

State Bar of California
ENVIRONMENTAL LAW SECTION UPDATE
RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

JANUARY/FEBRUARY/MARCH 2013
VOL. XVI, No. 1

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 October 1 through December 31, 2012. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at: <http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx>.

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

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

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cday-wilson@ci.eureka.ca.gov. I would like to thank Rachel Cook, Michael Haberkorn, Arielle Harris, David Levy, Whit Manley, Danielle K. Morone, Joseph D. Petta, Stephen Velyvis, John Epperson, and Amy Lawrenson for their contributions to this issue of the *Update*.

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

Case Law and Regulatory Update Authors:

Rachel Cook
Gatze, Dillon & Ballance LLP

Michael Haberkorn
Gatzke Dillon & Ballance LLP

Arielle O. Harris
Downey Brand LLP

David Levy
Baird Holm LLP

Whitman Manley
Remy, Thomas, Moose & Manley

Danielle K. Morone
Gatzke Dillon & Ballance LLP

Joseph D. Petta
Shute Mihaly & Weinberger

Stephen Velyvis
Burke Williams & Sorensen LLP

Legislative Committee:
John Epperson, Chair

TABLE OF CONTENTS

State of California Summaries

Air Quality
Attorney's Fees
California Environmental Quality Act
Climate Change
Coastal Resources
Endangered Species
Energy
Fees/Taxes
Forest Resources
Hazardous Materials/Wastes
Insurance Coverage
Land Use
Proposition 65
Resource Conservation
Solid Waste
Water Resources
Water Quality

Federal Summaries

Supreme Court

Ninth Circuit Court of Appeals
Endangered Species
NEPA
Water Resources

STATE OF CALIFORNIA SUMMARIES

LEGISLATIVE UPDATE

AIR QUALITY

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Air Quality Designations. In January 2013, the U.S. Environmental Protection Agency (USEPA) proposed to correct an error in a previous rulemaking that revised the boundaries between nonattainment areas in Southern California established to address the revoked National Ambient Air Quality Standard (NAAQS) for one-hour ozone. Specifically, the USEPA proposed to designate the Indian country of the Morongo Band of Mission Indians as a separate air quality planning area. For more information, see 78 Fed.Reg. 51.

In January 2013, the USEPA determined that the San Francisco Bay Area and Yuba City-Marysville nonattainment areas have attained the 2006, 24-hour PM_{2.5} NAAQS. For more information, see 78 Fed.Reg. 1760, 2211.

In March 2013, the USEPA clarified the description of the Imperial Valley planning area, which has been designated as nonattainment for the PM₁₀ NAAQS. For more information, see 78 Fed.Reg. 16792, 16827.

In March 2013, the USEPA proposed to redesignate the San Diego County ozone nonattainment area as an attainment area for purposes of the 1997, 8-hour ozone NAAQS. For more information, see 78 Fed.Reg. 17902.

Motor Vehicle Pollution Control Standards. In January 2013, the USEPA announced it would be holding a public hearing – tentatively scheduled for January 30, 2013 – to address the California Air Resources Board’s (CARB) request for a preemption waiver pursuant to section 209(b) of the Clean Air Act in order to implement its emission standards for urban bus engines. For more information, see 78 Fed.Reg. 719.

In January 2013, the USEPA granted CARB’s request for a waiver of Clean Air Act preemption to enforce its Advanced Clean Car regulations. For more information, see 78 Fed.Reg. 2112.

Nonroad Engine Pollution Control Standards. In January 2013, the USEPA announced it would be holding a public hearing – tentatively scheduled for January 30, 2013 – to address

CARB's amendments to the Airborne Toxic Control Measure for In-Use Diesel-Fueled Transportation Refrigeration Units (TRU) and TRU Generator Sets and Facilities Where TRUs Operate. CARB requested that the USEPA confirm that the TRU amendments *either* fall within the scope of the authorization previously granted by the USEPA on January 9, 2009 *or* are not subject to Clean Air Act preemption. For more information, see 78 Fed.Reg. 721.

In January 2013, the USEPA also announced it would be holding a public hearing – tentatively scheduled for January 30, 2013 – to address CARB's amendments to its Off-Highway Recreational Vehicle and Engines Regulations. For more information, see 78 Fed.Reg. 724.

State Implementation Plan. The USEPA issued a number of regulatory notices pertaining to various California air districts, as summarized below:

- *Feather River Air Quality Management District:* (i) interim determination to stay the imposition of offset sanctions and defer the imposition of highway sanctions based on proposed approval of other rule revision (78 Fed.Reg. 12243); (ii) limited approval and limited disapproval of permitting rules to regulate the construction and modification of stationary sources (78 Fed.Reg. 12267)
- *Imperial County Air Pollution Control District:* (i) stay imposition of sanctions based on proposed approval of local rules regulating PM₁₀ from fugitive dust sources (78 Fed.Reg. 894, 922); (ii) approve revisions addressing NOx emissions from certain boilers, process heaters and steam generators (78 Fed.Reg. 896)
- *Northern Sierra Air Quality Management District:* approve revisions addressing VOC emissions from the transfer of gasoline at gasoline dispensing facilities (78 Fed.Reg. 897, 921)
- *Placer County Air Pollution Control District:* (i) approve revisions concerning VOCs, NOx, and PM emissions from open burning (78 Fed.Reg. 6736); (ii) interim determination to stay the imposition of offset sanctions and defer the imposition of highway sanctions based on proposed approval of other rule revision (78 Fed.Reg. 12243); (iii) limited approval and limited disapproval of permitting rules to regulate the construction and modification of stationary sources (78 Fed.Reg. 12267)
- *Sacramento Metropolitan Air Quality Management District:* (i) approve revisions addressing VOC emissions from the transfer of gasoline at gasoline dispensing facilities (78 Fed.Reg. 897, 921); (ii) stay imposition of offset sanctions and defer the imposition of highway sanctions based on proposed approval of two related permitting rules (78 Fed.Reg. 10554); (iii) approve two permitting rules that regulate construction and modification of stationary sources (78 Fed.Reg. 10589)
- *San Diego Air Pollution Control District:* (i) approve revisions addressing VOC emissions from the transfer of gasoline at gasoline dispensing facilities (78 Fed.Reg. 897, 921); (ii) approve the motor vehicle emissions budgets for ozone in years 2020 and 2025, as contained in the *Redesignation Request and Maintenance Plan for the 1997 National Ozone Standard for San Diego County (December 2012)* (78 Fed.Reg. 17197)
- *San Joaquin Valley Air Pollution Control District:* approve revisions concerning VOC, CO, NOx, SOx, and PM emissions from glass melting furnaces (78 Fed.Reg. 6740, 6784)
- *South Coast Air Quality Management District:* (i) 1-hour ozone attainment plan substantially inadequate (78 Fed.Reg. 889); (ii) approve revisions addressing lead emissions from large lead-acid battery recycled facilities (78 Fed.Reg. 5305); (iii) approve revisions concerning

VOC emissions from municipal solid waste landfills and livestock waste (78 Fed.Reg. 7703); (iv) approve revisions concerning VOC emissions from architectural coatings (78 Fed.Reg. 18244); (v) withdraw previous approvals for and disapprove vehicle-miles-traveled emission offset requirements for the Los Angeles-South Coast Air Basin 1-hour and 8-hour ozone nonattainment areas (78 Fed.Reg. 18849); (vi) approve revisions concerning VOCs from organic liquid storage (78 Fed.Reg. 18853, 18936)

National Ambient Air Quality Standards. In January 2013, the USEPA made available a draft document titled, *Policy Assessment for the Review of the Lead National Ambient Air Quality Standards, External Review Draft*. For more information, see 78 Fed.Reg. 2394.

National Emission Standards for Hazardous Air Pollutants (NESHAPs). In January 2013, the USEPA finalized amendments to the NESHAPs for stationary reciprocating internal combustion engines. For more information, see 78 Fed.Reg. 6674. The USEPA also took final action on its reconsideration of certain issues in the NESHAPs for new and existing industrial, commercial, and institutional boilers and process heaters at major sources. For more information, see 78 Fed.Reg. 7138.

In February 2013, the USEPA took final action on its reconsideration of certain issues related to the NESHAPs for new and existing industrial, commercial, and institutional boilers at area sources. For more information, see 78 Fed.Reg. 7488.

In March 2013, the USEPA finalized revisions to the deadlines established in the NO₂ NAAQS for the near-road component of the monitoring network in order to implement a phased deployment approach. For more information, see 78 Fed.Reg. 16184.

Federal Reference Methods. In February 2013, the USEPA proposed to establish a new Federal Reference Method for measuring lead in total suspended particulate matter collected from ambient air. For more information, see 78 Fed.Reg. 8066.

New Source Performance Standards. In February 2013, the USEPA set forth its final decision on the issues for which it granted reconsideration arising from its March 21, 2011 final rule titled, “Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units.” For more information, see 78 Fed.Reg. 9112.

Renewable Fuel Standards (RFS). In February 2013, the USEPA proposed a projected cellulosic biofuel volume for 2013 that is below the applicable volume specified in the Clean Air Act, and proposed annual percentage standards for certain fuels. For more information, see 78 Fed.Reg. 9282, 12005.

In March 2013, the USEPA issued a final rule identifying additional fuel pathways that meet the biomass-based diesel, advanced biofuel or cellulosic biofuel lifecycle GHG reduction requirements specified in the RFS. For more information, see 78 Fed.Reg. 14190.

