reg. 6814.

3. Provided notice of a final rule approving a regulation, and making the requirement federally enforceable, for the San Joaquin Valley Unified APCD portion of the California SIP. The regulation, Rule 9410 (Employer Based Trip Reduction), establishes requirements for employers in the San Joaquin Valley to implement programs encouraging employees to use ridesharing and alternative transportation methods to reduce air pollution. 81 Fed. Reg. 6761.

4. Provided notice of a direct final rule approving revisions to the Yolo-Solano AQMD portion of the California SIP concerning emissions of VOCs and oxides of nitrogen from gasoline dispensing facilities and stationary gas turbines. 81 Fed. Reg. 6763. The U.S. EPA also provided notice of a proposed rule regarding same. 81 Fed. Reg. 6813.

5. Provided notice of a re-opened comment period for a proposed rule to approve a revision to the San Joaquin Valley Unified APCD portion of the California SIP concerning revisions to Rule 4702 (Internal Combustion Engines) and a referenced technical support document. 81 Fed. Reg. 7489.

In March 2016, the U.S. EPA:

1. Provided notice of a proposed action to approve a rule concerning control of oxides of nitrogen emissions from off-road diesel vehicles for the South Coast AQMD portion of the California SIP. The rule would require certain in-use off-road vehicle fleets to meet more stringent requirements when funding is provided by the South Coast AQMD in order to achieve additional reductions of oxides of nitrogen. 81 Fed. Reg. 12637.

2. Provided notice of a final rule approving revisions to the San Joaquin Valley Unified APCD and the South Coast AQMD portions of the California SIP concerning emissions of oxides of nitrogen from fan-driven natural-gas-fired central furnaces for residences and businesses. 81 Fed. Reg. 17390.

Volatile Organic Compounds (VOCs). In February 2016, the U.S. EPA provided notice of a final rule amending the regulatory definition of VOCs. The rule currently excludes t-butyl acetate (TBAC) for purposes of emissions limitations or content requirements. For consistency, this action would remove the requirements in the definition related to TBAC for purposes of recordkeeping, reporting, modeling, and inventory. 81 Fed. Reg. 9339.

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

Third District finds EIR for pest program violated CEQA by providing artificially narrow objectives and thereby omitting reasonable alternatives. *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647

The California Department of Food and Agriculture (CDFA) prepared a programmatic EIR for a seven-year program to eradicate the light brown apple moth, an invasive pest whose rapid proliferation posed a significant threat to sensitive species and crops in California. The draft EIR included five "alternatives" to the program. The court characterized these "alternatives" as not true alternatives, but as five different tools to achieve eradication. The tools focused on disrupting mating patterns and introducing pesticides and natural predators. The draft EIR did not evaluate control as an alternative to eradication, stating that the two mechanisms were fundamentally different because eradication has an end date, but control could potentially continue forever.

The CDFA certified as complete the EIR for the *eradication* program but, due to new information on the infeasibility of eradication, adopted findings for a *control* program. CDFA also revised the program's objective from eradication to protection of California's agricultural economy and the environment. The court held that even before these last minute changes, the EIR contained an artificially narrow project objective, resulting in the failure to analyze pest control as an alternative to eradication. The court stated that protection of plants and crops was "clearly" the objective and underlying purpose of the eradication program. The EIR's failure to analyze a control alternative "infected the entire EIR insofar as it dismissed out of hand anything that would not achieve complete eradication" of the moth.

CDFA argued control of the pest was narrower than, and therefore necessarily subsumed by, the eradication program. The court rejected this argument, reasoning that the absence of analysis of a control program in the EIR left CDFA unable to support this assertion with substantial evidence. The court held the final EIR's failure to study a range of reasonable alternatives was a prejudicial error.

The court held petitioners' claim of insufficiency of the evidence did not constitute a separate grounds for reversal of the judgment, and petitioners failed to show reversible error regarding the "No-Program" alternative or the EIR's impact analyses. The court did not address the cumulative impacts contentions, finding that the reversible error necessitated a new cumulative impacts discussion.

Fourth District finds psychological and social impacts resulting from changes in community character are alone insufficient to require an EIR. *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560

The Poway City Council unanimously approved an MND for a project which would replace a horse boarding facility with 12 residential lots. The horse boarding facility, called the "Stock Farm," operated for 20 years and came to be an integral community landmark. At the public hearing, many Poway residents voiced concerns about the loss of a wholesome recreational activity for young people, curtailment of equestrian activities at the facility across the street, and deterioration of the community character. Project opponents argued that CEQA required an EIR instead of an MND due to substantial evidence of a significant impact on the City's equestrian community character. The trial court agreed.

The Fourth District reversed the trial court's ruling, noting that economic and social impacts resulting from a project are not considered significant impacts on the environment under CEQA. When "community character" involves aesthetic impacts, analysis and mitigation of such impacts is required. Both the Initial Study and the MND found the project did not have aesthetic or visual impacts. Instead the court characterized the impacts as "psychological and social factors" that affect residents' "sense of place and identity." Ultimately, the court held that CEQA did not require the City to study the project's potential psychological and social impacts.

The court rejected the argument that the level of public controversy should in itself require an EIR, citing *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1026. The court also rejected the argument that effects *on* future residents from the trucks and horses associated with the equestrian facility across the street required an EIR, quoting the holding in *California Building Industry Association v. Bay Area Quality Management Dist.* (2015) 62 Cal.4th 369, 392, that CEQA does not generally require consideration of the effects of existing environmental conditions on a proposed project's future residents. Finally, the court found that the project opponents forfeited MND adequacy claims when they chose not to cross-appeal.

The Fourth District Court of Appeal held the affirmative defense of laches requires evidence of prejudice. *Highland Springs Conference & Training Ctr. v. City of Banning,* 199 Cal. Rptr. 3d 226 (Cal. Ct. App. 2016).

In California Environmental Quality Act actions, Highland Springs Conference and Training Center ("**Highland**") and Banning Bench Community of Interest Association ("**Banning**") challenged the City of Banning's certification of an environmental impact report for a real estate development project. Highland and Banning named "SCC/Black Bench, LLC, dba SunCal Companies" ("**SCC/BB**") as the only real party in interest. Two years later, Highland and Banning moved to recover, solely from SCC/BB, attorney fees incurred in the CEQA litigation. SCC/BB did not oppose the motion, and the trial court awarded over $1 million in attorney fees. Four years later, SCC/BB had not paid any of the awards, and Highland and Banning moved to add SCC Acquisitions, Inc. ("**SCCA**") as an additional judgment debtor, claiming SCCA was the alter ego of SCC/BB.

The trial court denied the motion. Plaintiffs brought the motion six years after the original CEQA action. There was insufficient evidence to justify the delay, and Highland and Banning should have known SCCA was a real party in interest. Moreover, SCCA could have spent its own resources to defend the original litigation and motion for fees, and now its financial circumstances had materially changed for the worse. Highland and Banning appealed.

