State Bar of California

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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 1 through September 30, 2012. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.
The current legislative calendar is also included at the end of the *Update.* *Please note that all case law, legislative and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form.* In addition, this issue also includes selected recent Federal case law of note from the U.S. Supreme Court, Ninth Circuit Court of Appeals and Federal District Courts.

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

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cday-wilson@ci.eureka.ca.gov I would like to thank Michael Haberkorn, Arielle Harris, David Levy, Whit Manley, Danielle K. Morone, Rachel Cook, Michael J. Steinbrecher, Stephen Velyvis and John Epperson for their contributions to this issue of the Update. Also, a special thank you to Arielle Harris, who, despite going into labor, was able to still provide me with her case summaries for this issue. The last summary was e-mailed to me at 2:00 a.m. as she left for the hospital. Now that is dedication! Arielle and her husband welcomed a baby girl on October 12, 2012. Congratulations Arielle! – Cyndy Day-Wilson.

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Legislative Developments

AB 1180 (Bradford) California Global Warming Solutions Act of 2006: compliance offsets
The bill would enact requirements for compliance offset protocols if the State Air Resources Board adopted a cap-and-trade program that would allow the use of offsets for compliance under the cap-and-trade program. This would occur under the State Air Resource Board's authority designated by the California Global Warming Solutions Act of 2006, which charged the agency with enacting statewide GHG emissions limits equivalent to that of 1990 by 2020. The Act also authorizes the state board to adopt market-based compliance mechanisms such as the compliance offset protocol. The bill would require that if the board adopted compliance offset protocols, they would need to meet all of the following requirements: (a) the protocol targets reductions from a high global warming potential greenhouse gas; (b) has been approved by a third-party registry as a voluntary protocol and the state board determined has it could be converted into a protocol for the purpose of compliance with the cap-and-trade program; (c) requires measurements and monitoring of GHG emission reductions continuously and in real time; (d) is capable of accurately, reliably, and permanently providing at least 1,000,000 metric tons of carbon dioxide equivalent GHG emission reductions each year; and (e) that the protocol meets the requirements of this division, including California Health and Safety Code sections 38562 and 35570. Status: this bill did not pass.

AB 2563 (Smyth) California Global Warming Solutions Act of 2006; offsets
The bill would implement and require a specified review process for the State Air Resources Board to follow when considering additional offset protocols and require an annual review of those offset protocols. The bill recognizes that the four currently adopted offset protocols combined are not expected to generate the volume of offset credits necessary to supply the full amount of allowable credits. The fours currently adopted offset protocols are Livestock Manure projects, Urban Forests projects, Ozone Depleting Substances Destruction projects, and Forests projects. The specified review process for additional offset protocols is intended to ensure any additional offset protocols are real, permanent, quantifiable, verifiable, and enforceable and to provide greater clarity and certainty for project developers and regulated entities. The specified review process would include: (1) a publically-available schedule posted on the state board's website of the timeline for review and consideration of proposed offset protocols that is regularly updates; (2) a publically-available online tracking system for the public to track the review and consideration of proposed offset protocols; (3) a point of contact person at the state board for entities interested in the review and consideration process; (4) an explanation of how the review and consideration process will accommodate public input and comments; and (5) an explanation of the consideration criteria for proposed offset protocols that would include a description of

standards for approval, rejection and delay, as well as the social, environmental and financial impacts that would be analyzed in such decisions. Status: this bill did not pass.

SB 1139 (Rubio) Greenhouse gas: carbon capture and storage
Summary: The bill would require the State Air Resources Board to adopt a final methodology for carbon capture and storage projects seeking to demonstrate sequestration under various laws providing for the reduction of GHGs by January 1, 2016. The bill provides specific requirements for the final methodology as well as specific requirements the final methodology must accomplish. Once the final methodology has been adopted, the bill would also authorize the Division of Oil, Gas, and Geothermal Resources to regulate these carbon dioxide enhanced recovery projects in addition to the Division's other current responsibilities of regulating the construction and operation of wells and regulating class II wells under the federal Underground Injection Control program. In addition, the bill would vest exclusive safety regulatory and enforcement authority over pipelines transporting a fluid consisting of more than 90% carbon dioxide compressed to a supercritical state to the State Fire Marshall (in conjunction with the U.S. Department of Transportation for interstate hazardous liquid pipelines under an existing agreement). Finally, the bill would amend how "free space" is defined under the California Civil Code section 659 definition of "land" to include pore spaces that can be possessed and used for the storage of GHGs. The intent of the bill is to create a clear and comprehensive permitting regime for carbon capture and storage projects in California and to clarify the Division of Oil, Gas and Geothermal Resources' authority to regulate carbon dioxide injection for enhanced oil recovery projects.

Status: this bill did not pass.

Regulatory Updates

National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). The USEPA published:

1) In August 2012, notice that the effectiveness of new NESHAPs for coal- and oil-fired electric utility steam generating units, as previously published on February 16, 2012, has been stayed until November 2, 2012 (see 77 Fed.Reg. 45967);
2) In September 2012, a rule finalizing the residual risk and technology review conducted for the pulp and paper industry source category, including related amendments to the applicable NESHAPs (see 77 Fed.Reg. 55698); and,
3) In September 2012, a rule finalizing the residual risk and technology review conducted for the following two source categories: hard and decorative chromium electroplating and chromium anodizing tanks, and steel pickling-HCl process facilities and hydrochloric acid regeneration plants, including related amendments to the applicable NESHAPs (see 77 Fed.Reg. 58220).

New Source Performance Standards. The USEPA published:

1) In August 2012, final NSPS for nitric acid plants, including a change to the NOx emissions limits that apply to nitric acid production units that commenced construction, modification, or reconstruction after October 14, 2011 (see 77 Fed.Reg. 48433);

2) In August 2012, final NSPS for VOC emissions from leaking components at onshore natural gas processing plants, gas wells, centrifugal compressors, reciprocating compressors, pneumatic controllers and storage vessels, and SO_2 emissions from natural gas processing plants. This action finalized the residual risk and technology review for the Oil and Natural Gas Production source category, and the Natural Gas Transmission and Storage source category. This final rule also contains a number of other regulatory revisions that concern the identified source categories (see 77 Fed.Reg. 49490); and,
3) In August 2012, proposed NSPS for stationary gas turbines and stationary combustion turbines in response to issues raised by the regulated community regarding the standards previously adopted in 2006 (see 77 Fed.Reg. 52554).

Nonroad Engine Pollution Control Standards. In August 2012, the USEPA invited public comment on CARB's adoption of: (1) additional amendments to its emission standards for fleets that operate nonroad, diesel-fueled equipment with engines 25 horsepower and greater, and (2) emission standards applicable to yard trucks powered by off-road engines and the auxiliary engines on two-engine sweepers. For more information, see 77 Fed.Reg. 50500, 50502, respectively.

Outer Continental Shelf ("OCS") Air Regulations. In August 2012, the USEPA published a proposal to update the portion of the OCS air regulations applicable to sources for which the Santa Barbara County Air Pollution Control District is the designated corresponding onshore area. For more information, see 77 Fed.Reg. 52630.

Vapor Recovery Systems. In September 2012, the Office of Administrative Law ("OAL") published notice of its disapproval of CARB's amendment of certain regulations pertaining to vapor recovery systems and system components used in underground and aboveground gasoline storage tanks. OAL determined that the regulations failed to meet the clarity standard of Government Code section 11349.1. For more information, see Cal. Reg. Notice Register, Vol. No. 39-Z, p. 1145.

Nonconformance Penalties for On-Highway, Heavy Duty Diesel Engines. In September 2012, the USEPA published its final rule establishing nonconformance penalties for manufacturers of heavy, heavy-duty diesel engines in model years 2012 and later for NOx emissions. For more information, see 77 Fed.Reg. 54384.

Standards of Performance. In September 2012, the USEPA published its final rule amending the standards of performance for petroleum refineries and petroleum refinery process units constructed, reconstructed, or modified after May 14, 2007. The USEPA also lifted a stay issued in 2008 following its receipt of petitions challenging these performance standards. For more information, see 77 Fed.Reg. 56422.

California Ambient Air Quality Standards ("CAAQS"). In July 2012, the California Air Resources Board ("CARB") published proposed amendments to the regulations designating areas of California as attainment, nonattainment, nonattainment-transitional, or unclassified for pollutants with CAAQS. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 29-Z, p. 954.

National Ambient Air Quality Standards ("NAAQS"). The following items summarize various regulatory actions taken by the U.S. Environmental Protection Agency ("USEPA") concerning the federal NAAQS on a pollutant-by-pollutant basis.

Particulate Matter ("PM")

In September 2012, the USEPA published notice of its designation of a new equivalent method for measuring $PM_{2.5}$ concentrations in the ambient air. For more information, see 77 Fed.Reg. 55832.

Ozone

In July 2012, the USEPA published notice of the availability of three documents pertaining to the review of the ozone NAAQS: (1) *Health Risk and Exposure Assessment for Ozone, First External Review Draft*; (2) *Exposure Assessment for Ozone, First External Review Draft*; and, (3) *Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards, First External Review Draft*. For more information, see 77 Fed.Reg. 42495, 51798.

In September 2012, the USEPA published a direct final rule first determining that six, 8-hour ozone nonattainment areas in California – Amador and Calaveras Counties, Chico, Kern County, Mariposa and Tuolumne Counties, Nevada County, and Sutter County – attained the 1997, 8-hour ozone NAAQS by their applicable attainment dates. The USEPA also granted Mariposa and Tuolumne Counties and Nevada County one-year attainment date extensions. Lastly, the USEPA determined that these six areas and the Ventura County nonattainment area have attained and continue to attain the subject NAAQS based on the most recent three years of data. For more information, see 77 Fed.Reg. 56775, 56797.

Sulfur Dioxide ("SO_2")

In August 2012, the USEPA published notice of its decision to extend, by up to one year, the deadline for promulgating initial area designations for the primary SO_2 NAAQS that was finalized in June 2010. With this extension, the USEPA is now required to complete the initial designations by June 3, 2013. For more information, see 77 Fed.Reg. 46295.

State Implementation Plan ("SIP") Revisions. The following items summarize various regulatory actions that concern the California SIP on an agency-by-agency basis.

Antelope Valley Air Quality Management District ("AVAQMD")

In September 2012, the USEPA published its direct final approval of revisions to the AVAQMD portion of the California SIP concerning VOC emissions from coatings of metal containers, closures and coils; graphic arts operations; the provision of sampling and testing facilities required for permitting; and adhesives and sealant applications. For more information, see 77 Fed.Reg. 58313, 58352.

Mojave Desert Air Quality Management District ("MDAQMD")

In July 2012, the USEPA published its final approval of revisions to the MDAQMD portion of the California SIP concerning glass furnaces and biomass boilers. For more information, see 77 Fed.Reg. 39181.

In August 2012, the USEPA published its final direct approval of revisions to the MDAQMD portion of the California SIP concerning VOC emissions from automotive parts and components, automobile refinishing, metal parts and products, and miscellaneous coating and refinishing operations. For more information, see 77 Fed.Reg. 47536, 47581.

Monterey Bay Unified Air Pollution Control District ("MBUAPCD")

In September 2012, the USEPA published its direct final approval of revisions to the MBUAPCD portion of the California SIP concerning VOC emissions from coatings of metal containers, closures and coils; graphic arts operations; the provision of sampling and testing facilities required for permitting; and adhesives and sealant applications. For more information, see 77 Fed.Reg. 58313, 58352.

Northern Sierra Air Quality Management District ("NSAQMD")

In August 2012, the USEPA published its final direct approval of revisions to the NSAQMD portion of the California SIP concerning VOC emissions from automotive parts and components, automobile refinishing, metal parts and products, and miscellaneous coating and refinishing operations. For more information, see 77 Fed.Reg. 47536, 47581.

