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RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from July, August, and September, 2013. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.

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

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

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

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

Case Law and Regulatory Update Authors:

Rachel Cook
Gatzke, 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

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Alternative Fuel Conversion Certification. In September 2013, the California Air Resources Board (CARB) conducted a public hearing to consider amendments to the Alternative Fuel Conversion Certification Procedures for On-Road Motor Vehicles and Engines. See Cal. Reg. Notice Register 2013, Vol. No. 32-Z, p. 1158.

Antiperspirants and Deodorants Regulation et al. In September 2013, CARB conducted a public hearing to consider amendments to the Regulation for Reducing Volatile Organic Compound Emissions from Antiperspirants and Deodorants; the Regulation for Reducing Emissions from Consumer Products; the Regulation for Reducing the Ozone Formed from Aerosol Coating Product Emissions; the Tables of Maximum Incremental Reactivity; and Method 310, Determination of Volatile Organic Compounds in Consumer Products and Reactive Organic Compounds in Aerosol Coating Products; and, to consider repeal of the Hairspray Credit Program. See Cal. Reg. Notice Register 2013, Vol. No. 32-Z, p. 1169.

Mobile Agricultural Equipment Credit. In October 2013, CARB conducted a public hearing to consider the proposed adoption of the State Implementation Plan Credit from Mobile Agricultural Equipment regulation. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1332.
Zero Emission Vehicle Regulation. In October 2013, CARB conducted a public hearing to consider minor, proposed amendments to the California Zero Emission Vehicle regulation. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1336.
Clean Fuels Outlet Regulation. In October 2013, CARB announced its withdrawal of the proposed rulemaking action pertaining to the clean fuels outlet regulation, as previously noticed in a February 2013 edition of the Register. See Cal. Reg. Notice Register 2013, Vol. No. 40-Z, p. 1556.
Alternative Diesel Fuels. In October 2013, CARB announced that it will be conducting a public hearing in December 2013 to consider a proposed regulation governing the commercialization of motor vehicle Alternative Diesel Fuels. See Cal. Reg. Notice Register 2013, Vol. No. 43-Z, p. 1646.
California Ambient Air Quality Standards. In October 2013, CARB provided notice of a proposal to amend the regulations designating areas as attainment, nonattainment, nonattainment-transitional, or unclassified for pollutants with the State ambient air quality standards. The proposed amendments pertain to the Sacramento Valley Air Basin; South Coast Air Basin; North County Air Basin; and, Salton Sea Air Basin. See Cal. Reg. Notice Register 2013, Vol. No. 43-Z, p. 1670.

ATTORNEY'S FEES

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No summaries this quarter.

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No updates this quarter.

CEQA

Recent Court Rulings

Update: on October 30, 2013, the California Supreme Court granted a petition for review in *Orange Citizens for Parks and Recreation v. Superior Court* (2013) 217 Cal.App.4th 1005.

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

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

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

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

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

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

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

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

The EIR concluded, and the county found, that no mitigation was possible to offset the loss of 45 acres of prime farmland. Masonite submitted comments stating the impact could have been mitigated by the acquisition of conservation easements on offsite properties, or by paying an "in-lieu" fee to fund such acquisitions. The State Department of Conservation submitted comments stating that an agricultural easement would offset the loss of farmland. The department also noted that, because the loss of farmland is felt beyond just the surrounding area, comparable replacement land did not need to be adjacent to the site. The county responded that an easement was not legally feasible in this case because an easement addresses only the indirect and cumulative effects of farmland conversion, and does not replace on-site resources. According to the county, indirect and cumulative impacts of farmland conversion occur when a project affects neighboring agricultural uses by increasing the speculative land value and farming costs due to land use incompatibilities and nuisance problems. The county felt that this risk was absent here because the nearest active agricultural operation was across the Russian River (a natural barrier).

The Court ruled that, because the county had found the mitigation to be legally infeasible, the finding was subject to de novo review. According to the Court, an agency's conclusion that mitigation is infeasible is entitled to deference under the substantial evidence standard if infeasibility is based on economic, environmental, social, and technological factors. In this case, "[b]ecause the County decided that [easements] were not a legally feasible means to mitigate the loss of farmland at the [p]roject site, it never investigated whether [easements] were economically feasible, and there is no evidence to review."

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

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

First District rules that the Bay Area Air Quality Management District did not need to prepare an EIR prior to adopting significance thresholds for greenhouse gas emissions. *California Building Industry v. Bay Area Air Quality Management Dist.* (2013) 218 Cal.App.4th 1171.

In June 2010, the Bay Area Air Quality Management District adopted CEQA thresholds of significance for greenhouse gas emissions, toxic air contaminants (TACs) and fine particulate matter (PM2.5). The California Building Industry Association filed a petition for writ of mandate challenging BAAQMD's adoption of the thresholds. The Alameda County Superior Court agreed, granted the petition, and awarded CBIA attorneys' fees. BAAQMD appealed.

The First District Court of Appeal reversed, finding that (1) BAAQMD's adoption of thresholds was not a "project" within the meaning of CEQA, and (2) there were no reasonably foreseeable impacts associated with its decision.

BAAQMD relied on CEQA Guidelines section 15064.7 in promulgating the thresholds. The Court noted that section 15064.7 establishes detailed procedures for adopting thresholds, and CEQA review is not part of those procedures. Section 15064.7, subdivision (b), provides that thresholds of significance must be formally adopted through a public review process and supported by substantial evidence if, as in this case, they are to be available for general use. BAAQMD accepted public comments and prepared responses. The Court concluded this process was substantially similar to the EIR process, and that requiring a redundant EIR process would be a waste of tax dollars.

The Court noted that, in any event, the action was not a "project" because the activity would not cause a direct physical change in the environment or a reasonably foreseeable indirect physical change. CBIA argued that impacts were reasonably foreseeable because the thresholds were more stringent than earlier thresholds and would require a more thorough environmental analysis; as a result, the CEQA process would become more burdensome, making urban development less desirable and leading to more suburban development with all its attendant impacts including traffic and air quality impacts.

The Court was unmoved, reasoning that the analysis posited by CBIA relied on a series of unproven assumptions that were too attenuate to require an EIR because "the extent to which land development projects might be relocated to a more suburban location would require a prescience we cannot reasonably demand of [BAAQMD]." For this reason, no CEQA review was required before BAAQMD promulgated the thresholds.

CBIA's petition had raised two other challenges to the substance of the thresholds the trial court had not addressed. Although CBIA did not cross-appeal, the First District agreed to consider these two challenges. First, CBIA argued the thresholds were inappropriate because they addressed the effects of the environment on sensitive receptors as part of the project; according to CBIA, that was contrary to CEQA as interpreted by the Second District in *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455. The First District did not address whether *Ballona* and its progeny were correctly decided, or whether, as a general rule, an EIR may be required solely because the existing environment may adversely affect future occupants of a project. Instead, the Court held the regulations were not facially invalid because they were relevant for purposes other than determining the effects of the environment on the project. The court also suggested that continuing vitality of *Ballona* was better reserved for a case in which the receptor thresholds were applied to a specific development project. Second, the First District concluded that BAAQMD's TAC Single-Source and Cumulative Thresholds were supported by substantial evidence and upheld them.

Finally, the Court reversed the trial court's award of attorneys' fees because CBIA was no longer a successful party.

Third District rules that an EIR prepared for a Wal-Mart "superstore" did not contain substantial evidence supporting the conclusion that the store's greenhouse gas emissions would be insignificant. *Friends of Oroville v. City of Oroville* (2013) 218 Cal.App.4th 1352.

Wal-Mart proposed to replace an existing store with a new store of roughly double the size. The city prepared and certified an EIR, and approved the project. The "Friends" sued. The trial court denied the petition. The Court of Appeal reversed, publishing only the portion of its decision addressing claims related to the EIR's analysis of greenhouse gas ("GHG") emissions.

The city evaluated the project's GHG emissions to determine whether the project would "significantly hinder or delay California's ability to meet the reduction targets" established by AB 32. The Scoping Plan prepared by the California Air Resources Board ("CARB") to implement AB 32 called for reducing the State's GHG emissions by 30% from "business as usual" emissions by 2020, or roughly 10% from emissions in 2010 (when the city prepared the EIR. The EIR also analyzed the extent to which the project implemented mitigation measures recommended by CARB and the Attorney General.

The EIR estimated GHG emissions attributable to the project. Roughly two-thirds of these emissions would come from vehicles traveling to and from the site. Total emissions would be roughly 15,000 metric tons of carbon dioxide equivalents (CO_2e) per year. The EIR identified the recommended measures incorporated into the project (e.g. efficient lighting, landscaping, etc.). The EIR concluded the project's contribution to State-wide emissions would be miniscule – roughly 0.003% of State-wide emissions in 2004.

The court held that, while the city had discretion to use the AB 32 targets as a threshold, the record did not contain substantial evidence supporting the conclusion that the project would meet this standard. The problem was two-fold.

First, the EIR's focus on the project's relative contribution to State-wide CO_2e emissions – 0.003% – was "meaningless." "The relevant question to be addressed in the EIR is not the relative amount of GHG emitted by the [p]roject when compared with California's GHG emissions, but whether the [p]roject's GHG emissions should be considered significant in light of the threshold-of-significance standard of Assembly Bill 32, which seeks to cut about 30 percent from business-as-usual emission levels projected for 2020, or about 10 percent from 2010 levels."

Second, the EIR did not estimate emissions from the existing Wal-Mart. Nor did the EIR provide a quantitative or qualitative estimate of the reduction in GHG emissions that would occur due to the mitigation measures incorporated into the project. None of these measures pertained to transportation-related emissions, even though two-thirds of the project's GHG emissions were attributable to transportation. Thus, the EIR "ignore[d] the elephant in the room – 68 percent of the [p]roject's GHG emissions come from motor vehicles." Although the traffic study suggested trip-generation rates would be reduced at a larger, integrated store, other portions of the study suggested the store would attract shoppers from a larger geographic area, such that there would be no reduction in vehicle miles travelled.
The court concluded that the record did not contain substantial evidence supporting the EIR's conclusion that – compliance with AB 32's goals for reducing GHG emissions – would be met.

Fourth District rejects a broad attack on an EIR certified by San Diego County to support the adoption of an ordinance allowing boutique wineries a "by right" permit in eastern portions of the county. *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1.