The Fourth District Court of Appeal reversed. Laches did not bar the motion to amend because SCCA failed to show sufficient prejudice, even if the delay was unreasonable. Whether SCCA virtually represented itself in the CEQA action as the alter ego of SCC/BB was a separate due process issue. SCCA did not show it no longer had the same resources, nor did it show any evidence was lost or any witnesses were no longer available. Denying the motion based solely on unreasonable delay would create a statute of limitations by judicial fiat, even though no limitations period applied to the motion to add a judgment debtor. As such, the Court reversed and remanded the case to the trial court to determine if Highland and Banning proved their alter ego claim against SCCA.

Fourth District Court of Appeal holds that an ordinance prohibiting mobile medical marijuana dispensaries is not a project subject to CEQA. *Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265.

The City of Upland adopted an ordinance in 2007 stating that no medical marijuana dispensary would be permitted in any zone in the City. The City analyzed the 2007 ordinance under CEQA and concluded that there was no substantial evidence that the ordinance would have a significant effect on the environment. In 2013, the City adopted an ordinance that prohibited mobile medical marijuana dispensaries from operating in the City. A non-profit civil rights organization filed a writ petition challenging the 2013 ordinance on the ground that the City violated the law in failing to conduct an environmental analysis under CEQA before adopting the ordinance.

The petitioner alleged that the ordinance was a project subject to CEQA. The City, however, argued that the ordinance was not a project, but even it was, CEQA's "common sense" exemption applied.

The Court of Appeal held that the 2013 ordinance was not a project under Public Resources Code section 21065 because the ordinance merely restated the prohibition on mobile dispensaries that was first imposed by the 2007 ordinance. Alternatively, the Court held that the 2013 ordinance was not a project because the purported environmental impacts were purely speculative.

California Supreme Court holds that CEQA generally does not require an EIR to consider the effect on residents of environmental conditions at a residential project site. *California Building Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369.

The Bay Area Air Quality Management District adopted new thresholds of significance for air pollutants. The new regulation included "receptor" thresholds that created a threshold for new receptors consisting of residents and workers who will be brought into the area because of the

proposed project. The California Building Industry Association filed a petition for writ of mandate in part on CEQA grounds.

The Court granted review to consider under what circumstances, if any, the California Environmental Quality Act (CEQA) requires a lead agency to analyze how existing environmental conditions will impact future residents or users of a proposed project.

The Court held that generally a lead agency is not require to analyze the impact of existing environmental conditions on a project's future users or residents. The Court recognized two exceptions to the general rule: (1) when a proposed project would exacerbate existing environmental hazards, CEQA required analysis of the exacerbated conditions on future residents or users; and (2) when CEQA specifically requires analysis of the project's impacts on future residents or users, such as with certain airport, school and housing construction projects.

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

Tribal Cultural Resources. In February 2016, and pursuant to AB 52 (Gatto, 2014), the California Natural Resources Agency provided notice of proposed amendments to the State CEQA Guidelines concerning impacts to tribal cultural resources. Cal. Reg. Notice 2016, Vol. 8-Z, p. 247.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Greenhouse Gas (GHG) Reporting Rule. In January 2016, the U.S. EPA provided notice of proposed amendments to provisions of the GHG Reporting Rule in response to a petition to reconsider specific aspects of the rule. 81 Fed Reg. 2535. In February 2016, the U.S. EPA provided notice of an extended comment period for same. 81 Fed. Reg. 9797.
In January 2016, the U.S. EPA also provided notice of a proposed rule concerning revisions and confidentiality determinations for the petroleum and natural gas systems source category of the GHG Reporting Program. 81 Fed. Reg. 4987. In February 2016, the U.S. EPA provided notice of an extended comment period for same. 81 Fed. Reg. 9797.

Inventory of U.S. GHG Emissions and Sinks: 1990-2014. In February 2016, the U.S. EPA provided notice of availability of the "*Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014*." 81 Fed. Reg. 8713.

Phase 2 Heavy-Duty National Program. In March 2016, the U.S. EPA and U.S. Department of Transportation provided notice of data availability related to the proposed Phase 2 Heavy-Duty National Program to reduce GHG emissions and fuel consumption for new on-road and heavy-duty vehicles and engines. 81 Fed. Reg. 10822.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CULTURAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

California Tiger Salamander. In March 2016, the U.S. FWS provided notice of availability of the draft recovery plan for the central California distinct population segment of the California tiger salamander. 81 Fed. Reg. 12930.

Colorado Desert Fringe-Toed Lizard. In January 2016, the U.S. FWS acknowledged receipt of a petition to list the Colorado Desert fringe-toad lizard as an endangered or threatened species, and announced its findings that the petitioned action is not warranted based on the scientific and commercial information available. 81 Fed. Reg. 1368.

Destruction or Adverse Modification. In February 2016, the U.S. FWS and National Marine Fisheries Service (NMFS) provided notice of a final rule to revise the regulatory definition for destruction or adverse modification. 81 Fed. Reg. 7214.

Endangered Species Act (ESA). In February 2016, the U.S. FWS and NMFS provided notice of a final rule amending the ESA concerning procedures and criteria used for adding species to the List of Endangered and Threatened Wildlife and Plants, and designating and revising critical habitat. 81 Fed. Reg. 7413.

Exclusions from Critical Habitat. In February 2016, the U.S. FWS and NMFS announced availability of the final joint policy on exclusions from critical habitat under the ESA. 81 Fed. Reg. 7226.

Humboldt Marten. In February 2016, the California Fish and Game Commission (Commission) provided notice of findings concerning the petition to list the Humboldt marten as an endangered species. Based on review of the available information, the Commission found that there is a substantial possibility the requested listing could occur. The California Department of Fish and Wildlife (CDFW) has one year from publication of the notice to provide a written report indicating whether the petitioned action is warranted. Cal. Reg. Notice Register 2016, Vol. 9-Z, p. 290.

Interagency Cooperative Policy. In February 2016, the U.S. FWS, NMFS and National Oceanic and Atmospheric Administration provided notice of a revision to the interagency policy to clarify the role of state agencies in activities undertaken by the federal agencies under authority of the ESA. The revised policy reflects a renewed commitment by the agencies to work together in conserving wildlife. 81 Fed. Reg. 8663.

Kings River Slender Salamander. In January 2016, the U.S. FWS acknowledged receipt of a petition to list the Kings River slender salamander as an endangered or threatened species, and announced its findings that the petitioned action is not warranted based on the scientific and commercial information available. 81 Fed. Reg. 1368.

Laguna Mountains Skipper. In January 2016, the U.S. FWS provided notice of availability of the draft recovery plan for the Laguna Mountains skipper. 81 Fed. Reg. 4333.

Sandstone Night Lizard. In January 2016, the U.S. FWS acknowledged receipt of a petition to list the sandstone night lizard as an endangered or threatened species, and announced its findings that the petitioned action is not warranted based on the scientific and commercial information available. 81 Fed. Reg. 1368.

San Miguel Island Fox. In February 2016, the U.S. FWS provided notice of its intent to remove the San Miguel Island fox from the Federal List of Endangered and Threatened Wildlife. 81 Fed. Reg. 7723.

Santa Catalina Island Fox. In February 2016, the U.S. FWS provided a notice of its intent to reclassify the Santa Catalina Island fox from an endangered species to a threatened species. 81 Fed. Reg. 7723.