Sacramento Metropolitan Air Quality Management District ("SMAQMD")

In August 2012, the USEPA published its final direct approval of revisions to the SMAQMD portion of the California SIP concerning the definition of VOCs, as well as a local rule regulating VOCs. For more information, see 77 Fed.Reg. 47535, 47581.

In August 2012, the USEPA published its final direct approval of revisions to the SMAQMD portion of the California SIP concerning VOC emissions from automotive parts and components, automobile refinishing, metal parts and products, and miscellaneous coating and refinishing operations. For more information, see 77 Fed.Reg. 47536, 47581.

San Diego County Air Pollution Control District ("SDCAPCD")

In August 2012, the USEPA published its final direct approval of revisions to the SDCAPCD portion of the California SIP concerning VOC emissions from automotive parts and components, automobile refinishing, metal parts and products, and miscellaneous coating and refinishing operations. For more information, see 77 Fed.Reg. 47536, 47581.

In September 2012, the USEPA published its direct final approval of revisions to the SDCAPCD portion of the California SIP concerning VOC emissions from coatings of metal containers,

closures and coils; graphic arts operations; the provision of sampling and testing facilities required for permitting; and adhesives and sealant applications. For more information, see 77 Fed.Reg. 58313, 58352.

San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD")

In August 2012, the USEPA published the final rule approving SJVUAPCD Rule 3170, Federally Mandated Ozone Nonattainment Fee, as a revision to the SJVUAPCD portion of the California SIP. Rule 3170 addresses Clean Air Act section 185, with respect to the one-hour ozone standard for anti-backsliding purposes. The USEPA also finalized its approval of the SJVUAPCD's fee equivalent program, which includes Rule 3170 and state law authorities authorizing the imposition of supplemental fees on motor vehicles. For more information, see 77 Fed.Reg. 50021.

In September 2012, the USEPA published a proposal to withdraw its prior approval of the SIP revisions providing for attainment of the 1-hour ozone NAAQS in the San Joaquin Valley extreme ozone nonattainment area. This proposal was made in response to the Ninth Circuit Court of Appeals' *Sierra Club v. EPA* decision. For more information, see 77 Fed.Reg. 58078.

In September 2012, the USEPA published its final approval of revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from the manufacture of polystyrene, polyethylene, and polypropylene products. For more information, see 77 Fed.Reg. 58312.

South Coast Air Quality Management District ("SCAQMD")

In July 2012, the USEPA announced its withdrawal of the direct final approval of SCAQMD Rule 1156, Further Reductions of Particulate Emissions from Cement Manufacturing Facilities, previously published on June 1, 2012. For more information, see 77 Fed.Reg. 39180.

In August 2012, the USEPA published a supplement to its proposal to approve a source-specific SIP revision known as the CPV Sentinel Energy Project AB 1318 Tracking System. The USEPA requested comment on three specific issues: (1) the SCAQMD's offsets quantification; (2) the SCAQMD's surplus adjustment; and, (3) the appropriate Air Quality Management Plan for determining the base year to evaluate the availability of offsets from shutdown sources. For more information, see 77 Fed.Reg. 50973.

In August 2012, the USEPA published a proposal to approve a permitting rule – Rule 1714, "Prevention of Significant Deterioration for Greenhouse Gases" – submitted for the SCAQMD portion of the California SIP. Because California does not have a SIP-approved Prevention of Significant Deterioration program within the SCAQMD, the Federal Implementation Program for non-GHG pollutants will continue to be applicable. For more information, see 77 Fed.Reg. 52277.

In September 2012, the USEPA published its final approval of revisions to the SCAQMD portion of the California SIP concerning PM emissions from cement manufacturing facilities. For more information, see 77 Fed.Reg. 53773.

In September 2012, the USEPA published a proposal to withdraw its prior approval of SIP revisions to meet the vehicle miles traveled emissions offset requirement for the Los Angeles-South Coast Air Basin 1-hour and 8-hour ozone nonattainment areas. The USEPA also proposed to find that the subject SIP revisions are substantially inadequate for purposes of demonstrating compliance with the obligation to adopt and implement a plan providing for attainment of the 1-hour ozone NAAQS. These actions were proposed in response to the Ninth Circuit Court of Appeals' *Association of Irritated Residents v. EPA* decision. For more information, see 77 Fed.Reg. 58067, 58072.

In September 2012, the USEPA published a proposal to approve revisions to the SCAQMD portion of the California SIP concerning lead emissions from large lead-acid battery recycling facilities. For more information, see 77 Fed.Reg. 58076.

Yolo-Solano Air Quality Management District ("YSAQMD")

In July 2012, the USEPA published its final approval of revisions to the YSAQMD portion of the California SIP concerning glass furnaces and biomass boilers. For more information, see 77 Fed.Reg. 39181.

ATTORNEY FEES

Recent Court Rulings
No Summaries or updates this quarter.

Legislative Developments
No Summaries or updates this quarter.

Regulatory Updates
No Summaries or updates this quarter.

CEQA

Recent Court Rulings

The California Supreme Court grants petition for review in *Neighbors for Smart Rail* case.

Earlier in 2012, the Second District Court of Appeal upheld an EIR for a transit project, concluding the agency had discretion to measure the traffic and air quality impacts against predicted future "baseline" conditions. *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2012) 205 Cal.App.4th 552. The California Supreme Court granted a petition for review, so the Second District's decision can no longer be cited.

Third District Court of Appeal orders de-publication of *Jamulians* decision.

Earlier in 2012, the Third District Court of Appeal ruled that a dispute over whether agency approval of an agreement was a "project" under CEQA could not be resolved by demurrer because the trial court could not take judicial notice of the terms of the agreement. *Jamulians Against the Casino v. Iwasaki* (2012) 205 Cal.App.4th 632. The Third District subsequently ordered this decision to be de-published.

First District Court of Appeal upholds San Francisco's determination that the installation of telecommunications equipment on utility poles was categorically exempt. *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950

T-Mobile applied to the city for permission to install telecommunications equipment on roughly 40 existing utility poles throughout the city. The city planning department issued certificates stating the installations were categorically exempt from CEQA. T-Mobile started installing the equipment, consisting of small antennae, cabinets and meters affixed at various heights to utility poles. A group of residents living close to one of the poles sued. The trial court denied the petition. The residents appealed.

The city determined the project fell within the Class 3 exemption, which encompasses the installation of a limited number of new, small facilities or structures. The court concluded the project – "the installation of small new equipment on numerous existing small structures in scattered locations" -- fell squarely within this exemption.

The residents argued the city had to consider the cumulative effects of the project under CEQA Guidelines section 15300.2, subdivision (b). The Court noted a split in authority over whether judicial review of this issue occurs under the deferential "substantial evidence" test, or the more rigorous "fair argument" test. In this case, the test did not matter, however, because even under the more rigorous test, the record did not contain a "fair argument" that the project might have impacts.

According to the residents, the analysis had to encompass the cumulative effect of all similar telecommunications installations throughout the entire city. The Court disagreed, holding that under the terms of the guidelines, this inquiry focused on the potential for cumulative impacts from successive telecommunications installations "in the same place." The meaning of the phrase "in the same place" necessarily depended on the project at issue, its potential impacts, and the setting. In this case, the residents' complaints focused on the visual and noise impacts of the installations. Those impacts were inherently localized, not city-wide. T-Mobile's equipment would be widely dispersed. There was thus no substantial evidence of the potential for a cumulative impact from similar projects. Nor was there evidence of potential future installations at the same locations proposed by T-Mobile.

The residents claimed the city had issued the permit for one installation before the planning department had issued its exemption certificate. The Court held that retroactively invalidating a permit, where required certification was obtained after the permit was issued, would be "absurd," particularly where the city ultimately found the project to be exempt. Indeed, there was no evidence that a "do-over" of the permit would yield a different result.

Finally, the residents argued they had not been provided adequate notice of the city's decision to issue a permit for the equipment neighboring their homes, in violation of their due process rights.

The problem with this argument, however, was that the installation of the equipment did not result in a substantial deprivation of the residents' property.

Second District Court of Appeal rules that an EIR prepared for a proposed high school did not contain an adequate analysis of risks to students jaywalking across a busy street bisecting the school. The Court otherwise upheld the EIR, and rejected challenges to its analysis of hazardous materials, cumulative traffic impacts, and project alternatives. *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362

A school district proposed to construct a new high school at a site encompassing two city blocks and bisected by an active street. The district prepared a draft EIR, and was greeted by critical comments from the City of Maywood, where the high school would be located. The district certified the EIR and approved the plan. The city sued. The trial court granted the writ and awarded the city roughly $670,000 in attorneys' fees. The district appealed.

First, with respect to pedestrian safety, the district had originally proposed to close the street. When the city balked, the district revised the plan to leave the street open, and to span it with a pedestrian bridge. The city criticized the EIR for failing to address whether this proposal would create safety hazards for students jaywalking across the street. The Final EIR responded that students would be prohibited from crossing the street, and would be required to use the pedestrian bridge. The city argued the response was inadequate. The Court agreed, holding that, under CEQA, the district had a duty to consider the project's potential impact on pedestrian safety. Nothing in the record indicated the district had looked at the issue. Nor did the record support the district's contention that the project's design features would force students and staff to use the pedestrian bridge when crossing the street.

Second, the trial court ruled the EIR had not analyzed the cumulative impacts of a proposal to expand the I-710 freeway, including new freeway ramps close to the school site. The Court of Appeal reversed. Because the record did not include enough information to establish that the off-ramps were a "probable future project," the district did not need to include the effect of the off-ramps in its cumulative impacts analysis.

Third, to construct the school, the district had to acquire two city blocks currently devoted to both commercial and residential uses. Several parcels had a history of using hazardous materials. The district had performed a preliminary assessment and had gathered soil samples from many of the parcels where the school would be located. At 27 of the parcels, however, the district had been unable to secure access, so no sampling had been performed. The assessment concluded the site could pose a health risk. The EIR stated that, in light of this risk, the district would perform a supplemental site investigation, and develop a "removal action work plan" governing the remediation or removal of contaminated soil, all subject to the approval of the Department of Toxic Substances Control. Ultimately, DTSC would have to certify that, following remediation, the site did not pose an unacceptable health risk. The city attacked this approach, arguing the district had impermissibly deferred the development of adequate mitigation measures to address this impact. According to the city, impermissible deferral occurred because (1) the district had not sampled 27 of the parcels within the project site, and (2) the district had not completed the actual remediation plan. The Court rejected both arguments. The record showed the district had performed an extensive preliminary investigation. Further steps were required, all subject to well established standards and to regulatory oversight.

Ultimately, construction would not start until DTSC determined that no further action was necessary. The district's approach complied with CEQA.

Fourth, the city argued the EIR did not analyze a reasonable range of alternatives. The EIR analyzed six possible alternatives: no build, reduced project, and four alternative sites. The city argued the EIR should have analyzed a seventh: a "reduced project" alternative that, unlike the alternative in the EIR, maintained the same number of classrooms while occupying less land. The district responded by noting that the Department of Education requires a certain amount of land per student, and that an increase in the density of the student population would violate the DOE's maximum density of 150 students per acre. The Court concluded the district had an adequate basis to reject this alternative. With respect to other sites, the city argued the district should have analyzed in detail one of the other sites that had been screened out during the scoping process. The Court of Appeal disagreed, concluding the record contained substantial evidence indicating the alternative site had more truck traffic and greater hazardous material risks. Nor was the EIR required to evaluate other sites proposed by the city.

Fifth, the Court held the record contained substantial evidence supporting the district's conclusions regarding safety impacts from a nearby rail line, and the EIR's use of an annual ambient growth rate to project future growth in traffic. The Court also held the district did not violate Education Code requirements pertaining to the acquisition of a school site.

