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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 October 1 through December 31, 2012. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.
The current legislative calendar is also included at the end of the *Update.* *Please note that all case law, legislative and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form.* In addition, this issue also includes selected recent Federal case law of note from the U.S. Supreme Court, Ninth Circuit Court of Appeals and Federal District Courts.

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

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

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TABLE OF CONTENTS

State of California Summaries

Federal Summaries

STATE OF CALIFORNIA SUMMARIES

LEGISLATIVE UPDATE

The California Senate and Assembly have convened and are in session, and at this time of the year, the flurry of new bills that will be considered during 2013 are being introduced. The deadline for introducing bills is February 22. Other key dates on this year's Legislative Calendar include: May 31 is the last day for bills to be passed out of the house of origin; July 12 is the last day for policy committees to meet and report bills; September 6 is the last day to amend bills on the floor; and September 13 is the last day for each house to pass bills. October 13 will be the last day for the Governor to sign or veto bills that were passed by the Legislature on or before September 13.

Although new bills continue to be introduced and a better picture of this year's legislative agenda will be available after the February 22 deadline for introducing legislation, it is already clear that CEQA reform will be one important topic. Senate President pro Tem Darrell Steinberg and Senator Michael Rubio, Chair of the Senate Environmental Quality Committee, have both indicated that amendments to CEQA will be an important issue that they want to address during this session, and that is sure to be a hot topic, as this is an area with many stakeholders with strong – and conflicting – opinions.

The State Bar provides bill tracking information on its website at http://calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx. Clicking on the Environmental Law Section's matrix leads to a summary table about individual bills most likely to be of interest to members of the Environmental Law section and includes links to official legislative information, including the text of the bill, current status, votes and legislative analysis.

AIR QUALITY

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Clean Fuels Outlet. In December 2012, the California Air Resources Board provided notice of its decision to withdraw rulemaking efforts relating to amendments to the clean fuels outlet regulation that were published in the California Regulatory Notice Register on December 9, 2011. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 50-Z, p. 1805.

National Emission Standards for Hazardous Air Pollutants ("NESHAPs"). In October 2012, the U.S. Environmental Protection Agency reopened the public comment period for the proposed amendments to the NESHAPs for *stationary reciprocating internal combustion engines*. For more information, see 77 Fed.Reg. 60341. In October 2012, the Agency also provided notice of its decision to stay application of the NESHAPs for *chemical manufacturing area sources* until December 24, 2012. For more information, see 77 Fed.Reg. 65135. The Agency provided notice of its final rule for *chemical manufacturing area sources* in December 2012, at which time the stay also was lifted. For more information, see 77 Fed.Reg. 75740.

In November 2012, the U.S. Environmental Protection Agency provided notice of its reconsideration of certain new source and startup/shutdown issues associated with the NESHAPs for *coal- and oil-fired electric utility steam generating units* and new source performance standards for *fossil-fueled-fired electric utility, industrial-commercial-institutional, and small industrial-commercial-institutional steam generating units*. For more information, see 77 Fed.Reg. 71323.

Ambient Air Monitoring Equivalent Methods. In October 2012, the U.S. Environmental Protection Agency provided notice of its designation of three new equivalent methods for measuring concentrations of $PM_{2.5}$, PM_{10}, and $PM_{10-2.5}$ in the ambient air. For more information, see 77 Fed.Reg. 60985.

Fuel Standards. In October 2012, the U.S. Environmental Protection Agency provided notice of its direct final rule to amend the definition of "heating oil" in the Renewable Fuel Standard program under section 211(o) of the Clean Air Act. For more information, see 77 Fed.Reg. 61281, 61313. In December 2012, the Agency provided notice of its withdrawal of *portions* of that rule due to the receipt of adverse comment. For more information, see 77 Fed.Reg. 72746.

Outer Continental Shelf ("OCS") Air Regulations. In October 2012, the U.S. Environmental Protection Agency provided notice of its proposal to update a portion of the OCS Air Regulations pertaining to the Ventura County Air Pollution Control District. For more information, see 77 Fed.Reg. 61308.

In December 2012, the U.S. Environmental Protection Agency provided notice of its final approval of revisions to a portion of the OCS Air Regulations pertaining to the Santa Barbara County Air Pollution Control District. For more information, see 77 Fed.Reg. 72744.

State Implementation Plan ("SIP") Revisions. The U.S. Environmental Protection Agency took the following actions relative to revision of California's SIP:

In October 2012, the U.S. Environmental Protection Agency provided notice of: (1) direct final action to approve revisions to the *Sacramento Metropolitan Air Quality Management District* portion of the California SIP concerning volatile organic compound source categories (see 77 Fed.Reg. 63743, 63781); (2) final approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* portion of the California SIP concerning volatile organic compound emissions from crude oil production sumps and refinery wastewater separators (see 77 Fed.Reg. 64427); (3) final limited approval and disapproval of revisions to the *Mojave Desert Air Quality Management District* portion of the California SIP concerning oxides of nitrogen from stationary

gas turbines (see 77 Fed.Reg. 65133); (4) final approval of revisions to the *Pesticide Element* of the California SIP concerning emissions of volatile organic compounds (see 77 Fed.Reg. 65294); and, (5) final approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* portion of the California SIP concerning incorporation of District Rule 2410, Prevention of Significant Deterioration (see 77 Fed.Reg. 65305).

In November 2012, the U.S. Environmental Protection Agency provided notice of: (1) proposed approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* portion of the California SIP concerning various emissions from glass melting furnaces (see 77 Fed.Reg. 66429); (2) final approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* portion of the California SIP concerning oxides of nitrogen from solid fuel-fired boilers (see 77 Fed.Reg. 66548); (3) proposed approval of revisions to the *South Coast Air Quality Management District* portion of the California SIP concerning volatile organic compound emissions from architectural coatings (see 77 Fed.Reg. 66780); (4) proposed approval of revisions to the *Placer County Air Pollution Control District* portion of the California SIP concerning emissions of oxides of nitrogen from biomass boilers (see 77 Fed.Reg. 67322); (5) direct final action to approve a source-specific SIP revision for the *South Coast Air Quality Management District* portion of the California SIP known as the CPV Sentinel Energy Project AB 1318 Tracking System (see 77 Fed.Reg. 67767); (6) withdrawal of its March 8, 2010 action approving SIP revisions submitted to achieve attainment of the 1-hour ozone NAAQS in the *San Joaquin Valley* extreme ozone nonattainment area, and withdrawal of its March 1, 2012 determination that the California SIP satisfies the requirement regarding offsetting emissions growth caused by growth in vehicle miles traveled for the 1997 8-hour ozone NAAQS in the *San Joaquin Valley* (see 77 Fed.Reg. 70376); (7) final approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* portion of the California SIP concerning volatile organic compound emissions from wine storage tanks (see 77 Fed.Reg. 71109); and, (8) final approval of revisions to the *San Joaquin Valley Unified Air Pollution Control District* and *South Coast Air Quality Management District* portions of the California SIP concerning volatile organic compound emissions from chipping and grinding activities, and composting operations (see 77 Fed.Reg. 71129).