Santa Cruz Cypress. In February 2016, the U.S. FWS provided notice of a final rule to change the listing status of the Santa Cruz cypress from an endangered species to a threatened species on the List of Endangered and Threatened Plants. 81 Fed. Reg. 8408.

Santa Cruz Island Fox. In February 2016, the U.S. FWS provided notice of its intent to remove the Santa Cruz Island fox from the Federal List of Endangered and Threatened Wildlife. 81 Fed. Reg. 7723.

Santa Rosa Island Fox. In February 2016, the U.S. FWS provided notice of its intent to remove the Santa Rosa Island fox from the Federal List of Endangered and Threatened Wildlife. 81 Fed. Reg. 7723.

Scarlet-Chested and Turquoise Parakeets. In January 2016, the U.S. FWS provided notice of a reopened public comment period concerning the 2003 proposed rule (68 Fed. Reg. 52169) to remove the scarlet-chested and turquoise parakeets from the list of endangered and threatened wildlife. The purpose is to determine if the action is still warranted and to get the best scientific and commercial information available. 81 Fed. Reg. 3373.

Southwestern Willow Flycatcher. In March 2016, the U.S. FWS acknowledged receipt of a petition to delist the Southwestern willow flycatcher as an endangered or threatened species, and announced its finding that the petitioned action provides substantial scientific or commercial information that indicates the petition may be warranted. 81 Fed. Reg. 14068.

Tricolored Blackbird. In January 2016, the Commission accepted for consideration the petition to list the tricolored blackbird as an endangered species. Based on the review of the available information, the Commission found that there is a substantial possibility the requested listing could occur. CDFW has one year from publication of the notice to provide a written report indicating whether the petitioned action is warranted. Cal. Reg. Notice Register 2016, Vol. 2-Z, p. 57.

Western Bumble Bee. In March 2016, the U.S. FWS acknowledged receipt of a petition to list the western bumble bee as a threatened or endangered species, and announced its findings that the petitioned action provides substantial scientific or commercial information that indicates the petition may be warranted. 81 Fed. Reg. 1368.

ENERGY

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.

FEES/TAXES

Recent Court Rulings

The Second District Court of Appeal has held that an agency's wholesale water rates that include the cost of a water service which the agency does not provide violate the California Constitution. *Newhall County Water District v. Castaic Lake Water Agency* (2016) 243 Cal.App.4th 1430.

Respondent Agency charged rates to supply imported water to four water retailers, including the plaintiff District. The four retailers obtained the water they supply from the Agency's imported water as well as local groundwater, making "conjunctive use" of these sources to ensure sustained use of the groundwater aquifer. Although state law authorized the Agency to develop plans to establish an integrated surface water and groundwater supply, the Agency did not actually provide or sell groundwater to the retailers. In 2013, the Agency adopted a new rate structure that combined the cost of providing imported water with a rate component based on the amount of local groundwater used by each retailer. As a result, the District experienced a 67 percent increase in Agency charges. The District filed suit, arguing the new rate structure violated the California Constitution and other provisions of California law.

The question on appeal was whether the Agency's combined rate violated Proposition 26. Proposition 26 expanded the constitutional definition of a "tax" to include "any levy, charge or exaction of any kind imposed by local government," with seven exceptions. An agency imposing a charge has the burden to show that the charge is no more than necessary to cover the reasonable costs of the government activity, and that the manner in which costs are allocated bear a reasonable relationship to the payor's burden on, or benefit received from, the government activity (the

"proportionality" requirement).

The court of appeal held that under Proposition 26, the Agency could not base its wholesale rate on the retailers' use of groundwater because the Agency did not supply groundwater. The court rejected the Agency's argument that it could include groundwater in its rates because Proposition 26's proportionality requirement is measured "collectively," not on an individual payor basis. While this reasoning may apply in the case of other types of fees, it did not apply here, where the government service was provided to only four rate payors. Furthermore, the Agency's groundwater activities benefitted the basin as a whole and thus were not "provided directly to the payor [and] not provided to those not charged." The court likewise rejected the Agency's attempt to defend its rates under Article X of the California Constitution on the ground they "put [water resources] to beneficial use" and prevented "unreasonable use" of groundwater. Article X's conservation mandate could not be read to eliminate Proposition 26's proportionality requirement.

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

Drought Mortality Amendments, 2015. In February 2016, the California Board of Forestry and Fire Protection provided notice of its intent to make permanent, through December 31, 2018, the proposed action to provide persons engaging in cutting or removal of dead or dying trees with an exemption from the plan preparation, submission requirements, completion report, and stocking report requirements. Cal. Reg. Notice Register 2016, Vol. 7-Z, p. 206.

State Responsibility Area (SRA) Fire Prevention Fund. In March 2016, the California Board of Forestry and Fire Protection provided notice of a proposed action concerning the SRA Fire Prevention Fund. The proposed action would establish a grant program, including applicant requirements, eligible entities, and application evaluation criteria. Cal. Reg. Notice Register 2016, Vol. 12-Z, p. 394.

Working Forest Management Plan. In February 2016, the California Board of Forestry and Fire Protection provided notice of a decision to not proceed with the May 1, 2015 rulemaking concerning implementation regulations for the Working Forest Management Plan program, based on the model of the Nonindustrial Timber Management Plan program. Cal. Reg. Notice Register 2016, Vol. 8-Z, p. 254.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Federal Agency Hazardous Waste Compliance Docket. In March 2016, the U.S. EPA provided notice of an updated list of federal facilities on the Federal Agency Hazardous Waste Compliance Docket. The revisions in this update to the docket include 7 additions, 22 corrections, and 42 deletions since the previous update. 81 Fed. Reg. 11212.

Hazard Ranking System (HRS). In February 2016, the U.S. EPA provided notice of a proposed rule to add a subsurface intrusion component to the HRS. The addition will allow an HRS evaluation to directly consider human exposure to hazardous substances, pollutants, or contaminants that enter regularly occupied structures through subsurface intrusion. 81 Fed. Reg. 10371.

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 Fourth District Court of Appeal reversed an award of $1 million in damages for loss of use of the property that was subject to remediation after purchase on the basis that the award and the amount were unsupported by substantial evidence. *Hot Rods v. Northrop Grumman Systems Corporation* (2015) 242 Cal. App. 4th 1166

Northrop Grumman (Northrop) owned and operated a property that was used for manufacturing floor beams for Boeing 747 aircraft. The manufacturing facility was closed in 1990. In 1994, an Environmental Assessment was conducted identifying several areas of concern for contamination. Northrop requested the Regional Water Quality Control Board (the Board) to close the site. The Board recommended that future remediation and monitoring may be necessary. In 1995, Hot Rods purchased the site from Northrop. The purchase agreement contained provisions about indemnification for environmental remediation and monitoring. The agreement also included an integration clause. Since 1995, Northrop regularly reimbursed Hot Rods for environmentally related expenses. In 2003, in response to the Board directive to remediate groundwater, Northrop developed and implemented a remediation plan. In 2007 and 2008, Northrop updated and implemented the plan to cover additional soil contamination that was revealed by further testing. Part of the property has since been completely remediated. Remediation activities are ongoing and expected to be fully completed with the property restored to its fair market value. Hot Rods continued to own and use the property. The dispute arose when Hot Rods asserted that its tenant delayed entering into a lease for the property because of the remediation activities.