San Diego County wished to promote the development of boutique wineries. In 2006, the county board of supervisors began exploring ways to allow boutique wineries to expand and operate by right in order to simplify the permitting process. In 2008, the county adopted a mitigated negative declaration and approved an ordinance allowing boutique wineries in new zoning designations by right if on public roads. Wineries on private roads needed an administrative permit or private road maintenance agreement. The county repealed the ordinance and decided to prepare an EIR. In 2009, the county released a draft EIR. The EIR concluded the ordinance would cause 22 significant and unmitigated environmental impacts as a result of approving an unlimited number of future wineries by-right. These impacts fell within seven resources areas, including air quality, biological resources, cultural resources, hydrology and water quality, noise, transportation, and water supply/groundwater supply. In 2010, the county published a final EIR, approved the ordinance, and adopted a statement of overriding considerations. The "San Diego Citizenry Group" sued. The trial court denied the petition. Petitioner appealed.

Petitioner challenged the county's project objectives. Petitioner argued the county had erred by failing to make a "preliminary policy determination" regarding the objectives for the project, and the EIR improperly relied on these objectives when analyzing the feasibility of mitigation measures. The court disagreed, noting that the county included within the EIR a "statement of the objectives sought by the proposed project" in compliance with CEQA Guidelines section 15124. CEQA did not require such a preliminary determination; rather, CEQA authorized an agency to delegate to staff the task of preparing the EIR.

Petitioner argued the EIR was inadequate because it did not discuss "any 'additional' mitigation measures in 'meaningful detail.'" The court noted the petitioner did not identify any potentially feasible mitigation measures that the EIR omitted. The county was not required to engage in an extensive discussion of infeasible mitigation measures, including mitigation measures that are incompatible with the project's "core" objectives. Requiring the county to analyze the incorporation of mitigation measures or alternatives that would defeat a project's primary objectives would run contrary to CEQA's definition of "feasible."

Petitioner attacked the adequacy of the EIR's discussion of impacts to private roads caused by the ordinance because the EIR rejected a mitigating traffic measure previously adopted in 2008. That measure had required wineries to obtain a permit or agreement for wineries located on private roads. The court concluded, however, that the county was not required to adopt the 2008 traffic measure simply because the county had adopted it in the past. Moreover, because the measure required a permit or agreement, it was inconsistent with a fundamental project objective: establishing a "by right" permitting system for boutique wineries. The county therefore had discretion to reject this measure.

Petitioner attacked the substance of the EIR on various grounds. Specifically:

- Focusing on potential future impacts to traffic, petitioner argued the EIR analysis was insufficient because the county did not use its "best efforts" to predict how many by-right wineries could be developed under the ordinance. The court disagreed, noting that the EIR did not "simply state that the level of development is unknown and then label each impact as significant without meaningful analysis or discussion." The county based a prediction of future boutique winery development on the pattern of development of existing grape growers and wineries. The county had surveyed 26 existing wineries, 11 of which responded, with eight indicating an intention to convert to boutique wineries under the proposed ordinance. The final EIR analyzed the amount of traffic each new boutique winery would generate and determined the maximum concentration of wineries that could be developed. Thus, the final EIR adequately analyzed the project's traffic impacts based on existing and anticipated development.
- Petitioner argued the EIR did not sufficiently identify project impacts to water supplies. The court disagreed, noting that the final EIR met the standard under *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412 that "a conceptual plan EIR, such as one for a general plan amendment to allow proposed development," must identify "the likely source of water for new development, noting the uncertainties involved, and discussing measures being taken to address the situation in the foreseeable future." The county collected survey data from wineries located in San Diego and Riverside counties to better estimate impacts on water supplies. That was sufficient.
- Petitioner argued the final EIR's discussion of grading permits was "materially misleading" by suggesting that the requirement to obtain grading permits would mitigate a winery's impacts. The court noted, however, that the EIR had not made such a claim.

Petitioner argued the board of supervisors' statement of overriding considerations was invalid because the final EIR was deficient and did not provide a basis for the findings. The court disagreed. The EIR had relied on conservative assumptions and disclosed potential environmental impacts in an informative matter. The board therefore had discretion to rely on the EIR when it adopted the statement of overriding considerations.

Petitioner argued the ordinance was inconsistent with the county's general plan. Specifically, the petitioner argued the ordinance allowed by-right wineries in environmentally constrained areas for which the general plan requires environmental review of development projects. The court found, however, that an EIR is not required to be consistent with a general plan; instead, the EIR must identify and discuss any such inconsistencies. The EIR in this case sufficiently discussed the alleged inconstancy, and petitioner did not meet its burden of proof to show that the county's decision to exclude wineries from the environmentally constrained area provisions of the general plan was "unreasonable."

Finally, the court ruled the trial court had erred when it ordered petitioner to reimburse the county for the cost of preparing certain transcripts for the record of proceedings. The disputed transcripts involved Planning Commission hearings on the proposed ordinance. The transcripts were prepared after the board adopted the ordinance. Public Resources Code section 21167.6, subdivision (e)(4), requires the party preparing the record to include transcripts or minutes "that were presented to the decisionmaking body prior to action on environmental documents or on the project." In this case, the transcripts were not "presented to the [board]"; rather, they were prepared after the lawsuit was underway. For this reason, they were not a proper part of the record. The trial court had ordered petitioner to pay approximately $6,000 for the costs of preparing these transcripts. The appellate court reduced the cost award by that amount.

California Supreme Court issues a fractured opinion focusing on the lead agency's discretion to determine the environmental setting – the "baseline" – against which to measure the impacts of a project in an EIR. *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439.

For the second time in three years, the California Supreme Court issued a decision addressing the lead agency's discretion to rely on a "future baseline" against which to measure the impacts of a project in an EIR. The clarity of the decision is diminished by the fractured nature of the Court's majority, concurring and dissenting opinions. Although six justices ruled in favor of the agency, they did so for different reasons. The lone dissenter's rationale generally aligned with the three-justice lead opinion.

In 2007, the Exposition Metro Line Construction Authority ("authority") commenced the CEQA process to construct the "Exposition Corridor Transit Project (Expo Phase 2)." The project involved constructing light-rail transit line from a station in Culver City to a terminus in Santa Monica. Expo Phase 2 project was designed to provide high-capacity transit service between the Westside area of Los Angeles and Santa Monica, creating an alternative to the area's congested roadways. In 2010, the authority certified a final EIR and approved the project. "Neighbors" sued. The trial court denied the petition. The Court of Appeal affirmed. The Supreme Court granted a petition for review to address two issues: (1) the propriety of the EIR's exclusive use

of a "future conditions" baseline to assess the project's impacts on traffic and air quality, and (2) the adequacy of mitigation measures for potentially significant spillover parking effects in areas near planned transit stations.

On the "baseline" issue, Justice Werdegar's lead opinion provided an overview of leading CEQA cases that discuss the use of a future conditions baseline, paying special attention to *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, and *Sunnyvale West Neighborhood Association v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351. The lead opinion concluded that unusual aspects of a project or surrounding conditions can justify a departure from the "normal" use of an existing conditions baseline prescribed by CEQA Guidelines section 15125, subdivision (a). Thus, while lead agencies have the discretion to "omit an analysis of the project's significant impacts on existing environmental conditions and substitute a baseline consisting of environmental conditions projected to exist in the future, the agency must justify its decision by showing an existing conditions analysis would be misleading or without informational value." The Court explicitly disapproved *Sunnyvale West*, *supra*, 190 Cal.App.4th 1351, and *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, insofar as they held that an agency can never employ the exclusive use of a future conditions baseline.

Justice Werdegar then proceeded to scrutinize the authority's exclusive use of a future baseline. The record showed that the authority commenced its CEQA analysis in 2007. The authority anticipated that the project would commence operations in 2015. The EIR used projected conditions in the year 2030, with and without the project, to analyze the project's traffic and air quality impacts. Justice Werdegar was untroubled by the decision to omit a "baseline 2007" discussion; after all, by the time the project commenced operations in 2015, those conditions would no longer exist, so it made little sense to analyze them. Justice Werdegar did not feel the same way, however, about the omission of a near-term (2015) analysis. The EIR's approach meant that the light rail line would be operational for 15 years, without any analysis or disclosure of what the project's impacts would be during this 15-year period. Justice Werdegar found that the record did not contain substantial evidence to support the decision to omit an analysis of project impacts on near-term (2015) conditions. Four justices agreed.

Justice Werdegar went on to find, however, that this omission was not prejudicial. Justice Werdegar parsed the EIR's traffic study, and noted "the lack of grounds to suppose the same analysis performed against existing . . . conditions would have produced any substantially different information." Justice Werdegar's opinion was carefully worded to limit the lead opinion's conclusion – that the EIR's failure to analyze the project's effects on existing traffic and air quality conditions had no prejudicial effect – to "these particular factual circumstances."

Justice Liu agreed with Justice Werdegar on all but the "prejudice" issue. Justice Liu concluded that the "EIR's failure to measure impacts against a baseline of existing conditions . . . deprive[d] the public of relevant information about the project."

Justice Werdegar closed with a short discussion of the adequacy of mitigation measures for spillover parking effects. The authority and the Metropolitan Transportation Authority (Metro) had adopted a series of measures proposed by the EIR to address the risk that communities

would be overwhelmed by people using on-street parking near light-rail stations. The measures required monitoring on-street parking, Metro's financial and administrative assistance with appropriate permit parking programs, and Metro's commitment to work with local jurisdictions to decide on other options (time-restricted, metered, or shared parking arrangements) if necessary. Petitioner argued the record did not contain substantial evidence of the feasibility of this measure, citing *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1262. The Court disagreed. While acknowledging that the authority and Metro "cannot guarantee local governments will cooperate to implement permit parking programs or other parking restrictions," the Court found that the record supported the conclusion that local municipalities "can and should" cooperate. All seven justices agreed.

Concurring and dissenting, Justice Baxter (joined by Chief Justice Cantil-Sakauye and Justice Chin) rejected the lead opinion's baseline analysis. According to Justice Baxter "an agency retains discretion to omit an analysis of a project's likely impacts with an existing conditions baseline, so long as the selected alternative of a projected future conditions baseline is supported by substantial evidence and results in a realistic impacts analysis that allows for informed decisionmaking and public participation." In this case, Justice Baxter found the authority "did not abuse its discretion in forgoing an existing conditions baseline in favor of a 2030 baseline," because substantial evidence supported this approach as a realistic baseline for analyzing the project's impacts. Justice Baxter criticized the lead opinion's heightened test as unsupported by the statute.