In December 2012, the U.S. Environmental Protection Agency provided notice of: (1) direct final action to approve revisions to the *Imperial County Air Pollution Control District*, *Placer County Air Pollution Control District*, and *Ventura County Air Pollution Control District* portions of the California SIP concerning emission statements and definitions (see 77 Fed.Reg. 72968, 73005); (2) direct final action to approve revisions to the *Eastern Kern Air Pollution Control District*, *Imperial County Air Pollution Control District*, *Placer County Air Pollution Control District*, and *Yolo-Solano Air Quality Management District* portions of the California SIP concerning PSD permit programs in each district for pre-construction review of certain new and modified major stationary sources in attainment or unclassifiable areas (see 77 Fed.Reg. 73316, 73391); (3) direct final action to approve revisions to the *Monterey Bay Unified Air Pollution Control District* portion of the California SIP concerning opacity standards related to multiple pollutants from several different types of sources (see 77 Fed.Reg. 73322, 73392); and, (4) final approval of revisions to the *South Coast Air Quality Management District* portion of the California SIP pertaining to Rule 317, Clean Air Act Non-Attainment Fee (see 77 Fed.Reg. 74372).

National Ambient Air Quality Standards ("NAAQS"). In October 2012, the U.S. Environmental Protection Agency provided notice of its determination that the Sacramento Metro 1-hour ozone nonattainment area has attained the revoked NAAQS, and its determination to exclude certain 2008 data caused by wildfire exceptional events. For more information, see 77 Fed.Reg. 64036. The Agency also provided notice of its proposal to determine that the Sacramento, San Francisco Bay Area, Yuba City-Marysville, and Chico nonattainment areas have attained the 2006 24-hour fine particle NAAQS. For more information, see 77 Fed.Reg. 65346, 65521, 65646, 65651.

In October 2012, the U.S. Environmental Protection Agency also provided notice of its proposal to revise the deadlines established in the nitrogen dioxide NAAQS for the near-road component of the monitoring network and to implement a phased deployment approach. This phased approach would make the near-road network operational between January 1, 2014 and January 1, 2017. The Agency also proposed to revise the approval authority for annual monitoring network plans. For more information, see 77 Fed.Reg. 64244.

In November 2012, the U.S. Environmental Protection Agency provided notice of its withdrawal of a direct final rule published on September 14, 2012 concerning certain 1997 8-hour ozone nonattainment areas in California due to receipt of adverse comment. For more information, see 77 Fed.Reg. 66715. The Agency also provided notice of its final rule: (a) 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) have attained the 1997 8-hour ozone NAAQS by their applicable attainment dates; (b) granting Mariposa and Tuolumne Counties and Nevada County one-year attainment date extensions; and, (c) determining that these six areas and the Ventura County 8-hour ozone nonattainment area have attained and continue to attain the 8-hour ozone NAAQS based on the most recent three years of data. For more information, see 77 Fed.Reg. 71551.

New Source Review ("NSR") & Prevention of Significant Deterioration ("PSD") Programs. In October 2012, the U.S. Environmental Protection Agency provided notice of its final rule revising the definition of "regulated NSR pollutant," as contained in two sets of PSD regulations and the Agency's Emission Offset Interpretive Ruling. For more information, see 77 Fed.Reg. 65107.

Regulatory Flexibility Act Section 610 Reviews. In October 2012, the U.S. Environmental Protection Agency provided notice that it will review three actions pursuant to section 610 of the Regulatory Flexibility Act: (1) Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements; (2) NESHAP: Reinforced Plastic Composites Production; and, (3) NPDES Permit Regulation and Effluent Limitations Guidelines Standards for CAFOs. For more information, see 77 Fed.Reg. 65840.

Document Availability. In November 2012, the U.S. Environmental Protection Agency provided notice of availability of a document titled, *Third External Review Draft Integrated Science Assessment for Lead*. For more information, see 77 Fed.Reg. 70776.

Airborne Toxic Control Measures. In December 2012, the U.S. Environmental Protection Agency provided notice of its decision to grant the California Air Resources Board's request for

authorization to implement its airborne toxic control measure for in-use portable diesel-fueled compression-ignition engines 50 horsepower and greater. For more information, see 77 Fed.Reg. 72846.

Portable Equipment Registration Program. In December 2012, the U.S. Environmental Protection Agency provided notice of its decision to grant the California Air Resources Board's request for authorization to implement amendments to its Portable Equipment Registration Program, a voluntary statewide program that enables registration of nonroad engines and equipment that operate at multiple locations throughout California so that the owners can operate throughout the State without having to obtain permits from multiple air districts. For more information, see 77 Fed.Reg. 72851.

ATTORNEY FEES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

CEQA

Recent Court Rulings

Fourth District Court of Appeal rejects claim that city engaged in impermissible "piece-meal" environmental review of park adjacent to proposed mixed-use village. *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209

The City of Newport Beach acquired coastal property and proposed to develop the land into a park. The city entered into an agreement with a neighboring property owner to construct an access road connecting the park site to the coast highway. The access road traversed a corner of the adjacent private land, which consisted of undeveloped coastal property used as an oil field and referred to as "Banning Ranch." Banning Ranch was, at the same time, the subject of a separate EIR process analyzing a proposed mixed-use development project. The EIR for the park treated the Banning Ranch development proposal as a separate project under CEQA. The city certified the park EIR, approved the park, and approved the access agreement. Petitioner sued. The trial court denied the petition. Petitioner appealed.

Petitioner argued the city had engaged in unlawful "piece-meal" review of the park and Banning Ranch projects. According to petitioner, the shared access road meant that the "whole of the project" consisted of both the park and the development proposal, and they had to be analyzed as a single project in the same EIR. The court disagreed. The Supreme Court's decision in *Laurel*

Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376 ("*Laurel Heights*") established the appropriate test for petitioner's piece-mealing claim. Under that test, the EIR for a project "must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (47 Cal.3d at p. 496.) In this case, the link between the park and the Banning Ranch proposal was the access road. That link, however, was too attenuated to require the city to analyze the park and the development project in the same EIR. The access road led to the park site, but nowhere else. The access road did follow the same alignment envisioned for Banning Ranch. But the access road was only a fragment of the ultimate alignment, and it was only a two-lane, gated road, rather than the four-lane, divided arterial that the Banning Ranch project would require. Because the access road was only a "baby step" in the direction of ultimate approval of the development proposal, it could not fairly be characterized as a "consequence" of the park project. Moreover, the city's General Plan called for building the four-lane, arterial through the private land, regardless of whether Banning Ranch remained as open space or was ultimately approved for development.