Finally, the Court of Appeal clarified the proper test for determining whether the prevailing party was entitled to attorneys' fees. To obtain a fee award under Code of Civil Procedure § 1021.5, the prevailing party must show, among other things, that "the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate." In *Conservatorship of Whitley* (2010) 50 Cal.4th 1214, the California Supreme Court held that, under this prong of the test "a litigant's personal nonpecuniary motives may not be used to disqualify the litigant from obtaining fees under section 1021.5." The Court of Appeal held that this principle also applied to public agencies seeking fees. The Court remanded the fee award back to the trial court to reassess whether fees were appropriate in light of the Court of Appeal's reversal of much, though not all, of the city's victory at trial.

Fourth District Court of Appeal rules that, although a city violated procedural requirements of the Planning and Zoning Law in approving a Wal-Mart, the errors were harmless. The Court also ruled the accompanying EIR complied with CEQA, and rejected attacks on the EIR's project description, air quality analysis, traffic analysis, greenhouse gas/climate change analysis and biological mitigation, and upheld the city's findings rejecting alternatives. *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899

The City certified an EIR and approved a 230,000-square-foot shopping center anchored by a Wal-Mart "supercenter." The trail court granted the writ. The city and Wal-Mart appealed. The Court of Appeal reversed.

Wal-Mart argued "Rialto Citizens" lacked standing to sue. Rialto Citizens, through its lawyer, had submitted comments to the city criticizing the EIR. The Court concluded that, although Rialto Citizens did not have a beneficial interest in the issuance of a writ, Rialto Citizens

nevertheless had "public interest standing" to seek to enforce the city's obligations under CEQA and the Government Code.

The Court of Appeal concluded the city had made two significant procedural errors in its handling of the project. First, the notice issued for a city council hearing had not included the planning commission's recommendations. Under Government Code section 65094, the commission's recommendations were a necessary part of the notice. That did not end the matter, however. Under Government Code section 65010, in order to invalidate the city's actions, the court had to find that the error was prejudicial, that the complaining party suffered substantial injury, and that a different result was probable had the error not occurred. At trial, Rialto Citizens made no attempt to show, and the trial court did not make, these findings. Rialto Citizens had the burden of proof on this issue. Showing that the notice was defective was not enough. The error was harmless.

Second, the city also approved a development agreement. Under Government Code section 65867.5, in approving a development agreement, an agency must find that the agreement is consistent with the agency's general plan and any applicable specific plan. In this case, the city council did not adopt such a finding. That was error. Nevertheless, the error was harmless. Once again, no showing had been made of prejudice, of substantial injury, or of the likelihood of a different result.

With respect to CEQA, the EIR's project description included a list of permits and other approvals needed for the project to proceed, as required by CEQA Guidelines section 15124, subdivision (d). The list did not include the development agreement. That was error. Once again, however, the error was not prejudicial because the omission of this information did not thwart public participation. The city had provided notice of its intention to adopt a development agreement. Moreover, all the improvements identified in the development agreement had been described and analyzed in the EIR, even though the EIR had not mentioned the development agreement itself.

The trial court ruled the EIR's cumulative traffic analysis was flawed. The Court of Appeal disagreed. Although the analysis did not include a list of "probable future projects," it did include a summary of projections based on San Bernardino's Congestion Management Plan. CEQA Guidelines section 15130, subdivision (b), authorized a "projections of a plan" approach.

The EIR's cumulative air quality analysis included a list of 72 proposed projects within a five-mile radius. Rialto Citizens argued, and the trial court agreed, that this list used an arbitrary cut-off of five miles from the site. The Court of Appeal disagreed because the analysis, on inspection, did not turn on the geographic scope of the projects included on the list. Rather, the project's emissions alone were sufficient to cause the significant cumulative effect because they exceeded thresholds recommended by the South Coast Air Quality Management District.

The EIR examined the extent to which the project would contribute to cumulative greenhouse gas ("GHG") emissions and to global climate change. The EIR described statutes and policies (AB 32, EO S-3-05) addressing this problem. The EIR concluded the impact was too speculative to determine. The trial court ruled this analysis was inadequate. The Court of Appeal disagreed and reversed. At the time the city prepared the EIR, there were no legal or regulatory standards available for determining whether an individual project's GHG emissions were cumulatively considerable. Although the Resources Agency adopted new CEQA Guidelines in 2010, these guidelines were not available in 2008, when the city was preparing the Wal-Mart EIR. Given the

paucity of guidance or scientific consensus about the proper threshold, the city acted within its discretion in concluding the significance of the cumulative impact was speculative.

The EIR concluded the site – a fallow agricultural field – contained suitable habitat for a variety of special status plant and wildlife species, though none were found during surveys. To mitigate impacts to these species, the EIR identified, and the city adopted, mitigation measures requiring further surveys. If the species were found, the next step varied depending on the species. For example, special status plants, if found, had to be transplanted and monitored to ensure re-establishment at the new site. Formally listed species triggered the requirement to consult with the Department of Fish and Game or U.S. Fish and Wildlife Service (depending on which agency had listed the species). Surveys and mitigation for listed animals had to follow adopted protocols. The trial court ruled this mitigation constituted improper deferral. The Court of Appeal disagreed. The requirement to consult with USFWS was "sufficiently definite to ensure that potential impacts" to federally listed species would be mitigated. The plant salvage program contained specific requirements and performance standards. Because the measures committed the applicant and the city to take steps to render any impact insignificant, they sufficed.

Finally, the EIR included an analysis of a "reduced density" alternative encompassing 250,000 square feet. That was smaller than the original, 284,000 square foot proposal. But it was bigger than the 230,000 square-foot project ultimately approved by the City. The city adopted findings rejecting the reduced-density alternative as infeasible, and as offering no environmental advantages over the project as approved. Wal-Mart argued substantial evidence supported the city's finding of infeasibility. The Court of Appeal agreed. In this case, the city had rejected the reduced-density alternative because it did not include four out-parcels. That, the city found, would frustrate the project objective of providing a mix of retail and restaurant tenants for shoppers. That would have justified rejecting the reduced-density alternative even if the city had found that it was environmentally superior to the project as approved (rather than as originally proposed).

Fifth District Court of Appeal rules that a "notice of exemption" filed prior to the date of project approval does not commence the 35-day statute of limitations to bring a CEQA challenge. *Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408

A coalition of labor and environmental groups ("Coalition") filed a CEQA lawsuit challenging the City of Visalia's approval of a large distribution facility for VWR International. VWR demurred. The trial court sustained the demurrer and dismissed the petition based on its conclusion that the Coalition missed the 35-day statute of limitations, measured from the date the City posted a "notice of exemption." The notice had stated the permits issued to VWR were ministerial in character, and therefore exempt. The Coalition appealed.

The Court of Appeal reversed. Because the case had been dismissed by way of demurrer, the Court assumed the allegations in the petition were true. The petition alleged the City posted the NOE on November 3, 2010. The petition also alleged the City approved the project, in the form of an "off-agenda" site-plan approval letter, on November 10, 2010. The Coalition filed the lawsuit on December 28, 2010, 55 days after the City allegedly posted the NOE.

The Coalition argued the posting of the NOE was a nullity because it occurred before the City allegedly approved the project. The Court agreed, noting that under CEQA Guidelines 15062 an

NOE must be filed after the agency approved the project. Because the Coalition alleged otherwise (and that was assumed to be true under the demurrer), the NOE was ineffective.

VWR argued that, under the California Supreme Court's decision in *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, the NOE triggers the statute if, on its face, it contains all the information required by the Guidelines. The Court rejected this argument, noting that under the guidelines the NOE had to be posted after the date of approval in order to be effective. *Stockton Citizens* did not alter this rule.

The Court of Appeal remanded the matter to the trial court to investigate whether, as a factual matter, the allegations in the petition regarding the dates of posting and approval were, in fact, true. The trial court would also determine on remand whether subsequent decisions by the City (e.g., the City Council's later alleged decisions to approve a parking variance, and to reimburse VWR $1.5 million for road improvements), were discretionary approvals that would trigger the obligation to perform a CEQA analysis of the whole of the action.

Finally, the Coalition also sought a writ of mandate against VWR for failing to apply for a permit under the indirect source rule adopted by the San Joaquin Valley Air Pollution Control District. The Court affirmed the trial court's decision to sustain this demurrer on the ground that a writ of mandate cannot be used to compel action by a private entity.

Third District Court of Appeal rules that, due to "unusual circumstances," a water district erred in relying on the Class 3 categorical exemption to approve an agreement to deliver water to a Native American casino through an existing pipeline. *Voices for Rural Living v. El Dorado Irrigation Dist.* (2012) – Cal.App.4th – [slip op. dated October 4, 2012, 2012 Cal.App.LEXIS 1046]

El Dorado Irrigation District ("EID") entered into an agreement with the Shingle Springs Band of Miwok Indians to supply water to a casino through an existing pipeline. EID found the agreement was exempt from CEQA under the Class 3 categorical exemption, which encompasses new construction of small structures, including utilities. The petitioner sued. The trial court granted the petition. The Tribe and the petitioner appealed.

Because the parties had not contested the issue, the Court of Appeal did not address whether the agreement fell within the Class 3 exemption. Instead, the Court focused on whether the agreement fell within the "unusual circumstances" exception to categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c).

The agreement between the Tribe and EID built upon a previous agreement for water service. In 1987, the County Local Agency Formation Commission ("LAFCO") approved an annexation agreement bringing the Tribe's Rancheria into EID's service area. LAFCO imposed conditions limiting the delivery of water to residential uses, and for no more than 40 units. The water was delivered through a three-inch main.

In 2001, the Tribe proposed a casino on its land. Following multiple rounds of litigation, the Tribe ultimately built the casino and commenced operations. The Tribe sought water from EID. Initially, EID balked based on LAFCO's restrictions. Ultimately, however, EID agreed with the Tribe that LAFCO's conditions impermissibly sought to restrict the use of land on the Rancheria and, as such, they were preempted by Federal law. EID and the Tribe entered into the agreement to provide water. EID relied on the Class 3 exemption because the pipeline would be relocated,

but would not be increased in size, and EID's existing sources were adequate to provide water to the Tribe.

In finding the agreement exempt, EID staff had considered whether the agreement had the potential to result in significant environmental effects due to unusual circumstances. One such "unusual circumstance" was whether the project would result in a substantial change in the demand for water service. Current demand at the Rancheria was equivalent to the demand from 45 residential units ("EDUs"). The casino would increase that to 279.75 EDUs, an increase of 215.75 EDUs. That was roughly 10% of the available supply for the area.

The Court's review involved a two-part inquiry: (1) whether the project involved unusual circumstances, and (2) whether the project gave rise to a reasonable possibility that significant impacts would occur. The first inquiry – whether the circumstances were "unusual" – was a question of laws, reviewed de novo by the Court. With respect to the second inquiry, the Court acknowledged a split of authority on the standard of review on this issue, and sided with the line of cases adopting the "fair argument" test.

The Court held that, as a matter of law, the circumstances were "unusual." The agreement was to provide water for a casino requiring 16 EDUs. That was outside the scope of the typical project involving a Class 3 exemption, which (under the terms of the exemption) would ordinarily involve delivering one to four EDUs of water.

The Court also held the record contained a fair argument that the increase of water deliveries from 45 EDUs to 261 EDUs could have a significant impact on the environment. EID's records showed that, during a drought, its existing customers would have to cut back. In addition, EID was required to maintain in-stream flows due to recent relicensing of its facilities. EID's own drought preparedness plan concluded that, in the event climate change led to reduced precipitation, EID might have trouble delivering reduced supplies. In concluding it had adequate supplies, EID had not considered the need to maintain instream flows, or the potential impact of climate change. Taken together, these uncertainties gave rise to a "fair argument" that committing additional water to the Rancheria could have a significant impact.

The trial court had ruled that EID had to prepare an EIR. The Court of Appeal reversed this aspect of the trial court's ruling because it exceeded the court's authority. The Court held that EID retained discretion regarding how to comply with the Court's ruling.

Finally, the Court held that EID did not have authority to second-guess the validity of LAFCO's conditions. Instead, EID had to apply to LAFCO to amend the conditions. If LAFCO denied the application, then EID's remedy would be to sue based on its Federal preemption theory. EID did not, however, have discretion to decide for itself the constitutionality of those conditions. Only the courts could do that.