To tally up the outcome:

- All seven justices agreed the *Sunnyvale West* and *Madera Oversight* decisions were wrong in treating the "future baseline" issue as a question of law. All seven justices agreed that such claims are subject to the "substantial evidence" test. *Sunnyvale West* and *Madera Oversight* are no longer good law on this issue.
- Four justices (Werdegar, Kennard, Corrigan, Liu) agreed that an agency has discretion to use a "future baseline" in lieu of an "existing conditions" baseline, but only if the agency can muster substantial evidence to explain why an analysis based on "existing conditions" would be misleading or useless. Although this is a "substantial evidence" question, these four justices believe the agency has a heightened burden of proof to explain why a departure from the normal "existing conditions" approach is warranted.
- These same four justices applied this heightened burden to the authority and concluded that, in this case, the authority did not justify its decision to use a future 2030 baseline. They therefore ruled the EIR was flawed.
- Three of the four justices (Werdegar, Kennard, Corrigan) concluded the error was not prejudicial because, even if the EIR did not expressly focus on this information, near term (2015) traffic and air quality impacts could be teased out of the information included in the EIR, and those impacts would be no worse than they would be over the long term (2030).
- One justice (Liu) found this error prejudicial and would have struck down the EIR.
- Three justices (Baxter, Cantil-Sakauye, Chin) agreed that the use of a future baseline is subject to review for substantial evidence, but saw no reason to depart from the typical, deferential formulation of that test. Thus, if a lead agency reasonably

believes that the baseline should reflect "future conditions," then these justices would defer to that approach if substantial evidence supports it. They would not impose a further duty on the agency to explain itself.

- These same three judges concluded that, under the conventional "substantial evidence" standard of review, the authority's EIR, and its exclusive use of a year 2030 baseline, was adequate. For this reason, these three justices did not reach the "prejudice" issue.
- In sum, there are four votes for Justice Werdegar's heightened substantial evidence test for evaluating an agency's use of a future baseline. As to the baseline issue, however, there are not four sure votes for anything else.
- All seven justices agreed the agencies' "spillover parking" mitigation, and their "can and should" finding, was adequate.

Second District holds (1) a city's permit decision on a solid waste facility is not a state-funded program and therefore its decisions is not subject to the antidiscrimination statute that applies to state-funded activities, and (2) the trial court abused its discretion in failing to excuse a one-week delay in requesting a hearing beyond the 90-day CEQA deadline. *Comunidad en Accion v. Los Angeles City Council* (2013) 219 Cal.App.4th 1116.

In May 2010, the Los Angeles City Council certified an EIR and approved an application to construct a solid waste transfer station, an expanded materials recycling facility, and an expanded green waste processing center at the Bradley Landfill site in Sun Valley, Los Angeles. A community organization -- Comunidad en Accion – sued. Comunidad alleged the facility subjected Sun Valley residents, most of whom are Latino, to a disproportionate amount of pollution in violation of Government Code Section 11135. That section prohibits discrimination based on, among other things, national origin and ethnic group identification. Comunidad also alleged the EIR violated CEQA. The trial court granted the city's motion for summary judgment. Comunidad appealed.

First, to succeed in its section 11135 claim, Comunidad had to show the discriminatory "program or activity . . . is funded directly by the state, or receives any financial assistance from the state." Comunidad argued the city received funding from the state, which it used to finance activities carried out by its local enforcement agency. The Court rejected this argument. Comunidad's complaint attacked the city's exercise of its land-use authority to approve a permit for the project. The complaint did not attack the LEA's exercise of its enforcement authority under State law. The Court acknowledged that the city's solid waste program, and the LEA's enforcement program, were intertwined, in that the city depended upon the LEA's function in order to comply with state law. The Court also acknowledged that the city housed the LEA offices; that State law required the LEA to review and comment on permitting decisions; and that the LEA depended on State funding to carry out its mission. The fact that the programs were intertwined, however, did not mean they were one and the same. In particular, the LEA did not answer to the city, but to CalRecycle. The Court therefore affirmed the trial court's decision to dismiss the section 11135 claim. Justice Rubin dissented from this portion of the opinion.

Second, the Court ruled the trial court abused its discretion in dismissing Comunidad's CEQA claim. Under Public Resources Code section 21167.4, the petitioner in a CEQA lawsuit must file

a request for a hearing within 90 days of filing the petition. If the petitioner does not request a hearing prior to this deadline, a party can move for dismissal, or the court can dismiss the claim on its own motion. In this case, the 90-day deadline passed, and the applicant moved to dismiss the CEQA claim. The next day, counsel for Comunidad filed a "request for hearing." The request was filed seven days late. Comunidad also requested relief from its mistake under Code of Civil Procedure section 473. Counsel filed a declaration stating the deadline was missed due to a calendaring error, and to a family illness that required counsel to be out of state in the two weeks leading up to the 90-day deadline. The trial court denied the request for relief under section 473 and dismissed the CEQA claim. The Court of Appeal reversed. It concluded that the trial court erred in denying Comunidad's relief from default. According to the Court, "[t]he one-week delay in requesting a hearing was an isolated mistake in an otherwise vigorous and thorough presentation of Comunidad's claims." The failure to correctly note the date was a clerical, calendaring mistake. Relief under section 473 was available for an excusable mistake of this sort.

Sixth District rules the City of San Jose improperly delegated the task of certifying an EIR to its planning commission as an unelected advisory body, and holds a petitioner exhausted its remedies despite its failure to appeal the planning commission's decision to the city council. *California Clean Energy Committee v. City of San* Jose (2013) – Cal.App.4th – [2013 Cal. App. LEXIS 869].

In June 2011, the City of San Jose released a draft EIR analyzing the impacts of a comprehensive update of the city's General Plan. Petitioner California Clean Energy Committee (CCEC) submitted a detailed comment letter attacking the EIR. In September 2011, the city's planning commission certified a final EIR and recommended approval of the plan. CCEC did not appeal the planning commission's decision to certify the EIR, but it did submit a follow-up letter encouraging the commission to reconsider its decision. In November 2011, the city council adopted the updated General Plan; the city council also adopted a resolution stating it had independently reviewed the EIR and certified its adequacy. CCEC sued. The city moved for summary judgment based on CCEC's failure to exhaust its administrative remedies. The trail court granted the motion. CCEC appealed.

The Court of Appeal reversed based on its conclusion that the city had improperly delegated authority to certify the EIR to the planning commission. Public Resources Code section 21151 provides that the lead agency may delegate certain duties under CEQA to unelected decision-making bodies. The duties that may be delegated include the certification of an EIR, provided the unelected body has the ability to approve or disapprove the project at issue.

The city's municipal code delegated certain duties to various bodies within city's organizational structure. The municipal code assigned to the planning commission responsibility for certifying EIRs for projects requiring environmental review. Having certified the EIR, the commission could then take action on the project (if it had authority to do so), or make recommendations to the city council. The planning commission's decisions could be appealed to the city council within three business days.

In this case, the planning commission did not have authority to adopt the new General Plan. For this reason, the planning commission was not a "decision-making body" with respect to the General Plan. Insofar as CEQA authorizes delegation only to an unelected "decision-making body," the delegation to the planning commission in this instance was improper.

The city argued that, under its municipal code, the certification process was bifurcated, such that the planning commission performed some CEQA functions, and the city council performed others. The Court ruled that CEQA prohibited such partial delegation to a non-decision-making body. The Court distinguished *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, in which the Regents delegated authority to certify an EIR to one of its committees, because in that case the Regents' committee was also a decision-making body.

The Court criticized the city's bifurcated process because it could "produce a situation in which the city council could be bound by a finding that it finds flawed -- that the final EIR is complete and in compliance with CEQA." "[T]he city council, as the decisionmaking body with respect to the [General Plan], is the entity tasked with certifying that the final EIR was compliant with CEQA. The delegation as part of its certification duty to the planning commission, as a nonelected nondecisionmaking body, therefore improperly segregated environmental review from project approval."

The city council ultimately adopted a separate resolution certifying the EIR. That decision did not suffer from the same defect, because the council *was* the decision-making body. The Court therefore turned to whether CCEC's letters were sufficient to exhaust its remedies. Because the planning commission's certification of the EIR was improper, CCEC was not required to file an administrative appeal of the commission's decision. Thus, the issue was whether CCEC's comment letter to the planning commission adequately exhausted its administrative remedies. CCEC's comment letter cited specific aspects of the EIR that CCEC felt were inadequate. That comment letter was before the city council at the time it certified the EIR. The claims in CCEC's petition largely tracked those in its comment letter. "Since the city council had the comment letter at the time it certified the final EIR and approved the project, [the city council] was fairly apprised of CCEC's objections. Accordingly, CCEC exhausted its administrative remedies."

First District rules that "substantial evidence" supported the City of Napa's determination that, in amending its General Plan to increase densities at certain locations throughout the city, the impacts of those amendments fell within the scope of those disclosed in the program EIR certified by the city when it adopted its General Plan. *Latinos Unidos de Napa v. City of Napa* (2013) – Cal.App.4th – [2013 Cal. App. LEXIS 893].

In 1998, the City of Napa certified a program EIR and approved a General Plan update. Beginning in 2008, the city embarked on proposed amendments to its Housing Element. The proposed amendments included amending the Land Use Element to increase the minimum residential densities in certain areas designated for mixed uses, and to increase the maximum permitted densities in certain other areas designated for multi-family residential uses. The net effect was to increase permitted density by 88 units. In May 2009, the city prepared an initial study to analyze the impacts of the amendments. The study concluded the impacts of the

amendments would remain "within the scope" of the impacts identified in the 1998 General Plan EIR. In June 2009, the city received comments, including a letter from a traffic engineer, stating that a supplemental EIR was required to account for the additional density. The city responded to the comments, in which staff rejected the comments from the traffic engineer as "misleading and inaccurate." In July 2009, the City Council adopted a finding that the amendments were within the scope of the 1998 EIR, and approved the amendments. The petitioner – an advocacy group focused on increasing affordable housing opportunities in the area – sued. The trial court denied the petition. The petitioner appealed.

The petitioner argued the "fair argument" standard of review applied to its claims, citing the First District's opinion in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307. The city disagreed, arguing that its decision should be upheld if supported by "substantial evidence." The Court agreed with the City that the "substantial evidence" test applied because the amendments addressed the same geographic area that was covered by the 1998 program EIR.

The petitioner argued the 1998 program EIR did not provide adequate coverage for the 2009 amendments, citing the comments submitted by the traffic engineer. The Court disagreed, characterizing the amendments as "limited," and not authorizing any actual, physical development. The impacts of the 2009 amendments were a byproduct of increasing minimum or maximum densities in certain areas within the city. In particular, the amendments authorized an increase in 88 residential units. This increased density, however, was offset by two factors: (a) many of the projects approved by the city resulted in fewer units than the number allowed under the applicable General Plan designations – that is, they built out at less than the maximum permitted density; and (b) the city's growth rate was slower than anticipated in the 1998 program EIR. As a result, the impacts of increasing density in 2009 remained "within the scope" of – that is, no greater than those disclosed in -- the 1998 EIR. Under the substantial evidence test, the fact that the traffic engineer disagreed was immaterial, insofar as the city responded to these comments. The petitioner bore the burden of proof to show the absence of substantial evidence, and in this case the petitioner did not carry that burden.