In 2011, Hot Rods sued Northrop alleging causes of action for breach of contract, fraud, negligent misrepresentation, nuisance, trespass, unfair business practice, and declaratory relief. Northrop moved to exclude extrinsic evidence concerning the meaning of the purchase agreement according to the integration clause. The referee denied the motion and allowed Hot Rods to present evidence of negotiations and draft provisions. The referee found that Hot Rods was entitled to $105,000 for lost rent, $10,000 for an air study, and $1,450 for electricity and water. The referee also awarded Hot Rods $1.1 million in damages for loss of use of the property and $1.8 million in attorney fees. Orange County Superior Court adopted the referee's findings. Northrop appealed.

On appeal, Northrop argued that the integration clause in the purchase agreement barred the introduction of extrinsic evidence in interpreting the agreement. The Court of Appeal ruled that the referee erred in admitting extrinsic evidence to interpret the agreement. The purchase agreement included an integration clause, which stated that the parties agree that "no extrinsic evidence whatsoever may be introduced" to interpret the agreement. The Court of Appeal explained that based on the plain language of the contract, no extrinsic evidence should have been admitted.

Northrop next argued that the indemnity provision in the purchase agreement only applies to third party claims and does not include direct claims for damages incurred by Hot Rods. The Court of Appeal, looking at the language of the agreement, found that the indemnification

provision was broad in itself, providing indemnity to Hot Rods for "any claims." The court further noted that the definitions of "claim" and "person" in the agreement are also broadly defined to cover any claim and any person. The Court of Appeal affirmed the declaratory judgment that finds Northrop liable for first and third party claims.

Northrop also argued that the $1 million damages award for loss of use of the property was improper. The Court of Appeal reversed the award for loss of use, finding that the amount of the award was not supported by substantial evidence. The court explained that Hot Rods' testimony was focused on the diminution in value of the property and there was no testimony regarding damages for loss of use. The court stated: "evidence introduced to prove plaintiff lost an apple cannot be used to justify an award of an orange." The court did not find that a reasonable basis of computation was used because there was no evidence to support the $1 million number or how it was determined. The Court of Appeal reversed the referee's award of $1 million for loss of use and affirmed the referee's award of $117,500 for lost rent, use of water, and air study. The Court of Appeal remanded to the trial court to determine the prevailing party and the issue of attorney fees.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

California Building Standards. In January 2016, the California Building Standards Commission proposed to adopt, approve, codify, and publish changes to the building standards of the plumbing code related to water-conserving flow rates for water closets and urinals. Cal. Reg. Notice Register 2016, Vol. 1-Z, p. 18.

PROPOSTITION 65

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Air Toxics Hot Spots Program. In February 2016, California's Office of Environmental Health Hazard Assessment (OEHHA) provided notice of a document summarizing the derivation of an inhalation cancer unit risk factor for *perchloroethylene*. Cal. Reg. Notice Register 2016, No. 9-Z, p. 290.

Chemicals Considered for Listing. In February 2016, OEHHA provided notice of chemicals selected to be considered for listing by the Development and Reproductive Toxicant Identification Committee. The chemicals being considered are: (i) *n-Hexane*; (ii) *nickel* and *nickel compounds*; (iii) *perfluorooctanoic acid* and its salts; and (iv) *perfluorooctane sulfonate* and its salts. Cal. Reg. Notice Register 2016, Vol. 8-Z, p. 254.

Clear and Reasonable Warnings. In March 2016, OEHHA provided notice of changes to the proposed regulations to repeal and add a new Article 6 to Title 27 of the California Code of Regulations. This proposed regulation was originally noticed on November 27, 2015 (see Cal. Reg. Notice Register 2015, Vol. 48-Z, p. 2188). The proposed changes are in response to comments that were received on the November 2015 proposal. Cal. Reg. Notice Register 2016, Vol. 13-Z, p. 458.

Notice of Intent. In January 2016, OEHHA provided notice of its intent to list *abiraterone acetate* as known to the State to cause reproductive toxicity via the Formally Required to be Labeled or Identified listing mechanism. Cal. Reg. Notice Register 2016, Vol. 5-Z, p. 150.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Commercial Sea Urchin Fishery. In February 2016, the California Fish and Game Commission provided notice of proposed amendments to Section 120.7 of Title 14 of the California Code of Regulations, concerning Commercial Sea Urchin Fishery. The proposed amendments would set conditions for issuance of diving permits, including limiting the number of permits issued, and would make minor revisions regarding the location of where fishing activity records should be sent. Cal. Reg. Notice Register 2016, Vol. 9-Z, p. 285.

Fishing Activity Records and CPFV Logbooks. In February 2016, the California Fish and Game Commission provided notice of proposed amendments to Sections 190 and 195 of Title 14 of the California Code of Regulations, concerning Fishing Activity Records and CPFV Logbooks. The proposed amendments would allow electronic submittal of records, in lieu of paper format, and make other clarifying amendments. Cal. Reg. Notice Register 2016, Vol. 9-Z, p. 283.

Eagle Permits. In February 2016, the U.S. FWS provide notice of a final rule concerning vacating provisions of regulations governing eagle nonpurposeful take permits that extended the maximum term of programmatic permits to 30 years. The rule reinstates the previous 5-year limit. 81 Fed. Reg. 8001.

Lower Klamath River Basin Sport Fishing. In March 2016, the California Fish and Game Commission provided notice of proposed amendments to Section 7.50(b)(91.1) of Title 14 of the California Code of Regulations, concerning Lower Klamath River Basin sport fishing. The proposed regulations are in conformance with federal law, and would promote sustainable management of Klamath River Basin salmonid resources. Cal. Reg. Notice Register 2016, Vol. 10-Z, p. 345.

Mammal Regulations. In January 2016, the California Fish and Game Commission provided notice of proposed amendments to certain sections of Title 14 of the California Code of Regulations concerning mammal regulations for the 2016-2017 seasons. Cal. Reg. Notice Register 2016, Vol. 2-Z, p. 34.

Marine Invasive Species Act. In February 2016, the State Lands Commission provided notice of its intent to adopt regulations concerning the enforcement and hearing process for imposing civil penalties for violations of the Marine Invasive Species Act. The regulations establish policies and procedures that the Executive Officer of the California State Lands Commission shall undertake in assessing penalties. Cal. Reg. Notice Register 2016, No. 6-Z, p. 164.

Migratory Bird Hunting. In March 2016, the U.S. FWS provided notice of a final rule concerning the frameworks that states use to select season dates, limits and other options for the 2016-17 migratory bird hunting seasons. The frameworks are necessary to allow recreational harvest at levels compatible with population and habitat conditions. 81 Fed. Reg. 17301.

Mitigation Policy. In March 2016, the U.S. FWS announced proposed revisions to the Mitigation Policy due to changes in conservation challenges and practices since its inception in 1981. The revised policy provides a framework for applying a landscape-scale approach to achieve a net gain in conservation outcomes or, at a minimum, no net loss of resources. 81 Fed. Reg. 12379.

