

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

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

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, Joseph D. Petta, Stephen Velyvis, John Epperson, and Amy Lawrenson for their contributions to this issue of the *Update*.

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Legislative Developments

No updates this quarter.

Regulatory Updates

Black-Backed Woodpecker. In November 2013, the Fish and Game Commission provided notice of its findings that the petition to add the black-backed woodpecker to the list of threatened or endangered species under the California Endangered Species Act is not warranted. See Cal. Reg. Notice Register 2013, Vol. No. 47-Z, p. 1837.

American Pika. In December 2013, the Commission provided notice of its findings that the petition to add the American pika to the list of threatened or endangered species under the California Endangered Species is not warranted. See Cal. Reg. Notice Register 2013, Vol. No. 52-Z, p. 2076.

Northern Spotted Owl. In December 2013, the Commission provided notice of its acceptance of the petition to list the Northern spotted owl as an endangered or threatened species based on a finding that the petition provided sufficient information to indicate that the petitioned action may be warranted. See Cal. Reg. Notice Register 2013, Vol. No. 52-Z, p. 2085.

Townsend's Big-Eared Bat. In December 2013, the Commission provided notice of its acceptance of the petition to list the Townsends Big-eared Bat as an endangered or threatened species based on the best available science, extensive information contained in the petition, the Department's petition evaluation report, and oral testimony. See Cal. Reg. Notice Register 2013, Vol. No. 52-Z, p. 2092.

ENERGY

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No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Appliance Efficiency Regulations. In December 2013, the California Energy Commission provided notice of its proposed amendments to the appliance efficiency regulations contained in Title 20 of the California Code of Regulations. See Cal. Reg. Notice Register 2013, Vol. No. 51-Z, p. 2029.

FEES/TAXES

Recent Court Rulings

No summaries this quarter.

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Regulatory Updates

No updates this quarter.

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Legislative Developments

No updates this quarter.

Regulatory Updates

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LAND USE

Recent Court Rulings

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No updates this quarter.

Regulatory Updates

Department Lands. In November 2013, the Fish and Game Commission proposed to amend various sections of Title 14 of the California Code of Regulations as those sections relate to public use of Department of Fish and Game lands, including the Department's wildlife area and ecological reserve holdings. See Cal. Reg. Notice Register 2013, Vol. No. 47-Z, p. 1826.

PROPOSITION 65

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Public Health Goals (PHGs). In November 2013, the Office of Environmental Health Hazard Assessment (OEHHA) announced the availability of a draft technical support document for proposed updates of the PHGs for *chlorobenzene*, *endothall*, *hexachlorocyclopentadiene*, *silvex*, and *trichlorofluormethanae* in drinking water. See Cal. Reg. Notice Register 2013, Vol. No. 44-Z, p. 1706.

Notice of Intent to Change Listing Basis. Effective November 8, 2013, OEHHA changed the basis for the listing of *chloroacetic acid*, *nitrous oxide*, and *carbaryl* as known to the State to cause reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 45-Z, p. 1748-1751; see also Vol. No. 52-Z, p. 2112.

Effective November 22, 2013, OEHHA changed the basis for the listing of *1,2-dibromo-3-chloropropane* (DBCP), *ethylene oxide*, and *lead* as known to the State to cause reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 47-Z, p. 1846.

Effective December 20, 2013, OEHHA changed the basis for the listing of *2-chloropropionic acid*, *N,N'-dimethylacetamide*, *4-vinylcyclohexene*, and *vinyl cyclohexene dioxide* as known to the State to cause reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 51-Z, p. 2055.

Listing Notices. In November 2013, OEHHA provided notice of its intent to list emissions from high-temperature, unrefined rapeseed oil as known to the State to cause cancer under the authoritative bodies listing mechanism. See Cal. Reg. Notice Register 2013, Vol. No. 46-Z, p. 1783.

In November 2013, OEHHA also provided notice of its intent to list *trichloroethylene* (TCE) as known to the State to cause reproductive toxicity under the authoritative bodies listing mechanism. See Cal. Reg. Notice Register 2013, Vol. No. 48-Z, p. 1906.