Third District rules that Nevada County did not need to recirculate a draft EIR for a proposed shopping center based on the county planning commission's decision to endorse a staff-recommended alternative that emerged after the county published the final EIR. *South County Citizens for Smart Growth v. County of Nevada* (2013) – Cal.App.4th – [slip op. dated October 8, 2013, certified for publication November 6, 2013].

In 2005, a developer filed an application to construct a small shopping center anchored by a grocery store. In 2007, the county released a draft EIR. In October 2008, the county released a final EIR that included comments on the draft EIR and responses to those comments. In January 2009, county staff recommended a modified version of the project in order to address traffic and air quality impacts that the EIR found to be "significant and unavoidable." The staff recommendation capped commercial development, increased open space, disallowed fast food restaurants, and expanded a wetland buffer. The planning commission recommended that the county Board of Supervisors certify the EIR and approve the staff recommendation. Based on the commission's recommendation, the developer devised two alternative redesigns that responded to staff's proposal, albeit with some tweaks. Staff embraced the developer's second

redesign proposal. In May and June 2009, the planning commission concluded the EIR encompassed the second redesign, and recommended approval. In July 2009, at the outset of the Board of Supervisors' hearing, Smart Growth's counsel submitted a lengthy comment letter attacking the EIR. The county continued the hearing. In August 2009, the board certified the EIR and approved the project. The petitioner sued. The trial court denied the petition. In April 2011, the petitioner appealed.

First, Smart Growth argued the county violated CEQA by failing to prepare and recirculate a draft EIR to analyze the impacts of the "staff alternative." According to Smart Growth, once the planning commission voted to recommend the staff alternative, the county had to recirculate the draft EIR, the failure to do so deprived the public of the opportunity to comment on a feasible alternative, and by not recirculating the draft EIR the county failed to proceed in the manner required by law.

The Court disagreed. According to the Court, the duty to recirculate arises only if the information is "significant new information," and the agency's determination whether the new information is "significant" will be upheld if supported by substantial evidence. Thus, "Smart Growth bears the burden of proving a double negative, that the County's decision not to revise and recirculate the final EIR is not supported by substantial evidence. That is, Smart Growth must demonstrate that there is no substantial evidence to support a determination that the staff alternative was not significant new information. For the staff alternative to be significant new information, it must be feasible; it must be considerably different from other alternatives previously analyzed; it must clearly lessen the significant environmental impacts of the proposed project; and the project's proponents must decline to adopt it. Smart Growth has the burden to demonstrate that there is no substantial evidence to support a negative finding on any of these factors in order to establish that the County abused its discretion in failing to recirculate the EIR." (Citations omitted.)

The Court concluded that Smart Growth did not meet its burden to show that the staff alternative was considerably different from those already analyzed in the EIR. The EIR looked at four alternatives. Staff's recommendation provided more open space than any of these alternatives, but that in itself was not enough to show that it was considerably different from those already analyzed in the EIR. Nor did Smart Growth explain how the staff alternative would clearly lessen the significant impacts of the project.

Second, Smart Growth argued the county violated CEQA by failing to adopt findings regarding the feasibility of the staff alternative. According to Smart Growth, once the planning commission found the staff alternative sufficiently feasible to recommend approval of the alternative to the board, the board had to either adopt the staff alternative or make findings setting forth the reasons why the staff alternative was not feasible. Again, the Court disagreed. Smart Growth did not argue, and thus conceded, that the draft EIR analyzed a reasonable range of alternatives. Under such circumstances, the board was not required to make an express finding of feasibility as to an alternative that emerged after the publication of the EIR.

Third, Smart Growth argued the county violated CEQA by relying on future, unapproved traffic improvements to conclude the project's traffic impacts would be insignificant. The road in

question – Combie Road – was projected to operate at LOS F under its existing designation as a "major collector." The county's traffic study determined that the road actually functioned as a "minor arterial" because it served as a thoroughfare through the area. Under this alternative functional designation, LOS was adequate. The Court ruled the county acted within its discretion in focusing on how the road actually functioned, rather than based on its formal designation. The record showed the county planned to widen Combie Road, and that the project was fully funded, lending further support to the County's decision to evaluate the road as a "minor arterial." Because the analysis focused on the functioning of the road, rather than on future traffic improvements, the county was not obliged to condition the project on the future expansion of the roadway.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

CLIMATE CHANGE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

State Cap-and-Trade Program. In October 2013, the California Air Resources Board (CARB) conducted a public hearing to consider proposed amendments to the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms regulation to: (1) allow for additional transition assistance for covered entities; (2) add a new offset protocol; and, (3) incorporate additional cost containment features. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1354.

State Mandatory Reporting Regulation. In October 2013, CARB conducted a public hearing to consider proposed amendments to the Regulation for the Mandatory Reporting of Greenhouse Gas Emissions. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1361.

Medium- and Heavy-Duty Engines and Vehicles; Tractor-Trailer Regulation; Idling Rule; and, Heavy-Duty Hybrid-Electric Vehicles. In October 2013, CARB announced that it will be conducting a public hearing in December 2013 during which it will consider: (1) adoption of new regulations to establish GHG standards for medium- and heavy-duty engines and vehicles; (2) amendments to CARB's existing Heavy-Duty Vehicle GHG Emission Regulation (Tractor-Trailer GHG Regulation); (3) adoption of new, optional NOx standards for heavy-duty vehicle engines; (4) amendments to the Airborne Toxic Control Measure to Limit Diesel-Fueled Commercial Motor Vehicle Idling; and, (5) amendments to the California Interim Certification Procedures for 2004 and Subsequent Model Hybrid-Electric and Other Hybrid Vehicles in the

Urban Bus and Heavy-Duty Vehicle Classes. See Cal. Reg. Notice Register 2013, Vol. No. 43-Z, p. 1656.

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
No updates this quarter.

ENERGY

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Geothermal Grant and Loan Program. In October 2013, the California Energy Commission (CEC) conducted a public hearing to consider adoption of amendments to the Geothermal Grant and Loan Program regulations, located in sections 1660-1665 and Appendix A of Title 20 of the California Code of Regulations. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1257.
2013 Nonresidential Building Standards. In September 2013, the CEC denied a petition to stay the implementation of the 2013 Building Energy Efficiency Standards for purposes of their application to nonresidential buildings. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1466.

FEES/TAXES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Lake and Streambed Alteration Agreements. In August 2013, the California Department of Fish and Wildlife proposed to increase the fees it charges to administer and enforce Fish and Game Code section 1600 et seq., which have not been adjusted since 2009. As a result of the proposed adjustment, the subject fees would increase by approximately 9.5 percent. The Department also proposed to amend certain regulations to delete certain fees pertaining to timber harvesting agreements that are no longer chargeable as of July 1, 2013. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1247.

FOREST RESOURCES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Forest Practice Rules. In August 2013, the State Board of Forestry and Fire Protection proposed to amend the existing Forest Practice Rules to acknowledge that the native Monterey pine (*Pinus radiate*) is not managed by itself as a commercial species in California. The proposed amendments also are intended to remove impediments to the treatment of hazardous fuel conditions caused by the presence of non-native, highly flammable eucalyptus species; and, correct the scientific names for incense cedar (*Calocedrus decurrens*) and tanoak (*Notholithocarpus densiflorus*). See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1240.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings
No updates this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Partial Disapproval of Regulatory Action Concerning Consumer Products. In September 2013, the Office of Administrative Law provided notice of its partial disapproval of regulatory action undertaken by the Department of Toxic Substances Control. The subject action included the adoption of numerous regulations contemplated for inclusion in Title 22 of the California Code of Regulations, and pertained to consumer products. See Cal. Reg. Notice Register 2013, Vol. No. 37-Z, p. 1448.

California Accidental Release Prevention Program. In September 2013, the Governor's Office of Emergency Services proposed to adopt regulations pertaining to implementation of the California Accidental Release Prevention Program that was created by Senate Bill 1889 in 1997. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1464.

Range Clearance Exception. In October 2013, the Department of Toxic Substances Control denied a petition requesting that the Department adopt the federal Military Munitions Rule to exempt certain soils, particularly those at shooting ranges, from regulation. See Cal. Reg. Notice Register 2013, Vol. No. 42-Z, p. 1618.

Photovoltaic Modules. In October 2013, the Office of Administrative Law notified the Department of Toxic Substances Control of its disapproval of regulations proposed by the Department to amend various sections in Title 22 of the California Code of Regulations that would regulate photovoltaic (PV) modules as hazardous waste, define PV modules, create exemptions to hazardous waste management requirements for these PV modules, and provide requirements for these exemptions. See Cal. Reg. Notice Register 2013, Vol. No. 42-Z, p. 1619.

INSURANCE COVERAGE

Recent Court Rulings

The Sixth District Court of Appeal Has Held That Insurers' Reservations of Various Rights to Deny Indemnity to a Third-Party Defendant in a CERCLA Action Did Not Result in a Conflict of Interest Requiring Insurers to Pay for Defendant's Independent Counsel. *Federal Insurance Co. v. MBL, Inc.* (2013) 219 Cal.App.4th 29.

The federal government brought a Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) action against owners and operators of a drycleaning facility to recover the cost of remediating contamination of soil and groundwater. Defendants filed third-party actions for indemnity against MBL, a supplier of drycleaning chemicals, and other parties. MBL tendered its defense to its six insurance companies. Under California law, an insurer must defend a suit which potentially seeks damages within the coverage of the policy. MBL's insurers agreed to defend MBL subject to reservations of various rights which could result in possible noncoverage. MBL argued the insurers' reservations of rights created a conflict of interest because the various factual positions favorable to the insurers on the issue of MBL's liability were directly opposite to those favorable to MBL in the underlying litigation. MBL demanded independent counsel paid for by insurers under Civil Procedure Code § 2860, which provides that a conflict requiring independent counsel may exist when an insurer reserves its rights on a given issue *and* the outcome of that coverage issue can be controlled by insurer's counsel. The

insurers filed declaratory relief actions denying the conflict of interest, and the trial court granted summary judgment in favor of insurers.

On appeal, the issue was whether the insurers' reservations of rights created a conflict of interest requiring the insurers to pay for independent counsel.