The court also rejected petitioner's other claims that the park EIR was inadequate:

- The EIR's analysis of cumulative traffic impacts referenced the city's General Plan EIR, which had looked at the cumulative traffic impacts of development on Banning Ranch.
- The EIR's analysis of growth-inducing impacts was adequate because substantial evidence supported the park EIR's conclusion that constructing the access road would not induce growth on Banning Ranch. Moreover, the impact of development of Banning Ranch would not somehow be missed, since that proposal was undergoing its own EIR process.
- The EIR's analysis of cumulative biological impacts, and impacts to gnatcatcher habitat, were supported by substantial evidence. Evidence showed that much of the habitat on the park site was degraded, and that adopted mitigation was sufficient to avoid significant impacts to this habitat.
- The EIR included an adequate discussion of the park project's impact on "environmentally sensitive habitat areas" ("ESHAs") and wetlands protected under the Coastal Act.

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) 209 Cal.App.4th 1096

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.

Second District Court of Appeal rules district's declaration of emergency under groundwater adjudication judgment was not a "project" under CEQA. *Central Basin Municipal Water Dist. v. Water Replenishment Dist. of Southern California* (2012) 211 Cal.App.4th 943

Under authority established by a judgment adjudicating a groundwater basin, the Water Replenishment District of Southern California declared a "water emergency" in the basin due to the threat of groundwater degradation. Under the judgment, the court retained jurisdiction concerning its implementation. The replenishment district's declaration of an emergency altered the allocation of groundwater pumping rights. The effect was to increase pumpers' right to "carry over" their allocations to another year, and to extend the period during which pumpers could replace over-extracted water. The Central Basin Municipal Water District ("CBD") sued the district, arguing that the declaration of an emergency had environmental impacts that required study under CEQA. According to CBD, the district's declaration would increase short-term holding and long-term pumping of groundwater, which could result in significant environmental effects. The district demurred. The trial court sustained the demurrer. CBD appealed.

The Court of Appeal affirmed, finding that CEQA did not apply to the district's emergency declaration. First, the declaration of a water emergency by itself had no environmental impact; rather, the declaration was simply a statement that the groundwater basin's resources were threatened. The district's role was to declare whether a water emergency existed. The fact that consequences arguably flowed from that declaration did not alter the nature of the declaration, or the absence of impacts that would occur as a result of the declaration. Second, even if the district had prepared an EIR, and the EIR had shown the potential for environmental effects, under the judgment the district had no authority to do anything about it. In particular, the district could not alter the carryover rights or delayed replenishment; those were dictated by the terms of the judgment. Because the emergency declaration was ministerial in character, CEQA did not apply.

Finally, the power to enforce a physical solution implementing water rights under Cal. Const., art. X, § 2, was reserved to the court that had continuing jurisdiction. The judgment established a physical solution; the judgment was not subject to CEQA; the district could not alter the judgment; thus, CEQA did not apply.

Second District Court of Appeal rules that a city council's decision to place on the ballot a measure requiring competitive bidding of future trash hauling contracts was not a "project" under CEQA. *Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394

Monterey Park contracted with Athens Services to provide trash service. The contract expires in 2017. The city council voted to place "Measure BB" on the ballot. Measure BB required the city to competitively bid trash contracts upon expiration of the 2017 contract with Athens. Athens opposed the council's decision. The voters approved Measure BB. Petitioner sued, arguing the council's decision to place Measure BB on the ballot required CEQA review. The trial court denied the petition. Petitioner appealed.

The Court of Appeal affirmed. It regarded the council's decision to place the measure on the ballot as a fiscal activity and, as such, excluded from the definition of "project" CEQA Guidelines section 15378, subdivision (b)(4). The measure merely established a competitive bidding process for future waste services contracts – in other words, it altered the manner in which contracts would be awarded in the future. There was no commitment to any specific project. As such, it was not a project within the meaning of CEQA.

The petitioner argued the measure allowed the city to award the contract to multiple franchisees, rather than just one. That, the petitioner claimed, could result in increased truck traffic. The court regarded this argument as speculative, given the absence of any specific commitment to a particular course of action. In this respect, the council's decision was not a project under the test established by *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Measure BB did not require the city to select more than one service provider, or preclude the city from providing its own solid waste services. There was no way to predict which companies would bid on the city's solid waste franchise, whether additional trucks would be needed, or what potential impacts would arise from the city's choice of a service provider. The time to address those issues would be 2017.

Fifth District Court of Appeal Rules a City Council Cannot Approve a Voter-Sponsored Initiative Without First Performing CEQA Review. *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2012) 210 Cal.App.4th 1006

Wal-Mart sought to expand an existing store in Sonora into a "supercenter." The city prepared an environmental impact report (EIR). The planning commission recommended approval. At the council hearing, the city received notice of intent to circulate an initiative. The aim of the initiative was to approve the supercenter. The council tabled its vote on the EIR and the supercenter entitlements. The initiative proponents gathered and submitted the requisite number of signatures to place the initiative on the ballot. The council held a public hearing to consider the initiative. Rather than voting to place the measure on the ballot, the council approved the initiative, as authorized by Elections Code section 9214, subdivision (a). The Tuolumne Jobs & Small Business Alliance ("Alliance") sued. The trial court sustained a demurrer filed by Wal-Mart with respect to three of the four causes of action, including the CEQA claim. The Alliance filed a writ seeking appellate review of the trial court's ruling on the demurrer. The Fifth District Court of Appeal stayed the trial court proceedings while it considered the petition.

The court reasoned that the voters' power to approve an initiative in an election is protected by the California Constitution and cannot be undermined by state laws such as CEQA. In this case, however, there was no election; instead, the council approved the measure without a vote. Under *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, CEQA review is required even if an election is held, where the public agency itself (as opposed to persons signing petitions) decides to put the initiative on the ballot. The court used section 15378 and the holding

in *Friends of Sierra Madre* to conclude that CEQA clearly applies when a city council approves a project without an election after a "mere 15 percent of voters" expressed support of the initiative. The constitutional nature of the voters' initiative power was not implicated, because the council's decision meant the initiative would never go to a vote.

The court found that the city's decision not to submit the initiative to the voters was a policy decision and an exercise of agency discretion that deprived the voters of the opportunity to make the final decision via the ballot box. The council necessarily exercised its discretion in deciding whether to approve the measure or place it on the ballot. As such, it could not be construed as a ministerial action exempt from CEQA.

Finally, the court explained why it chose not to follow *Native American Sacred Site & Environmental Protection Assn. v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961. In that case, the Fourth District Court of Appeal held an agency's decision to approve a project via adoption of an initiative without holding an election is ministerial because the city was bound by Elections Code section 9214 to either adopt a qualified voter-sponsored initiative or to place it on the ballot. The Fifth District disagreed, reasoning: "Although the duty to adopt the initiative *or* hold a special election certainly is mandatory under Elections Code section 9214—the statute says the city council 'shall' do one or the other—the *choice between the two* is entirely discretionary. This choice is not insignificant, for it means the difference between giving the voters the opportunity to exercise their franchise and withholding that opportunity; and the array of reasons that can enter into the city council's exercise of discretion is large. We do not agree that the city's action in approving the project via adoption of the initiative is ministerial because the city was required to do either that or something else. After all, how can the making of a policy choice be ministerial, even when the choice must be made?" (210 Cal.App.4th at p. 1025.)

According to the court, the option of placing the voter-sponsored measure on the ballot (rather than approving it) remains exempt from CEQA because of the constitutional principle that precludes interfering with the initiative power.