Effective December 20, 2013, OEHHA added *diisononyl phthalate* to the list of chemicals known to the State to cause cancer. See Cal. Reg. Notice Register 2013, Vol. No. 51-Z, p. 2036.

De-Listing Notices. Effective December 13, 2013, OEHHA removed *tert-amyl methyl ether*, *2-ethylhexanoic acid*, *ethyl-tert-butyl ether*, *p,p'-oxybis (benzenesulfonyl hydrazide)*, and *1,3,4-triglycidyl-s-triazinetrione* from the list of chemicals known to the State to cause reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 50-Z, p. 1993.

List of Chemicals Known to the State. In December 2013, OEHHA published an updated list of the chemicals known to the State to cause cancer or reproductive toxicity. See Cal. Reg. Notice Register 2013, Vol. No. 52-Z, p. 2093.

PUBLIC RECORDS

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RESOURCE CONSERVATION

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No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

Market Squid. In December 2013, the Fish and Game Commission provided notice of its intend to amend Sections 149 and 149.1 of Title 14 of the California Code of Regulations, as

those sections relate to the commercial take of market squid. See Cal. Reg. Notice Register 2013, Vol. No. 49-Z, p. 1926.

Mineral Resource Areas. In December 2013, the State Mining and Geology Board provided notice of its proposal to amend Section 3550.15 of Title 14 of the California Code of Regulations, as that section relates to the description and designation of mineral resources areas in the Palm Springs Production-Consumption Region, Riverside County. See Cal. Reg. Notice Register 2013, Vol. No. 49-Z, p. 1930.

SOLID WASTE

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No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

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No updates this quarter.

Regulatory Updates

Well Stimulation Treatment Regulations. In November 2013, the Department of Conservation issued a notice of proposed rulemaking in response to Senate Bill 4 (Pavley; 2013). The intent of SB 4, and the Department's rulemaking, is to provide a comprehensive regulatory framework for well stimulation treatments in California, including the processing of permits from the Division of Oil, Gas and Geothermal Resources. See Cal. Reg. Notice Register 2013, Vol. No. 46-Z, p. 1773.

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Recent Court Rulings

No summaries this quarter.

NEPA

Recent Court Rulings

No summaries this quarter.

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Recent Court Rulings

Federal Regulatory Update

AGENCY ADMINISTRATION

Civil Penalty Inflation. In November 2013, the U.S. Environmental Protection Agency (EPA) provided notice of its final rule amending the Civil Monetary Penalty Inflation Adjustment Rule. See 78 Fed.Reg. 66643.

Strategic Plan. In November 2013, the EPA provided notice of the availability of the *Draft FY 2014-2018 EPA Strategic Plan* for public review and comment. See 78 Fed.Reg. 69412.

AIR QUALITY

National Emissions Standards for Hazardous Air Pollutants (NESHAPs). In November 2013, the U.S. Environmental Protection Agency (EPA) provided notice of its proposed amendments to the NESHAPs for flexible polyurethane foam production to address the results of the residual risk and technology review. See 78 Fed.Reg. 66108.

Equivalent Methods. In November 2013, the EPA provided notice of its designation of five new equivalent methods for monitoring ambient air quality. See 78 Fed.Reg. 67360.

National Ambient Air Quality Standards (NAAQS). In November 2013, the EPA provided notice of its proposed rulemaking in response to the January 2013 *Natural Resources Defense Council v. EPA* decision issued by the D.C. Circuit Court. The EPA specifically proposed to identify the classification for areas currently designated nonattainment for the 1997 and/or 2006 PM_{2.5} standards, the deadlines for states to submit attainment-related and new source review (NSR) state implementation plan (SIP) elements required for these areas, and the EPA guidance that is currently available regarding those requirements. This proposed rulemaking impacts the San Joaquin Valley, Los Angeles-South Coast Air Basin, and Imperial County. See 78 Fed.Reg. 69806.