The court of appeal affirmed. Under section 2860, where an insurer's reservation of rights is based on coverage issues having nothing to do with the issues being litigated in the underlying action, no conflict exists. As to one of the insurers, the court held that its reservation of the right to deny coverage under a particular pollution exclusion in its policy did not create a conflict because whether the exclusion barred a claim arising out of MBL's activities was not at issue in the underlying action; thus appointed counsel could not influence the outcome of this coverage issue. The court also held that no conflict existed with respect to three of MBL's insurers because they had not expressly reserved their rights to deny coverage under *particular* exclusions in their policies. The insurers' *general* reservations of rights did not give rise to a conflict of interest; at most, general reservations of rights create a theoretical, potential conflict of interest—"nothing more." Additionally, the court held that though some of the insurers had retained separate counsel to represent other third-party defendants in the underlying litigation, this did not *per se* result in "significant and actual" conflicts entitling MBL to independent counsel. Under the comparative negligence system, each insurer had no incentive to shift liability among its respective insureds. Therefore, MBL was not entitled to independent counsel and none of the insurers were obligated to contribute to payment of MBL's counsel.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

LAND USE

Recent Court Rulings

The Fifth District Court of Appeal has ruled that in an oil and gas lease matter regarding federal lands, the federal courts do not have exclusive jurisdiction if the interests of the United States are not implicated. *Tearlach Resources Ltd., v. Western States International, Inc.* (August 5, 2013) 219 Cal.App.4th 773.

The case arose out of an assignment of an interest in certain leases for oil and gas rights on land owned by the U.S. government; the lands were leased pursuant to the Mineral Leasing Act of 1920. The assignee of the lease brought action against the assignor alleging various contract and tort claims, including breach of contract, breach of the covenant of good faith and fair dealing, fraud, negligence and negligent misrepresentation, declaratory relief, an accounting, constructive trust, and conversion. Among the defenses presented, the assignor parties argued the trial court lacked subject matter jurisdiction to adjudicate the claims because the federal courts have exclusive jurisdiction of claims involving ownership of interests in federal mineral leases. On

that basis, the trial court dismissed the case on those grounds, that it lacked subject matter jurisdiction.

On appeal, the Fifth District reversed, concluding that the matter presented only issues concerning the contractual relationship between the parties and tort claims; the interests of the United States were not implicated in the litigation and the jurisdiction of the federal courts, therefore, was not exclusive. The appellate court also ruled that the U.S. was not an indispensible party even though the Secretary of the Interior had not consented to the assignment because the assignee did not claim ownership of the property, did not challenge the title of the U.S. to the property, and did not dispute the right of the U.S. to lease the property for purposes of extracting oil and gas from it.

Legislative Developments
No updates this quarter.

Regulatory Updates

Solar-Use Easements. In August 2013, the California Department of Conservation provided notice of a proposed rulemaking to clarify, interpret, implement and make specific the procedural and substantive requirements that a landowner, applicant, or project proponent must satisfy in order to place land under a solar-use easement. The proposed regulations also clarify, interpret, implement and make specific the roles of cities, counties, and the Department in processing proposals and applications for solar-use easements. See Cal. Reg. Notice Register 2013, Vol. No. 33-Z, p. 1208.

Mining Ordinances. In August 2013, the State Mining and Geology Board provided notice of a proposed rulemaking that would add Article 16 to Title 14 of the California Code of Regulations, and provide for (1) mandatory notification to the Board of mining ordinances that have been previously certified by the Board, and subsequently amended; and, (2) mandatory recertification by the Board. See Cal. Reg. Notice Register 2013, Vol. No. 33-Z, p. 1214.

Public Pools. In September 2013, the California Department of Public Health provided notice of a proposed regulatory action to amend public pool operation and maintenance regulations that affect public pool sanitation, health and safety practices in California. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1370.

PROPOSITION 65

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. For the more current listing of chemicals known to the State to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2013, Vol. No. 39-Z, p. 1518.

Notice of Intent to List. In September 2013, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of its intent to list *methyl isobutyl ketone* (MIBK) as known to the State to cause reproductive toxicity. The action was proposed under the authoritative bodies listing mechanism. See Cal. Reg. Notice Register 2013, Vol. No. 36-Z, p. 1379.

New Listings. In September 2013, OEHHA provided notice of the listing of four chemicals effective September 13, 2013: (1) *chloral*; (2) *chloral hydrate*; (3) *1,1,1,2-tetrachloroethane*; and, (4) *trichloroacetic acid*. These chemicals are known to the State to cause cancer. See Cal. Reg. Notice Register 2013, Vol. No. 37-Z, p. 1429.

In September 2013, OEHHA also provided notice of the listing of *chloramphenicol sodium succinate* as known to the State to cause cancer, effective September 27, 2013. See Cal. Reg. Notice Register 2013, Vol. No. 39-Z, p. 1518; see also Cal. Reg. Notice Register 2013, Vol. No. 31-Z, p. 1141.

Notice of Availability of Hazard Identification Materials. In September 2013, OEHHA announced the availability of a hazard identification document to support the reconsideration of chemicals listed under Proposition 65 as known to cause reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1470.

Notice of Intent to Change the Listing Basis. In September 2013, OEHHA announced its intent to change the basis for the listing of three chemicals that are known to the State to cause reproductive toxicity: *1,2-dibromo-3-chloropropane*; *ethylene oxide*; and, *lead*. More specifically, OEHHA intends to change the basis of these listings to the "formally required to be labeled or identified" listing mechanism. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1471.

In September 2013, OEHHA also provided notice of its intent to change the basis for the listing of *dichloroacetic acid* as known to the State to cause reproductive toxicity. More specifically, OEHHA intends to utilize the "authoritative bodies" listing mechanism for this chemical. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1474.

In September 2013, OEHHA proposed to change the listing bases for *hexafluoroacetone* and *phenylphosphine* as known to the State to cause reproductive toxicity, though both chemicals will continue to be listed via the Labor Code mechanism. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1477. However, in October 2013, OEHHA withdrew the September notice, and instead referred the two chemicals to the Developmental and Reproductive Toxicant Identification Committee. See Cal. Reg. Notice Register 2013, Vol. No. 42-Z, p. 1617.

In September 2013, OEHHA further proposed to change the listing basis for *nitrous oxide* as known to the State to cause reproductive toxicity. More specifically, OEHHA intends to utilize the "authoritative bodies" listing mechanism for this chemical. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1479.

Notice to Interested Parties of Listed Chemicals Affected by Hazard Communications Standard Amendments. In September 2013, OEHHA provided notice of its intent to take various actions related to certain chemicals listed as known to the State to cause reproductive toxicity that were added pursuant to Labor Code Section 6382(d), the listing of which relied on federal regulations contained in Title 29 of the Code of Federal Regulations. Due to changes in the federal regulations, OEHHA needs to revisit the listing basis for various chemicals. OEHHA

will publish separate notices concerning individual listings, and some chemicals will be referred to the Developmental and Reproductive Toxicant Identification Committee. See Cal. Reg. Notice Register 2013, Vol. No. 38-Z, p. 1481.

Reference Exposure Levels (RELs). In October 2013, OEHHA transmitted a revised draft document describing the RELs for *benzene* to the State's Scientific Review Panel on Toxic Air Contaminants. See Cal. Reg. Notice Register 2013, Vol. No. 40-Z, p. 1556.

In October 2013, OEHHA also adopted RELs for *caprolactam*. See Cal. Reg. Notice Register 2013, Vol. No. 42-Z, p. 1617.

PUBLIC RECORDS

Recent Court Rulings

No updates this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

PUBLIC UTILITIES COMMISSION

Recent Court Rulings

The Third District Court of Appeal has ruled that the California Public Utilities Commission ("PUC") lacks authority to order railroads to stop using locomotive-mounted horns at rail crossings outside of federal quiet zones. *BNSF Railway Co. v. Public Utilities Commission* (August 5, 2013) 218 Cal.App.4th 778.

In 2004, the PUC approved the San Clemente Beach Safety Enhancement Project, which included protective barriers, undercrossings, and seven at-grade crossings intended to enhance pedestrian safety. A railroad track separates the beach from the bluff on which the residential and commercial areas of the city are located. Before implementation of the Safety Project, access across the railroad track to and from the beach was essentially uncontrolled; beachgoers would walk up and down the bluff on informal trails and cross the track at virtually any point they chose. The Safety Project was the result of an effort to develop a more regular trail and safer crossings.

While the Safety Project did increase public safety, it also resulted in significant complaints regarding the noise of the trains transiting the area because approximately 50 trains per day travel that stretch of track, and the trains blow their horns at all seven of the at-grade pedestrian crossings. In response, the city sought approval from the PUC to provide an audible warning system at each crossing, in addition to other safety features, to be used during non-emergency conditions in place of the train-mounted warning horns, which are substantially noisier. The railroads filed a protest asserting that the PUC has no statutory authority to approve the

alternative system. An administrative law judge concluded that the PUC did have jurisdiction, and the PUC adopted that decision as its own. The railroads sought review of the decision in the Court of Appeal.

The appellate court framed the issue as whether the PUC has the authority to prohibit trains from using their horns at pedestrian rail crossings, in favor of audible warning signals mounted at the crossings, where those crossings are not located in a federally established quiet zone. The Court concluded that the answer to the question is "no" because in Public Utilities Code section 7604, the Legislature has commanded that an audible warning device mounted on the train must be sounded at every rail crossing in the state, except those within federal established quiet zones. Because the pedestrian crossings at issue here are not within a federally established quiet zone, a train horn must be sounded at those crossings, and the PUC has no authority to order otherwise. As a result, the Court set aside the PUC's decision.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

RESOURCE CONSERVATION

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Commercial Kelp Harvest. In August 2013, the California Fish and Game Commission proposed to amend Sections 165 and 165.5 of Title 14 of the California Code of Regulations, as those provisions relate to the commercial harvest of kelp. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1306.

List of Waters with Special Fishing Regulations. In September 2013, the California Fish and Game Commission proposed to repeal, amend and add various subsections within Section 7.50 of Title 14 of the California Code of Regulations, as those subsections relate to the alphabetical listing of waters with special fishing regulations. See Cal. Reg. Notice Register 2013, Vol. No. 37-Z, p. 1401.

Private Lands Management. In October 2013, the California Fish and Game Commission provided notice of a proposal to amend Sections 601 and 702(a)(1) of Title 14 of the California Code of Regulations, as those provisions relate to the Private Lands Wildlife Habitat Enhancement and Management Area (PLM) Program. See Cal. Reg. Notice Register 2013, Vol. No. 43-Z, p. 1668.