The city noted the Elections Code provides a third option: ordering a report on the initiative due within 30 days. The city argued the Legislature intended this report to substitute for CEQA review. The court was unpersuaded, noting that Elections Code section 9214, subdivision (c) – the statute creating this option – did not say that. Moreover, the separate obligation to perform CEQA review arose only where the council sought to approve the measure, and the measure had the potential for environmental effects.

The court noted that section 9214 establishes tight deadlines – up to 40 days – for a council to respond to a voter-sponsored initiative. The court conceded there was no way to prepare and certify an EIR within such a short time frame. The court "acknowledge[d] that our holding means the direct-adoption option of Elections Code section 9214, subdivision (b), will usually not be available for an initiative that would have a significant environmental impact, and an election will usually be required. The results in a case like this, in which statutes point in different directions and must be reconciled with one another, are bound to be imperfect. Our solution is the better one, however, because it avoids the anomalous consequence of allowing a small fraction of a local electorate, combined with a majority of a city council, to nullify state law under conditions in which the local electorate as a whole has not been given a voice." (210 Cal.App.4th at pp. 1031-1032.) Even though there may be insufficient time to prepare an EIR,

the result is that the initiative measure must be placed before the voters. "Without an election, it simply is not possible to say that the people's will requires the important legislative objectives of CEQA to be set aside so a project can be expedited." (*Id*. at p. 1033.)

Third District Court of Appeal Rejects Attack on EIR Prepared for Expansion of Wood Manufacturing Facility to Include Cogeneration Plant. *Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184

Roseburg Forest Products Co. (Roseburg) proposed to expand its wood veneer manufacturing facility. Rosewood sought to install a biomass-fueled cogeneration power plant. The electricity generated by the plant would power the facility. Excess electricity would be sold to the grid. Bark and wood trimmings from the facility and elsewhere in the region would fuel the cogeneration plant. The county prepared and certified an EIR and approved the project. Petitioners sued. The trial court denied the petition. Petitioners appealed.

First, petitioners argued the EIR analyzed an insufficient range of alternatives. The EIR discussed several alternatives (constructing the plant at Roseburg's Oregon facility; moving a boiler to another location; reducing the size of the cogeneration plant), but eliminated them from detailed analysis because they did not meet the project's objectives. The EIR analyzed in detail only one alternative: the "no project" alternative. Nevertheless, this range was adequate in view of the objectives of the project. In particular, petitioners did not meet their burden of proof by pointing to a potentially feasible alternative that met project objectives while avoiding environmental impacts. Substantial evidence supported the county's decision to reject as infeasible the three alternatives eliminated from detailed analysis.

Second, petitioners attacked the EIR's analysis of the cogeneration plant's air quality impacts. Petitioners claimed the county used the wrong "baseline" to assess those impacts. According to petitioners, the EIR's baseline consisted of permitted emissions, rather than actual emissions, in violation of *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310. To support this argument, petitioners relied primarily on a letter submitted by their expert at the Board of Supervisors' hearing on petitioners' appeal of the Planning Commission's decision to approve the project. Under county administrative rules, the letter was submitted late, and the Board was justified in refusing to consider it. Although the county included the letter in the administrative record, the fact remained that the Board did not consider it. Although the letter was submitted prior to the Board's hearing on the appeal, it came after the Planning Commission's "approval" of the project. The letter was therefore untimely.

Aside from the late letter, the record showed the existing facility produced steam at an average rate of 112,000 pounds per hour. The EIR used a baseline of 120,000 pounds per hour. The county argued this figure was a reasonable approximation of actual emissions. Petitioners argued the EIR's estimate of pollutant emissions – NOx and PM10 – were understated because they were derived from the 120,000 pound-per-hour figure for permitted steam emissions, rather than the 112,000 pound-per-hour figure for actual, estimated emissions. That difference amounted to 7%. The court concluded this discrepancy was not prejudicial. The court also concluded the EIR contained an adequate description of equipment that would be used to control NOx emissions.

Third, the EIR concluded the project's noise impacts would be insignificant. Petitioners attacked this conclusion. The EIR used a significance threshold requiring an increase of 3.0 dB in operational noise, as well as noise in excess of local noise limits. This threshold was consistent

with local standards, and within the county's discretion. In arguing noise levels in the area already exceeded these standards, petitioners conflated noise levels averaged over differing periods. The county was not required to accept unsubstantiated letters from project proponents asserting that noise impacts would be greater than disclosed in the EIR.

Fourth, petitioners attacked mitigation measures adopted by the county to address noise. The measures required Roseburg to perform additional noise measurements in the event the county received complaints, and then scale back night-time operations if monitoring showed that the increase in noise exceeded 3.0 dB. The court ruled there was nothing wrong with relying on complaints to trigger follow-up monitoring.

Fifth, the record showed that, on a cumulative basis, noise in the area already exceeded applicable standards. Petitioners argued the record did not support the county's conclusion that the project's contribution to cumulative noise impacts would be insignificant. Adopted mitigation, however, required Roseburg to reduce the project's contribution to cumulative noise to an increase of less than 1.0 dB. Plaintiffs argued the EIR did not consider noise increases along haul routes that trucks would use to deliver fuel to the site. The court found that substantial evidence supported the EIR's conclusion that truck trips would not significantly increase noise levels along haul routes.

Sixth, petitioners argued the county should have recirculated the Draft EIR to include two noise studies performed for the project. The record showed, however, that the EIR summarized information from these studies, that discrepancies were minimal, and that the studies did not show new or greater noise impacts.

Seventh, petitioners argued the EIR underestimated and mischaracterized water use at the project. The EIR stated there would be no change in water use. Because there was no evidence to the contrary, the court rejected this argument. The petitioners also argued the EIR failed to disclose water discharges from cooling towers. But the EIR stated the cooling towers would be a closed loop system. Claims to the contrary were mere differences of opinion that did not show the EIR lacked substantial evidence. Although the record contained discrepancies regarding the amount of water the project would consume, there was no evidence that this use would have significant environmental impacts. The fact that water use may have been understated was therefore non-prejudicial.

Fourth District Court of Appeal Rules City Impermissibly Deferred Mitigation Measure to Address Development Project's Impacts on Species; in Addition, Discrepancies Between Water Supply Assessment and EIR, and Uncertainty of Supplies, Rendered Analysis Inadequate. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260

HomeFed Fanita Rancho, LLC, sought to develop 1,380 single-family homes, a pedestrian-oriented village center, recreational facilities, and an open-space preserve on 2,600 acres. The city certified an EIR and approved the project. A coalition of environmental groups sued. The trial court granted the petition as to one issue: fire safety. The trial court issued a limited writ with respect to that issue. The coalition appealed concerning biological impacts, water demand, and the trial court's decision to issue a limited writ.