Volatile Organic Compounds. In February 2013, the USEPA revised the definition of VOCs under the Clean Air Act to add four chemical compounds. For more information, see 78 Fed.Reg. 9823. The USEPA also revised the definition to exclude one chemical compound on the basis that the compound makes a negligible contribution to tropospheric ozone formation. For more information, see 78 Fed.Reg. 11101, 11119.

Outer Continental Shelf (OCS) Regulations. In March 2013, the USEPA finalized the update of the OCS regulations pertaining to sources for which the Ventura County Airport Pollution Control District is the designated corresponding onshore area. For more information, see 78 Fed.Reg. 14917.

ATTORNEY'S FEES

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

CEQA

Recent Court Rulings

Third District Court of Appeal Rules that Code of Civil Procedure Section 473 Does Not Provide Relief for Missing CEQA's Statute of Limitations. Alliance for the Protection of the Auburn Community Environment v. County of Placer (2013) -- Cal.App.4th -- [2013 Cal.App. LEXIS 256]

Placer County certified an EIR and approved a project proposed by Bohemia Properties. The project consisted of a 155,000 square-foot building. The county approved the project on September 28, 2010, and filed a notice of determination ("NOD") the following day. The statute of limitations for a CEQA lawsuit expired 30 days later, on October 29, 2010. The Alliance filed a CEQA petition on November 1, 2010. Bohemia demurred. The Alliance responded by filing a motion for relief under Code of Civil Procedure section 473 based on mistake or excusable neglect. The trial court declined to grant relief and dismissed the lawsuit. The Alliance appealed.

The Alliance argued the trial court should have granted relief under section 473. The Alliance claimed the late filing resulted from miscommunication between the attorney and its filing service. By the time the service understood the need to file on October 29, it was too late, and the clerk's office had closed.

The Court of Appeal ruled dismissal was proper under *Maynard v. Brandon* (2005) 36 Cal.4th 364, in which the Supreme Court stated that relief under section 473 is not available for dismissals based on missing the statute of limitations, where the statute is cast in mandatory terms.

Here, the 30-day statute of limitations was established by Public Resources Code section 21167. The statute does not provide for extending the limitations period on a showing of good cause. No published decision had held that Code of Civil Procedure section 473 provides relief from a litigant's failure to file its petition within the 30-day limitations period under Public Resources Code section 21167. Under the statute, such relief was unavailable.

Sixth District Court of Appeal Rules an EIR Prepared to Analyze Proposed Amendment to a City's Sphere of Influence Did Not Analyze a Reasonable Range of Alternatives Because the EIR Did Not Consider an Alternative That Would Restrict Water Supplies to the Area Proposed for Inclusion in the Expanded Sphere. *Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277

UC Santa Cruz adopted a Long Range Development Plan ("LRDP") calling for development of a "North Campus." The city and UC entered into an agreement to resolve various disputes about expansion of the campus. UC committed to develop on-campus housing, provided the city obtained approval from the Local Agency Formation Commission ("LAFCO") to expand the city's sphere of influence to include the North Campus area. LAFCO approval was needed for the city to provide water and sewer service to this area. (Gov. Code, § 56133.) The city applied to LAFCO for the sphere expansion, and UC applied to LAFCO for approval of a water/sewer contract with the city. The city prepared an EIR. The EIR identified one significant and unavoidable impact: the city had insufficient water to supply the North Campus during drought conditions. Other impacts, while significant, could be mitigated. The city certified the EIR. Habitat sued. The trial court denied the petition. Habitat appealed.

Habitat argued the EIR contained insufficient information regarding the availability of city water supplies to serve the North Campus, and the impacts of going forward with the project despite the insufficiency of those supplies. The Court disagreed. The EIR described the city's existing and projected water supply and demand, acknowledged the city's supplies were inadequate, and predicted the situation would get worse. That situation would exist with or without the North Campus; supplying water to the North Campus would simply make a bad situation slightly worse. The EIR disclosed the supply/demand imbalance, and the project's potential to exacerbate that imbalance. Ultimately, the city could impose cutbacks on water use. That remedy might be harsh, but the EIR did its job by disclosing that it might be necessary. Although Habitat argued the EIR should have analyzed the biological impacts of drawing more water from its existing sources, the Court noted that the city did not propose to increase its supplies; instead, the city would implement conservation or curtailments or develop a desalination facility.

Habitat argued the EIR did not disclose increased erosion that would occur in the watershed where the North Campus would be located. The Final EIR's discussion of erosion cited to erosion control measures that UC had to carry out under a permit issued by the Regional Water Quality Control Board. Habitat argued that discussion was insufficient because the Regional Board requirements were not in the EIR itself. The Court disagreed, holding that the discussion was sufficient to inform decisionmakers.

Habitat claimed the EIR was inadequate because the city did not include a delineation of wetlands. Mitigation required a pre-construction delineation, followed by avoidance or

compensation. That sufficed. Similarly, substantial evidence supported the EIR's conclusions regarding off-campus growth the North Campus would induce.

Habitat argued the project description was flawed because the EIR stated that, under the settlement agreement, the city was required to provide the North Campus with water and sewer service. In fact, the agreement merely committed the city to apply to LAFCO for the sphere amendment, and for UC to request LAFCO to approve the contract for extraterritorial service. The whole of the project included not merely the city's decision to propose a sphere amendment, but also UC's request for approval of extraterritorial service, and LAFCO's decision on both the proposal and the request. Taken together, they represented the "project" for CEQA purposes. The Draft EIR, however, stated only that the project's objective was to apply to LAFCO for a sphere amendment, as required by the city-UC agreement. According to the Court, that was insufficient, because that described only the nature of the project, not its underlying purpose. The Final EIR made clear, however, that the project's objective was to provide water and sewer service to the North Campus in order to trigger UC's obligations under the agreement. Thus, the Final EIR remedied the problem.

Habitat argued the range of alternatives analyzed in the EIR was too narrow because it did not include an alternative that would reduce the project's impact on the city's water supplies. The Court agreed. The EIR had ruled out any alternatives that deviated from the terms of the city-UC agreement, on the theory that the city was legally obliged to fulfill its obligations. But LAFCO was not a party to the agreement and, because LAFCO was a "responsible agency," the EIR had to provide an adequate analysis for LAFCO's purposes as well. The EIR did look at an alternative that consisted of modifying the sphere of influence's boundaries. But the EIR did not analyze a "reduced development" or "limited water" alternative. "Reduced development" did not need to be analyzed, since by statute LAFCO had no authority to regulate directly the use of land. (Gov. Code, § 56375.) The city had an insufficient basis, however, for ruling out a "limited water" alternative. Such an alternative would at least partly meet the city's objectives. The rationale for omitting it from analysis – that UC might simply shift development onto its Main Campus – was a matter of speculation. Moreover, although LAFCO could not regulate land use, it could adopt conditions that imposed limits on the amount of water supplied by the city to UC. "Because the draft EIR and the final EIR failed to discuss any feasible alternative, such as a limited-water alternative, that could avoid or lessen the significant environmental impact of the project on the city's water supply, the alternatives discussions in the draft EIR and the final EIR did not comply with CEQA."

The Court rejected the balance of Habitat's arguments. To wit:

- Mitigation measures to address water supply shortfalls during droughts, which were drawn from the LRDP and required water conservation and similar measures, were sufficiently specific.
- The city's CEQA findings were inadequate to the extent they touched on alternatives because, as noted above, the EIR did not analyze a reasonable range of alternatives. The attack on the city's findings, however, was entirely derivative of other Habitat's other claims and were otherwise adequate.

- The city’s statement of overriding considerations cited six reasons why the city approved the project, despite its significant and unavoidable water supply impact. Three of these reasons – helping UC implement the LRDP, and fulfilling the city’s obligations under the city-UC agreement – were invalid. The others, however, were supported by substantial evidence. Because one reason was enough, three were plenty.

Second District Court of Appeal Defers to a County’s Formulation of Significance Thresholds to Address the Hydrologic Impacts of a Proposed Sand and Gravel Mine. *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059

A gravel mine operator applied to Santa Barbara County for a use permit to establish a sand and gravel mine and operating facility in the bed of the Cuyama River. The county certified an EIR and approved the project. A citizens’ group sued, alleging the EIR was defective in various respects. The trial court denied the petition. The citizens appealed.

The Court of Appeal concluded the EIR was adequate and affirmed. Specifically:

- CEQA did not require the county to go through a formal process in order to fashion a “significance threshold” for the mine’s hydrologic impacts. Nor did the county have to explain why its threshold deviated from CEQA Guidelines Appendix G.
- The EIR found the mine’s hydrological impact on the river would be “minor.” This impact consisted of creating a “sediment deficit” in river flows, which would result in scouring of the riverbed. The citizens argued the mine’s impact, together with another existing mine in the riverbed, would be of such magnitude that it would necessarily be significant. Substantial evidence, however, supported the EIR’s conclusion that the mine would not degrade the riverbed or result in headcutting. The fact that experts (including U.S. EPA and the citizens group’s own expert) disagreed was not determinative, given that substantial evidence supported the EIR’s conclusions.
- Mitigation measures aimed at these impacts were adequate. The measures required the applicant to monitor the site for headcutting or other degradation, and take corrective action if such degradation appeared to be developing. The measure was not too vague, and provided sufficient assurance that identified problems could be addressed by reconfiguring the mine.
- The EIR used a threshold of 31 acre-feet per year to determine the significance of the project’s groundwater use. This threshold applied on both a project-specific and cumulative basis, and was derived from a thresholds adopted by the county in 1992. The EIR found the 1992 threshold remained valid. The Court saw nothing wrong with this approach.
- To protect water quality, the county adopted a condition of approval requiring the operator keep the bottom of any pits at least six feet above groundwater levels. Data showed groundwater levels varied from 40 to 110 feet below the ground. The operator proposed to excavate to a depth of 90 feet. The citizens argued this meant groundwater would necessarily be exposed. The EIR therefore erred in identifying this impact as insignificant. The Court agreed. The error was harmless, however, since the county still adopted a condition of approval requiring the operator to avoid exposing groundwater, regardless of the depth at which it was encountered.