SOLID WASTE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Waste Tire Standards. In August 2013, the California Department of Resources Recycling and Recovery provided notice of a proposed, comprehensive rulemaking that would add, amend or repeal various sections in Title 14 of the California Code of Regulations in order to address the treatment of waste tires, including – but not limited to – collection locations, permit procedures, notification requirements, and penalty provisions. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1249.

WATER QUALITY

Recent Court Rulings

Ninth Circuit Finds Pollution Exceedances Sufficient to Trigger Liability of County of Los Angeles under NPDES Permit. *Natural Resources Defense Council Inc. v. County of Los Angeles* (9th Cir. 2013) 725 F.3d 1194.

After the U.S. Supreme Court reversed the Ninth Circuit's prior decision, finding the County of Los Angeles and Los Angeles County Flood Control District ("District")(collectively the "County") not liable for permit violations under the Clean Water Act ("CWA"), on remand the Ninth Circuit found that because results of the County's pollution monitoring conclusively demonstrated that pollution levels in the Los Angeles and San Gabriel Rivers are in excess of those allowed under the County's National Pollutant Discharge Elimination System ("NPDES") permit ("Permit"), the County was liable for Permit violations as a matter of law.

In 2008, the Natural Resources Defense Council ("NRDC") sought to hold the County liable for high pollution levels in stormwater discharges from the County's municipal separate storm sewer system ("MS4"). The County's MS4 primarily collects and conveys stormwater runoff in the unincorporated areas of the County. On remand, NRDC advanced the same argument it has used throughout the litigation—that the County's monitoring data established their liability for Permit violations. The Ninth Circuit previously rejected this argument, but the Supreme Court explicitly declined to address it. The County argued that the Ninth Circuit could not reconsider its earlier decision because it was final, and alternatively, that the Court's earlier disposition should be left undisturbed as "law of the case." The Ninth Circuit rejected each of the County's arguments, and reconsidered the merits of the Plaintiff's prior arguments.

Section 301(a) of the CWA prohibits the "discharge of any pollutant" from any "point source"

into "navigable waters" unless the discharge complies with certain other sections of the CWA. (33 U.S.C. § 1311(a).) One of those sections is section 402, which provides for the issuance of NPDES Permits. (33 U.S.C. § 1342.) The State Water Resources Control Board for the Los Angeles Region first issued an NPDES permit (the Permit) regulating stormwater discharges by the County in 1990. The Permit has since been amended or renewed several times; the version of the Permit at issue in this case was issued in 2001. The Permit places limits on the type and amount of pollutants that the permittees (84 incorporated municipalities in the District, hereinafter "Permittees") may discharge from the MS4. The Permit also requires the Permittees to monitor the impacts of their MS4 discharges on water quality and to annually publish the results of all monitoring. One of the principle ways that the Permittees monitor the MS4 is through mass-emissions monitoring. The Permittees sited a mass-emissions monitoring station in both the Los Angeles and San Gabriel Rivers ("Monitoring Stations"). Between 2002 and 2008, the District published annual monitoring reports that contain the data the District collected at the Monitoring Stations. Those reports identified 140 separate exceedances of the Permit's water quality standards.

The County did not dispute that it was discharging pollutants from the MS4 into the Los Angeles and San Gabriel Rivers, or that its monitoring reports demonstrated that pollution levels recorded at the Monitoring Stations were in excess of those allowed under the Permit. Instead, the County claimed that Plaintiffs could not meet the applicable evidentiary burden, claiming it could not be held liable for Permit violations based solely on the data published in the District's monitoring reports because: (1) the mass-emissions monitoring required under the Permit was "neither designed nor intended" to measure the compliance of any Permittee; and (2) the monitoring data cannot parse out precisely whose discharge(s) contributed to any given exceedance because the monitoring stations sample pollution levels downstream from a legion of discharge points controlled by various Permittees and other non-party entities, as opposed to at the discharge points themselves.

The Ninth Circuit interpreted the language of the Permit, finding that the "Monitoring and Reporting Program" of the Permit has the "stated objectives of *both* characterizing stormwater discharges *and* assessing compliance with water-quality standards" and that the Permit "could not be more explicit in this regard." (725 F.3d at 1205.) Thus, the Court rejected the County's argument that the Monitoring Stations do not assess compliance of any Permittee with the Permit. The Court also found instructive the Regional Board's interpretation of the Permit. The Regional Board "indicated that it 'does not agree' that the 'burden [of proving Permit violations] rests upon the enforcing entity.'" (*Id.* at p. 1208.) Finally, the Court found that the County's "arguments run counter to the purposes of the CWA, and ignore the inherent complexity of ensuring an MS4's compliance with an NPDES permit that covers thousands of different point sources and outfalls." (*Ibid.*)

Ultimately, the Ninth Circuit found the County liable for the Permit violations and remanded the case to the district court to determine the appropriate remedy. It is anticipated that the District will seek review of the decision.

Legislative Developments

No updates this quarter.

Regulatory Updates

Hexavalent Chromium MCL. In October 2013, the California Department of Public Health conducted public hearings concerning proposed regulations designed to serve two purposes: (1) to adopt a maximum contaminant level (MCL) for hexavalent chromium in drinking water, as required by the California Safe Drinking Water Act; and, (2) to revise and augment regulations related to the public notification of public water systems' violation of provisions of the referenced Act and regulations adopted thereunder. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1266.

Shoreline Protection Table. In September 2013, the Office of Spill Prevention and Response within the California Department of Fish and Wildlife proposed to amend Section 790 in Subdivision 4, Chapter 1, of Title 14 of the California Code of Regulations, and thereby update the Shoreline Protection Tables. See Cal. Reg. Notice Register 2013, Vol. No. 39-Z, p. 1505.

Storm Water Pollution Prevention Plan. In October 2013, the Office of Administrative Law accepted a petition alleging that the State Water Resources Control Board improperly promulgated an underground regulation by issuance of the July 2, 2013 Fact Sheet, titled Qualified Storm Water Pollution Prevention Plan Developer (QSD) Training Program for Professionals Licensed by the California Board of Professional Engineers, Land Surveyors and Geologists. See Cal. Reg. Notice Register 2013, Vol. No. 41-Z, p. 1576.

WATER RESOURCES

Recent Court Rulings

The Fourth District has held that a preelection declaratory relief action regarding the validity of an initiative does arise out of the proponent's protected activity under the SLAPP Act, but found that voter initiatives which violated the Water Code section 31007, requiring that a water district's rates cover its costs, were likely to be meritless. *Mission Springs Water District v. Verjil* (2013) 218 Cal.App.4th 892.

Following an increase in water and sewer rates by the Mission Springs Water District ("District") in 2010, two public initiatives to roll back the increases gathered enough signatures to be included on the ballot. The initiatives not only purported to restore existing water and sewer rates, but also limited the District's ability to adjust these rates in the future. Rather than place the initiatives on the next general election ballot, as required by statute, the District filed an action against proponents of the initiatives for declaration that they were invalid on the grounds that the initiatives: (1) went beyond Proposition 218's authorization by limiting future rate increases; (2) were void for vagueness; (3) would cause the District to become insolvent; (4) required the District to enact legislation; and (5) unconstitutionally impaired the obligation of contract. Proponents of the initiatives responded by filing a "SLAPP" motion, which requires a showing that the action arose out of activity protected under the constitutional right of petition or free speech. Proponents also filed a demurrer, arguing that the District to prevail on the merits.

The trial court denied the SLAPP motion on the grounds that the action did not arise out of any protected activity; it therefore did not reach the question of whether the District had shown a

probability of prevailing on their claims. It further overruled the demurrer, determining that the District's claim that the initiatives unconstitutionally limited future rate increases was meritorious. The District appealed. The case presented two issues to the appellate court, analyzing the SLAPP motion -- first, whether the initiative's proponents had made a threshold showing that the challenged cause of action arose from a protected activity; and second, whether the District had demonstrated a likelihood of success on the merits.

The Court of Appeal concluded that the SLAPP motion was properly denied by the trial court, but on the wrong grounds. Based on a review of prior case law – specifically *City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582 and the California Supreme Court's more recent decision in *Perry v. Brown* (2011) 52 Cal.4th 1116 – the court determined that when the proponent of an initiative is a party to preelection litigation challenging the initiative, the litigation arises out of the proponent's exercise of the constitutional right of petition. Having determined that the first threshold of the SLAPP analysis was satisfied because the challenged initiatives arose from a protected activity, the court moved to the second question – whether the litigation had merit. On this point, relying on uncontradicted evidence submitted by the District, the court held that the District had demonstrated the probable validity of its claim that the initiatives would violate Water Code section 31007 by setting the District's rates so low as to be inadequate to cover the District's costs. On these grounds, the court affirmed the trial court's order denying the SLAPP motion and demurrer.

The Third District has held that a State Water Resources Control Board may make a preliminary determination as to whether a party is illegally diverting water for purposes of enforcement. *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397.

In February 2009, the State Water Resources Control Board ("Water Board") conducted an investigation into the diversion of water from the Middle River in the Sacramento-San Joaquin River Delta by Woods Irrigation Company ("Woods"), a water distribution corporation. The Board then issued a Cease and Desist Order against Woods for the unauthorized diversion of water. Woods requested a hearing to provide evidence supporting the company's riparian or pre-1914 appropriative water rights; additionally, Woods' customers ("Customers") sought to intervene at the hearing, but the Water Board's hearing officer declined to allow the late intervention or continue the hearing date. Following the hearing, the Water Board approved the draft Cease and Desist Order. Woods' Customers then sought administrative review of the Cease and Desist Order, petitioning the Water Board for reconsideration and claiming that the Board had violated their rights to due process. At the same time, Customers sought judicial review, petitioning the superior court for writ of mandate. Before the Water Board acted on the reconsideration request, the superior court issued a peremptory writ ordering the Board to set aside the Cease and Desist Order. The Water Board then reversed their prior order declining intervention and granted the petition for reconsideration, allowing the Customers to participate in the proceedings.

Customers argued that the Water Board did not have jurisdiction to issue a Cease and Desist Order against diverters, asserting that the validity of water rights must be decided by a court. On reconsideration, the Board concluded it had jurisdiction under Water Code section 1831 to determine the extent and validity of riparian or pre-1914 appropriative water rights. Customers

filed a second petition for writ of mandate to set aside the reconsideration order, but the parties stipulated to stay proceedings pending resolution of the appeal.