The coalition attacked three aspects of the EIR's analysis of biological impacts. The Court of Appeal rejected the first two, and agreed with the third. First, the coalition argued the EIR's

analysis of cumulative impacts improperly relied on a draft sub-area plan prepared pursuant to San Diego County's Multi Species Conservation Program ("MSCP"). The analysis assumed that any development in the region would be carried out in a manner consistent with the MSCP. The petitioners argued the MSCP did not cover all biological resources potentially affected by the project. Even if true, however, there was not enough information to assess the biological impacts of other projects in the area, because all of these projects were early in the planning process, so there was insufficient data to perform a species-by-species cumulative analysis. In any event, the city reasonably assumed both this project and the surrounding projects would be required to comply with the MSCP.

Second, the city adopted a mitigation measure requiring the developer to acquire off-site mitigation property. The coalition argued the record did not contain substantial evidence showing that acquisition was feasible. The record indicated, however, that potential off-site land had been identified that met the species' needs.

Third, the mitigation measure adopted to address impacts to the Quino checkerspot butterfly required the developer to preserve or acquire roughly 1,350 acres of suitable habitat, and to develop and implement a plan to manage this habitat for the benefit of the butterfly. The coalition argued that the EIR improperly failed to specify performance standards or provide guidelines for the management of this habitat. The court agreed. A draft habitat management plan prepared by the developer stated that vegetation management was key for the conservation of the butterfly. But the city had foresworn grazing and controlled burning, the two identified means of managing the habitat. The draft plan left to the preserve manager the timing and details of other management activities. The EIR also did not explain why it was impractical or infeasible to specify performance standards or provide guidelines for the active management of the habitat to benefit the butterfly. The city therefore violated CEQA by improperly deferring formulation of this measure.

With respect to water supply, the court noted a discrepancy between the EIR's estimate of the project's water demand (1,446 acre-feet/year), and the estimate in the water supply assessment for the project (881 acre-feet/year). The EIR did not explain the reason for this discrepancy, and the parties' attempts to explain why the water supply assessment was more accurate were unavailing because the explanation did not appear in the record itself. For these reasons, the record lacked substantial evidence supporting the EIR's estimate of anticipated water demand. The court also found the EIR improperly failed to discuss uncertainties surrounding State Water Project deliveries to the water wholesaler (Metropolitan Water District) as the result of potential cutbacks mandated by a 2007 court decision, and the potential impact of these cutbacks on the project's water supplies. Given these uncertainties, the EIR should have discussed possible alternative water sources. Finally, the court found the EIR violated CEQA by failing to analyze the impacts of using groundwater to fill and recharge a ten-acre lake proposed as part of the project. Studies showed the groundwater might not provide sufficient water for this purpose, but the EIR did not consider the impacts of obtaining water from other sources in lieu of groundwater.

The coalition argued the trial court erred by issuing a limited writ on only the fire safety issue. The court held that Public Resources Code section 21168.9 does provide the trial court with discretion to issue a limited writ. Thus, even if the trial court finds a CEQA violation, the court is not required to issue a writ directing the agency to decertify an EIR and set aside all project approvals. The Court of Appeal went on to observe, however, that in this instance the trial court

may have abused its discretion in issuing a limited writ because of the interrelationship between the fire safety and biological impacts of the project. Nonetheless, in subsequent trial court proceedings concerning the city's return to the limited writ, the trial court had already ordered the city to decertify the EIR and set aside project approvals, so the issue was moot.

Finally, the trial court had awarded attorneys' fees and costs to the collation. The city and developer challenged this award, arguing the coalition should not have prevailed, and the trial court did not spell out how it calculated the amount of the award. On the first issue, the Court of Appeal held the coalition was the prevailing party, and had conferred a benefit justifying the award. This was all the more true given the additional CEQA violations identified by the Court of Appeal. As to the amount, the court ruled the city and the developer did not establish that they requested and were denied a statement of decision on this issue. The court remanded the case to the trial court to determine the appropriate amount of the award.

Legislative Updates
No updates this quarter.

Regulatory Updates
No updates this quarter.

CLIMATE CHANGE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

CAFÉ Standards. In October 2012, the U.S. Environmental Protection Agency and National Highway Traffic Safety Administration provided notice of their file rule to further reduce greenhouse gas emissions and improve fuel economy for light-duty vehicles for model years 2017 and beyond. For more information, see 77 Fed.Reg. 62624, 68070.

Greenhouse Gas Reporting Rule. In October 2012, the U.S. Environmental Protection Agency provided notice of its proposed rule to amend the calculation and monitoring methodologies for the *Electronics Manufacturing* sector, as well as related confidentiality determinations. For more information, see 77 Fed.Reg. 63538, 69585.

Prevention of Significant Deterioration ("PSD") Program. In December 2012, the U.S. Environmental Protection Agency provided notice of its final approval of a SIP revision for the *South Coast Air Quality Management District* incorporating District Rule 1714, Prevention of Significant Deterioration for Greenhouse Gases. For more information, see 77 Fed.Reg. 73320.

National Water Program. In December 2012, the U.S. Environmental Protection Agency provided notice of availability of the final document titled, *National Water Program 2012 Strategy: Response to Climate Change*. For more information, see 77 Fed.Reg. 76034.

COASTAL RESOURCES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

The Third District Court of Appeal has reversed a trial court ruling and held that a petition for de-listing an endangered species under the California Endangered Species Act ("ESA") could not be used to challenge a prior determination to join northern and southern coho salmon as a single evolutionary species unit ("ESU"), and that such ESU determination was binding. *Central Coast Forest Assn. v. California Fish and Game Comm.* (December 14, 2012) 211 Cal.App.4th 1433.

In the case, the Fish and Game Commission ("Commission") added coho salmon in streams south of San Francisco (Santa Cruz County) to the list of endangered species under the California ESA. In 2004, the Commission joined them with coho salmon north of San Francisco (to Punta Gorda) as members of the Central California Coast ("CCC") ESU.

Respondents own and harvest timber from lands in the area of the coho salmon spawning streams in the Santa Cruz Mountains. Respondents received notice of the 1995 proceeding and participated in the 2004 proceeding but did not seek review of the final decision in either case. However, just before the 2004 decision became final, respondents filed a petition with the Commission seeking to redefine the southern boundary of the CCC ESU to remove (delist) coho salmon in coastal streams south of San Francisco. The Commission denied the petition and Respondents sought review in the superior court, which ruled that the petition should be accepted for consideration, thereby directing the Commission to re-examine the petition. On remand, the Commission reconsidered the petition and rejected it a second time. The trial court again ruled for the Respondents and the Commission appealed from that decision.

On appeal, the Court explained that Respondents sought to show through their delisting petition that there was no basis for the Commission's 1995 finding that coho salmon is an endangered

species. On that basis, the Court reversed the trial court, ruling that the petition fails at the outset because a petition to delist a species may not be used to challenge a final determination of the Commission. The delisting procedure is not a means by which new information may be submitted on the merits of a final determination. The exclusive means of judicial review of the merits is by administrative mandamus.

Legislative Developments

No updates this quarter.

Regulatory Updates

Northern Spotted Owl. In October 2012, the California Fish and Game Commission provided notice of its receipt – on September 7, 2012 – of a petition from the Environmental Protection Information Center to list the northern spotted owl as threatened or endangered under the California Endangered Species Act. It is anticipated that the Commission will consider the Department of Fish and Game's evaluation of the petition and recommendation will be received by the Commission at its February 2013 meeting. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 40-Z, p. 1490.