Waterfowl Hunting. In February 2016, the California Fish and Game Commission provided notice of proposed amendments to Sections 502 and 507 of Title 14 of the California of Regulations concerning waterfowl hunting. The proposed amendments would: (i) increase certain daily bag limits; (ii) modify the age to participate in the Youth Waterfowl Hunting Days; and, (iii) delete Section 507(a)(2), which prohibits the possession of a firearm while archery hunting. Cal. Reg. Notice Register 2016, Vol. 9-Z, p. 287.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

List of Categorical Non-Waste Fuels. In February 2016, the U.S. EPA provided notice of a final rule amending the Non-Hazardous Secondary Materials rule to include three additional materials on the list of categorical non-waste fuels. Specifically, the following materials are added when presented under specific processing and combustion: (i) construction and demolition wood; (ii) paper recycling residuals; and, (iii) creosote treated railroad ties. 81 Fed. Reg. 6687.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Biotic Ligand Model. In February 2016, the U.S. provided notice of availability, and requested comments on, a draft technical support document titled "*Recommended Estimates for Missing Water Quality Parameters for Application in EPA's Biotic Ligand Model*." This document summarizes the data analysis approaches the U.S. EPA used to develop recommendations for default values for water quality parameters used in the Freshwater Copper biotic ligand model when data are lacking. 81 Fed. Reg. 7784. In March 2016, the U.S. EPA provided notice of an extended comment period for same. 81 Fed. Reg. 12729.

Contaminant Candidate List. In January 2016, the U.S. EPA provided notice of final regulatory determinations to not issue national primary drinking water regulations for *dimethoate, 1,3-dinitrobenzene, terbufos*, and *terbufos sulfone.* The U.S. EPA is delaying the final regulatory determination on *strontium* in order to consider additional data. This action is in response to the U.S. EPA's requirement to make regulatory determinations every five years on at least five unregulated contaminants under the Safe Drinking Water Act. 81 Fed. Reg. 13.

National Pollutant Discharge Elimination System (NPDES). In January 2016, the U.S. EPA provided notice of proposed amendments to the regulations governing small municipal separate storm sewer system (MS4) permits to respond to a U.S. Court of Appeals decision. The amendments would revise the small MS4 regulations to ensure that the permitting authority determines the adequacy of best management practices and other requirements, and provides public notice and the opportunity to request a public hearing on the requirements for each MS4. 81 Fed. Reg. 415.

In January 2016, the U.S. EPA also provided notice of, and requested comments on, the draft 2016 NPDES pesticide general permit. The permit covers point source discharges from the application

of pesticides to waters of the United States, and would replace the existing permit that expires later this year. 81 Fed. Reg. 4289.

Treatment of Indian Tribes. In January 2016, the U.S. EPA provided notice of a proposed rule to establish regulatory procedures for eligible tribes, in a manner similar to the states, for the Clean Water Act Section 303(d) Impaired Water Listing and total maximum daily load (TMDL) Program. The proposed rule would enable eligible tribes to obtain authority to identify impaired waters on their reservations and to establish TMDLs, which serve as plans for attaining and maintaining applicable water quality standards. 81 Fed. Reg. 2791.

WATER RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

National Coastal Condition Assessment (NCCA). In January 2016, the U.S. EPA provided notice of the final NCCA 2010, which describes the results of a nationwide coastal probabilistic survey that was conducted in the summer of 2010. The results of the assessment include biological quality, water quality, sediment quality, and ecological fish tissue quality. 81 Fed. Reg. 3409.

National Rivers and Streams Assessment (NRSA). In March 2016, the U.S. EPA provided a notice of availability of the final NRSA 2008/2009 which describes the results of the probabilistic survey that was conducted in the summers of 2008 and 2009. The report includes information on how the survey was implemented, what the findings are on a national and ecoregional scale, and future actions and challenges. 81 Fed. Reg. 15100.

Protecting Aquatic Life from Effects of Hydrologic Alteration. In March 2016, the U.S. EPA and United States Geological Survey provided a notice of availability of, and requested comments on, a draft technical report titled "*Protecting Aquatic Life from Effects of Hydrologic Alteration*." The purpose of the report is to: (i) assist with the maintenance of hydrologic flow regime; (ii) provide information on the relationship between hydrologic condition and water quality; and, (iii) translate narrative criteria and develop flow targets to protect aquatic life and habitat. 81 Fed. Reg. 10620.

Regional Monitoring Networks to Detect Changing Baselines in Freshwater Wadeable Streams. In February 2016, the U.S. EPA provided notice of a document titled "*Regional Monitoring Networks (RMNs) to Detect Changing Baselines in Freshwater Wadeable Streams*." The document describes the development of current RMNs for riffle-dominated, freshwater wadeable streams. 81 Fed. Reg. 10240.

Underground Storage Tanks. In March 2016, the State Water Resources Control Board provided notice of proposed regulations clarifying reporting requirements under the Underground Storage Tanks Program, including electronic submittal of data and documents. Cal. Reg. Notice Register 2016, Vol. 13-Z, p. 452.

Water Storage Investment Program. In January 2016, the California Water Commission provided notice of proposed regulations regarding the Water Storage Investment Program. The regulations would allow the State to invest funds in public benefits associated with water storage. Cal. Reg. Notice Register 2016, Vol. 5-Z, p. 144.

Federal Summaries

Supreme Court

The U.S. Supreme Court held the Act of August 7, 1882, did not diminish the Omaha Indian Reservation, and the disputed land was within the reservation's boundaries. *Nebraska v. Parker,* 136 S. Ct. 1072 (2016).

The Omaha Indian Tribe asserted jurisdiction over the village of Pender, Nebraska by subjecting Pender retailers to a liquor ordinance that required liquor licenses, imposed sales tax on liquor sales, and fined violators. Pender and Pender retailers sued members of the Omaha Tribal Council in their official capacities in federal court to challenge the Tribe's power to impose the ordinance on nonmembers. Federal law permitted the Tribe to regulate liquor sales on its reservation and in "Indian Country." The challengers alleged they were not bound by the ordinance because they were not within the boundaries of the reservation or Indian Country.

The legal issue was whether Congress "diminished" the Omaha Indian Reservation in the Act of August 7, 1882 (the "**1882 Act**"). If Congress did so, Nebraska had jurisdiction over the disputed land. If Congress did not, then federal, state, and tribal authorities shared jurisdiction, and the Tribe could impose the liquor ordinance on nonmembers. The federal district court determined Congress did not diminish the reservation, and the Eighth Circuit Court of Appeals affirmed.

The Supreme Court also affirmed, holding the 1882 Act did not diminish the Omaha Indian Reservation. Only Congress can divest a reservation of its land, and its intent to do so must be clear. To determine if Congress diminished the reservation, the Court analyzed, in order of importance, the: (1) text of the 1882 Act; (2) historical evidence surrounding the passage of the 1882 Act; and (3) the subsequent demographic history of the lands in dispute.