Based on its review of case law and statutes, the appellate court determined that the Legislature had expressly vested authority in the Water Board to determine if any person is unlawfully diverting water. The court did not agree with Woods' Customers' claim that the water diverter could divest the Water Board of jurisdiction under Water Code section 1831 "simply by alleging riparian or pre-1914 appropriative rights;" furthermore, it found that Water Code section 1831, subdivision (e), vested in the Board the authority to regulate the diversion and use of unappropriated water, including water claimed under pre-1914 appropriative rights but never perfected, and rights perfected under a pre-1914 right but lost through nonuse. On a secondary issue of private attorney general fees, the court found that Woods' Customers had lost on their jurisdictional claim; and with respect to their due process claim, the court found that the Customers had a financial stake in the proceedings and saw no evidence in the record that the Customers' ability to participate in the proceedings had conferred any benefit on the public generally. Therefore, the attorney fees award was reversed.

Legislative Developments

No updates this quarter.

Regulatory Updates

Forest Practice Rules. In August 2013, the State Board of Forestry and Fire Protection proposed to amend the existing Forest Practice Rules to clarify the Board's intent with regard to the identification and protection of water-courses designated as "Class II-Large." See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1236. In August 2013, the Board also proposed to amend the existing Forest Practice Rules and adopt a Technical Rule Addendum in order to satisfy two long-term objectives of the Board: (1) to ensure that all road-related Forest Practice Rules are adequate to prevent adverse impacts to beneficial uses of water; and (2) to organize all road-related rules into a logical, consistent order and locate them in one portion of the Forest Practice Rulebook for ease of reference and understanding by all. See Cal. Reg. Notice Register 2013, Vol. No. 34-Z, p. 1243.

SWP Encroachment Permits. In October 2013, the California Department of Water Resources provided notice of its proposal to adopt new regulations establishing rules and procedures for obtaining an Encroachment Permit and removal of unauthorized encroachments along the State Water Project. See Cal. Reg. Notice Register 2013, Vol. No. 43-Z, p. 1679.

FEDERAL SUMMARIES

Supreme Court

Ninth Circuit Court of Appeals

ENDANGERED SPECIES

Recent Court Rulings
No summaries this quarter.

NEPA

Recent Court Rulings
No summaries this quarter.

WATER RESOURCES

Recent Court Rulings

Ninth Circuit holds that Bureau of Reclamation Not Required to Provide Central Valley Project Contractors Priority Water Rights. *Tehama-Colusa Canal Authority v. United States Department of the Interior* (9th Cir. 2013) 721 F.3d 1086.

The Tehama-Colusa Canal Authority ("Canal Authority"), a joint powers authority comprised of sixteen water agency members, brought suit against the Department of the Interior ("DOI"), the Bureau of Reclamation ("Bureau"), and two California water authorities, to establish priority water rights under Central Valley Project ("CVP") water service contracts in the Sacramento Valley. The Canal Authority sought declaratory and injunctive relief limiting the export of water south of the Sacramento-San Joaquin Delta ("Delta") until its members received 100% of the water supply referenced in the CVP contracts. The CVP operates under an agreement between the Bureau and the California Department of Water Resources ("DWR") as an integrated unit. Contractors receiving water from the CVP contract directly with the Bureau for water allocations. Canal Authority members executed their original CVP water service contracts in the 1960s and 1970s, and have entered into a series of renewal contracts since that time. The current renewal contracts of the Canal Authority's members were executed in 2005.

The Bureau normally allocates CVP water on a pro rata basis, except when operational constraints or contract provisions dictate priority allocation. When water shortages occur, CVP contractors will receive less than their full contractual allocation, but contractors south of the Delta usually bear an increased burden of the shortages. The two drought years at issue in this case are 2008 and 2009. In 2008, Canal Authority received 100% of their contractual water allocations. In 2009, after the Governor of California declared a state of emergency because of the drought, the Canal Authority received 40% of their allocations.

The issue presented was whether the Bureau was required to provide CVP contractors priority water rights under California Water Code ("CWC") section 11460.

The Bureau's appropriation of water for the CVP is subject to the area of origin statutes, CWC sections 11460 through 11465, which were enacted to alleviate the concern that construction of

the CVP would result in inadequate water supplies for local users. The Court explained that while the area of origin statutes help to determine the total quantity of water available to the Bureau for allocation, those statutes do not control how the water is allocated by the Bureau once acquired.

All the original Canal Authority contracts contained shortage provisions that permitted the Bureau to apportion and reduce available water supply in years of shortage, but the current renewal contracts did not include area of origin language or priority distribution provisions. The Ninth Circuit found that when the Canal Authority and its members signed the renewal contracts, there was absolutely no misunderstanding of the Bureau's position that area of origin law did not afford Canal Authority and its members priority to CVP water supply. Therefore, the Court held that under the plain language and terms of the contracts, the Bureau did not act arbitrarily when it rejected the Canal Authority's demand to prioritize federally appropriated water to the Canal Authority and its members. The Bureau could not, however, decline to include area of origin provisions in the renewal contracts.

The Court noted prior court opinions and administrative decisions confirm that CWC section 11460 has not been interpreted to provide priority for the Canal Authority and its members in the realm of *federally* protected water. Because the Canal Authority and its members hold no water permits issued by the SWCRB that would establish priority under CWC section 11460, the Bureau's continued rejection of priority provisions in the water service contracts was not improper.

The Court pointed to Article 12 of the 2005 renewal contracts, which provides that the Canal Authority and its members are not entitled to the full complement of water contracted for, and may have to endure pro rata reduction in times of shortage, along with other CVP contractors. Article 12 also expressly and explicitly provides that in times of shortage, the Bureau may divert water to other contractors to meet the Bureau's overall goal to provide water to the maximum number of users for the greatest potential benefit. The Court held that Article 12 foreclosed any argument by the Canal Authority that it and its members are entitled, during times of shortage, to receive the full complement of contracted water supply.

As a separate ground for rejecting the Canal Authority's argument, the Court pointed to the fact that the Canal Authority and its members previously invoked the provisions of California Code of Civil Procedure section 870 to obtain judgments validating each of the renewal contracts under California law. The Court stated that each validation judgment ensured the enforceability and validity of the renewal contracts. It also held that the Canal Authority and its members were statutorily barred from challenging any provision of the renewal contracts since the validation actions were brought in 2005.

Federal Regulatory Update

AGENCY ADMINISTRATION

No updates this quarter.

AIR QUALITY

California State Implementation Plan (SIP). The U.S. Environmental Protection Agency (EPA) took the following action relative to the California SIP:

- *Antelope Valley Air Quality Management District*: (i) direct final action rescinding local rules that consider sulfur oxide emissions from lead smelters (78 Fed.Reg. 49925, 49992); (ii) final action to approve SIP revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 58459); and, (iii) final action approving SIP revisions concerning standards for continuous emissions monitoring systems and SOx emissions (78 Fed.Reg. 59840).
- *El Dorado County Air Quality Management District*: (i) proposed action to approve SIP revisions concerning the air district's demonstrations regarding Reasonably Available Control Technology requirements for the 1997, 8-hour ozone NAAQS (78 Fed.Reg. 63934).
- *Feather River Air Quality Management District*: (i) final action providing for a limited approval and limited disapproval of two permitting rules concerning construction and modification of stationary sources (78 Fed.Reg. 58460).
- *Placer County Air Pollution Control District*: (i) final action concerning NOx emissions from biomass boilers (78 Fed.Reg. 53249); (ii) direct final action concerning VOC emissions from adhesives and sealants (78 Fed.Reg. 53680, 537110); and, (iii) final action providing for a limited approval and limited disapproval of two permitting rules concerning construction and modification of stationary sources (78 Fed.Reg. 58460).
- *Sacramento Metropolitan Air Quality Management District*: (i) final action approving two permitting rules that concern construction and modification of stationary sources (78 Fed.Reg. 53270).
- *San Joaquin Valley Unified Air Pollution Control District*: (i) final action to correct its May 2004 approval of the air district's New Source Review rules by limiting the approval relative to agricultural sources in specified ways (78 Fed.Reg. 46504); (ii) interim final determination to stay the imposition of offset sanctions and to defer the imposition of highway sanctions, as such sanctions relate to the nonattainment area contingency measure requirement for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS (78 Fed.Reg. 53038); and, (iii) proposed action to approve SIP revisions to address the nonattainment area contingency measure requirement for the 1997 annual and 24-hour $PM_{2.5}$ NAAQS (78 Fed.Reg. 53113).
- *Santa Barbara County Air Pollution Control District*: (i) direct final action concerning VOC emissions from adhesives and sealants (78 Fed.Reg. 53680, 537110); and, (ii) final action to approve SIP revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 58459).
- *South Coast Air Quality Management District*: (i) proposed action to approve SIP revisions concerning PM and CO emissions from cement kilns (78 Fed.Reg. 56639); (ii) final action to approve SIP revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 58459); (iii) final action approving SIP revisions concerning VOC, NOx, and PM emissions from open burning and wood-burning devices (78 Fed.Reg. 59249); and, (iv) final action approving SIP revisions to address contingency measure requirements for the 1997 annual and 24-hour NAAQS for $PM_{2.5}$ in the Los Angeles-South Coast Air Basin (78 Fed.Reg. 64402).

- *Ventura County Air Pollution Control District*: (i) direct final action rescinding local rules that concern VOC emissions from data storage and vacuum producing device industries (78 Fed.Reg. 49925, 49992); (ii) direct final action concerning VOC emissions from adhesives and sealants (78 Fed.Reg. 53680, 537110); and, (iii) final action to approve SIP revisions concerning VOC emissions from motor vehicle and mobile equipment coating operations and from graphic arts operations (78 Fed.Reg. 58459).

National Ambient Air Quality Standards (NAAQS). The EPA took the following action relative to the NAAQS:

- *Fine Particulate Matter ($PM_{2.5}$)*: (i) final action determining that the Chico nonattainment area in Butte County has attained the 2006, 24-hour fine particulate matter NAAQS (78 Fed.Reg. 55225).
- *Ozone*: (i) final actions revising the regulatory definition of VOCs for purposes of preparing SIPs to attain the ozone NAAQS (78 Fed.Reg. 53029 and 62451); (ii) withdrawal of a proposed action to reclassify the Indian country pertaining to the Morongo Band of Missions Indians from "severe-17" to "extreme" for the 1997, 8-hour ozone NAAQS (78 Fed.Reg. 58266); and, (iii) final action to correct an error in a previous rulemaking that revised the boundaries between nonattainment areas in Southern California for the one-hour ozone NAAQS, and to revise the boundaries of air quality planning areas to designate the Morongo Band of Mission Indians as a separate air quality planning area for purposes of the one-hour and 1997, 8-hour ozone NAAQS (78 Fed.Reg. 58189).
- *Particulate Matter (PM_{10})*: (i) final action approving the redesignation of the Sacramento nonattainment area as attainment for purposes of the 24-hour NAAQS, and related approval of maintenance plans, emissions budgets, and emissions inventory data (78 Fed.Reg. 59261).
- *Sulfur Dioxide (SO_2)*: (i) final action establishing air quality designations for certain areas in the U.S. for the 2010 primary NAAQS (78 Fed.Reg. 47191).