Clear Lake Hitch. In October 2012, the California Fish and Game Commission provided notice of its receipt – on September 25, 2012 – of a petition from the Center for Biological Diversity to list the Clear Lake Hitch as threatened or endangered under the California Endangered Species Act. It is anticipated that the Commission will consider the Department of Fish and Game's evaluation of the petition and recommendation will be received by the Commission at its February 2013 meeting. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 41-Z, p. 1502.

Southern Mountain Yellow-Legged Frog and Sierra Nevada Mountain Yellow-Legged Frog. In October 2012, the California Fish and Game Commission announced its proposal to amend Section 670.5 of Title 14 of the California Code of Regulations to add the southern mountain yellow-legged frog to the list of endangered animals, and the Sierra Nevada mountain yellow-legged frog to the list of threatened animals. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 43-Z, p. 1558.

Gray Wolf. In November 2012, the California Fish and Game Commission provided notice of its acceptance for consideration a petition to list the Gray Wolf as an endangered species, and declared the Gray Wolf a candidate species as defined by Fish and Game Code section 2068. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 44-Z, p. 1610.

Townsend's Big-Eared Bat. In November 2012, the California Fish and Game Commission provided notice of its receipt – on November 1, 2012 – of a petition from the Center for Biological Diversity to list the Townsend's big-eared bat as threatened or endangered under the California Endangered Species Act. It is anticipated that the Commission will consider the Department of Fish and Game's evaluation of the petition and recommendation will be received by the Commission at its March 2013 meeting. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 48-Z, p. 1747.

Valley Elderberry Longhorn Beetle. In October 2012, the U.S. Fish and Wildlife Service provided notice of its proposal to remove the valley elderberry longhorn beetle from the federal list of endangered and threatened wildlife. For more information, see 77 Fed.Reg. 60238.

Candidate Notice of Review. In November 2012, the U.S. Fish and Wildlife Service provided notice of an updated list of plant and animal species native to the United States that the Service regards as candidates for *or* have proposed for addition to the Lists of Endangered and Threatened Wildlife and Plants under the Endangered Species Act. For more information, see 77 Fed.Reg. 69994.

Ashy Storm-Petrel. In November 2012, the U.S. Fish and Wildlife Service provided notice of the opening of an information collection period regarding the status of the ashy storm-petrel throughout its range in the United States. For more information, see 77 Fed.Reg. 70987.

Northern Spotted Owl. In December 2012, the U.S. Fish and Wildlife Service provided notice of its final designation of critical habitat for the northern spotted owl. In total, the Service designated about 9.5 million acres of land in California, Oregon, and Washington as critical habitat. For more information, see 77 Fed.Reg. 71876.

Riverside Fairy Shrimp. In December 2012, the U.S. Fish and Wildlife Service provided notice of its final designation of critical habitat for the Riverside fairy shrimp. In total, the Service designated approximately 1,724 acres of land in Ventura, Orange and San Diego counties as critical habitat. Areas in Riverside County were excluded. For more information, see 77 Fed.Reg. 72070.

Lost River Sucker and Shortnose Sucker. In December 2012, the U.S. Fish and Wildlife Service provided notice of its final designation of critical habitat for the Lost River sucker and shortnose sucker. In total, the Service designated about 146 miles of streams and 117,848 acres of lakes and reservoirs for the Lost River sucker, and about 136 miles of streams and 123,590 acres of lakes and reservoirs for the shortnose sucker as critical habitat. The streams, lakes, and reservoirs are located in Klamath and Lake Counties, Oregon, and Modoc County, California. For more information, see 77 Fed.Reg. 73740.

ENERGY

Recent Court Rulings

No summaries this quarter.

Legislative Developments

No updates this quarter.

Regulatory Updates

No updates this quarter.

FEES/TAXES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

State Responsibility Area Fire Prevention Benefit Fee. In October 2012, the California State Board of Forestry and Fire Protection promulgated a regulation to make permanent the emergency "State Responsibility Area Fire Prevention Benefit Fee" regulations previously adopted pursuant to Assembly Bill X1 29 (2011), Public Resources Code section 4210 et seq. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 40-Z, p. 1453.

FOREST RESOURCES

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Reporting Requirements. In November 2012, the Department of Toxic Substances Control provided notice of its tent to amend various provisions in Title 22 of the California Code of Regulations pertaining to the reporting requirements applicable to the owners and/or operators of hazardous waste treatment, storage, and disposal facilities. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 47-Z, p. 1702.

Significant New Use Rules ("SNURs"). In October 2012, the U.S. Environmental Protection Agency provided notice of its direct final rule to promulgate SNURs under the Toxic Substances Control Act for 20 chemical substances that were the subject of premanufacture notices. For more information, see 77 Fed.Reg. 66149. In December 2012, these SNURs were withdrawn due to the receipt of adverse comment. For more information, see 77 Fed.Reg. 75566.

In December 2012, the U.S. Environmental Protection Agency provided notice of its direct final rule to promulgate SNURs under the Toxics Substances Control Act for 9 chemical substances that were the subject of premanufacture notices. For more information, see 77 Fed.Reg. 75390. That same month, the Agency also provided notice of its removal of SNURs for four chemical substances previously published at 77 Fed.Reg. 58666. For more information, see 77 Fed.Reg. 76897.

National Oil and Hazardous Substances Pollution Contingency Plan ("Contingency Plan"). In November 2012, the U.S. Environmental Protection Agency took direct final action to amend the Contingency Plan to acknowledge advancements in technologies used to manage and convey information to the public. For more information, see 77 Fed.Reg. 66729, 66783.

Lead. In December 2012, the U.S. Environmental Protection Agency requested information on renovation, repair, and painting activities on and in public and commercial buildings, and particularly whether such activities create lead-based paint hazards. If hazards are created, the Agency requested information on the development of certification, training, and work practice requirements, as required by the Toxic Substances Control Act. For more information, see 77 Fed.Reg. 76996.

INSURANCE COVERAGE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

LAND USE

Recent Court Rulings

The Fourth District Court of Appeal held that the City of Carlsbad's revisions to the housing element of its general plan could make changes to land use element, so long as the City adopted a timeline for making the changes. *Friends of Aviara v. City of Carlsbad,* (2012) 210 Cal.App.4th 1103.

The City of Carlsbad revised the housing element of its general plan to fulfill the City's obligation under the Government Code to provide low cost housing in the region. In the revision, the City identified an inventory of parcels suitable for low cost housing. The revision to the housing element presented inconsistencies with the land use element of the City's general plan, which the City would change to develop the parcels. The City proceeded with adopting the revision to the housing element without first revising the land use element and without adopting a timeline to revise the land use element.