First District Court of Appeal Upholds a Trial Court’s Decision to Order a Limited Remedy for a CEQA Violation in an Eminent Domain Proceeding Initiated by a Park District. Golden Gate Land Holdings, LLC v. East Bay Regional Park Dist. (2013) – Cal.App.4th – [2013 Cal.App.LEXIS 283]

The East Bay Regional Park District (the “district”) adopted a resolution of necessity to condemn eight acres along the east bay shoreline owned by Golden Gate Land Holdings (“GGLH”). The district sought to acquire this land to complete a shoreline park and to construct a segment of a trail circumnavigating San Francisco Bay. The district found its decision was categorically exempt from CEQA. GGLH sued, arguing the district should have prepared an EIR. The trial court agreed and granted the petition, but did not direct the district to rescind its resolution of necessity. That enabled the district to proceed with its condemnation action despite the issuance of the writ. GGLH appealed.

First, the district argued the appeal was moot. The district requested judicial notice of resolutions in which it certified an EIR for the same project, and adopted a new resolution of necessity based on the certified EIR. The district also pointed to the return on the writ it had filed with the trial court, which attached these same documents. The Court of Appeal held, however, that the appeal was not moot. GGLH’s appeal focused on the propriety of the limited remedy ordered by the trial court, not whether the district had complied with that limited remedy. The Court of Appeal could still grant effective relief by ordering the district to set aside its resolution of necessity. For these reasons, the appeal was not moot.

Second, GGLH argued the trial court’s remedy violated CEQA. GGLH argued that, after concluding the district had violated CEQA, the trial court was required to direct the district to vacate its resolution of necessity. GGLH noted that the district’s CEQA violation—an improper conclusion that its resolution of necessity was categorically exempt—encompassed the whole of the district’s decision; there was no way to parse one aspect of the project from another. Thus, according to GGLH, the trial court should not have allowed portions of the project to proceed under Public Resources Code section 21168.9.

In this case, the entire “project” consisted of acquiring and developing the shoreline property for public recreation. The activities implementing that project, however, could be parsed; they consisted of initiating eminent domain proceedings, acquiring the land, and constructing the improvements. The first activity – launching the condemnation process by adopting a resolution of necessity – would not cause impacts. The purpose of the project was, at least in part, to preserve open space or parkland, uses which in of themselves would not cause a physical change in the environment (and thus would not necessarily require any CEQA review). There was no evidence that, by continuing the eminent domain proceedings, the district would prejudice its future consideration or implementation of alternatives or mitigation measures. In particular, allowing that action to proceed would not prejudice the district’s CEQA analysis, so long as the district did not commit millions of dollars to a particular trail alignment by actually acquiring the land prior to completing the CEQA process. Similarly, construction of the park and trail improvements could not occur until after the district completed the CEQA process. For these reasons, the trial court did not misinterpret section 21168.9, or abuse its discretion in exercising its equitable powers under that statute.

First District Court of Appeal Upholds a City’s Reliance on a Statutory Exemption Applicable to Residential Projects that Are Consistent with a Specific Plan for which the City Certified an EIR. *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301

In 2002, the City of Dublin certified a program EIR and approved the “Eastern Dublin Specific Plan.” The specific plan authorized a high-density, mixed-use, transit-oriented project adjacent to a Bay Area Rapid Transit station. The EIR analyzed impacts of full build-out of the specific plan, analyzed alternatives, and identified mitigation measures. The 2002 specific plan included land-use designations for the parcel at issue in the litigation. The parcel was designated for up to 405 high-density residential units and up to 25,000 square feet of retail space.

In 2011, AvalonBay submitted a proposal to develop the parcel. The project included 505 apartment units, a leasing center, a fitness center, two parking structures, and on-street parking spaces. The plan did not include retail uses. AvalonBay asked the city to amend the plan to reallocate 100 residential units from elsewhere in the specific plan area to this parcel. The city found the project exempt from CEQA under Government Code section 65457 and approved the proposal. The petitioners sued. The trial court denied the petition. The petitioners appealed.

Government Code section 65457, subdivision (a), provides a statutory exemption for residential projects consistent with a specific plan for which an EIR was certified. “... [T]o qualify for the section 65457 exemption, the project must be for residential development, it must implement and be consistent with a specific plan for which an environmental impact report previously has been certified, and the qualification contained in the final sentence must not apply, i.e., either a supplemental EIR must not be required by Public Resources Code section 21166 or such a supplemental EIR must already have been prepared and certified.” (*Id.* at p. 1311.) The court held the “substantial evidence” test applied to the city’s findings concerning the applicability of the exemption.

The petitioners argued the project did not qualify for the exemption because the underlying zoning authorized up to 25,000 square feet of retail uses; for this reason, the petitioner reasoned, the project was not exclusively “residential development” as required by section 65457. The Court of Appeal disagreed. AvalonBay’s project consisted entirely of residential units and ancillary uses. Even if AvalonBay could later seek to convert a portion of the project to retail uses, that would require a separate discretionary approval by the city. The fact that the zoning authorized mixed uses did not alter the purely residential character of AvalonBay’s project.

The petitioners argued the project was inconsistent with the 2002 specific plan; petitioners argued that the specific plan called for “mixed use,” so the project also had to be mixed use. The Court disagreed, noting that the specific plan did not require commercial uses on this particular parcel; moreover, the specific plan could retain its mixed-use character even if this particular site contained only residential uses.

The petitioners argued that, because the 2002 EIR was a “program EIR,” the city could not now shift gears and rely on Government Code section 65457. The Court disagreed, noting that CEQA Guidelines section 15168, which addresses the use of program EIRs in evaluating

later activities, does not mandate a particular approach towards environmental review in evaluating later projects within the scope of a certified program EIR; that latter review could, therefore, consist of a determination that the project was statutorily exempt.

The petitioners argued that the city erred by failing to perform supplemental review pursuant to Public Resources Code section 21166. First, the petitioners argued the shift of 100 residential units to this site represented a significant change in the specific plan. The specific plan, however, authorized reallocating residential units within the plan area; thus, “[s]hifting 100 units to a different location within the transit center is not a significant change” because “the total number of residential units was not increased.”

Second, the petitioners argued significant new information regarding greenhouse gas (“GHG”) emissions had come to light since the city certified the EIR in 2002. The petitioners cited thresholds adopted by the Bay Area Air Quality Management District (“BAAQMD”) in 2010. The Court noted that BAAQMD’s 2010 thresholds had been suspended due to separate litigation. Even if the 2010 thresholds remained valid, they did not apply retroactively. Finally, GHG impacts were not “new”; the issue was known, and had been debated and regulated, since the early 1990s. The petitioners argued the 2010 thresholds were necessarily “new” because they did not exist in 2002, when the city certified the 2002 EIR. The Court was unmoved. The 2002 EIR analyzed the specific plan’s impact on air quality; the GHG issue was known at the time; and the issue could have been addressed. Under such circumstances, substantial evidence supported the city’s decision not to prepare a supplemental EIR.

Updates:

- In December 2012, the Fourth District Court of Appeal rejected a claim that the city had engaged in impermissible “piece-meal” environmental review of a park proposed next to a mixed-use village. *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209. The Supreme Court denied a petition for review on March 27, 2013. The Court of Appeal’s decision is now final.
- In October 2012, the Fifth District Court of Appeal ruled a city council could not approve a voter-sponsored initiative without first performing CEQA review. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006. On February 13, 2013, the Supreme Court granted a petition for review of the case. The Fifth District’s decision can no longer be cited.

Legislative Developments

No updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

2012-2016 Light Duty Vehicle Standards. In January 2013, the U.S. Environmental Protection Agency (USEPA) denied the petition of the Pacific Legal Foundation to reconsider the final rules establishing greenhouse gas (GHG) emission standards from light duty motor vehicles for model years 2012-2016. For more information, see 78 Fed.Reg. 5347.

Climate Change Adaptation Plan. In February 2013, the USEPA announced the availability of its draft *Climate Change Adaptation Plan*. For more information, see 78 Fed.Reg. 9387.

GHG Reporting Rule. In February 2013, the USEPA took direct final action to revise the deadline by which owners or operators of facilities subject to the petroleum and natural gas systems source category of the GHG Reporting Rule must submit requests for use of best available monitoring methods. For more information, see 78 Fed.Reg. 11585, 11619.

1990-2011 GHG Inventory. In February 2013, the USEPA made available the *Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2011*. For more information, see 78 Fed.Reg. 12310.

Watershed Modeling and Climate Change. In March 2013, the USEPA made available a draft document titled, *Watershed Modeling to Assess the Sensitivity of Streamflow, Nutrient, and Sediment Loads to Climate Change and Urban Development in 20 U.S. Watersheds*. For more information, see 78 Fed.Reg. 13874.

2016-2019 Light Duty Vehicle Standards. In March 2013, the USEPA requested comment on draft guidance to auto manufacturers for weighting the GHG emissions of a flexible fuel vehicle operating on E85 with the GHG emissions of the vehicle operating on conventional gasoline, when calculating the compliance value to use for the USEPA's GHG emission standards. For more information, see 78 Fed.Reg. 17660.