In 1854, the Tribe entered into a treaty with the United States to create a 300,000 acre reservation (that treaty, the "**1854 Treaty**"). In the 1854 Treaty, the Tribe agreed to "cede" and "forever relinquish all right and title to" its land west of the Mississippi River except the reservation for $840,000. In 1865, the Tribe entered into another treaty with the United States and agreed to "cede, sell, and convey" an additional 98,000 acres on the north side of the reservation in exchange for $50,000 (that treaty, the "**1865 Treaty**"). In the Act of June 7, 1872 (the "**1872 Act**"), Congress

authorized the Secretary of the Interior to sell 50,000 more acres of the reservation, but rather than sell a fixed amount of land for a fixed sum, a nonmember could purchase tracts not to exceed 160 acres, and proceeds of the sales would appear as credits to the Indians on the books of the U.S. Treasury. The 1882 Act was similar to the 1872 Act and authorized the Secretary of the Interior to sell more than 50,000 acres by issuing a proclamation the "lands are open for settlement." The 1882 Act also provided proceeds from land sales would appear as credits to the Indians on the books of the U.S. Treasury.

In examining the text of the 1882 Act, the Supreme Court found none of the standard indications of diminishment—explicit references to cession, language evidencing the present and total surrender of tribal claims in exchange for fixed payment, or provisions restoring portions of the reservation to the "public domain." Whereas the 1854 Treaty and 1865 Treaty terminated the Tribe's jurisdiction in unequivocal terms, the 1882 Act (and the 1872 Act) did not.

The historical evidence—contemporaneous floor statements and the manner in which the United States and the Omaha Tribe negotiated the transaction—was mixed and could not overcome the lack of a clear textual signal Congress intended to diminish the reservation. The subsequent demographic history of the disputed land strongly supported the petitioners, as the Tribe was almost entirely absent from the disputed territory for more than 120 years. But the Court found it never relied solely on the third consideration to find diminishment, and it was not the Court's role to rewrite the 1882 Act in light of subsequent demographic history.

The U.S. Supreme Court has held that land within conservation system units in Alaska may be treated differently from other federally managed preservation areas across the country. *Sturgeon v. Frost, et al.* (March 22, 2016) 136 S.Ct. 1061.

In the case, plaintiff hunter brought action against the National Park Service (NPS) challenging NPS enforcement of a regulation banning operation of hovercrafts on a river that partially fell within a federal preservation area. The district court entered summary judgment for the NPS, and plaintiff, along with the State of Alaska, which had intervened, appealed. The Ninth Circuit affirmed in part, vacated in part, and remanded. The U.S. Supreme Court granted certiorari, ultimately vacating the Ninth Circuit decision and remanding the case back to the district court.

The Supreme Court ruled that the Ninth Circuit had misinterpreted the controlling law, the Alaska National Interest Lands Conservation Act (ANILCA), which recognizes that Alaska is different and which carves out numerous Alaska-specific exceptions to the NPS' general authority over federally managed preservation areas. The Court further found that the Ninth Circuit had rendered an implausible reading of the statute and, therefore, rejected the Ninth Circuit's interpretation of ANILCA. Ultimately, the Court did not decide whether NPS has authority under ANILCA to regulate plaintiff's activities on the river and left those arguments to the lower courts for consideration as necessary.

United States Court of Appeals

Recent Court Rulings

The U.S. Court of Appeals, Second Circuit, has affirmed a District Court ruling upholding a U.S. Fish and Wildlife Service (USFWS) permit authorizing the emergency take of migratory birds that threatened to interfere with aircraft at an international airport. *Friends of Animals v. Clay, et al.* (January 26, 2016) 811 F.3d 94.

In the case, plaintiff animal rights group brought suit against the U.S. Department of Agriculture, U.S. Animal and Plant Health Inspection Service, and the USFWS challenging issuance of a depredation permit to the Port Authority of New York and New Jersey. The permit authorized the emergency take of migratory birds that threatened to interfere with aircraft at JFK International Airport. Plaintiff argued that USFWS' own regulations unambiguously prohibit it from issuing such a permit and that the permit should, therefore, be set aside as arbitrary and capricious. The district court granted summary judgment in favor of defendants and plaintiff appealed.

The Second Circuit ruled, in short, that, contrary to plaintiff's arguments, the USFWS regulations, in fact, unambiguously authorize the issuance of such a permit. In reaching its decision, the court found that the subject regulation, 50 C.F.R. §21.41, "plainly authorizes" USFWS to issue depredation permits that contain non-species-specific emergency-take provisions of the type issued by USFWS in this case and, as such, USFWS "did not run afoul" of the regulation.

The U.S. Court of Appeals, D.C. Circuit, has affirmed a District Court ruling upholding a U.S. Fish and Wildlife Service (USFWS) decision to withdraw its proposal to list the dunes sagebrush lizard as endangered under the Endangered Species Act (ESA). *Defenders of Wildlife and Center for Biological Diversity v. Jewell* (March 1, 2016) 815 F.3d 1.

In the case, plaintiff organizations brought action challenging a USFWS decision to withdraw its proposal to list the dunes sagebrush lizard as endangered under the ESA. Plaintiffs raised multiple arguments, each rejected by the district court, which granted USFWS motion for summary judgment. Plaintiffs appealed the ruling.

On appeal, the D.C. Circuit ruled that plaintiffs waived their argument that USFWS unlawfully considered voluntary actions and unenforceable restrictions meant to aid in the preservation of the species as a factor in determining whether to list the lizard under the ESA. The Court also ruled that USFWS' determination that a state plan to conserve habitat for the lizard was sufficiently certain to be implemented and effective to protect the lizard such that the lizard did not need to be listed under the ESA was not arbitrary and capricious. Finally, the Court ruled that plaintiffs' argument that the state plan failed to specify enrollment goals at a granule level and, thus, was not sufficiently certain to be implemented was waived.

D.C. Circuit Court of Appeals holds that a challenge to EPA's final rule regarding Clean Air Act's (CAA) permitting scheme for new major emitting sources in non-attainment areas is time-barred. *Sierra Club de Puerto Rico v. Environmental Protection Agency* (D.C. Cir. 2016) 815 F.3d 22.

A waste incinerator operator obtained state and federal permits as the CAA requires. Several non-profit organizations and a residents' group sued, but rather than challenge the permits, they sought to vacate a rule promulgated by the EPA in 1980 that implemented the CAA's permitting scheme.

The issue was whether the CAA's 60-day statute of limitations barred the challenge.

The Court held that the challenge was time-barred. The Court observed that the CAA sets a 60-day limitation period to challenge EPA regulations and a renewed 60-day period if "after-arising grounds" occur. The "after-arising grounds" rule allowed challenges after a regulation's initial adoption when the subsequent occurrence of an event ripens the claim. The Court held that the exception did not apply because petitioners challenged the mere application of an old rule and did not present a subsequent legal or factual change that created new legal consequences for the petitioners.

Eighth Circuit Court of Appeals holds that it had jurisdiction to consider challenge to EPA's approval of Minnesota's Haze State Implementation Plan and that EPA's approval was not arbitrary, irrational or capricious. *National Parks Conservation Assn. v. McCarthy* (8th Cir. 2016) 816 F.3d 989.

In its Regional Haze State Implementation Plan (Plan), the State of Minnesota elected to use alternative emissions trading program under the Transport Rule in lieu of source specific best available retrofit technology (BART) for electric generating units (EGU) and also set reasonable-progress goals to attain natural visibility conditions in Class 1 federal areas. Several conservation organizations brought petitions to review the Plan.