The Friends of Aviara, residents concerned about protecting a nearby lagoon, sued claiming the inconsistencies between the land use and housing elements were unlawful and the land use element must be consistent with the housing element prior to making changes to the housing element. The trial court found that the revision to the housing element created an impermissible conflict with the land use element, but the conflict was permissible if the City adopted an appropriate timeline for making changes to the land use element. Accordingly, the trial court issued a writ of mandate directing the City to adopt a timeline for the general plan changes.

On appeal, the Fourth District affirmed. The Court relied on the legislative intent and understanding that inconsistencies between the general plan and the housing element will arise and it may not be possible to resolve inconsistencies at the time of adoption. As such, inconsistencies may require municipalities to set forth a program, such as a timeline, to resolve inconsistencies. The Court further explained that the plaintiff's suggested interpretation would delay adoption of revised housing plans, which is inconsistent with the Legislature's urgent concern that municipalities provide adequate housing.

The United States Court of Appeals for the Ninth Circuit held that municipal zoning ordinances, aimed at preserving the existing availability of manufactured homes, do not violate the Washington or federal Constitutions. *Laurel Park Community, LLC v. City of Tumwater,* (2012) 608 F.3d 1180.

In response to concerns of possible closures of manufactured home parks, the Tumwater City Council enacted ordinances aimed at preserving the current stock of manufactured home parks within the City. The ordinances amended the Tumwater Comprehensive Plan, Zoning Map, and City Code to create a new land use designation and a zoning district for "Manufactured Home Parks." The ordinances designated six of the ten existing parks in Tumwater under the new land use designation and placed those properties, and only those properties, in the new zoning district. The ordinances restricted use of the properties, such that the park owners could no longer re-develop the properties for multi-family residences or other dense types of development.

Owners of three of the newly designated Manufactured Home Parks sued in federal district court claiming the ordinances facially violated various constitutional provisions including the federal takings clause, the state takings clause and state substantive due process clause. The district court granted summary judgment to the City.

On appeal, the Ninth Circuit affirmed. The owners limited their appeal to claims under the federal takings clause, state takings clause and state substantive due process clause. The Court found that the federal takings claim failed because there was little economic effect from the ordinances and the owner's reliance on the possibility of redevelopment under the prior zoning designation was too speculative. The state takings claim failed because the owners still had the ability to sell the properties under the revised zoning and the new ordinances maintained the current economically viable use of the properties, as manufactured home parks. The Court held that the state substantive due process claim failed because the ordinances were aimed at a legitimate public purpose of preserving sufficient land for manufactured homes and the amount of harm was relatively small, if not nonexistent.

The Fourth District Court of Appeals held that a grant of a conservation easement to the Department of Fish and Game was not void from the onset and failure of the Department to meet its obligation to post "no hunting" and "no trespassing" signs on the property did not rescind the easement. *Wooster v. Department of Fish and Game,* (2012) 211 Cal.App.4th 1020.

In 2009, plaintiff landowner acquired property in Calaveras County subject to a conservation easement the prior owner granted in 1981 to the Department of Fish and Game. The easement's purpose was to preserve and protect the property for wildlife conservation purposes. Declarations of the easement gave the Department full development and hunting rights subject to certain restrictions and obligations. Specifically, the ninth paragraph specified that the Department "shall post the property at all points of entry to inform the public that said property is a State wildlife area and that no trespassing or hunting is allowed." The Department failed to post signs on the property.

Landowner sued in January 2010 to quiet title, rescission and cancellation, and declaratory relief. Landowner sought to rescind the deed based on the Department's failure to post "no hunting" and "no trespassing" signs. Landowner also claimed the easement was void form onset because the Department could not accept the grant of full hunting rights due to inconsistency with the purposes of a conservation easement. After a series of demurrers and supplemental complaints, the trial court dismissed the suit.

On appeal, the Fourth District affirmed. The Court found that the Department's failure to post signs was not a condition subsequent of the easement, but merely a covenant, and failure to post signs did not extinguish the easement. The Court further found that, in no way, does the California Fish and Game Code establish a public policy that forbids the Department from accepting a conservation easement for the purpose of creating an area, comparable to a game refuge, in which no hunting is allowed.

The Third District Court of Appeal held that California Government Code section 65009 (c)(1)(E) barred a writ of mandate because the writ was not filed within 90 days of the date the Director of the City of Stockton's Community Development Department sent an approval letter to the real parties in interest. *Stockton Citizens for Sensible Planning v. City of Stockton, (2012) 210 Cal.App.4th 1484*.

Doucet and Associates, Inc. submitted a Site Plan, Pre-Expansion Elevations, Post Expansion Elevations and Conceptual Landscaping Plan to the Director of the City of Stockton's' Community Development Department for construction of a Wal-Mart Supercenter. On December 15, 2003, the Director responded with a letter to Doucet conditionally approving the plan. On July 22, 2004, Stockton Citizens for Sensible Planning filed a writ of mandate alleging (among other causes of action not subject to this appeal) that the approval had violated numerous planning and zoning laws.

At trial, Doucet argued California Government Code Section 65009 (c)(1)(E) barred the writ of mandate because the writ was not filed within 90 days of the approval. Subdivision (c)(1)(E) establishes a 90-day statute of limitations for challenges to a broad range of local zoning and planning decisions. Stockton Citizens argued the letter approval did not trigger the 90-day period because it was not a permit issued after a decision by a legislative body. The trial court disagreed and granted Doucet's motion to dismiss.

On appeal, the Third District agreed with the trial court. Specifically, the Court found that the language of (c)(1)(E) expressly states that any decision on the matters listed in California Government Code section 65901 is subject to the 90-day limitation period, and approval of

Doucet's plans was clearly in the scope of section 65901. Accordingly, the Court upheld the trial court's dismissal on the grounds that the action was not filed within the required 90-day statutory period.

The California Supreme Court held that the requirements of the California Coastal Act of 1976 and the Mello Act apply to a proposed conversion of California coastal mobile home property from tenant-occupied to resident-owned. *Pacific Palisades Bowl Mobile Estates LLC v. City Of Los Angeles, (2012) 2012 Cal. LEXIS 11380 (official reporter citation not available).*

Palisades Bowl Mobile Estates LLC applied to convert a 170-unit mobile home park from tenant occupancy to resident ownership. The City of Los Angeles denied its request because Palisades Bowl's application failed to include a coastal development permit application required by the California Coastal Act of 1976 or an approval required the Mello Act. In response, Palisades Bowl filed a petition for writ of mandate requesting the superior court to find that the California Government Code section 66427.5, which governs substantive and procedural matters for map approval of mobile home park conversions, prohibited the City's denial.

The trial court found in favor of Palisades Bowl and issued a preemptory writ of mandamus commanding the City to vacate its decision that Palisades Bowl's application was incomplete and ordering the City to evaluate the application. On appeal, the Second District Court of Appeal reversed and ruled that the policy considerations behind the Coastal Act and Mello Act are more extensive than section 66427.5 and thus 66427.5 did not displace such acts. Accordingly, it held that 66427.5 did not preclude the City from imposing conditions required by the Coastal Act and Mello Act on a party converting a mobile home park.