Heavy-Duty Engine and Vehicle and Nonroad Amendments. In August 2013, the EPA and National Highway Traffic Safety Administration (NHTSA) withdrew those elements of a June 17, 2013 direct final rule regarding Heavy-Duty Engine and Vehicle and Nonroad Technical Amendments that the agencies received adverse comment on. See 78 Fed.Reg. 49963.

Marine Spark Ignition Amendments. In August 2013, the EPA announced that it was accepting comment on and holding a public hearing for California's request for authorization to implement its amendments to the Spark Ignition Marine Engine and Boat Regulations. See 78 Fed.Reg. 50412.

Outer Continental Shelf (OCS) Regulations. In September 2013, the EPA finalized the update of the OCS regulations pertaining to the requirements for sources for which the Santa Barbara Air Pollution Control District is the designated corresponding onshore areas. See 78 Fed.Reg. 59263.

New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAPs). In September 2013, the EPA finalized the amendments to the NSPS for the oil and natural gas sector. See 78 Fed.Reg. 58416. The EPA also announced its reconsideration of the NESHAPs for stationary reciprocating internal combustion engines and the NSPS for stationary internal combustion engines, due to its receipt of three petitions for reconsideration. See 78 Fed.Reg. 54606.

Nonroad Engine Pollution Control Standards. In September 2013, the EPA provided notice of its decision to grant California's request for authorization to implement its regulations applicable to in-use fleets that operate off-road, diesel-fueled vehicles with engines 25

horsepower or greater. The regulations require such fleets to meet fleet average emissions standards for NOx and PM, or, alternatively, to comply with best available control technology requirements. See 78 Fed.Reg. 58090.

ATTORNEY'S FEES

No updates this quarter.

CEQA

No updates this quarter.

CLIMATE CHANGE

Tractor-Trailer Regulation. In August 2013, the U.S. Environmental Protection Agency announced that it was accepting comment on and holding a public hearing for California's request for authorization to implement its tractor-trailer greenhouse gas (GHG) emission regulation applicable to new and in-use, 53-foot and longer box-type trailers, and to new and in-use tractors that haul such trailers on California highways. See 78 Fed.Reg. 51724.

GHG Reporting Program. In September 2013, the EPA proposed amendments to the reporting and recordkeeping requirements, and an alternative verification approach for the GHG Reporting Program. See 78 Fed.Reg. 55994.

COASTAL RESOURCES

No updates this quarter.

ENDANGERED SPECIES

Webber's Ivesia. In August 2013, the U.S. Fish and Wildlife Service (Service) proposed to designate 2,011 acres in Plumas, Lassen and Sierra counties as critical habitat for the Webber's Ivesia. See 78 Fed.Reg. 46862, 51705. The Service also proposed to list the Webber's Ivesia as a threatened species. See 78 Fed.Reg. 46889.

Soldier Meadow Cinquefoil. In August 2013, the Service announced that listing of the Soldier Meadow cinquefoil is no longer warranted, and removed the species from the candidate list. See 78 Fed.Reg. 46889.

Critical Habitat Regulations. In August 2013, the Service and the National Marine Fisheries Service (NMFS) finalized a revision to the regulations pertaining to the impact analyses conducted for the designation of critical habitat. See 78 Fed.Reg. 53058.

Santa Cruz Cypress. In September 2013, the Service announced its 12-month finding on a petition to reclassify the Santa Cruz cypress as threatened. The Service found that reclassifying the cypress was warranted; therefore, the Service proposed to reclassify the cypress as threatened

and correct the scientific name of the Cypress on the Service's List of Endangered and Threatened Plants. See 78 Fed.Reg. 54221.

Incidental Take Statements. In September 2013, the Service and NMFS proposed to amend the regulations governing consultation under section 7 of the Endangered Species Act relative to incidental take statements. The purpose of the proposed amendments is to address the use of surrogates to express the amount or extent of anticipated incidental take, and incidental take statements for programmatic actions where implementation of the program requires later authorization, funding, or implementation of site-specific actions that will be subject to section 7 consultation and incidental take statements, as appropriate. See 78 Fed.Reg. 54437.

Northern Spotted Owls. In September 2013, the Service announced the availability of the record of decision for the final environmental impact statement for experimental removal of barred owls to benefit threatened northern spotted owls. See 78 Fed.Reg. 57171.

Yellow-Billed Cuckoo. In October 2013, the Service proposed to list the yellow-billed cuckoo in the western portions of the United States as a threatened distinct vertebrate population segment. See 78 Fed.Reg. 61622.

Ashy Storm-Petrel. In October 2013, the Service announced its 12-month finding on a petition to list the ashy storm-petrel as an endangered or threatened species, and to designate critical habitat. The Service found that listing was not warranted at this time. See 78 Fed.Reg. 62523.

Greater Sage-Grouse. In October 2013, the Service proposed to designate critical habitat for the Bi-State distinct population segment (DPS) of the greater sage grouse, including areas located within Alpine, Mono and Inyo counties. See 78 Fed.Reg. 64328. That same month, the Service also proposed to list the Bi-State DPS of the greater sage-grouse as threatened, and proposed a special rule under section 4(d) of the Endangered Species Act for the conservation of this DPS. See 78 Fed.Reg. 64358.

Vandenberg Monkeyflower. In October 2013, the Service proposed to designate 5,785 acres of critical habitat for the Vandenberg Monkeyflower in Santa Barbara County. See 78 Fed.Reg. 64446. That same month, the Service also proposed to list the Vandenberg Monkeyflower as endangered. See 78 Fed.Reg. 64840.

North American Wolverine. In October 2013, the Service reopened the comment period on the proposed rule to list the DPS of the North American wolverine in the contiguous United States as threatened. See 78 Fed.Reg. 65248.

ENERGY

Renewable Fuels. In August 2013, the U.S. Environmental Protection Agency (EPA) set the annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that apply to all motor vehicle gasoline and diesel produced or imported in the 2013 calendar year. See 78 Fed.Reg. 49794.

In October 2013, the EPA amended the definition of "heating oil" in the regulations for the Renewable Fuel Standard program under section 211(o) of the Clean Air Act. See 78 Fed.Reg. 62462.

FEES/TAXES

No updates this quarter.

FOREST RESOURCES

No updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Hazardous and Solid Waste Management System. In August 2013, the U.S. Environmental Protection Agency (EPA) invited comment on additional information obtained in conjunction with a June 2010 proposed rule titled, Hazardous and Solid Waste Management System: Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities. See 78 Fed.Reg. 46940.

Significant New Use Rules (SNURs). In August 2013, the EPA promulgated SNURs for 53 chemical substances under the Toxic Substances Control Act (TSCA) that were previously the subject of premanufacture notices. See 78 Fed.Reg. 48051.

In September 2013, the EPA finalized SNURs for three chemical substances that were the subject of premanufacture notices and a TSCA section 5(e) consent order. See 78 Fed.Reg. 55632.

All Appropriate Inquiries. In August 2013, the EPA proposed to amend the Standards and Practices for All Appropriate Inquiries to reference a standard practice recently made available by ASTM International. Use of this standard is intended to satisfy the requirements for conducting all appropriate inquiries under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See 78 Fed.Reg. 49714, 64403.

Electronic Reporting of Toxics Release Inventory Data. In August 2013, the EPA finalized a rule requiring facilities to report non-trade-secret Toxics Release Inventory forms to the EPA using electronic software provided by the agency. See 78 Fed.Reg. 52860.

INSURANCE COVERAGE

No updates this quarter.

LAND USE

No updates this quarter.

PROPOSITION 65

No updates this quarter.

RESOURCE CONSERVATION

Migratory Bird Hunting. In August 2013, the U.S. Fish and Wildlife Service (Service) proposed to adopt special migratory bird hunting regulations for certain Tribes on Federal Indian reservations, off-reservation trust lands, and ceded lands for the 2013-2014 hunting season. See 78 Fed.Reg. 47136. That same month, the Service also proposed to establish the 2013-2014 late-season hunting regulations for certain migratory game birds. See 78 Fed.Reg. 52338, 58124 (final rule). Finally, the Service finalized its rule to prescribe final early-season frameworks for the 2013-2014 migratory bird hunting season. See 78 Fed.Reg. 52658.

In September 2013, the Service finalized the hunting seasons, hours, areas, and daily bag and possession limits for general waterfowl seasons and those early seasons for which States previously deferred selection. See 78 Fed.Reg. 58204.

SOLID WASTE

No updates this quarter.

WATER QUALITY

Effluent Guidelines Program. In August 2013, the U.S. Environmental Protection Agency (EPA) announced the availability of the Preliminary 2012 Effluent Guidelines Program Plan, and the 2011 Annual Effluent Guidelines Review Report. See 78 Fed.Reg. 48159.

Ammonia. In August 2013, the EPA announced the availability of the final national recommended ambient water quality criteria for the protection of aquatic life from effects of ammonia in freshwater. See 78 Fed.Reg. 52192.

Water Quality Standards. In September 2013, the EPA proposed changes to the federal water quality standards regulation, which helps implement the Clean Water Act, in order to improve the regulation's effectiveness in restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. See 78 Fed.Reg. 54518, 58500.

General Permit for Stormwater Discharges. In September 2013, the EPA requested public comment on the draft 2013 National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges from industrial activity, also referred to as the Multi-Sector General Permit. See 78 Fed.Reg. 59672.

Electronic Reporting Rule. In October 2013, the EPA extended the comment period for the NPDES Electronic Reporting Rule, published on July 30, 2013. See 78 Fed.Reg. 64435.

Best Practices for Continuous Monitoring of Temperature and Flow in Wadeable Streams. In October 2013, the EPA announced the availability of a draft document titled, Best Practices for Continuous Monitoring of Temperature and Flow in Wadeable Streams. See 78 Fed.Reg. 65306.

WATER RESOURCES

Water Body Connectivity. In September 2013, the U.S. Environmental Protection Agency (EPA) Science Advisory Board (SAB) Staff Office announced a public meeting of the SAB Panel to conduct a review of the draft report titled, Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis of the Scientific Evidence. See 78 Fed.Reg. 58536.