COASTAL RESOURCES

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Southwestern Willow Flycatcher. In January 2013, the U.S. Fish and Wildlife Service (Service) designated revised critical habitat for the southwester willow flycatcher; in total, approximately 1,975 stream kilometers were designated, which encompasses 208,973 acres within a combination of federal, state, tribal and private lands in Inyo, Kern, Los Angeles, Riverside, Santa Barbara, San Bernardino, San Diego and Ventura counties, as well as lands in Nevada, Utah, Colorado, Arizona and New Mexico. For more information, see 78 Fed.Reg. 344.

Valley Elderberry Longhorn Beetle. In January 2013, the Service reopened the public comment period on its October 2012 proposed rule to remove the valley elderberry longhorn beetle from the List of Endangered and Threatened Wildlife. For more information, see 78 Fed.Reg. 4812.

North American Wolverine. In February 2013, the Service proposed to list the distinct population segment of the North American wolverine occurring in the contiguous United States as a threatened species under the federal Endangered Species Act (ESA). For more information, see 78 Fed.Reg. 7864.

Island Night Lizard. In February 2013, the Service proposed to remove the island night lizard from the List of Endangered and Threatened Wildlife. For more information, see 78 Fed.Reg. 7908.

Tidewater Goby. In February 2013, the Service designated critical habitat for the tidewater goby; in total, approximately 12,156 acres were designated in Del Norte, Humboldt, Mendocino, Sonoma, Marin, San Mateo, Santa Cruz, Monterey, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, and San Diego counties. For more information, see 78 Fed.Reg. 8746.

Coachella Valley Milk-Vetch. In February 2013, the Service designated critical habitat for the Coachella Valley milk-vetch; in total, approximately 9,603 acres were designated in the Coachella Valley area of Riverside County. For more information, see 78 Fed.Reg. 10450.

Buena Vista Lake Shrew. In March 2013, the Service reopened the public comment period on its July 2012 revised proposal to designate critical habitat for the Buena Vista Lake shrew, and announced a revision of the unit map labels and the availability of a draft economic analysis, as well as amended required determinations. For more information, see 78 Fed.Reg. 14245.

Fisher. In March 2013, the Service opened an information gathering period regarding the status of the fisher throughout the range of its West Coast distinct population segment. The status review will include whether listing of the fisher's referenced distinct population segment is warranted. For more information, see 78 Fed.Reg. 16828.

Grizzly Bear Recovery Plan. In March 2013, the Service made available the draft Revised Supplement to the *Grizzly Bear Recovery Plan*. For more information, see 78 Fed.Reg. 17708.

ENERGY

Recent Court Rulings

The Ninth Circuit Court of Appeal has affirmed a District Court ruling granting Shell Oil a preliminary injunction prohibiting Greenpeace from coming within a specified distance of Arctic oil drilling vessels. *Shell Offshore, Inc. v. Greenpeace, Inc.* (9th Cir. March 12, 2013) 709 F.3rd 1281.

In the case, Shell was scheduled to begin federally-authorized oil exploration of its Arctic Outer Continental Shelf ("OCS") leases in 2012. In the months leading up to the exploration, Shell first obtained a temporary restraining order and then a preliminary injunction that barred Greenpeace USA from coming within specified distances of named Shell vessels involved in the OCS exploration. The injunction also prevented Greenpeace USA from committing various tortious and illegal acts against those vessels and their occupants. Greenpeace USA challenged the injunction on several grounds, including that the district court based its ruling on legal standards and factual findings that were erroneous.

A plaintiff who seeks a preliminary injunction must show: (1) likelihood of success on the merits, (2) likelihood of suffering irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in plaintiff's favor, and (4) an injunction is in the public interest. As to likelihood of success on the merits, the record before the district court contained evidence that: (1) Greenpeace USA forcibly boarded and defaced a Shell vessel, the Harvey Explorer, as part of its campaign to "stop Shell" from drilling in the Arctic; (2) on two occasions, activists that Greenpeace USA termed "our activists" employed unlawful and tortious means to stop another energy company from finding oil in the Arctic; (3) Greenpeace USA conceded that it uses "direct action"—including unlawful conduct—as means to an end; (4) Greenpeace USA and the global Greenpeace organization share the goal of stopping Shell from drilling in the Arctic; and (5) Greenpeace activists from other nations have on multiple occasions employed unlawful or tortious means to stop Shell from drilling in the Arctic. On these facts, the Ninth Circuit found the district court did not abuse its discretion in concluding that Shell met its burden as to likelihood of success.

As to likelihood of irreparable harm, the Court of Appeal explained that the record provided ample support for the conclusion that Greenpeace USA has either undertaken directly, or embraced as its own, tactics that include forcible boarding of vessels at sea and the use of human beings as impediments to drilling operations, and that such tactics at minimum pose a serious risk of harm to human life. Accordingly, the Court of Appeal found no abuse of discretion in the district court's conclusion that Shell demonstrated a likelihood of irreparable harm.

As to the balance of equities, the district court concluded that "[b]y carefully tailoring preliminary injunctive relief to focus on illegal and tortious conduct, and minimizing any impact on Greenpeace USA's right to monitor the activities and peacefully protest against Shell within the confines of the law, the balance of the equities remains solidly tipped in Shell's favor." The Court of Appeal explained that Shell has an interest in conducting legally authorized exploration

of its Arctic leases without dangerous interference from Greenpeace USA, and Greenpeace USA has a countervailing First Amendment right to protest Shell's drilling activities. Greenpeace USA argued that the safety zones imposed around the Shell vessels constituted an undue speech restriction. The Court of Appeal disagreed, explaining that the safety zones do not prevent Greenpeace USA from communicating with its target audience, and, in any event, the high seas are not a public forum. In light of the serious risk to human life and property posed by the conduct that the preliminary injunction enjoins, and given the narrow tailoring of the order, the Court of Appeal found that the district court did not abuse its discretion in finding that the scales of equity tip in Shell's favor.

Finally, as to whether the district court abused its discretion in concluding that an injunction is in the public interest, the Court of Appeal explained that Congress has recognized a public interest in the “expeditious and orderly development” of the OCS, and Shell's Arctic OCS project is authorized by law. Greenpeace USA argued that the district court failed to consider the public interest in environmental protection before issuing the injunction. The Court of Appeal disagreed, explaining that the district court crafted a narrow injunctive order that prohibited only illegal and tortious conduct and by expressly inviting Greenpeace USA to seek to modify the order so as to permit Greenpeace to more closely monitor Shell's activities within the safety zones established by the order. As such, the Court of Appeal concluded that the district court did not abuse its discretion in granting Shell's motion for a preliminary injunction, and affirmed the district court’s order.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

FEES/TAXES

Recent Court Rulings

The Second District Court of Appeal has ruled that a paper carryout bag charge is not a tax for purposes of California Constitution article XIII C because the charge is payable to and retained by the retail store and is not remitted to the county. *Schmeer v. County of Los Angeles* (February 21, 2013) 213 Cal.App.4th 1310.

In the case, the Los Angeles County Board of Supervisors enacted an ordinance prohibiting retail stores from providing plastic carryout bags to customers. Under the ordinance, retail stores may provide only recyclable paper carryout bags or reusable carryout bags meeting certain requirements. The ordinance further provided that retail stores must charge the customer 10 cents for each recyclable paper carryout bag provided, and the money received for the bags must be retained by the store and used only for: (1) the costs of compliance with the ordinance; (2) the actual costs of providing recyclable paper bags; or (3) the costs of educational materials or other costs of promoting the use of reusable bags. Petitioners filed suit alleging that the carryout bag

charge is a "tax" and that the charge violates section 2, article XIII C of the California Constitution, which prohibits any new general or special tax imposed by local government without prior approval by the voters.

In addressing the issue before it, the Court of Appeal provided a detailed summary of recent state tax law, beginning with Proposition 13, enacted in 1978, which, in addition to limiting real property taxes, also required that any change in State taxes enacted for the purpose of increasing revenue be approved by two-thirds of the Legislature, and that special taxes imposed by cities, counties and special districts be approved by a two-thirds vote of the electors. However, as the Court noted, in the years following approval of Proposition 13, local governments found ways to generate additional revenue without a two-thirds vote of the electors. As a result, in 1992, voters adopted Proposition 218, which imposed additional voting approval requirements on the imposition of taxes by a local government. Thereafter, in 1997, the state Supreme Court held that fees imposed by the Legislature on manufacturers and others contributing to environmental lead contamination were regulatory fees and not taxes. (*Sinclair Paint Co. v. State Board of Equalization* (1997) 15 Cal.4th 866.) In response, in 2010, voters approved Proposition 26, which expanded the definition of taxes so as to include fees and charges, with specified exceptions; required a two-thirds vote of the Legislature to approve laws increasing taxes on any taxpayers; and shifted to the state or local government the burden of demonstrating that any charge, levy or assessment is not a tax. Prop 26 was an effort to close perceived loopholes in Propositions 13 and 218, and was largely a response to the Sinclair decision.