Trial Court upholds San Francisco's Plastic Bag Ordinance.

On September 20, 2012, San Francisco County Superior Court Judge Teri Jackson denied a petition filed by Save the Plastic Bag Coalition. The petition challenged San Francisco's "Checkout Bag Ordinance." Existing law in the City bans single-use non-compostable plastic checkout bags at supermarkets and at chain pharmacies. The new Checkout Bag Ordinance extends this ban to all retailers. In addition, the new ordinance requires retailers to charge ten cents for each single-use compostable or paper bag. Single-use paper bags must have 40 percent

minimum recycled content. The ordinance also establishes performance standards for reusable bags and directs San Francisco's Department of the Environment to conduct education and outreach to store owners and consumers.

The coalition asserted two grounds for challenging the Checkout Bag Ordinance. First, the coalition argued the City and County's reliance on a Categorical Exemption under CEQA was unlawful. The trial court ruled San Francisco qualified as a "regulatory agency" eligible to invoke the Class 7 and 8 categorical exemptions, and that these exemptions applied to legislative activity. The court also found the record did not contain a "fair argument" that the ordinance will cause significant environmental harm due to unusual circumstances.

Second, the coalition argued that state law preempted the ordinance. The trial court disagreed, finding that the Retail Food Code preempts only local laws establishing health and sanitation standards for retail food establishments. While the code addresses single-use bags to ensure they are safe and clean for transporting food, it does not require retail food establishments to use or provide customers with single-use bags. Nor does the code require that single-use bags be made from any particular material. For these reasons, the court found the City and County's Checkout Bag Ordinance constituted an environmental standard (rather than a health and safety standard which could be preempted by State law).

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

Infill Projects. In July 2012, the California Natural Resources Agency published proposed regulations setting forth streamlined environmental review for qualifying infill projects. The proposed would result in the addition of section 15183.3, Appendix M, and Appendix N to the State CEQA Guidelines. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 30-Z, p. 1023.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Tailoring Rule and Plantwide Applicability Limitations ("PALs"). In July 2012, the U.S. Environmental Protection Agency ("USEPA") published the third step of its phased-in approach to the permitting of greenhouse gases ("GHGs"). In the final rule, the USEPA determined not to lower the current Prevention of Significant Deterioration ("PSD") and Title V applicability thresholds for GHG-emitting sources established in the Tailoring Rule for the first and second

steps. The USEPA also set forth regulatory revisions for better implementation of the federal program establishing PALs for GHG emissions. For more information, see 77 Fed.Reg. 41051.

Mandatory Reporting Rule. In August 2012, the USEPA published a rule finalizing the confidentiality determinations for certain data elements under the Mandatory Greenhouse Gas Reporting Rule. In addition, the USEPA finalized the amendments deferring the reporting deadline of certain data elements until 2013, and other data elements until 2015. Finally, the USEPA finalized amendments regarding the calculation and reporting of emissions from facilities that use best available monitoring methods. For more information, see 77 Fed.Reg. 48072.

In August 2012, the USEPA also published a final rule amending specific provisions of the Mandatory Reporting Rule to provide greater clarify and flexibility to facilities from the industrial waste landfill, petroleum and natural gas systems, fluorinated gas production, and electronics manufacturing source categories, which report data for the first time in September 2012. The USEPA also made confidentiality determinations for four new data elements for the fluorinated gas production source category, and deferred the reporting deadline for a data element used as an input to an emission equation in that source category until 2015. For more information, see 77 Fed.Reg. 51477.

Denial of Petition for Reconsideration. In August 2012, the USEPA published notice of its denial of a petition from Plant Oil Powered Diesel Fuel Systems, Inc. to reconsider the final rules establishing GHG emission standards for on-road, heavy-duty vehicles. For more information, see 77 Fed.Reg. 51701.

Advanced Clean Car ("ACC") Program. In August 2012, the USEPA published a notice requesting comment on CARB's ACC program, which combines the control of smog and soot causing pollutants and GHG emissions into a single coordinated package of requirements for passenger cars, light-duty trucks, and medium-duty passenger vehicles. (Limited requirements also would apply to heavy-duty vehicles.) The ACC program revises California's Low Emission Vehicle and Zero Emission Vehicle programs. CARB submitted a request that the USEPA grant a waiver of preemption under Section 209(b) of the Clean Air Act in connection with this regulatory effort. For more information, see 77 Fed.Reg. 53199.

Title V Programs. In September 2012, the USEPA published final approval of revisions to the Operating Permits (Title V) programs of the Monterey Bay Unified Air Pollution Control District, San Luis Obispo County Air Pollution Control District, Santa Barbara County Air Pollution Control District, South Coast Air Quality Management District, and Ventura County Air Pollution Control District. These revisions require sources, which with the potential to emit GHGs above the Tailoring Rule's thresholds, which have not been previously subject to Title V for other reasons, to obtain Title V permits. For more information, see 77 Fed.Reg. 54382.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates

Buena Vista Lake Shrew. In July 2012, the U.S. Fish and Wildlife Service ("USFWS") published further revisions to the proposed critical habitat designation for the Buena Vista Lake Shrew. In 2009, the USFWS proposed to designate 4,649 acres of land in Kern County as critical habitat; with the use of current GIS technology, that acreage quantity has been revised to 4,657 acres. Additionally, the USFWS proposes to add 525 acres – in Kern and King counties – to the designation. In total, the USFWS now proposes to designate approximately 5,182 acres of critical habitat for the Buena Vista Lake shrew. For more information, see 77 Fed.Reg. 40706.

Southwestern Willow Flycatcher. In July 2012, the USFWS reopened the comment period on the August 15, 2011 proposed critical habitat designation for the southwestern willow flycatcher. The USEPA reopened the comment period to allow for an opportunity to comment on its amended required determinations, revisions to the proposed designation (which include additional areas on two streams within the Santa Cruz Management Unit in Arizona), revisions to areas being considered for exclusion under Section 4(b)(2) of the Endangered Species Act ("ESA"), draft environmental assessment, and draft economic analysis. For more information, see 77 Fed.Reg. 41147.

Tidewater Goby. In July 2012, the USFWS reopened the comment period on the October 19, 2011 proposed critical habitat designation for the tidewater goby. The USEPA reopened the comment period to allow for an opportunity to comment on its draft economic analysis and amended required determinations. For more information, see 77 Fed.Reg. 43222.

Lost River Sucker and Shortnose Sucker. In July 2012, the USEPA reopened the comment period on the December 7, 2011 proposed critical habitat designation for the Lost River sucker and short nose sucker. The USEPA reopened the comment period to allow for an opportunity to comment on the draft economic analysis and amended required determinations. For more information, see 77 Fed.Reg. 43796.

Revised Regulations for Impact Analyses of Critical Habitat. In August 2012, the USFWS and National Marine Fisheries Service ("NMFS") published a proposal to revise the regulations pertaining to impact analyses for critical habitat designations. The proposal is intended to address the President's February 28, 2012 memorandum directing both agencies to revise the subject regulations to provide that the economic analysis be competed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. For more information, see 77 Fed.Reg. 51503.

White Shark. In September 2012, the California Fish and Game Commission ("CFGC") published notice of its receipt, on August 20, 2012, of a petition to list the white shark as threatened or endangered under the California Endangered Species Act ("CESA"). It is anticipated that the CFGC will consider the petition at its February 2013 meeting. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 37-Z, p. 1376.

Mardon Skipper. In September 2012, the USFWS published notice of its 12-month finding on a petition to list the mardon skipper as threatened or endangered. Based on its review, the USFWS determined that listing the mardon skipper is not warranted at this time. For more information, see 77 Fed.Reg. 54332.

Franciscan Manzanita. In September 2012, the USFWS published its determination that the Franciscan Manzanita meets the definition of an endangered species. The USFWS also proposed to designate approximately 318 acres of critical habitat for the species in the City and County of San Francisco. For more information, see 77 Fed.Reg. 54434, 54517

Eagle Lake Rainbow Trout. In September 2012, the USFWS published its 90-day finding on a petition to list the Eagle Lake rainbow trout. Based on its review, the USFWS determined that the listing may be warranted; as such, the USFWS requested scientific and commercial data, and other information, to assist with the undertaking of its 12-month finding on the petition. For more information, see 77 Fed.Reg. 54548.

Munz's Onion and San Jacinto Valley Crownscale. In September 2012, the USFWS reopened the comment period on the April 17, 2012 critical habitat proposal for Munz's onion and San Jacinto Valley crownscale. The USEPA reopened the comment period to allow for an opportunity to comment on its draft economic analysis, amended required determinations, and correction of some errors regarding the habitat elevations necessary for conservation of Munz's onion. For more information, see 77 Fed.Reg. 55788.

Island Fox. In September 2012, the USFWS announced the availability of the draft recovery plan for four subspecies of Island fox: San Miguel Island fox; Santa Rosa Island fox; Santa Cruz Island fox; and, Santa Catalina Island fox. For more information, see 77 Fed.Reg. 56858.

Aquatic Mollusks. In September 2012, the USFWS published its 12-month finding on a petition to list 14 aquatic mollusks as endangered or threatened. Based on its review, the USFWS determined that listing is not warranted at this time for any of the mollusks. For more information, see 77 Fed.Reg. 57922.

ENERGY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

AB 2514 (Bradford) Net Energy Metering
This bill would require the commission to complete a study by June 30, 2013, to determine the extent to which each class of ratepayers and each region of the state receiving service under the net energy metering tariff is paying the full cost of the services provided to them by electrical corporations, the extent to which those customers pay their share of the costs of public purpose programs, and the benefits of net energy metering. The bill would require the commission to report the results of the study to the Legislature within 30 days of its completion. Status: this bill passed both houses, was approved by the Governor and has been chaptered by the Secretary of State.

SB 1537 (Kehoe) Energy: rates: net energy metering.
This bill prohibits the Public Utilities Commission (PUC) from adopting any new demand charge, standby charge, customer charge, minimum monthly charge, interconnection charge, or other fixed charge that applies only to customers receiving electric service pursuant to a net energy metering contract or tariff until January 1, 2014. Status: this bill was vetoed.

AB 1456 (Hill) Gas corporation pipeline safety performance standards.
This Bill would add Section 960 to the Public Utilities Code relating to gas corporations. Existing law allows the Public Utilities Commission regulatory authority over public utilities, including gas corporations, as defined. Existing law authorizes the Commission to fix the rates and charges for every public utility, and requires that those rates and charges be just and reasonable. This Bill would require the Commission to perform an analysis of benchmark data and adopt safety performance standards for pipeline safety and reliability. The Bill would require the Commission to evaluate a gas corporation's safety performance based on those standards and would authorize the Commission to implement a rate incentive program that could contain penalties based on safety performance. Status: this bill passed both houses, was approved by the Governor and has been chaptered by the Secretary of State.

AB 1990 (Fong) Small-Scale renewable energy generation.
AB 1990 is an act to add Section 399.23 to the Public Utilities Code relating to electricity. Under existing law the PUC has regulatory authority over public utilities, including electrical corporations while local publicly-owned electric utilities, are under the direction of their governing board. This Bill establishes a small-scale renewable generation program with the goal of installing 375 megawatts of electrical generating capacity from small-scale renewable generation facilities in the state's most impacted and disadvantaged communities. The Bill would also require each electrical corporation to file with the PUC a standard tariff for electricity purchased pursuant to a clean energy contract with a small-scale renewable generation facility owner or operator. The goal of the legislation is to increase small-scale local clean energy

development in communities throughout the state in order to increase green jobs and businesses that benefit communities where electrical utility customers live, especially in the most impacted and disadvantaged communities. Status: this bill did not pass out of the Senate.