The Court considered both procedural and substantive issues. First, the EPA argued that the D.C. Circuit, and not the 8th Circuit, had exclusive jurisdiction to consider the EPA's approval of the Plan because the approval, which was based on the EPA's Transport Rule, was a nationally-applicable action. Substantively, the Court considered whether the EPA abused its discretion in approving the Plan and Minnesota's reasonable progress goals.

The Court rejected the EPA's contention that it lacked jurisdiction to decide the challenge to the Plan approval. The Court held that it had jurisdiction to hear the petition because it challenged an element of a national program—the Transport Rule—based on an the purely local consideration of whether the Transport Rule as applied to the EGU is better than BART. The Court further held that the EPA's decision that under the circumstances presented, the Transport Rule was better than source-specific BART was rational. Noting that the EPA's determination regarding Minnesota's progress goals was entitled to deference, the Court also held that the EPA's approval of Minnesota's progress goals was also rational.

Third Circuit Court of Appeals holds that a citizen suit failed to state a Clean Air Act (CAA) claim under Rule 12(b)(6) because the administrative agencies diligently prosecuted the CAA violations at issue in the citizen suit. *Group Against Smog and Pollution Inc. v. Shenango Incorporated* (3rd Cir. 2016) 810 F.3d 116.

A group brought a citizen suit under the CAA for alleged CAA violations. The district court granted a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction because the local county health department and state environmental protection agency were already diligently prosecuting the violations.

The issues were (1) whether the CAA's "diligent prosecution" bar (42 U.S.C. section 7604(a) and (b)) was jurisdictional; and (2) whether the "diligent prosecution" bar applied even though the civil enforcement actions had resulted in Consent Decrees and final judgment had been entered.

The Court held that the "diligent prosecution" bar to a citizen suit was not jurisdictional and thus the case was not subject to dismissal under Rule 12(b)(1). The Court, however, continued that the bar could be asserted pursuant to Rule 12(b)(6) for failure to state a claim. The Court also held that civil enforcement actions that had resulted in consent decrees met the requirements of the "diligent prosecution" bar.

The United States Court of Appeals for the First Circuit has affirmed a district court's dismissal of a complaint alleging violations of NEPA and the Federal-Aid Highway Act. *Town of Portsmouth Rhode Island v. Lewis* (1st Cir. 2016) 813 F.3d 54.

The Rhode Island Department of Transportation sought and obtained federal funding for a new bridge. The bridge was not analyzed as a toll bridge for the purposes of NEPA, but after the bridge opened the Rhode Island legislature authorized the imposition of tolls on the bridge. Subsequently, the NEPA documentation was updated to address the tolls. The Town of Portsmouth filed a lawsuit against several state and federal defendants that challenged the tolls on two grounds: First, that the tolls violated the Federal-Aid Highway Act, which generally prohibits tolls on federally-funded bridges, and second, that the defendants had not complied with NEPA in evaluating the impact of the tolls.

After the Rhode Island legislature repealed the tolls, the district court dismissed the case as moot. On appeal, the Town argued that a general exception to the mootness doctrine applied to its claims, and, more specifically, that it could maintain its claim for restitution even if its other claims were moot, because claims for monetary relief can survive events that moot other claims.

The court of appeals rejected the argument that an exception to the mootness doctrine applied to the Town's claims for injunctive and declaratory relief. With respect to the claim for restitution, the court acknowledged that such claims can survive events that moot other claims, but found that the restitution claim nevertheless failed on two grounds: it had not been sufficiently raised before the district court, and in addition the Town lacked a private right of action under NEPA because the First Circuit has held that NEPA provides no private right of action at all.

The United States Court of Appeals for the Fourth Circuit has denied a petition for review involving a challenge to a decision of the Federal Mine Safety and Health Review Commission. *Knox Creek Coal Corporation v. Secretary of Labor, Mine Safety and Health Administration* (4th Cir. 2016) 811 F.3d 148.

After inspecting one of the Knox Creek Coal Corporation's mines, the Federal Mine Safety and Health Administration issued numerous citations that it deemed "significant and substantial" under the Federal Mine Safety and Health Act of 1977. The reviewing Administrative Law Judge (ALJ) found that none of the four violations at issue were in fact "significant and substantial." Three of the four violations were "permissibility" violations involving a requirement that a mine's electrical equipment enclosures be explosion-proof. The last violation was an "accumulations" violation involving a prohibition against allowing coal dust to accumulate. The Federal Mine Safety and Health Review Commission (Commission) reversed the ALJ's decision, finding that the ALJ had not properly applied the applicable standard to the "permissibility" violations, and had erroneously relied on Knox Creek's efforts to abate the "accumulations" violation in deeming the violation to not be "significant and substantial."

The petitioners appealed, arguing that with respect to each type of violation, the Commission had either applied an incorrect legal standard or improperly reweighed the ALJ's findings.

The court found that with respect to the "permissibility" violations, the Commission had not applied the correct standard, but that the outcome would be the same with application of the correct standard: the key was that the conclusions that the identified hazards were reasonably likely to cause injury were supported by substantial evidence. With respect to the "accumulations" violation, the court found that the Commission had applied the correct legal standard, because Commission precedent holds that "significant and substantial" determinations should be made without assumptions as to abatement. The court rejected the argument that the Commission had improperly reweighed the evidence considered by the ALJ because the Commission had adopted, rather than rejected, the ALJ's findings of fact – the fault the Commission found with the ALJ's conclusions was based on "decades" of binding precedent, not differing factual findings.

The Sixth Circuit Court of Appeals has held has held that under the Clean Water Act's judicial review provisions, the circuit court of appeals has original jurisdiction over challenges to the Clean Water Rule. *In Re: U.S. Department of Defense & U.S. Environmental Protection Agency Final Rule: Clean Water Rule: Definition of "Waters of the United States," 80 Fed. Reg. 37,054 (June 29, 2015).*

The Department of Defense and Environmental Protection Agency adopted the Clean Water Rule, clarifying the definition of "waters of the United States" as used in the Clean Water Act. Various states and state agencies challenged the Rule in the circuit court of appeal under the judicial review provisions of the Clean Water Act, alleging that the Rule effects an expansion of the federal government's regulatory jurisdiction, the definition in the Rule conflicts with that currently recognized by the Supreme Court, and the Rule's adoption was not in conformity with the Administrative Procedure Act. Various environmental petitioners intervened to challenge the circuit court of appeals' jurisdiction, alleging that original jurisdiction is properly in the district

courts and that the Clean Water Act's judicial review provisions did not provide for the circuit courts' jurisdiction to review the Rule.

The question for the Sixth Circuit was whether 33 U.S.C. section 1369(b)(1)(E) ("subsection (E)") and section 1369(b)(1)(F) ("subsection (F)") provided for original jurisdiction over the agencies' claims in the circuit court of appeals. Subsection (E) provides for original jurisdiction in reviewing "approv[al] or promulgati[on] any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345" of the Clean Water Act. Subsection (F) provides for jurisdiction in reviewing "issu[ance] or den[ial][of] any permit under section 1342" of the Act.