Proposition 26 defined a "tax" to include "any levy, charge, or exaction of any kind imposed by" the state or a local government, with specified exceptions. The question before the Court of Appeal in the instant case was whether the paper carryout bag charge constitutes a tax and, therefore, is subject to voter approval requirements. The County argued it was not a tax because it is payable to and retained by the retail store and is not remitted to the county. The Court agreed, explaining that the term "tax" in ordinary usage refers to a compulsory payment made to the government or remitted to the government. The Court acknowledged that the definition of a "tax" in the Constitution does not explicitly state that the levy, charge, or exaction must be payable to a local government, although it does state that it must be "imposed by a local government." Recognizing the definition is ambiguous, the Court looked to other provisions of Proposition 26, finding that the language suggests that any charges imposed by a local government are limited to charges payable to a local government. Accordingly, the Court concluded that the language "any levy, charge, or exaction of any kind imposed by a local government" is limited to charges payable to, or for the benefit of, a local government. Because the subject carryout bag charge is not remitted to the county and raises no revenue for the county, the Court concluded that the charge is not a "tax" requiring voter approval.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

The Second District Court of Appeal has held that a complaint for enforcement may be amended with civil conspiracy causes of action against opposing attorneys where the attorneys allegedly assisted the defendants in thwarting a court-ordered remediation plan. *Rickley v. Goodfriend* (2013) 212 Cal.App.4th 1136.

Defendant Goodfriend remodeled his home and discarded construction materials containing asbestos and lead on both his and his neighbor Rickley's properties. Plaintiff Rickley prevailed in a private nuisance lawsuit and the court ordered the defendant to carry out a remediation plan on both properties. Defendant failed to carry out the plan. Plaintiff filed a second suit to enforce the court's order and then moved to amend the complaint to add causes of action of civil conspiracy against the defendant's attorneys for assisting the defendant in thwarting the court-ordered remediation plan. The amended complaint alleged that the attorneys disbursed money from a remediation fund for purposes other than remediating the plaintiff's property; sent emails to third parties regarding the cleanup that had not been approved by the trial court or the plaintiff; and actively participated in unapproved cleanup activities on the defendant's property. The trial court allowed the amendment and the defendant appealed the trial court's decision.

At issue was whether the trial court abused its discretion by allowing amendment of the complaint to include civil conspiracy causes of action against the defendant's attorneys. The court also considered the defendant's arguments that the civil conspiracy cause of action would necessarily violate the litigation privilege and attorney-client privilege.

The court held that the amended complaint plausibly alleged that the attorneys had violated their duties to the plaintiff not to engage in affirmative misconduct that would interfere with the remediation of contaminated debris (which could also result in a violation of the Coastal Act), and to disburse remediation funds from their trust account in a fair manner. Therefore, the strict procedural requirements of Civil Code § 1714.10, governing causes of action for civil conspiracy, did not apply. The plaintiff's claims were not barred by the litigation privilege because, as alleged, the attorneys' communications and misconduct intentionally obstructed the abatement of a nuisance, involved communications with nonparticipants in the action, and did not attempt to achieve the objects of any litigation. Finally, the conspiracy claims did not violate

the attorney-client privilege because the plaintiff's theory of liability was based on nonconfidential communications with, and conduct involving, third parties.

The dissent disagreed that the defendant attorneys had a duty to the plaintiff to remediate the properties; rather, the attorneys' duty to remediate was to their client, and they had done nothing to interfere with their client's performance of the remediation. The dissent also stated that the facts, as alleged, did not reach the high bar for bringing a cause of action of civil conspiracy against opposing attorneys.

The Fourth District Court of Appeal has held that the Department of Toxic Substances Control must transfer a hazardous waste site owner's statutory cleanup obligations from the "corrective action" process (Chapter 6.5 of the Hazardous Waste Control Law) to California's "Superfund" process (Chapter 6.8) when the owner requests the transfer. *Soco West, Inc. v. Cal. Env'tl Protection Agency* (2013) 213 Cal.App.4th 1511.

Soco assumed the cleanup obligations of its predecessor when it took ownership of a hazardous waste site. Those obligations arose from Chapter 6.5 of the Hazardous Waste Control Law (Health & Safety Code § 25100 et seq.), requiring "corrective action" to address releases of hazardous waste. In 2008 and 2009, Soco submitted written requests to the Department of Toxic Substances Control (DTSC) to transfer the cleanup process from Chapter 6.5 to Chapter 6.8 (§ 25300 et seq.), also known as "California's Superfund" law, which sometimes gives owners more flexibility and cost recovery from insurance carriers. Section 25187(b)(1) requires DTSC to pursue the remedies under Chapter 6.5 before using remedies under Chapter 6.8, except in six enumerated circumstances. The first of these is when the responsible party voluntarily requests in writing that DTSC issue an order to that party to take corrective action pursuant to Chapter 6.8. DTSC declined Soco's request and subsequent requests for reconsideration. Soco sued, alleging violation of DTSC's statutory mandate, and the trial court granted Soco's motion for judgment on the pleadings. DTSC appealed.

At issue was whether § 25187 required DTSC to transfer the cleanup process of a hazardous waste site from Chapter 6.5 to Chapter 6.8 upon written request from a responsible party, or merely gave DTSC discretion to decide whether to do so.

The Fourth District held that the plain language of § 25187(b)(1)(A) unambiguously required DTSC to invoke the legal remedies available pursuant to Chapter 6.8 after Soco voluntarily requested in writing that DTSC issue an order for Soco to take corrective action pursuant to that chapter. Legislative history surrounding the adoption of that statutory section confirmed the court's reading, as DTSC's comments to the Legislature during the drafting process never recommended that DTSC be allowed discretion to require a site be cleaned up under Chapter 6.5 even if a responsible party requests to proceed under Chapter 6.8. The court affirmed the trial court's judgment with a minor modification of the order to more accurately reflect the language of the statute.

A concurring opinion disagreed that the plain language of § 25187(b)(1)(A) was unambiguous as to whether DTSC must actually grant the transfer request, and recommended that the court further scrutinize the legislative history.

The Fifth District Court of Appeal has upheld a preliminary injunction to prevent Kern County from enforcing a voter-approved ban on land application of sewage sludge in unincorporated areas of the county. *City of Los Angeles v. County of Kern* (2013) 214 Cal.App.4th 394.

The City sought to enjoin the County's enforcement of Measure E, a countywide voter initiative adopted in 2006 that would ban all land application of recycled municipal sewage sludge in unincorporated areas of Kern County. The City and its contractors in Kern County relied on land application in the County to dispose of the City's waste. Previously, the federal district court, on remand from the Ninth Circuit, dismissed the plaintiffs' dormant commerce clause claim, and as a result the plaintiff sought relief for its unresolved causes of action in state court. The City requested a preliminary injunction against enforcement of Measure E based on the likelihood of preemption by the California Integrated Waste Management Act (CIWMA) and application of the "regional welfare doctrine" exception to the police power. The trial court granted a preliminary injunction and the County appealed.

At issue was whether (1) 28 U.S.C. § 1367(d), providing for federal jurisdiction over supplemental state claims, time-barred plaintiffs' CIWMA and regional welfare doctrine causes of action; (2) Measure E was preempted by the CIWMA; and (3) the regional welfare doctrine limited Kern County's police power.

The Fifth District held that § 1367(d) did not time-bar plaintiffs from raising their unresolved causes of action in state court, since the "natural" interpretation of the statute was that the statute of limitations on dependent claims stops running while these claims are pending in federal court and for 30 days after they are dismissed. The court also held that plaintiffs were likely to prevail on their preemption cause of action. The CIWMA, while allowing some degree of local authority to regulate solid waste management facilities, prohibited local regulation that directly conflicted with the state law. Since the CIWMA requires local agencies, including Kern County and Los Angeles, to "promote and maximize recycling," the County's total ban on recycling of sewage sludge would conflict with state law. (At the same time, the court noted, the CIWMA leaves some room for local regulation, likely of the sort that Kern County had in place prior to adopting Measure E.) The court also held that the City was likely to prevail on its claim that the regional welfare doctrine—requiring that the regional effect of local regulation be considered as a potential limitation on the locality's police power—prevented enforcement of Measure E, since the region would have nowhere to dispose of its sewage sludge if land application in Kern County was prohibited, and Kern County's local interests did not outweigh the regional interests. The court held that Los Angeles would suffer considerably more harm without an injunction than Kern County would suffer with it.

Legislative Developments

No updates this quarter.

Regulatory Updates

Toxic Substances Control Act. In February 2013, the U.S. Environmental Protection Agency (USEPA) proposed significant new use rules for 37 chemical substances that were the subject of premanufacture notices. This action would require any person who intends to manufacture, import or process any of these 37 chemical substances for an activity that is designated as a

significant new use by this proposed rule to notify the USEPA at least 90 days before commencing that activity. For more information, see 78 Fed.Reg. 12684.

INSURANCE COVERAGE

Recent Court Rulings

The Second District Court of Appeal held the Compassionate Use Act and the Medical Marijuana Program Act do not preempt Agoura Hills municipal ordinances banning medical marijuana dispensaries within city limits and said ordinances do not violate the California or federal Constitutions. *Conejo Wellness Center, Inc. v. City of Agoura Hills* (2013) 2013 Cal. App. Lexis 248 (no official reporter citation available).

Conejo Wellness Center, Inc. is a nonprofit collective corporation operating as a medical marijuana dispensary in the City of Agoura Hills. When Conejo started operations in 2006, the Agoura Hills Municipal Code did not allow medical marijuana dispensaries as a permitted use. In 2008, Agoura Hills adopted an ordinance which expressly banned the operation of medical marijuana dispensaries anywhere in the city. In 2010, Agoura Hills adopted an ordinance which prohibited businesses from operating or advertising without a business registration permit. The 2010 ordinance also prohibited medical marijuana dispensaries from receiving compensation for distribution of medical marijuana. In 2010 and 2011, Conejo applied for business registration permits. Agoura Hills rejected both applications citing Conejo's operations as a non-conforming use.