SB 1455 (Kehoe) Alternative (non-petroleum) Vehicle Fuels.
This bill would create additional reporting requirements for the California Energy Commission and the Air Resources Board (ARB). Beginning on November 1, 2015, and every two years thereafter, ARB and the Commission would be required to report on the state's alternative transportation fuel use within the Commission's integrated energy policy report, pursuant to Public Resources Code section 25302. The report must include the quantity of alternative transportation fuel used in the state during the preceding years. The report must also incorporate the Commission's findings of how new and existing investment programs, federal fuel policies, and existing state policies could increase alternative transportation fuel use. The Commission and ARB would be required to measure in-state job creation in the alternative fuel industry, alternative fuel market penetration, the increase in access to alternative fuels and vehicles for residents, and the vulnerability of residents to petroleum price spikes. The Commission and ARB must also add a price range of petroleum and alternative fuels to the economic analysis used to develop and amend ARB regulations. This bill did not pass, amendments made by the Assembly were not concurred with by the Senate.

AB 578 (Hill) Natural gas pipeline safety
This bill would require the Public Utilities Commission ("PUC") to provide responses to safety recommendations regarding gas pipeline facilities in certain circumstances. First, if the National Transportation Safety Board ("NTSB") submits a safety recommendation letter to PUC concerning gas pipeline safety, PUC must provide a formal written response within 90 days. In its response, PUC would need to state its intent to implement the recommendation, in whole or in part, with a proposed timetable, and would need to provide detailed reasons for rejecting any portion of the recommendation. Second, PUC would need to determine if safety recommendations concerning a commission-regulated gas pipeline facility submitted by the NTSB to the United States Department of Transportation, the Pipeline and Hazardous Materials Safety Administration ("PHMSA"), or the commission, should be implemented. Third, PUC would need to determine if action is needed in response to an advisory bulletin issued by the PHMSA if it addressed a commission-regulated gas pipeline facility. PUC would need to consider if a more cost effective alternative address the safety issue exists and provide an annual report to the Legislature regarding any actions taken in response to a recommendation or advisory bulletin. Status: this bill is now law.

Regulatory Updates
No summaries or updates this quarter.

FEES/TAXES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments

AB 467 (Eng) – Department of Public Health, Groundwater Cleanup Funds

The existing section 75101(a) requires the California Department of Public Health (CDPH), in collaboration with Department of Toxic Substances Control (DTSC) and the State Water Resources Control Board (SWRCB), to adopt regulations governing repayment of costs recovered from parties responsible for contamination.

AB 467 would amend section 75101(a)(2) by adding subsections (B)-(F). The amended section 75101(a)(2) would allow the previously required cost recovery regulations to be initially passed as emergency regulations pursuant to Government Code section 11340 et seq. CDPH would then be required to adopt permanent regulations within 180 days of the effective date of the emergency regulations. The bill would also establish the Groundwater Contamination Prevention Account in the State Treasury, and would set guidelines for the expenditure of Account funds. CDPH would be required to pass regulations authorizing it to enter into agreements with grantees, which recover funds from responsible parties, to allow the grantees to use those recovered funds for ongoing treatment and remediation activities. CDPH would be authorized to enter into an MOU with SWRCB for administering the recovered funds. Status: the bill passed out of the legislature but was vetoed by the Governor.

AB 1701 (Wieckowski, Smyth) Underground storage tanks: local agencies.
Provides for state certification of cities and counties to oversee the cleanup of underground storage tanks (USTs). Specifically, this bill:

1) Requires a city or county to apply to the State Water Resources Control Board (SWRCB) to be certified to implement the local UST cleanup programs.
2) Provides that only a certified city or county is authorized to implement the local UST oversight cleanup program after July 1, 2013. Status: this bill passed both houses, approved by the Governor and has been chaptered by the Secretary of State.

AB 2205 (Perez)– Hazardous Waste Control Law, Exemption for Geothermal Waste
AB 2205 would clarify the existing definition of "[w]astes from the extraction, beneficiation, and processing of ores and minerals" to include certain spent brine solutions used to produce geothermal energy. This clarification would have the effect of exempting these brine solutions from the requirements of the Hazardous Waste Control Law, Chapter 6.5 of Division 20 of the Health and Safety Code. To qualify for the exemption, such brine solutions cannot be made of solid or semisolid hazardous residuals and must be managed in accordance with existing state law and federal regulations. Status: this bill passed both houses, was approved by the Governor and has been chaptered by the Secretary of State.

Regulatory Updates

Polychlorinated Biphenyls ("PCBs"). In September 2012, the U.S. Environmental Protection Agency ("USEPA") published a direct final rule to update and clarify several sections of the PCB regulations associated with the manifesting requirements, which uses the Resource Conservation and Recovery Act Uniform Hazardous Waste Manifest, under the Toxic Substances Control Act. For more information, see 77 Fed.Reg. 54818, 54863.

INSURANCE COVERAGE

Recent Court Rulings

The California Supreme Court has ruled that insurers were required to cover the total amount of the state's liability for the continuous damage that occurred at an industrial waste site, and held the state was permitted to "stack" its various policy limits, thereby disapproving of a previous Court of Appeal precedent. *State of California v. Continental Insurance Company et al.* (2012) 55 Cal.4th 186.

In 1955, a state geologist designated a quarry site in Riverside County as a suitable location for disposal of industrial waste. The State developed the facility, known as the "Stringfellow Acid Pits," which received over 30 million gallons of waste over the course of 16 years. In 1972, the state closed the facility after discovering groundwater contamination had been occurring continuously during its operation. In 1998, a federal court found the State liable to the United States for remediation damages on the grounds of negligence in investigating, selecting, and designating the site. Subsequently, the State brought an action in Riverside County Superior Court against several liability insurers to recover indemnity under consecutive commercial general liability (CGL) policies. Over the course of multiple trial phases it was determined that the State had not breached its duty to mitigate the damage, that each of its insurer was liable for the total damages subject to its policy limits, and that the insurers were in breach of their policies. However, the trial court also ruled that the State was prohibited from "stacking" its total policy limits in effect for any one policy period, relying on *FMC Corp v. Plaisted & Companies* (1998) 61 Cal.App.4th 1132. As a result, after the liability was offset by settlements with other insurers, the trial court entered judgment nominally in the State's favor, but awarded $0. The State filed an appeal to the Fourth District Court of Appeal, and all but one of the insurers filed cross-appeals.

Like the trial court, the Court of Appeal rejected the insurers' argument that they could not be liable for policyholder damage that occurred outside their respective policy periods. However, the Court of Appeal reversed the lower court on the issue of "stacking." The California Supreme Court granted the petition of review to determine the following issues: (1) when a continuous condition such as the slow, progressive damage of groundwater contamination becomes an "occurrence" for the purpose of triggering insurance coverage; and (2) whether the State could "stack" policy terms, allowing it to recover the combined total of the policy limits it had purchased.

Relying on "settled rule of the case law," the Supreme Court held that if an insurer is liable at some point during the period of the continuous property damage, that insurer "remains obligated to indemnify the insured for the entirety of the ensuing damage or injury." Therefore, the insured is potentially covered by all policies in effect during the period of the continuous damage. The Court rejected the argument that the losses should be allocated "proportionate to the damage suffered during that policy's term," explaining that this method would violate the "all sums" language in the CGL policies involved in the case. On the issue of stacking, the Supreme Court upheld the Court of Appeal, pointing out that the CGL policies in this case did not include antistacking provisions. Therefore, allowing the policies to be stacked would not only comport with the parties' reasonable expectations, but would assume that insurers could avoid stacking of policy limits by specifically including such a provision in their policies. The court concluded that the "all sums with stacking rule" resolved the question of insurance coverage as equitably as possible in continuous damage scenarios, and on those grounds it disapproved of *FMC Corp, supra,* 61 Cal.App.4th 1132.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

LAND USE

Recent Court Rulings

Ideal Boat & Camper Storage v. County of Alameda (2012) – First District Court of Appeal, No. A132714

Appellants own a boat and camper storage operation in rural eastern Alameda County. Beginning in 1964, respondents County of Alameda ("County"), through a variety of land use decisions, approved the use of the property for boat and recreational storage purposes. In 2010, however, the County denied Appellants' application to expand its storage facility to accommodate up to 720 additional vehicles and boats.

Appellants filed a petition for writ of mandate and declaratory and injunctive relief to overturn the denial. The trial court denied the petition, holding Appellants did not have vested rights to an expanded use, and that such expanded use would conflict with the County's land use plan. Thus, the trial court found that the County did not abuse its discretion in denying Appellants' application.

The Court of Appeal affirmed. The Court confirmed that Appellants may continue to use their existing facility, to which they do have a vested right as a legal nonconforming use, but Appellants have no right to an expanded use that conflicts with the applicable land use plans.

The Court of Appeal applied the traditional mandamus standard of review under Code of Civil Procedure ("CCP") section 1085. Appellants argued for the administrative mandamus standard in CCP section 1094.5. That standard applies where the challenge is to an administrative decision arising out of a process "in which by law a hearing is required to be given." Here, the County Planning Director held a hearing on Appellants' application, but the law did not require him to do so. Therefore, the Court of Appeal held that section 1094.5 does not apply here.

Beyond the discussion of the standard of review, the Court of Appeal dismissed each of Appellant's arguments on essentially the ground that the applicable land use plans do not allow expansion of legal nonconforming uses. Appellants claimed that their legal nonconforming use status applies to their entire parcel and not just their existing facility. The Court of Appeal disagreed.

Appellants also argued that the County had no discretion as to Appellants' application because that particular process is actually ministerial. Again, the Court of Appeal disagreed. Indeed, the court cited a case from 1984 in which the same court had held that an earlier version of the same process was discretionary.

Finally, Appellants argued that they had a vested right to the expanded use. Noting that a property owner cannot have a vested right in something for which it has not received a land use approval, the Court of Appeal again disagreed.

Legislative Developments

AB 1570 (Perea) Amendment to CEQA adding new section 21167.6.2, which would allow a project applicant, at its cost, to elect to have lead agency prepare CEQA record of proceedings at commencement of CEQA review process. If CEQA review proceeds under such an election, the lead agency will be required to post the environmental document and all materials cited or relied upon electronically contemporaneously with their submittal or release. The lead agency will be required to then certify its record of proceedings within 30 days of project approval. Disputes regarding content of the record will be resolved by any reviewing court. The applicant's costs of preparing the record as the agency's CEQA review process proceeds will not be a recoverable cost in any litigation that may be filed after project approval. Status: this bill did not pass out of the Senate.

SB 1148 (Brownley) This bill would provide that no conservation bank, mitigation bank, or conservation and mitigation bank is operative, vested, or final, nor bank credits issued, until the Department of Fish and Game has approved the bank in writing and a conservation easement has been recorded on the site. The bill would authorize the Department to adopt and amend guidelines and criteria to amend provisions relating to the Department's review of a bank. In addition, the bill would require the Department to follow certain procedures and authorize the Department to charge and adjust specified fees to cover the reasonable costs of the Department reviewing various documents when a person is interested in establishing a bank. The bill would also require a number of changes in the Department's management and role under the Marine

Life Protection Act and the Trout and Steelhead Conservation and Management Planning Act of 1979. The bill also authorizes the state and those acting as trustees for fish and wildlife to recover damages in a civil action against any person or local agency that unlawfully or negligently takes or destroys any wildlife, including but not limited to, a bird, mammal, fish, reptile, or amphibian protected by state law. Status: this bill is now law.

SB 52 (Steinberg): The Jobs and Economic Improvement Through Environmental Leadership Act of 2011 (AB900) was conceived and passed in the space of a few days. At the time of its passage, it was recognized that drafting corrections and clarifications would need to be made in a subsequent clean-up bill. SB 52 is the clean-up bill. AB900 gave the Governor the ability to certify a project for CEQA streamlining if certain conditions were met.

This bill requires that a project result in a minimum investment of $100,000,000 spent on planning, design, and construction of the project. The bill, in order to maximize public health, environmental, and employment benefits, would require a lead agency to place the highest priority on feasible measures that will reduce greenhouse gas emissions on the project site and in the neighboring communities of the project site.