In November 2013, the EPA announced the availability of the “First External Review Draft Integrated Science Assessment for Nitrogen Oxides – Health Criteria” for public review and comment. See 78 Fed.Reg. 70040.

Emissions Modeling Platform. In November 2013, the EPA announced the availability of the 2011 Emissions Modeling Platform data for public review and comment. See 78 Fed.Reg. 70935.

Prevention of Significant Deterioration (PSD). In December 2013, the EPA provided notice of its final rule amending regulations to remove the vacated PM_{2.5} significant impact levels and significant monitoring concentration provisions. See 78 Fed.Reg. 73698.

State Implementation Plans (SIPs). In November 2013, and in accordance with Section 110(h) of the Clean Air Act, the EPA announced the availability of compiled, federally-enforceable SIPs for all states. See 78 Fed.Reg. 71508.

In December 2013, the EPA provided notice of its proposal to approve a SIP revision submitted by the State of California to provide for attainment of the 2008 lead NAAQS in the Los Angeles County nonattainment areas. See 78 Fed.Reg. 75293.

Standards of Performance. In December 2013, the EPA provided notice of its direct final action to amend the standards of performance for petroleum refineries for which construction,

reconstruction or modification commenced after May 14, 2007. The direct final rule amends the definition of “delayed coking unit” and removes a redundant definition of the same term of art from the rule text. See 78 Fed.Reg. 76753, 76788.

ATTORNEY’S FEES

No updates this quarter.

CEQA

No updates this quarter.

CLIMATE CHANGE

Adaptation Plans. In November 2013, the U.S. Environmental Protection Agency (EPA) provided notice of the availability of *Climate Change Adaptation Implementation Plans* for each of its ten regions and seven national programs. See 78 Fed.Reg. 65980.

Greenhouse Gas (GHG) Reporting Program. In November 2013, the EPA announced an extension of the public comment period for the proposed rule titled, “Revisions to Reporting and Recordkeeping Requirements, and Proposed Confidentiality Determinations under the Greenhouse Gas Reporting Program.” See 78 Fed.Reg. 66674.

In November 2013, the EPA provided notice of its final rule amending the calculation and monitoring methodologies for electronics manufacturers covered by the GHG Reporting Rule. The EPA also made confidentiality determinations for new and revised data elements pertaining to this business sector. See 78 Fed.Reg. 68162.

In November 2013, the EPA provided notice of its proposed rule to amend certain provisions of the fluorinated gas production source category of the GHG Reporting Rule. See 78 Fed.Reg. 69337.

In November 2013, the EPA provided notice of its final rule to amend the GHG Reporting Rule in order to implement technical corrections, clarifying revisions, and other amendments to improve the quality and consistency of the data collected by the EPA. Among other changes, the EPA also amended the Rule’s table of global warming potential values for certain GHGs, and established confidentiality determinations for the reporting of new or substantially revised data elements. See 78 Fed.Reg. 71904.

COASTAL RESOURCES

No updates this quarter.

ENDANGERED SPECIES

Inyo California Towhee. In November 2013, the U.S. Fish and Wildlife Service (Service) provided notice of its proposed rule to remove the Inyo California towhee from the Federal List of Endangered and Threatened Wildlife due to recovery. See 78 Fed.Reg. 65938.

Candidate Notice of Review. In November 2013, the Service published its Candidate Notice of Review, which presents an updated list of plant and animal species native to the United States that the Service regard as candidates for or have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants. See 78 Fed.Reg. 70104.

Indian Knob Mountain Balm. In December 2013, the Service provided notice of its 12-month finding on a petition to reclassify Indian Knob mountain balm as a threatened species. Based on its review of the best available scientific and commercial information, the Service found that reclassification is not warranted at this time. See 78 Fed.Reg. 75313.

Franciscan Manzanita. In December 2013, the Service provided notice of its final rule designating 230.2 acres in San Francisco County as critical habitat for the Franciscan Manzanita. See 78 Fed.Reg. 77290.