Conejo sued Agoura Hills. Conejo claimed the Compassionate Use Act and Medical Marijuana Program Act preempt and invalidate the ordinances. Conejo asserted the Acts create a state right to cultivate, distribute, or otherwise obtain marijuana collectively, and thereafter possess and use it for medical purposes. Conejo also claimed the ordinances violate California and federal constitutional rights of substantive and procedural due process as well as state rights of privacy and freedom of association. Conejo sought an injunction against Agoura Hills prohibiting further enforcement of the ordinances. Agoura Hills cross-claimed and sought an injunction against Conejo's continued operation as a medical marijuana dispensary. The trial court dismissed Conejo's claim in part, granted summary judgment to Agoura Hills on the remainder, and permanently enjoined Conejo from distributing marijuana in Agoura Hills.

On appeal, the Second District affirmed. The Court held the Compassionate Use Act and the Medical Marijuana Program Act do not create a state right to cultivate, distribute, or otherwise obtain medical marijuana. Rather, the Acts provide certain groups of individuals limited criminal immunity for specified actions. Further, neither Act explicitly or implicitly occupies the field of medical marijuana regulation or prohibit further legislation in the area of medical marijuana regulation. The Court held the ordinances do not violate Conejo's substantive due process rights because Agoura Hills' municipal code always prohibited Conejo's operation. Further, the Court held Conejo's procedural due process claims failed based on the Court's ruling on Conejo's preemption claims. The Court also held the ordinances do not violate Conejo's members' right to privacy or freedom to associate because the ordinances do not prohibit the

right to associate and discuss medical marijuana, rather, they prohibit the operation of medical marijuana dispensaries.

Legislative Developments

No updates this quarter.

Regulatory Updates

LAND USE

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

PROPOSITION 65

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Enforcement Initiatives. In January 2013, the U.S. Environmental Protection Agency solicited public comment and recommendations on national enforcement initiatives to be undertaken in fiscal years 2014 through 2016. For more information, see 78 Fed.Reg. 5799.

Migratory Bird Hunting. In March 2013, the U.S. Fish and Wildlife Service proposed to revise regulations regarding the approval of nontoxic shot types in order to improve comprehensibility relative to the language governing determinations of Expected Environmental Concentrations in terrestrial and aquatic ecosystems. For more information, see 78 Fed.Reg. 14060.

SOLID WASTE

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

WATER QUALITY

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

National Oil and Hazardous Substances Pollution Contingency Plan. In January 2013, the U.S. Environmental Protection Agency (USEPA) withdrew its direct final rule, previously published on November 7, 2012 and titled, “National Oil and Hazardous Substances Pollution Contingency Plan; Revision to Increase Public Availability of the Administrative Record File,” due to the receipt of adverse comment. For more information, see 78 Fed.Reg. 4333. Subsequently, in March 2013, the USEPA took final action on the previously withdrawn amendment by responding to the adverse comment and finalizing the amendment, so as to broaden the technology, to include computer telecommunications or other electronic means, which the lead agency is permitted to use to make the administrative record file available to the public. For more information, see 78 Fed.Reg. 16612.

Total Coliform Rule. In February 2013, the USEPA published its final revisions to the 1989 Total Coliform Rule. For more information, see 78 Fed.Reg. 10270.

Oil and Grease Method. In March 2013, the USEPA provided its final decision on the reconsideration of a new method, ASTM D7575, for oil and grease testing procedures under the Clean Water Act. For more information, see 78 Fed.Reg. 14457.

WATER RESOURCES

Recent Court Rulings

The Third District has held that the Department of Water Resources is not required to value power at market rates in State Water Project contracts. *Alameda County Flood Control v. Department of Water Resources* (2013) 213 Cal.App.4th 1163.

This case involves contracts between Northern California water districts and the Department of Water Resources (DWR) for the delivery of State Water Project (SWP) water. As background, the State Water Project generates electricity through hydropower. Although its pumping activities consume more power than the SWP generates overall, the SWP's power plants can operate at all hours; therefore, DWR is able to exploit the variable price of electricity, running its water pumping plants at "off-peak" times, and selling or trading on the open market power it produces at "on-peak" times when the value of electricity is higher, thereby netting a profit to reduce SWP's costs. In 1967, DWR signed a 50-year "Power Sale Contract," agreeing to sell its excess power at then-current market rates to several utilities. These revenues yielded a "power credit" that was used to reduce the cost of project water for contractors, with the exception of large landholders. Later, DWR took over the Power Sale Contract, in effect paying itself what the utilities had been paying to DWR.

At issue in this case was the interpretation of a contract provision regarding how to credit contractors with revenues from the Oroville Dam, the site of the Hyatt-Thermalito Power Complex, which produces 2.2 billion kilowatt hours of electricity annually. Plaintiff contractors argued that the water contract provisions required a market-rate valuation of power, while DWR and interveners claimed the contract unambiguously *precludes* this interpretation. Additionally, "lead" plaintiff Kern County Water Agency claimed that all revenue from sales or "allocable" transfers of Oroville power must be credited to the contractors' "Delta Water Charge" – an allotment of water conservation facility capital, operation, maintenance, power and replacement costs that is paid by all contractors regardless of whether or not they take water, in contrast to "Transportation Charges" that are levied on delivered water. Credits to the Delta Water Charge benefit all contractors, whereas credits to Transportation Charges benefit contractors as they receive water – and the further it travels, the more those contractors benefit.

The Court applied general rules of contract interpretation to determine that the contract was not ambiguous on the subject of market rates, because its language was not reasonably susceptible of a reading that requires application of *current* market rates. Furthermore, the court noted that the issue of market rate valuation was considered by the legislature during contract negotiations and "the concept of a market-based valuation of power was ultimately deleted from the contract." Additionally, the court noted that the statutes governing water contracts – the Burns-Porter Act and the Central Valley Project Act – granted DWR "full charge and control of the construction, operation, and maintenance of the project, and the collection of all rates, charges, and revenues from it." A review of these statutes demonstrated that DWR had the discretion to set rates, and was not required to pay more for power than the utilities were paying; therefore, the contract did not require DWR to pay market rates for energy. On the related question of DWR's practice of pooling power revenues from the Oroville plant to offset to the cost of transporting water rather than offsetting the Delta Water Charge, the court found that DWR acted within its statutory authority, noting that any arguable contractual ambiguity regarding was properly resolved against plaintiffs by the practical construction rule, given a 20-year period of performance without challenge to DWR's administration of the contract. Finally, the court disagreed with

plaintiffs' claim that the failure to credit revenue benefits to the Delta Water Charge was a showing of bad faith, finding that DWR's actions were permissible under the contract terms. On these grounds, the Third District affirmed the trial court.

Legislative Developments

Regulatory Updates

No updates this quarter.

FEDERAL SUMMARIES

Supreme Court

The Supreme Court of the United States has held that the flow of stormwater out of a concrete channel within a river into a downstream portion of the same river did not constitute as a "discharge of a pollutant" under the Clean Water Act. Los Angeles County Flood Control District v. Natural Resources Defense Council (2013) 133 S.Ct 710

The Los Angeles County Flood Control District (District) operates a drainage system known as a "MS4" that collects, transports, and discharges storm water. Because storm water is often heavily polluted, the District is required to hold a National Pollutant Discharge Elimination System (NPDES) permit for discharging into navigable waters. Between 2002 and 2008, four monitoring stations located in a concrete-channelized portion of the MS4 identified hundreds of exceedances of the Permit's water-quality standards. As a result, in 2008, Natural Resources Defense Council (NRDC) and Santa Monica Baykeeper (Baykeeper) filed a citizen suit against the District under section 505 of the Clean Water Act (CWA), claiming that water quality measurements from monitoring stations were proof that the District was violating the terms of its permits.

The District Court granted summary judgment to the District on these claims, but the Ninth Circuit reversed, finding that a discharge had occurred when polluted water detected at the monitoring stations flowed out of the concrete channel and entered downstream portions of waterways that lacked concrete linings. The U.S. Supreme Court granted certiorari on a single question – whether, under the CWA, a “discharge of pollutants” occurred when polluted water flows from one portion of a river that is navigable water of the United States, through a concrete channel or other engineered improvement in the river, and then into a lower portion of the same river. The Court held that the answer was no, relying on a previous holding in South Florida Water Management Dist. V. Miccosukee Tribe (2004) 541 U.S. 95, 109-112, which held that the transfer of polluted water between "two parts of the same water body" does not constitute a discharge of pollutants under the CWA. The Court's holding was also based on the CWA's text in section 1362(12), which defines the term “discharge of a pollutant” to mean “any addition of any pollutant to navigable waters from any point source.” The Court found that no pollutants are “added” to a water body when water is merely transferred between different portions of that water body. On these grounds, in a decision written by Justice Ginsburg and joined by seven of the justices with Justice Alito concurring, the judgment of the Ninth Circuit was reversed and the case remanded.

Ninth Circuit Court of Appeals

ENDANGERED SPECIES

Recent Court Rulings

Ninth Circuit reverses District Court decision, enjoins conservation group from approaching or attacking whaling ships or crew members and reinstates Japanese whalers' piracy claims against conservation group. Institute of Cetacean Research v. Sea Shepherd Conservation Society 708 F.3d 1099 (9th Circuit, February 25, 2013).