This bill repeals the requirement that a party seeking judicial review of the EIR to bring concurrently other claims alleging a public agency has granted land use approvals or a leadership project in violation of relevant laws.

This bill imposes a state-mandated local program and would require that the Judicial Council report to the Legislature on the effects of the act on the administration of justice.

Status: this bill did not pass.

AB 890. Environment: CEQA exemption: roadway improvement (Olsen).
As originally drafted (2/17/2011), this bill would have created a new statutory exemption to the California Environmental Quality Act for a project or activity undertaken by a city or county within an existing roadway right-of way that includes (but is not limited to) shoulder widening, guardrail improvement, minor drainage, culvert replacement, traffic signal modification, and safety improvements.

The bill has since been narrowed to apply to a project or activity to repair, maintain, or make minor alterations to an existing roadway if: a) the activity is initiated by a city or county to improve public safety; b) the project does not cross a waterway, and involves negligible or not expansion of existing use. The exemption would sunset on January 1, 2026. Status: this bill is now law.

AB 1549 (Gatto) Common Interest Developments; Expedited Review
This bill would require the Office of Permit Assistance ("Office") to provide information to developers explaining the permit approval process at the state and local levels, or assist them in meeting statutory environmental quality requirements, and would prohibit the Office or the state for incurring any liability as a result of the provisions of this assistance. The bill requires the Office to assist state and local agencies in streamlining the permit approval process, and an

applicant in identifying any permit required by a state agency for the proposed project. The bill would authorize the Office to call a conference of the parties at the state level to resolve questions or immediate disputes arising from a permit application for a development project. The bill also requires the Office to develop guidelines providing technical assistance to local agencies for establishing and operating expedited development permit processes.

Status: this bill did not pass out of the Senate.

SB 972 (Simitian) This bill requires a lead agency to notify public agencies that have previously requested to be on the mailing for CEQA documentation, when public scoping meetings are to be conducted (PRC §21083.9). Additionally, it requires public agencies send notices (such as notice of preparation, notice of completion, and notice of availability) to those entities that request such notices in writing (PRC §21092.2). The public agencies may require such parties to annually provide written requests; the agencies may also charge a reasonable fee to provide such service. Further, if legislators make such written requests for projects within their districts, the State Clearinghouse must send them such notices, if it has received them. The repeal of a third section (PRC §21162) is necessary to remove the redundancy found in the newly proposed amendment in a different section (PRC §21092.2) concerning notifying the legislators.

Status: this bill passed both houses, was approved by the Governor and has been chaptered by the Secretary of State.

Regulatory Updates

California Code of Regulations, Title 24. In August 2012, the California Building Standards Commission ("CBSC") on its own behalf, and on behalf of other state agencies, proposed to adopt, approve, codify, and publish changes to:

(1) Building standards contained in the 2011 National Electrical Code for use as the 2013 California Electrical Code (Part 3 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 34-Z, pp. 1166, 1181, 1190, 1202, 1215);

(2) Building standards contained in the 2012 Uniform Mechanical Code for use as the 2013 California Mechanical Code (Part 4 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 34-Z, pp. 1169, 1184, 1194, 1206, 1218);

(3) Building standards contained in the 2012 Uniform Plumbing Code for use as the 2013 California Plumbing Code (Part 5 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 34-Z, pp. 1172, 1187, 1198, 1211, 1220);

(4) Building standards related to the construction of hospitals, skilled nursing facilities and correctional treatment centers (Part 2 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 34-Z, p. 1175);

(5) Building standards related to the International Residential Code (Part 2.5 of Title 24) and International Building Code (Part 2 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, pp. 1256, 1261, 1282, 1286, 1291, 1294);

(6) Building standards related to green building standards (Part 11 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, pp. 1264, 1271, 1308);

(7) Administrative standards applicable to the structural design of public elementary and secondary schools, community colleges, and state-owned or state-leased essential services buildings (Part 1 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, pp. 1268, 1279);

(8) Building standards related to the 2012 International Fire Code (Part 9 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, p. 1274);

(9) Building standards related to amendments, reformatting , and new regulations (Part 1 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, pp. 1298, 1301);

(10) Building standards contained in Part 10, Chapter A1, of Title 24 (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, p. 1305);

(11) Building standards related to public pools (Part 2 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, p. 1311); and,

(12) Building standards related to the International Existing Building Code (Part 10 of Title 24) (for more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, p. 1314).

PROPOSTITION 65

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates

Summary Requirements. In August 2012, California's Office of Environmental Health Hazard Assessment (OEHHA) published a proposed amendment to section 25903, Appendix A, of Title 27 of the California Code of Regulations. The amendment would update and clarify the Proposition 65 summary that must be included as an attachment to all Notices of Violation that are served upon alleged violators of Proposition 65. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 31-Z, p. 1097.

Technical Documents Relating to Possible Listings. In August 2012, OEHHA announced the availability of two documents for public review: "Evidence on the Carcinogenicity of C.I. Disperse Yellow 3" and "Evidence on the Carcinogenicity of 2,6-dimethyl-N-nitrosomorpholine." For more information, see Cal. Reg. Notice Register 2012, Vol. No. 32-Z, p. 1117.

In September 2012, OEHHA announced the availability of the following document for public review: "Evidence on the Developmental and Reproductive Toxicity of Xylene." For more information, see Cal. Reg. Notice Register 2012, Vol. No. 39-Z, p. 1444.

Maximum Allowable Dose Levels ("MADLs"). In August 2012, OEHHA announced its augmentation of the administrative record for the proposed regulation to establish a MADL for chloroform. The augmentation consists of scientific papers and their references. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 34-Z, p. 1225.

No Significant Risk Level ("NSRL"). In August 2012, OEHHA published a proposed NSRL of 96 micrograms per day for bromoethane. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 35-Z, p. 1318.

Notices of Intent. In September 2012, OEHHA published notice of its intent to list the following two chemicals as known to the State to cause cancer: *alpha-methylstyrene* and *1,3-dinitropyrene*. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 37-Z, p. 1376.

Chemicals Known To The State. For the most current list of the chemicals known to the State of California to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2012, No. 29-Z, p. 968. Relatedly, in July 2012, OEHHA provided notice of its decision to add the following chemicals to the list of chemicals known to the State to cause cancer: *isopyrazam* and *3,3',4,4'-tetrachloroazobenzene*. These listings became effective on July 24, 2012. For more information, see Cal. Reg. Notice Register 2012, No. 29-Z, p. 986.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

AB 2082 (Atkins) - Prohibits constructing or maintaining any structures on land that is under State Land's jurisdiction and ownership without first obtaining all necessary permits/authorizations and establishes civil penalties for violations of such requirements. Exempts infrastructure (telephone poles, wires, pipelines, etc.) owned by an electrical or gas corporation, as defined in the statute. Requires notice and hearing before such penalties may be levied. Status: this bill passed both houses, was approved by the Governor and has been chaptered by the Secretary of State.

AB 2609 (Hueso)

AB 2609 is an act to amend Section 102 of, to add Sections 101.5, 107, and 108 to, and repeal Section 106 of, the Fish and Game Code and to amend Section 87200 of the Government Code, relating to the Fish and Game Commission. The California Constitution establishes the five-

member Fish and Game Commission, with members appointed by a Governor and approved by the Senate. Existing law requires the Commissioners to elect one of their members as President and one as Vice-President. This Bill would modify the election provisions to instead require that Commissioners annually elect one of their members as President and one as Vice-President by a concurrent vote of at least three Commissioners. The Bill would also prohibit a President or Vice-President for serving more than two consecutive years and would prohibit the Commission from adopting or enforcing any other policy or regulation that would make a Commissioner ineligible to be elected as President or Vice-President of the Commission. The Bill would also require the Commission to adopt a Code of Conduct that requires a Commissioner to adhere to prescribed principles and, by July 1, 2013, to adopt rules to govern the business practices and processes of the Commission. The Bill would also subject Commissioners to certain provisions of the Political Reform Act of 1974 by adding members of the Commission to those specified officers who must publicly identify a financial interest giving rise to a conflict of interest or potential conflict of interest, and recuse themselves accordingly. Status: this bill was passed by both the Senate and Assembly and is now law.

AB 2402 (Huffman):
This bill has been significantly amended since its introduction in February 2012. As of July 3, 2012, this bill would make certain changes to the administration of the California Department of Fish and Game. For example, it would require the Department, rather than the Fish and Game Commission, to establish a list of threatened and endangered species, and would require an interested person to petition the Department, rather than the Commission, to consider a petition for listing of the species. The bill would also rename the Department to the Department of Fish and Wildlife. It would also require the Department to and the Commission to develop a strategic plan to implement reform proposals.

Status: this bill passed both houses, approved by the Governor and has been chaptered by the Secretary of State.

AB 1966 (Ma)
As amended on June 23, amends the Civil Code to require the owner of mineral rights or its agent to provide a minimum 5 days' notice regarding several aspects of the general nature of the work when that owner or agent intends to enter the real property to undertake non-surface-disrupting activities, including surveying, water and mineral testing, and removal of debris and equipment. Also requires the owner of mineral rights, or its agent, to provide a minimum of 60 days' notice in writing, specifying the extent and location of the prospecting, mining, or extracting operation, and the approximate time or times of entry and exit upon the real property, when that owner or agent intends to enter real property to undertake, surface-disrupting activities, including excavation, drilling new wells, constructing structures, bringing excavation vehicles or equipment on the real property, or reclamation of the real property after it has been disturbed. Waives the 60-day notice requirement described above under an emergency situation, as defined by the bill, authorized by the Division of Oil, Gas, and Geothermal Resources. Status: this bill passed and is now law.

Regulatory Updates

Commercial Herring Fisheries. In July 2012, the California Fish and Game Commission ("CFGC") published a proposed rule to amend sections 163 and 164 of Title 14 of the California Code of Regulations, as such sections relate to commercial herring fisheries. The proposed regulations would establish the fishing quota, season dates and times for fishing operations for the 2012-2013 season in the San Francisco Bay. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 27-Z, p. 908.

Fee Recovery. In July 2012, the California Department of Fish and Game ("CDFG") published proposed regulations providing for inspection and cost recovery pursuant to Fish and Game Code section 2150.2. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 30-Z, p. 1011.

Sport Fishing Regulations. In July 2012, the CFGC published a proposed rule to amend and add various sections to Title 14 of the California Code of Regulations relating to sport fishing. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 30-Z, p. 1013.

Skipper's Log. In September 2012, the Office of Administrative Law ("OAL") published notice of its receipt, on July 6, 2012, of a petition challenging the Skipper's Log issued by CDFG as an alleged underground regulation. On August 31, 2012, CDFG certified to OAL that the subject instruction had been rescinded, thereby triggering the suspension of all activities related to the petition. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 38-Z, p. 1410.

SOLID WASTE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

WATER QUALITY

Recent Court Rulings

The First District Court of Appeal has held that elimination of a provision designating beneficial uses for a water body requires an amendment to the Regional Water Quality Control Board's Basin Plan. *California Association of Sanitation Agencies v. State Water Resources Control Board* (2012) 208 Cal.App.4th 1438

The City of Vacaville, operator of a water treatment plant, challenged the more stringent requirements that were added to its 2001 discharge permit issued by the Central Valley Regional

Water Quality Control Board (RWQCB), claiming that the Board's reliance on "blanket" designations to otherwise undesignated water bodies was improper and not supported by evidence or findings of fact. In setting the permit's discharge limits, the Regional Board determined that the Old Alamo Creek's receiving waters, located four and a half miles from the Delta, had "existing municipal or domestic uses downstream of the discharge point" and was therefore designated for beneficial "MUN" and "COLD" uses by the 1995 Basin Plan. On the City's petition for review, the State Board held that the Regional Board had "reasonably interpreted the 1995 Basin Plan language as assigning beneficial uses to tributary streams," and "properly concluded that MUN was previously designated for Old Alamo Creek through the tributary footnote…" The State Board determined that the proper method to change a beneficial use designation was through a Basin Plan amendment. Recognizing that the MUN and COLD designations were likely inappropriate for Old Alamo Creek, it instructed the Regional Board to "expeditiously" consider an amendment dedesignating that water body.