Greater Sage Grouse. In December 2013, the Service provided notice of its extension of the comment periods on its proposals to list the bi-State distinct population segment (DPS) of greater sage-grouse as threatened and to designate critical habitat. See 78 Fed.Reg. 77087.

Yellow-Billed Cuckoo. In December 2013, the Service provided notice of the re-opening of the comment period on its proposal to list the yellow-billed cuckoo in the western portion of the United States as a threatened DPS. See 78 Fed.Reg. 78321.

ENERGY

Renewable Fuel Standard Program. In November 2013, the U.S. Environmental Protection Agency (EPA) provided notice of its proposed rule to set the renewable fuel percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that would apply to all motor vehicle gasoline and diesel produced or imported in the year 2014. See 78 Fed.Reg. 71732.

FEES/TAXES

No updates this quarter.

FOREST RESOURCES

No updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Toxic Substances Control Act (TSCA). In December 2013, the U.S. Environmental Protection Agency (EPA) provided notice of its final rule amending certain reporting requirements that were promulgated under the TSCA to require the use of electronic reporting. See 78 Fed.Reg. 72818.

Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). In December 2013, the EPA provided notice of its final rule to amend the standards and practices for conducting all appropriate inquiries under CERCLA to reference a standard practice recently made available by ASTM International. See 78 Fed.Reg. 79319.

INSURANCE COVERAGE

No updates this quarter.

LAND USE

No updates this quarter.

PROPOSITION 65

No updates this quarter.

RESOURCE CONSERVATION

Migratory Bird Permitting. In November 2013, the U.S. Fish and Wildlife Service provided notice of its final rule revising the List of Migratory Birds protected by the Migratory Bird Treaty Act; the Service's amendments include both the addition and removal of 23 and 4 species, respectively. See 78 Fed.Reg. 65844.

In November 2013, the Service provided notice of its final rule revising the definition of "hybrid" as it relates to birds protected under the Migratory Bird Treaty Act. As revised, the definition of "hybrid" applies to all offspring of any species listed at 50 C.F.R. 10.13. See 78 Fed.Reg. 65576.

In November 2013, the Service provided notice of its final rule revising its regulations that allow control of depredating birds in California; the revisions specify the counties in which the order is effective, identify the species that may be taken, add a requirement that landowners attempt nonlethal control, add a requirement for use of nontoxic ammunition, and revise the reporting requirements. See 78 Fed.Reg. 65578.

In November 2013, the Service provided notice of its proposed rule to remove regulations that set forth certain depredation orders for migratory birds due to lack of use of those regulations for the last 15 years. See 78 Fed.Reg. 65953.

In December 2013, the Service provided notice of its final rule to delegate permitting for falconry to the State of California, and 16 other states. See 78 Fed.Reg. 72830.

In December 2013, the Service provided notice of its final rule to revise the regulations regarding the approval of nontoxic shot types for use in waterfowl hunting. See 78 Fed.Reg. 78275.

Bald and Golden Eagle Protection Act (BGEPA). In December 2013, the Service provided notice of its final rule to revise the regulations for permits for take of golden eagles and bald eagles that is associated with, but not the purpose of, an activity. The Service extended the maximum term for programmatic permits to 30 years, while maintaining its discretion to issue permits of shorter duration, as appropriate. See 78 Fed.Reg. 73704.

SOLID WASTE

No updates this quarter.

WATER QUALITY

Regulatory Clarifications. In November 2013, the U.S. Environmental Protection Agency (EPA) provided notice of its extension of the comment period for the proposed rule titled, "Water Quality Standards Regulatory Clarifications." See 78 Fed.Reg. 70905.

Industrial Permit. In December 2013, the EPA provided notice of its extension of the comment period on the draft National Pollutant Discharge Elimination System (NPDES) general permit for stormwater discharges from industrial activity, also referred to as the Multi-Sector General Permit. See 78 Fed.Reg. 72676.

WATER RESOURCES

No updates this quarter.