Plaintiffs/Appellants (collectively “Cetacean”) are Japanese researchers who hunt whales in the Southern Ocean (i.e., Antarctic Ocean) based on a Japanese permit issued pursuant to the International Convention for the Regulation of Whaling, signed by the United States, Japan and many other nations, which authorizes whale hunting when conducted in compliance with a research permit issued by a signatory. Defendants/Appellees Sea Shepherd Conservation Society and its eccentric founder, Paul Watson (collectively “Sea Shepherd”), have hounded Cetacean on the high seas for many years in protest of its whale hunting activities. Sea Shepherd’s actions included ramming Cetacean’s ships, hurling glass containers of acid, dragging metal-reinforced ropes in the water to damage propellers and rudders, launching smoke bombs and flares with hooks and pointing high-powered lasers at Cetacean’s ships. Cetacean sued Sea Shepherd under the Alien Tort Statute for injunctive and declaratory relief in the United States District Court for the Western District of Washington, arguing that Sea Shepherd’s acts amount to piracy and violate international agreements regulating conduct on the high seas. The District Court denied the Cetacean’s request for a preliminary injunction and dismissed Cetacean’s piracy claims. Cetacean timely appealed and the Ninth Circuit granted an injunction pending the appeal.

The two issues on appeal were (1) whether Sea Shepherd’s actions amounted to piracy subject to relief under the Alien Tort Statute (de novo review) and (2) whether the District Court abused its discretion in denying Cetacean’s request for preliminary injunctive relief. The Ninth Circuit, led by chief judge Kozinski, held that the Sea Shepherd’s actions clearly amounted to piracy, that the District Court abused its discretion in denying Cetacean a preliminary injunction and took the extraordinary step of ordering the case transferred to another justice upon remand back to the District Court pointing to the District Judge’s numerous, serious and obvious errors as raising doubt as to whether he will be perceived as impartial going forward in this high-profile case (Circuit Judge Milan D. Smith, Jr. dissented from the judicial transfer aspect of the decision only).

On the first issue, the Ninth Circuit found that the District Court erroneously interpreted two key terms, “violence” and “private ends”, in the international definition of piracy – which entails illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship . . . and directed . . . on the high seas, against another ship . . . or against persons or property on board such ship. Contrary to the District Court’s decision, the Ninth Circuit held that acts committed for private ends are not limited to those pursued for financial gain. Based on the rich history of piracy law and Belgian Court decisions directly on point, the Ninth Circuit held that private ends can include environmental activism or any end pursued on personal, moral or philosophical grounds. The key distinction is private versus public, not whether the act sought financial gain. The court found the District Court’s interpretation of “violence” was equally off-base in that it held that Sea Shepherd’s acts were not violent because they targeted ships and equipment rather than people. Citing the same United Nations Convention on the Law of the Sea (“UNCLOS”) from which it took the definition of

piracy as well as the commonsense understanding of the term “violence,” the Ninth Circuit found that violence can extend to malicious acts against inanimate objects and even if violence was limited to acts endangering people, the Sea Shepherd’s conduct certainly endangered the whaling crew, both directly (via projectiles) and indirectly (efforts to damage ship’s propeller/rudder could sink or strand it in glacier-filled Antarctic waters.)

On the second issue, again, the Ninth Circuit found the District Court abused its discretion in denying the preliminary injunction prayed for by Cetacean. With respect to the likelihood of success on the merits prong of the injunction analysis, the Ninth Circuit found that the District Court improperly determined that Cetacean was unlikely to succeed on its claims brought under the Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation and UNCLOS, criticizing the District Court’s reliance on the fact that the Sea Shepherd has not yet disabled any of Cetacean’s ships and failure to recognize Sea Shepherd’s repeated attempts to endanger the ships, which is all that must be demonstrated. On the likelihood of irreparable harm prong, the Ninth Circuit similarly found that the District court improperly determined that irreparable harm to Cetacean was not likely by focusing on the fact that Cetacean hasn’t suffered any grave injuries yet. On the public interest prong, the Ninth Circuit determined that the District Court improperly denied the preliminary injunction based on its focus on keeping U.S. courts out of the international political controversy surrounding whaling and on international comity grounds related to Cetacean’s apparent disregard for an Australian court order enjoining it from whaling in Antarctic coastal waters over which Australia claims sovereignty. Finally, the Ninth Circuit disagreed with the District Court’s denial of the preliminary injunction based in its determination that Cetacean’s hands were unclean because it flouted the Australian injunction, noting that because neither the U.S. nor Japan recognizes Australia’s jurisdiction over any portion of the Southern Ocean, Cetacean owes no respect to the Australian injunction (which dealt with whaling under Australian law) and there is nothing inequitable in enforcing Cetacean’s right to safe navigation and protection from pirate attacks.

NEPA

Recent Court Rulings

Ninth Circuit Upholds Idaho Roadless Rule. *Jayne v. Sherman* (9th Cir. 2013) 706 F.3d 994.

In the 1970s, the Forest Service began to catalog roadless areas within National Forests, and designated roadless areas of more than 5,000 acres as “inventoried roadless areas” (IRAs). Responding to a growing concern of development encroaching into these IRAs, in 2001 the Forest Service promulgated the Roadless Area Conservation Rule (“2001 Roadless Rule”) to “prohibit road construction, reconstruction, and timber harvest in inventoried roadless areas.” The 2001 Roadless Rule was uniformly applied to all States. In 2005, the Forest Service changed its approach and invited States to submit petitions to adjust the management requirements for the IRAs within their borders, which would be reviewed by an advisory committee set up by the Department of Agriculture (USDA) called the Roadless Area Conservation National Advisory Committee (RACNAC). Idaho submitted a state petition, and ultimately the USDA approved the petition in December 2006 resulting in what is now known as the “Idaho Roadless Rule.”

The Idaho Roadless Rule creates five different categories of lands within Idaho's 9.3 million acres of IRAs based on the specific qualities of the lands, and applies different management policies to each category. Three of the categories of lands are managed with greater protection than they would have been under the 2001 Roadless Rule. However, two categories, the Backcountry/Restoration (BCR) category and the General Forest, Rangeland, Grassland (GFRG) category are managed with less protection. In BCR areas temporary roads and logging are allowed to reduce the threat of wildfire. Within GFRG areas, construction is permitted in association with phosphate deposits in specified "phosphate lease areas."

Because the GHRG and BCR management policies apply to areas that contain habitat for grizzly bear and caribou, two species listed under the Endangered Species Act (ESA), the U.S. Fish & Wildlife Service (FWS) – after Section 7 consultation with the Forest Service – issued a Biological Opinion (BiOp) discussing the potential impacts on these two species. The BiOp concluded that the protections afforded wildlife in the National Forests' Long Range Management Plans (LRMPs) were sufficient to ensure that the caribou were not likely to be jeopardized, and that an Access Amendment setting standards for wheeled, motorized use within grizzly bear habitat was sufficient to protect the species. The plaintiffs argued that the FWS improperly relied on "promises" of future actions to ensure the protection of listed. The Court disagreed, finding the FWS' reliance on Forest Service commitments was proper because the "Access Amendment was not some vague aspiration but a detailed proposal," and that the Forest Service "made a firm commitment to protect the grizzly bear in other areas, and it is reasonable to assume they would follow the same course." The Court distinguished its holding in *National Wildlife Federation v. National Marine Fisheries Services* (9th Cir. 2008) 524 F.3d 917, stating that the "'immediately negative effects' on a listed species present in National Wildlife do not exist in the present case" and "[t]hus, there is no compelling reason here—as there was in that case—to require promises to be 'binding' or 'guaranteed.'"

Plaintiffs also challenged the Forest Service's Final Environmental Impact Statement (FEIS) as based on an "inaccurate" and "irrational" assumption that logging and road building under the Idaho Roadless Rule would not increase significantly over the levels experienced under the more restrictive 2001 Roadless Rule. In particular, plaintiffs challenged the Forest Services' reliance on "the realities of budgets and the balancing of priorities" for its projections that neither logging nor road-building would increase significantly compared to the amounts authorized under the 2001 Roadless Rule. Plaintiffs, however, offered no evidence to rebut the Forest Service projections. While the Court recognized that the Idaho Rule technically allows more road-building and logging than under the 2001 Roadless Rule, the Court found the Forest Service's projections of only modest increases to be "entitled to deference given the expertise the agency has in matters of its own budget and how it affects project priorities."

The environmental plaintiffs also claimed that the Forest Service violated NEPA by failing to conduct a site-specific analysis of future mining operations in the area opened to future phosphate mining. The Court also rejected these arguments, stating that NEPA only "requires a full evaluation of site-specific impacts . . . 'when the agency proposes to make an irreversible and irretrievable commitment of the availability of resources to a project at a particular site.'" The Court found that the Forest Service had not made such a commitment. The FEIS concluded that the only known proposal for mining phosphate in an IRA was a planned expansion of the Smoky Canyon Mine, but that the proposed expansion of that particular mine had already been

studied in a site-specific EIS, which concluded that mitigation measures were sufficient to protect water quality and contain selenium contamination. Further, the Smoky Canyon Mine EIS and the decision to proceed with the mine expansion had recently been upheld by the Ninth Circuit as meeting NEPA requirements in *Greater Yellowstone Coalition v. Lewis* (9th Cir. 2010) 628 F.3d 1143, 1153.

Finding that the FWS did not violate the ESA and that the Forest Service did not violate NEPA, the Ninth Circuit affirmed the district court's grant of summary judgment.

Ninth Circuit Upholds BLM's Decision to Allow Reopening of Uranium Mine After 17 Years of Non-Operation Without New Plan of Operations or NEPA Review. *Center for Biological Diversity v. Salazar* (9th Cir. 2013) 706 F.3d 1085.