After the trial court upheld the State Board's review, Petitioners City of Vacaville and California Association of Sanitation Agencies appealed to the First District Court of Appeal to present the following claims: (1) the "tributary footnote's" presumption that the beneficial uses designated for specific, identified water bodies also generally applied to their tributary streams was invalid, and should be replaced by a case-by-case analysis on each permit; (2) incorporation of Resolution 88-63, which designated the MUN use for otherwise non-designated streams, was invalid; and (3) two water quality objective provisions – one incorporating the maximum contaminant levels (MCLs) for certain chemicals and the other requiring chlorinated pesticides not be present at "detectable" concentrations in the water column – could not be incorporated by reference into the Basin Plan prospectively because the Regional Board had not and could not take economic and other necessary factors into account prior to their application.

In its decision, the Court of Appeal noted that the case involved both quasi-judicial and quasi-legislative actions. Reviewing the case with a "focus on the reasonableness of the agency's action as a whole," the Court upheld the Regional and State Board's conclusions that attributing beneficial uses to unlisted tributaries was reasonable in light of the tributary footnote, and was a practicable way to provide flexibility "in light of the large number of water bodies and tributaries within the state." Similarly, the Court found that Resolution 88-63 had been properly incorporated into the 1995 Basin Plan, which was approved following a public hearing process. The Court agreed with the State Board's conclusion that changes to a beneficial use designation required an amendment to the Basin Plan, and explained that the quasi-legislative basin planning process was the proper venue to consider a resource's beneficial use, as it allowed for a noticed public hearing and resulted in a determination that applied to the overall basin, rather than to individual permitting actions. The Court also concurred with the State Board's finding that the presumption of beneficial use could be unreasonable in some applications, and in such cases, the Regional Board was required to "expeditiously initiate appropriate basin plan amendments to consider dedesignating the use." The Court dismissed Petitioners' arguments that this remedy was illusory because a permitee could not require the adoption of Basin Plan amendments; it held that a writ of mandate could compel an agency to execute its non-discretionary duty where it has unreasonably failed or refused to do so.

With respect to the incorporation by reference of water quality objectives, the Court found that Petitioners had failed to meet their evidentiary burden showing that the challenged objectives would have had an economic impact, pursuant to Government Code §13241. Furthermore, in response to Petitioners' claim that incorporation of water quality standards and detection methods would apply future changes *automatically,* without consideration of economic factors, the Court noted that MCLs were adopted pursuant to the California Administrative Procedure Act, with opportunity for public participation. The Court also determined that the Basin Plan's provision requiring "non-detectable" levels of chlorinated hydrocarbon pesticides was valid, holding that the "Regional Board could properly leave to the Executive Officer the determination of the *method* of complying with the permit."

Legislative Developments

AB 640 (Logue): Water discharges: mandatory minimum civil penalties.
Increases the size of small community facilities that are allowed to use mandatory minimum civil penalties (MMPs) for remediation of water code violations. Specifically, this bill expands the definition of small community publicly owned treatment works (POTWs) that are allowed to use MMPs for remediation of water code violations by increasing the allowable population serving the small community POTW from 10,000 to 20,000 persons. Status: this bill did not pass out of the Senate.

Regulatory Updates

Concentrated Animal Feeding Operation ("CAFO") Reporting Rule. In July 2012, the U.S. Environmental Protection Agency ("USEPA") published notice of its withdrawal of a proposal to collect CAFO information by rule in order to improve and restore water quality, as previously published on October 21, 2011. Instead, the USEPA plans to collect CAFO information, where appropriate, using existing sources of information. For more information, see 77 Fed.Reg. 42679.

The USEPA, in July 2012, also published a final rule eliminating the requirement than an owner or operator of a CAFO that "proposes to discharge" apply for a National Pollutant Discharge Elimination System ("NPDES") permit. The rulemaking also removed the voluntary certification option for unpermitted CAFOs, as removal of the permitting requirement for discharge proposals renders the certification option unnecessary. For more information, see 77 Fed.Reg. 44494.

Logging Roads. In September 2012, the USEPA published a proposal to revise its Phase I stormwater regulations in order to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a NPDES permit is not required for such discharges. For more information, see 77 Fed.Reg. 53834.

WATER RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments

AB 2398 (Hueso): Water Recycling Act of 2012.
Organizes and coordinates various statutory references to recycled water and clarifies certain State Board processes. Approved by Assembly. Referred to Senate Natural Resources & Water, and Environmental Quality, Committees. This bill did not pass out of the Senate.

SB 1495 (Wolk) San Joaquin Delta Reform Act of 2012
This is an act to amend Section 85057.5 of the Water Code, relating to the Sacramento-San Joaquin Delta. The Sacramento-San Joaquin Delta Reform Act of 2009 establishes the Delta Stewardship Council, which is required to develop, adopt, and commence implementation of a comprehensive management plan for the Delta by January 1, 2012. The Act requires a state or local public agency that proposes to undertake a covered action to prepare a written certification, as prescribed, as to whether the covered action is consistent with the Delta plan. This Bill would exclude from the definition of "covered action" specified leases approved by specified special districts, and routine dredging activities necessary for maintenance of certain facilities operated by special districts. Status: this bill passed both houses, approved by the Governor and has been chaptered by the Secretary of State.

AB 939 (Perez) Salton Sea Restoration
An act to repeal and add Article 2 (commencing with Section 2940) of Chapter 13 of Division 3 of the Fish and Game Code, relating to the Salton Sea.

Existing law establishes the Salton Sea Restoration Council, a state agency within the Natural Resources Agency (NRA) charged with overseeing the restoration of the Salton Sea. AB 939 would eliminate the existing Council and establish the Salton Sea Authority, a local joint powers authority responsible for the restoration efforts. The authority would be comprised of Imperial and Riverside counties, the Imperial Irrigation District, the Coachella Valley Water District, and the Torres Martinez Desert Cahuilla Indian Tribe. The bill specifies required restoration efforts, requires the authority to develop a restoration plan, and requires the authority to present its restoration plan to the Governor and the Legislature by June 30, 2014. The bill would also require the Departments of Fish and Game and Water Resources to provide staff services, upon request of the authority, to carry out the authority's assigned functions. The Directors of Fish and Game and Water Resources would also be authorized to enter into agreements with other state agencies to provide the authority with staff services. Status: this bill did not pass out of the Senate.

Regulatory Updates
No summaries or updates this quarter.

Federal Summaries

Supreme Court
No summaries or updates this quarter.

Ninth Circuit Court of Appeals

Air Quality

Recent Court Rulings

The Ninth Circuit Denies Vacatur of EPA Rulemaking to Allow Construction of Power Plant. *California Communities Against Toxics v. United States Environmental Protection Agency* (9th Cir. 2012) 688 F.3d 989.

The Clean Air Act requires the United States Environmental Protection Agency (EPA) to set national ambient air quality standards for air pollutants, but states are responsible for implementing those standards. The states must, however, obtain approval from the EPA for such plans. For those areas that do not meet the EPA's standards, the states must establish a permitting program for new polluters, which must ensure any emissions increases be offset by corresponding emission reductions.

The South Coast Air Quality Management District (District) regulates the air quality in the South Coast Air Basin and the Riverside portions of the Salton Sea Air Basin—areas that do not meet the EPA's air quality standards. In 2009, California passed Assembly Bill 1318, which requires the District to transfer emissions credits under its plan to a soon-to-be completed power plant named Sentinel. Because the bill changed the District's plan, the District had to obtain approval from the EPA. The petitioners, two environmental groups, challenged the EPA's final rule approving the District's revision, alleging procedural errors in the rulemaking process and that the revised state plan violates the Clean Air Act. Both petitioners and the EPA agreed that the case should be remanded, therefore the sole issue before the court was whether vacatur was appropriate.

Whether an agency action should be vacated depends on the seriousness of the agency's error and the severity of the consequences that would stem from an interim change. Petitioners first allege that the EPA did not disclose certain documents in the electronic docket or list them in the docket index, which, according to petitioners, violated the notice-and-comment provisions of the Administrative Procedure Act. The Ninth Circuit disagreed finding that the EPA's failure to include all documents was not an error because the E-Government Act requires online disclosure only "to the extent practicable, as determined by the agency . . ." (E-Government Act of 2002, Pub L. No. 107-347, § 206(d)(2), 116 Stat. 2899, 2916 (2002).) The Court did find that the EPA misstated that all documents in the docket were listed in the index, but found the error to be harmless as to the petitioners who had the documents in their possession and were "intimately familiar with the documents at issue."

Petitioners also argued that the EPA's rulemaking violated the Clean Air Act. Because the Court agreed that the final rule was invalid, it looked at the severity of the consequences that would stem from vacatur of the final rule. The Court found that vacatur of the final rule would cause severe consequences. Vacatur would pave the road to legal challenges to the plant, which would provide a much needed power supply, would be economically disastrous, and would require the California legislature to pass a new bill. The Court also pointed out that the California Energy

Commission already found that Sentinel's construction harms are insignificant with mitigation that is not implicated by the emissions credits. For each of these reasons, the Court remanded without vacating the EPA's final rulemaking.

NEPA

Recent Court Rulings

The Ninth Circuit Court of Appeals has affirmed a District Court ruling in an action brought under the Endangered Species Act ("ESA"), holding that plaintiffs did not have standing to challenge the U.S. Bureau of Reclamation's ("Bureau") renewal of certain water supply contracts, and that the renewal of certain other contracts was not a discretionary action subject to the ESA. *Natural Resources Defense Council, et al. v. Salazar, et al.* (July 17, 2012) 686 F.3d 1092.

The Bureau operates the Central Valley Project ("CVP"), a network of dams, reservoirs, and pumping facilities that regulate the flow of water in the San Joaquin and Sacramento Rivers. To operate the CVP, the Bureau had to obtain water rights under state law and a dispute arose regarding the priority of pre-CVP water rights. Under California law, a senior holder of water rights has the right to fulfill his needs before a junior appropriator is entitled to use any water. As a result, in 1964, the Bureau and those asserting senior water rights ("Settlement Contractors") entered into 145 settlement contracts for 40-year terms, whereby the Settlement Contractors were guaranteed a certain amount of annual water supply at no charge. The Bureau also entered into related long-term contracts with a coalition of water service contractors who would pay to obtain water from the Delta-Mendota Canal ("DMC Contractors").

In 2005, in preparation for the contract renewals, the U.S. Fish and Wildlife Service ("Service") prepared a biological opinion under the ESA regarding the effect the Bureau's contract renewals would have on the delta smelt, an endangered species. The opinion concluded that the Bureau's proposed action was not likely to threaten the smelt. Plaintiffs brought action under the ESA challenging the Bureau's action for failing to adequately conduct consultation relative to the smelt, and jeopardizing the existence of the smelt. The District Court ruled in favor of plaintiffs and ordered the Bureau and Service to re-consult on the effects of the CVP operation on the smelt and prepare a new biological opinion, which the agencies did. Plaintiffs thereafter filed another complaint alleging ESA violations. Each party moved for summary judgment, and the District Court ruled this time for the defendants, finding that plaintiffs lacked standing to challenge the DMC contracts, and that the plaintiffs' claims against the Settlement Contractors failed because the contracts were not discretionary and, therefore, were exempt from ESA Section 7's requirements.

On appeal, the Ninth Circuit affirmed. With respect to standing, the Court ruled that plaintiffs satisfied the injury-in-fact requirement by their assertion that they believe the Bureau has overcommitted water under the contracts, which will harm the delta smelt. However, the Court ruled that plaintiffs failed to establish a causal connection between the threatened injury and the Bureau's action because the DMC contracts include a shortage provision, which expressly allows the Bureau to take any action necessary to meet its legal obligations, including not delivering

water to the DMC Contractors if necessary to comply with the ESA. Thus, the threatened injury, i.e., jeopardy to the delta smelt, would not be traceable to the contract renewals because such contracts expressly allow for ESA compliance. With no threatened injury, there is nothing to redress.