Two of three judges held that the court had original jurisdiction under subsection (F). Judge McKeague opined that the Rule qualified as a "limitation" under subsection (E) because by expanding the definition of "waters of the U.S.," in operation with other regulations the Rule will result in imposition of limitations. Judge McKeague opined that even though the Rule did not directly impose any restriction or limitation, such a "functional" application of subsection (E) was appropriate in light of other circuit court decisions. Judge McKeague also opined that under subsection (F), original jurisdiction was proper because the Rule will extend protection to additional waters and therefore "affect" permitting decisions. Judge Griffin, concurring in the judgment, instead opined that a "textualist" approach was more appropriate and that the Rule was not a "limitation" under a plain reading of subsection (E); rather, it involved the threshold issue of the Act's jurisdictional reach. Similarly, the Rule did not directly involve permitting under subsection (F), and thus review under that subsection was not appropriate either. However, Judge Griffin opined that the court was bound by its decision in *National Cotton Council of America v. U.S. E.P.A.*, 553 F.3d 927, 933 (6th Cir. 2009), which extended jurisdiction under subsection (F) when a rule "regulates the permitting procedures."

Ninth Circuit Court of Appeals

Recent Court Rulings

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

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

The first issue on appeal was whether BSEE's approval violated the Administrative Procedures Act (the "APA"). Plaintiffs alleged Shell assumed, in the event of a worst-case

discharge, it would achieve recovery of 90 to 95% of any spilled oil. The court found, however, that Shell claimed it could store 90 to 95% of the volume, not that it would actually collect that much. Moreover, BSEE was aware of the distinction between collection and storage and therefore, even if Shell asserted it would collect 90 to 95% of the oil, BSEE did not rely on this claim in approving the OSRPs.

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

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

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

The U.S. Court of Appeals, Ninth Circuit, has upheld the United States Forest Service's (USFS) closure of certain National Forest lands to domestic sheep grazing. *Idaho Wool Growers Assn., et al. v. Vilsack, et al.* (March 2, 2016) 816 F.3d 1095.

In the case, plaintiffs brought action challenging the USFS decision to close to domestic sheep grazing approximately 70% of allotments on which grazing had been permitted in the Payette National Forest in Idaho. USFS took the action in response to concerns regarding disease transmission to immunologically vulnerable bighorn sheep. The district court granted summary judgment in favor of USFS and plaintiffs appealed.

The Ninth Circuit held that, pursuant to the NEPA environmental review process, any error by USFS in failing to consult with the Agricultural Research Service, a federal agency within the U.S. Department of Agriculture, before preparing the final supplemental impact statement and record of decision relating to the closure was harmless error. The court held that because the lack of consultation did not prevent USFS or the public from considering information about the uncertainties in the transmission of disease from domestic to bighorn sheep, such as the Agricultural Research Service would have offered, and because information about the precise mechanisms of such transmission was not a basis of the USFS decision, no prejudice resulted from the lack of consultation.

The court also held that USFS did not otherwise act arbitrarily or capriciously or abuse its discretion by declining to supplement the final supplemental impact statement, or in its modeling used to analyze bighorn sheep home ranges and movement, and the potential impacts of various management alternatives.

The United States Court of Appeals for the Ninth Circuit has held that the Federal Aviation Administration did not violate NEPA in approving commercial passenger operations at an airfield that had previously not been used for such services. *City of Mukilteo v. U.S. Department of Transportation* (9th Cir. 2016) 815 F.3d 632.

Paine Field was constructed in 1936 and was initially envisioned as a major airport that would serve communities located north of Seattle, Washington. This vision did not come to fruition as planned, and authorization to use Paine Field for commercial passenger service was not issued until 2012. After preparing an environmental assessment for its authorization under NEPA, the Federal Aviation Administration (FAA) determined that preparation of an environmental impact statement was not necessary in order to commence commercial passenger operations at Paine Field and issued a finding of no significant impact (FONSI).

Petitioners challenged the FAA's NEPA decision, alleging that the FAA had unreasonably restricted the scope of the environmental assessment, failed to include connected actions in the assessment as NEPA requires, and had determined the outcome of its analysis before even starting the environmental review process.

The court of appeals rejected the petitioners' arguments. First, it found that the FAA had not erred in failing to analyze the impacts that would occur if more airlines than expected started to use Paine Field, because the record demonstrated that the only reasonably foreseeable flights were those the environmental assessment did analyze – thus, it was not arbitrary or capricious for the FAA to limit its analysis to those flights. Second, the court found that Petitioners had failed to demonstrate that there were any connected actions that the FAA needed to address. Finally, the court found that evidence that the FAA favored opening Paine Field for passenger service and had given a contractor a schedule that included a date for potential issuance of a FONSI did not mean that the FAA had improperly pre-determined the matter, because (i) NEPA does not prohibit the FAA or other federal agencies, from having a favored outcome, and because issuing a schedule that includes a date on which a FONSI *could* be issued did not constitute evidence that the FAA had committed to issuing a FONSI before the environmental assessment was complete. However, the court also noted that petitioners would be able to challenge the FAA's future actions if expansion of the use of Paine Field was sought in the future.

The United States Court of Appeals for the Ninth Circuit has provided additional guidance regarding when and to what extent potential terrorist attacks must be addressed in NEPA documents. *San Diego Navy Broadway Complex Coalition v. U.S. Department of Defense* (9th Cir. 2016) 817 F.3d 653.

The U.S. Navy proposed to redevelop a fifteen-acre parcel of land in downtown San Diego. The project was first approved in 1992 after preparation of an environmental impact statement (EIS) pursuant to NEPA, but was put on hold for many years after real estate conditions changed.

In 2006, the Navy prepared a new environmental assessment (EA) that analyzed the impacts of implementing the previously-approved project and issued a finding of no significant impact (FONSI). The 2006 EA and FONSI were successfully challenged, and the Navy prepared a new EA and issued a new FONSI in 2009.

Petitioners challenged the 2009 EA and FONSI on several grounds. The district court granted summary judgment in favor of the defendants. On appeal, the petitioner/appellant argued that the 2009 EA and FONSI did not properly address the potential threat of terrorist attacks at the redeveloped site. The defendants argued that the rule that NEPA requires consideration of terrorism does not apply when a federal agency seeks to redevelop an existing site, or that if such analysis was required, it had been provided.

The court held that NEPA did require a consideration of a potential terrorist attack at the redeveloped facility, in light of the general risk of terrorism, the location of the project, and the military facilities to be located at the site. It also criticized the Naval Criminal Investigative Service's conclusion that there was no known specific threat of a terrorist attack at the site, noting that the risks associated with terrorism are in constant flux, and so the absence of a specific threat should not bear on the consideration of the potential impacts of a terrorist attack. However, it found that the analysis of potential terrorist attacks was sufficient because it explained the Navy's Anti-Terrorism Force Protection requirements and clarified that those requirements would apply to any buildings occupied by Department of Defense personnel and noted that antiterrorism building standards would reduce the potential damage that a terrorist attack could cause, and because the Navy had conducted a public comment period which enabled the public to participate in the decision-making process. Thus, while the Navy could have provided additional information regarding the potential effects of terrorism, it gave the issue the "hard look" that NEPA requires. One member of the panel dissented, arguing that while the Navy had provided information about how it would deal with a potential terrorist attack, it had not properly asses the actual likely impacts of such an attack, and so the analysis was not adequate.