This case involved the re-opening of a uranium mine (the Arizona I Mine) owned by Denison Mines Corporation and Denison Arizona Strip, LLC (Denison) following 17 years of idleness. The mine is located on federal lands managed by the Bureau of Land Management (BLM) in Mohave County, Arizona, approximately 6.5 miles north of Grand Canyon National Park. The BLM approved a plan of operations for the mine in 1988 after preparation of an Environmental Assessment under the National Environmental Policy Act (NEPA) for the mining activities. That plan of operations contained a provision governing the interim management of the Arizona I Mine "in the event of an 'extended period of non-operation before mining is completed.'" The plan of operations noted that while such a shutdown was unanticipated, it was a "possibility."

Responding to a severe drop in uranium prices, Denison's predecessor-in-interest idled the mine in 1992 and placed the mine on "standby and interim management status." Following idling of the mine, Denison and its predecessor complied with the requirements of the interim management portion of the 1988 plan of operations, including maintenance of buildings, mine shafts, gates, fences and signage, and payment of various bonds, taxes and fees. Likewise, BLM conducted field inspections of the site during the idle period. In 2007, after uranium prices rose, Denison notified BLM of its intention to restart mining operations. As part of this process, the BLM required Denison to obtain new state air and water permits, update its reclamation bond, and obtain authorization from Mohave County to improve and maintain a right-of-way accessing the mine site.

Appellants, a consortium of various environmental and tribal interests, filed suit in late 2009. Appellants argued that the Arizona I Mine's 1988 plan of operations became "ineffective" after the mine closed in the early 1990s, requiring a new plan of operations before mining activities could begin again. Appellants relied on 43 C.F.R. section 3809.423, which provides that an operator's "plan of operations remains in effect as long as [the operator is] conducting operations, unless the BLM suspends or revokes [the] plan of operations." From this, appellants asserted that a new plan of operations was required because Denison's predecessor stopped "conducting operations" in 1992 when it idled the mine. The Ninth Circuit rejected appellants' interpretation, stating, "[u]pon reading the regulations as a whole, it is clear, . . . that section 3809.423 does not mean that a temporary closure of a mine immediately results in an ineffective plan of operations." Appellants' reading of the regulation would have rendered several other regulatory provisions superfluous—such as the provisions requiring an interim management plan to govern during periods of temporary closure.

Appellants also claimed that the BLM violated NEPA by failing to supplement the 1988 Environmental Assessment (EA) prepared in connection with the plan of operations, arguing the EA was “stale and outdated, necessitating supplemental review.” The appellants claimed that each of the various ancillary permits or actions necessary for resumption of mining (e.g., the issuance of a gravel permit to Mohave County relating to the mine, requiring a new air quality control permit, and approval of an updated reclamation bond) was a prerequisite to resuming mining, and thus were “major Federal actions” requiring updated NEPA analysis. The Court rejected this claim, reasoning that while these could have been “major Federal actions,” they did not affect the validity or completeness of the plan of operations, nor did they prevent Denison from mining under that plan. The Court also rejected the contention that the updated reclamation bond was a “major Federal action” requiring NEPA compliance, concluding that this “action did not consist of an “[a]pproval of [a] specific project[.]” under 40 C.F.R. § 1508.18(b)(4). Rather, the plan of operations and its reclamation portion both remained valid, and the updated reclamation bond was merely a ministerial task, i.e., a “post-project-approval” monitoring and compliance activity that does not trigger NEPA.

Ninth Circuit Finds No Supplemental EIS Needed For Road Repair. *Great Old Broads v. Kimbell* (9th Cir. 2013) 709 F.3d 836.

This case arises out of the long and contentious process to repair a flood-damaged road known as the South Canyon Road, in a sensitive area of the Humbolt-Toiyabe National Forest in Elko County, Nevada. Until 1995, the South Canyon Road gave the only motorized-vehicle access to the wilderness area at Snowslide Gulch. In 1995, the Jarbidge River flooded making this part of the road unpassable to passenger vehicles. In 2005, the Forest Service issued a final (ROD) and final environmental impact statement (EIS), which determined a method for restoring the South Canyon Road as a part of the Jarbidge Canyon Project (Project). The ROD did not apply any of the four alternatives analyzed in the EIS. Instead, it combined elements from three of the alternatives into one selected alternative.

Appellants argued that the Forest Service’s approval of the Project violated NEPA. Specifically, Appellants argued the selected “combined” alternative dramatically changed the environmental impacts, therefore requiring preparation of a supplemental environmental impact statement (SEIS). The court held the Forest Service’s decision to not prepare a SEIS was not arbitrary or capricious because it met the Council for Environmental Quality’s (CEQ) guidelines. Under the CEQ guidelines an SEIS is not required when: (1) the new alternative is a minor variation of one of the alternatives discussed in the draft EIS, and (2) the new alternative is qualitatively within the spectrum of alternatives that were discussed in the draft EIS. The Court held the selected alternative met each of these requirements because it was primarily made of elements from Alternatives 1, 3, and 4, which were all analyzed as elements in the EIS. The Forest Service and the public could therefore adequately assess the cumulative effect of these elements, and reasonably determine that the combination was “within the spectrum” of previously analyzed alternatives.

Appellants also claimed that even if the Forest Service correctly decided a SEIS was not required, it violated NEPA by failing to adequately document that determination in the record. The Court disagreed finding the Forest Service did make a reasoned decision. Additionally, the Forest Service adequately documented the decision in the record with an explanation of why a

SEIS is not needed. The Court concluded the Forest Service met the requirement under NEPA to “document its decision that no SEIS is required to ensure that it remains ‘alert to new information that may alter the results of its original environmental analysis, and continue[s] to take a ‘hard look at the environmental effects of [its] planned action, even after a proposal has received initial approval.’”

In regard to the exhaustion doctrine, the Court stated that the Forest Service and the District Court, when reviewing Appellant’s claims, considered only the filed appeal letter and not any of the attachments. The Forest Service claimed that it did not consider the attached comment letters because the appeal letter did not explain which parts of which comments in the attached letters were relevant to each element of the appeal. However, Forest Service regulations provide that attachments are a part of an appeal. Therefore the Court reversed the District Court’s ruling and held that the Appellants did exhaust their administrative remedies.

WATER RESOURCES

Recent Court Rulings

Ninth Circuit affirms District Court decision and rejects Central Valley farmers’ APA claims seeking to prioritize water use for irrigation over all other uses and compel the United States Bureau of Reclamation to provide the farmers’ irrigation districts with more water. San Luis Unit Food Producers v. United States, 709 F.3d 798 (9th Circuit, March 1, 2013).

The Central Valley Project (“CVP”) is the nation’s largest federal reclamation project and consists of an interconnected system of dams, reservoirs, levees, canals, pumping stations, hydropower plants and other infrastructure that collects water from mountain ranges in northern California (e.g., Sierra Nevada, Klamath Mountains and California Coast Ranges) and transports and distributes it south throughout California’s vast Central Valley. The United States Bureau of Reclamation (“the Bureau”) is the agency within the Department of the Interior charged with administering the CVP, construction for which began in the late 1930’s. In 1960, Congress authorized the Secretary of the Interior to construct and operate the San Luis Unit as an integral part of the CVP with an additional dam, reservoir, canals and related facilities. The Bureau contracts with irrigation districts for the delivery of water, and the irrigation districts in turn contract with end-users like farmers. After decades of delivering enough water to irrigate 100% of the Central Valley farmers’ lands, the Bureau began providing less water for irrigation and allocating more and more water for other purposes – primarily for the protection and restoration of fish and wildlife. The farmers sued the Bureau directly in the United States District Court for the Eastern District of California. Rather than basing their claims in contract, the farmers sued under the Administrative Procedure Act (“APA”) claiming that various federal reclamation statutes independently impose mandatory obligations upon the Bureau to distribute more water to the irrigation districts. The U.S. District Court granted the Bureau’s motion for judgment on the pleadings and the farmers appealed.

On appeal, the central legal issue was whether the farmer’s water claims were proper and justiciable under the APA. Pursuant to the Supreme Court’s unanimous decision in *Norton v.*

Southern Utah Wilderness Alliance (2004) 542 U.S. 55 [judicial review of a failure to act under section 706(1) of the APA is limited to mandatory discrete actions, general alleged deficiencies in compliance lack the specificity requisite for agency action and thus broad programmatic attacks on an agency's administration of a program are prohibited under the APA], the Ninth Circuit held that the Bureau is not legally required to take any discrete action to deliver the farmers' preferred amount of San Luis Unit water for irrigation before allocating the water for other uses and that the Bureau retains the discretion to allocate the water among various parties to satisfy all of its competing obligations. As such, the Ninth Circuit concluded that there was no final agency action, nor any action that the Bureau has unlawfully withheld at issue in this case, but rather, that the farmers' claims amounted to a broad programmatic attack on the way the Bureau generally operates the CVP and thus the farmers APA claims fail for lack of subject matter jurisdiction.

The Ninth Circuit so held after rejecting the farmers' proffered interpretations and related arguments stemming from the language of various federal reclamation statutes (e.g., the CVP Act, the CVP Improvement Act, the San Luis Act and the Reclamation Act). In each instance the Ninth Circuit rejected the farmers' arguments by demonstrating that none identified a single discrete action or contract the Bureau took or entered into that caused the farmers' harm and/or by showing that none of the language from the various reclamation statutes relied upon by the farmers mandated the Bureau to take any particular action in its management of the CVP let alone that it must deliver a certain amount of irrigation water prior to engaging in fish and wildlife protection efforts. In sum, the Bureau had no mandatory statutory duty to deliver CVP water for first priority irrigation uses but broad discretion to manage the CVP and water for a variety of uses and obligations, including river regulation, navigation, flood control, irrigation and domestic uses, fish and wildlife mitigation, protection and restoration purposes and power.