As to the Settlement Contractors, ESA Section 7(a)(2), which required federal agencies to ensure any action is not likely to jeopardize the continued existence of a threatened species, only applies to federal agency action "in which there is discretionary Federal involvement or control." In this case, the Court ruled that the Bureau's renewal of the Settlement Contracts was not a discretionary action as applicable law, including the federal Reclamation Act and California water law, resulted in limited discretion with regard to the contracts such that ESA Section 7(a)(2) is not triggered. In the Court's words, "the Bureau's hands are tied historically by those asserting senior water rights in the CVP. The Bureau was required to acknowledge such rights in order to operate the CVP, which it did by entering into the Settlement Contracts."

The Ninth Circuit Court of Appeals has affirmed a District Court ruling, holding that the National Marine Fisheries Service ("NMFS") complied with both the Magnuson-Stevens Fishery Conservation and Management Act ("MSA") and the National Environmental Policy Act ("NEPA") in adopting changes to a fishery management plan. *Pacific Coast Federation of Fishermen Associations v. Blank* (September 10, 2012) 2012 WL 3892940 (Cal.)

The MSA establishes Fishery Management Councils composed of fishing representatives and government and tribal officials charged with preparing fishery management plans for fisheries that require "conservation and management." To the extent measures are necessary to reduce overall harvest to prevent overfishing, a fishery management plan must allocate any harvest restrictions fairly and equitably among the commercial and recreational sectors that participate in the fishery.

In 2011, the NMFS and the Pacific Fishery Management Council adopted changes to the fishery management plan for the trawl sector of the Pacific Coast groundfish fishery. The changes, adopted as Amendments 20 and 21 to the Pacific Coast Groundfish Fishery Management Plan, are designed to increase economic efficiency through fleet consolidation, reduce environmental impacts, and simplify future decision-making. NMFS prepared separate draft and final environmental impact statements ("EIS") under NEPA to analyze the potential impacts of each Amendment. Plaintiffs are a collection of primarily non-trawl fishermen's associations and groups whose longtime participation in the fishery may shrink under the Amendments. Plaintiffs filed suit claiming that the Amendments are unlawful under the MSA and NEPA.

The District Court granted summary judgment to the defendants, and the Ninth Circuit affirmed, ruling that NMFS complied with the MSA's provisions, which required the agency to consider fishing communities such as plaintiffs but did not require it to develop criteria for allocating fishing privileges to such communities or to restrict privileges to those who "substantially participate" in the fishery. The Court also ruled that NMFS complied with NEPA by preparing a separate study for each Amendment, analyzing a reasonable range of alternatives, adequately evaluating potential environmental effects, and adopting flexible mitigation measures designed, in part, to lessen the potential adverse effects of Amendments 20 and 21 on fishing communities.

Specific to the separate EISs prepared for each Amendment, the Court ruled that each Amendment had "independent utility" and that while the goals of the two Amendments were "overlapping," they were not "co-extensive." As to any concern with adequately studying the combined effects of the two Amendments, the Court found that NMFS prepared "lengthy EISs that thoroughly studied the direct, indirect, and cumulative effects of the Amendments, individually and together."

In conclusion, the Court stated, "The plaintiffs reasonably disagree with the balance NMFS struck between competing objectives, but they do not show that NMFS exceeded its statutory authority under the MSA or ignored its obligations under NEPA."

Ninth Circuit upholds Forest Service's Angora Fire Restoration Project in the Lake Tahoe Basin and rejects alleged NFMA and NEPA violations advanced by environmental groups concerned about the project's impact on management indicator species such as the black-backed woodpecker. *Earth Island Institute v. United States Forest Service* 2012 U.S. App. Lexis 19769 (9th Circuit, September 20, 2012).

In June 2007, a wind driven wildfire allegedly caused by an illegal campfire began near Seneca Pond, a small lake near Lake Tahoe and the town of Myers ("Angora Fire"). Before it was fully contained and controlled a few weeks later, the fire burned 3,100 acres, destroyed 242 residences and 67 commercial structures, and damaged 35 other homes. The United States Forest Service's Lake Tahoe Basin Management Unit ("LTBMU"), which manages the affected National Forest System land, subsequently developed the Angora Fire Restoration Project ("Project") in an effort to balance the ecological needs of restoring the ecosystem and protecting area residents and visitors from falling trees and future fires. The Project activities included the removal of certain live and dead trees from portions of the forest. Before implementing the Project, the Forest Service prepared an Environmental Assessment ("EA") under NEPA and solicited public comment on the EA, some of which raised concerns about potential impacts to various species, including black-backed woodpeckers, and the Project's plan to remove standing dead trees ("snags"). After responding to comments and assessing various project alternatives, the Forest Service ultimately issued a Decision Notice and a Finding of No Significant Impact ("FONSI") and approved the Project with some modifications. Notably, the approved Project authorized the removal of snags and downed trees and the thinning of live trees on approximately 1,411 acres but left the remaining burned area, consisting of approximately 1,168 acres, alone to provide habitat diversity in the forest. Further, based on the fact that the Project created twelve "wildlife snag zones" within the areas to be treated that would be subject to limited or no snag removal and that significant woodpecker habitat would be retained, the Forest Service concluded that the Project would not lead to a change in the distribution of black-backed woodpeckers across the Sierra Nevada bioregion.

The Earth Island Institute and the Center for Biological Diversity ("Plaintiffs") sued the Forest Service, alleging noncompliance with the National Forest Management Act ("NFMA") and NEPA. Specifically, the Plaintiffs alleged that (1) NFMA required the Forest Service to demonstrate at a project level that the Project would maintain viable population levels of management indicator species ("MIS"), including black-backed woodpeckers; and (2) the Forest

Service's EA was arbitrary and capricious because it lacked scientific integrity and failed to take the requisite hard look at the Project's impacts on black-backed woodpeckers by not responding to dissenting expert biological opinions concerning impacts to black-backed woodpeckers or adequately considering the Plaintiffs' proposed project alternative. The district court granted summary judgment in favor of the Forest Service on all claims and Plaintiffs timely appealed. Both the district court and the court of appeal denied Plaintiffs' motions for injunctions pending appeal.

The Ninth Circuit Court of Appeals reviewed the district court's grant of summary judgment de novo under the Administrative Procedure Act's deferential (to the Forest Service) arbitrary and capricious standard of review. Relying heavily on its prior decision in *Earth Island Institute v. Carlton*, F.3d 462 (9th Cir. 2010), the court held that it was required to rule in favor of the Forest Service on Plaintiffs' NFMA claim and determined that the LTBMU Forest Plan did not incorporate stricter MIS viability requirements from a 1982 regulation, and even if it had, that the Forest Service adequately demonstrated compliance therewith from a planning level perspective and was not required to assess species viability at the project level as advanced by the Plaintiffs. The court also rejected the Plaintiffs' various NEPA claims. Regarding the alleged lack of scientific integrity in the Forest Service's EA, the court found that the Forest Service did not misrepresent the facts and pointed to data in the record supporting the Forest Service's claim regarding the stable distribution of black-backed woodpecker populations in the Sierra Nevada. The court also held that NEPA's requirement that agencies respond explicitly and directly to responsible opposing views only applies to full Environmental Impact Statements, not the lesser EA as was prepared here, and even if the requirement did apply, the Forest Service's responses to comments by the Plaintiffs expert regarding black-backed woodpecker impacts, while not a point-by-point counter-argument, were adequate and not arbitrary and capricious. Finally, the court rejected Plaintiffs' claim that the Forest Service violated NEPA by improperly dismissing their proposed project alternative (requiring retention of more snags for habitat purposes). It did so first by acknowledging the less rigorous alternatives analysis requirements of an EA and explaining that no reported Ninth Circuit case had ever found an EA arbitrary and capricious when it considered both a no-action and preferred action alternative like the Forest Service had done in this case, and second, by finding the Forest Service's basis for rejecting Plaintiffs' proposed alternative – failure to achieve goal of reduced fire risk – consistent with its decision in *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233 (9th Cir. 2005) in which the court held that when the purpose of a project is to reduce fire risk, alternatives that would increase fire risk need not be considered. For these reasons, the court concluded that the Plaintiffs failed to demonstrate that the analysis in the Forest Service's EA failed to take the required hard look under NEPA.

Water Quality

Ninth Circuit upholds Environmental Protection Agency's NPDES permit for open pit zinc and lead mine in northwestern Alaska. *Native Village of Kivalina IRA Council v. United States Environmental Protection Agency* 687 F.3d 1216 (9th Circuit, August 9, 2012).

In December 2008, the Environmental Protection Agency ("EPA") proposed to re-issue a National Pollutant Discharge Elimination System ("NPDES") permit under the federal Clean

Water Act authorizing the discharge of wastewater caused by the continued operation of the Red Dog Mine, an open pit zinc and lead mine located in northwestern Alaska. The mine's operations produce contaminated wastewater that after treatment, is discharged into the Wulik River which flows into the Chukchi Sea near the Native Village of Kivalina. At the same time EPA issued the draft permit for public comment on December 5, 2008, the Alaska Department of Environmental Conservation certified that the mining activity and resulting discharges would comply with section 401 of the Clean Water Act and Alaska Water Quality Standards. In October 2009, EPA completed a Final Supplemental Environmental Impact Statement and issued responses to public comments in December 2009. On January 8, 2010, EPA issued its record of decision and final NPDES permit for the Red Dog Mine.

On February 15, 2010, the Native Village of Kivalina (and another tribe and several environmental groups who had commented critically on EPA's draft permit) filed an administrative petition for review with the EPA's Environmental Appeals Board ("EAB") challenging many conditions of the final permit. In response, EPA withdrew certain effluent limitations of the permit to which most of Kivalina's objections were addressed and EAB concluded that the majority of Kivalina's petition (which challenged the withdrawn effluent limitations) was moot. On November 18, 2010, the EAB issued an order denying the remaining portion of Kavalina's petition, which challenged three monitoring conditions in the NPDES permit: (1) the reduction in monitoring requirements, (2) the removal of biomonitoring provisions, and (3) EPA's failure to require third-party monitoring, noting that Kivalina's petition consisted of only slightly more than two pages and concluding that Kivalina had not satisfied the procedural requirements to obtain review under 40 C.F.R. § 124.19(a) because it did not set forth sufficient detail about why EPA's responses to public comments on the adequacy of the draft permit were irrelevant, erroneous, insufficient, or an abuse of discretion. Kivalina filed a timely petition for review of EPA Administrator's final permit decision directly with the 9th Circuit Court of Appeals pursuant to 33 U.S.C. § 1369(b)(1)(F).

The 9th Circuit Court of Appeals reviewed EAB's procedural default ruling under the federal Administrative Procedure Act's deferential arbitrary and capricious standard of 5 U.S.C. § 706(2) and quickly concluded that EAB did not err in declining to review Kivalina's challenges to EPA's allegedly improper reduction in monitoring requirements, removal of biomonitoring provisions and failure to require third-party monitoring. First, the court reviewed the EAB petition requirements found in 40 C.F.R. § 124.19(a) and decisions approving interpretations thereof permitting EAB to deny review of petitions that merely reiterate or attach comments previously submitted regarding a draft permit and do not engage the EPA's responses to those comments. Next, the court summarized all of EPA's responses to comments regarding the monitoring requirements Kivalina challenged in its petition and concluded that Kivalina did not meet its burden of showing that EAB review of those monitoring requirements was warranted because Kivalina did not respond to or otherwise engage the EPA's responses to the public comments on those alleged deficiencies. In sum, the court held that while it does not judge a petition based merely on its length or discourage brevity, Kivalina's generally conclusory arguments failed to respond to EPA's responses to comments and thus failed to satisfy the procedural requirements for obtaining EAB review under 40 C.F.R. § 124.19(a).