On appeal, the California Supreme Court acknowledged the troublesome interplay between the different statutory schemes, but upheld the decision of the Court of Appeal. The Court recognized that compliance with all three statutory schemes would slow down conversions, which was contrary to the express intent of section 665427.6, but found no support to rule that one statutory scheme preempted the other. Accordingly, the Court held that the City could require mobile home conversions to comply with the Coastal Act and Mello Act.

The Fourth District Court of Appeal held that the City of Chino could not deny an application to convert mobile home property from tenant-occupied to resident-owned based solely the results of a survey of the tenants. *Chino MHC, LP v. City of Chino, (2012) 110 Cal.App.4th 1049.*

A mobile home park owner applied to the City of Chino to convert its mobile home property from tenant-occupied to resident-owned. The owner conducted a survey of the tenants, though it did not consult the homeowners' association prior to conducting the survey. In its application, the owner delivered results of the survey, which showed that 58 percent of the respondents opposed the conversion. The City rejected the owner's application, finding that it was incomplete because the owner did not consult the homeowners' association in the method of conducting the survey and therefore, the owner did not properly conduct the survey. The owner filed for a writ of mandate to have the application declared complete, and in settlement, the City stipulated that the application was complete. In response, the tenants appealed to the Chino City

Council, which denied the application based on the results of the survey and lack of evidence that the owner properly conducted the survey.

After the City Council denied its application, the owner again filed a mandate proceeding seeking to have the application declared complete. The trial court found in favor of the owner, ruling that California Government Code section 66527.5 prohibited the City from denying the application based on the results of the survey. Additionally the trial court held that the stipulated judgment collaterally estopped the City from finding that the survey had not been properly conducted.

On appeal, the Fourth District Court of Appeal agreed with the trial court's result, but disagreed with the reasoning. The Court held that that the City was entitled to consider the results, but could not deny the application based on the survey results unless it showed the survey was a sham. In regard to the stipulated judgment, the Court held that even aside from collateral estoppel issue on which the trial court ruled, the Permit Streamlining Act precluded the City from denying the application once it had accepted the application as complete. Accordingly, the Court upheld the trial court's order that City accept the owner's application as complete.

Legislative Developments

No summaries this quarter.

Regulatory Updates

California Building Code. In October 2012, the California Building Standards Commission, on behalf of the Division of the State Architect, provided notice of its proposal to adopt, approve, codify and publish changes to building standards contained in Title 24, Part 2, of the California Code of Regulations, which relate to the 2013 California Building Code. Among other things, the proposed modifications are intended to benefit small and large businesses by eliminating forced violations of the federal 2010 ADA standards, thus minimizing the potential for disputes, claims and litigation. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 40-Z, p. 1474, and Vol. No. 43-Z, p. 1577.

In October 2012, the California Building Standards Commission, on behalf of the Department of Housing and Community Development, also provided notice of its proposal to adopt, approve, codify and publish changes to building standards contained in Title 24, Part 2, of the California Code of Regulations relating to housing accessibility. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 43-Z, p. 1570.

In October 2012, the California Building Standards Commission, on behalf of the Division of the State Architect, provided notice of its additional proposal to adopt, approve, codify and publish changes to building standards contained in Title 24, Part 1, of the California Code of Regulations relating to fees collected for the review of applications and revisions. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 43-Z, p. 1574.

Mobilehome and Special Occupancy Parks, and Manufactured Housing. In November 2012, the California Department of Housing and Community Development provided notice of a proposal to amend existing regulations and adopt new regulations governing mobilehome and

special occupancy parks, and manufactured housing. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 44-Z, p. 1606.

Juvenile Detention Facilities. In November 2012, the California Building Standards Commission, on behalf of the Board of State and Community Corrections, provided notice of its proposal to adopt, approve, codify and publish changes to the building standards contained in Title 24, Parts 1 and 2, of the California Code of Regulations relating to minimum standards for the design and construction of local juvenile detention facilities. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 45-Z, p. 1660.

PROPOSITION 65

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Documents for Review. In October 2012, the Office of Environmental Health Hazard Assessment announced the availability of the following document for public review, *Evidence on the Developmental and Reproductive Toxicity of Deltamethrin*. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 41-Z, p. 1503.

In December 2012, the Office of Environmental Health Hazard Assessment announced the availability of a revised draft technical support document for a proposed, updated Public Health Goal for perchlorate in drinking water. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 49-Z, p. 1775.

Chemicals Known to the State. In November 2012, the Office of Environmental Health Hazard Assessment published a list of the chemicals known to the State to cause cancer or reproductive toxicity. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 44-Z, p. 1610.

New, Additional Chemicals Known to the State. In November 2012, the Office of Environmental Health Hazard Assessment provided notice that – effective November 2, 2012 – *alpha-methylstyrene* and *1,3-dinitropyrene* were added to the list of chemicals known to the State to cause cancer. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 44-Z, p. 1629.

Requests for Information. In November 2012, the Office of Environmental Health Hazard Assessment requested relevant information on the carcinogenic hazards of *butyl benzyl phthalate*. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 47-Z, p. 1709.

Decisions Not to Proceed. In December 2012, the Office of Environmental Health Hazard Assessment provided notice of its decision to withdraw a proposal – previously announced in April 2012 – to adopt a no significant risk level and specific regulatory level having no observable effect for *polychlorinated biphenyls*. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 51-Z, p. 1825.

RESOURCE CONSERVATION

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates

Mineral Resource Sectors. In October 2012, the State Mining and Geology Board provided notice of a proposal to amend Section 3550.15 to Title 14 of the California Code of Regulations in order to provide a revised description of the locations of mineral resource areas designated to be of statewide significance, and areas where such designations will be terminated, within the Palm Springs Production-Consumption Region, San Bernardino County. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 40-Z, p. 1456.

In October 2012, the State Mining and Geology Board also provided notice of a proposal to amend Section 3550.5 to Title 14 of the California Code of Regulations in order to provide a revised description of the locations of mineral resource areas designated to be of statewide significance, and areas where such designations will be terminated, within the San Gabriel Valley Production-Consumption Region, Los Angeles County. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 40-Z, p. 1463.

In November 2012, the State Mining and Geology Board provided notice of a proposal to amend Section 3550.8 to Title 14 of the California Code of Regulations in order to provide a revised description of the locations of mineral resource areas designated to be of statewide significance, and areas where such designations will be terminated, within the San Bernardino Production-Consumption Region, San Bernardino and Riverside counties. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 45-Z, p. 1654.

Federal Groundfish. In October 2012, the California Fish and Game Commission provided notice of its proposal to amend various sections in Title 14 of the California Code of Regulations relating to recreational fishing regulations for federal groundfish and associated species. The amendments are intended to make the regulations consistent with federal rules for 2013 and 2014. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 42-Z, p. 1520.

Public Use of Lands within State Jurisdiction. In October 2012, the California Fish and Game Commission provided notice that the Office of Administrative Law – on September 28, 2012 – disapproved the Commission's regulatory action to consolidate and clarify existing regulations that govern the public use of lands that are under the jurisdiction of the Department of Fish and Game. The Commission's action also provided a statewide procedure and fee for the issuance of special use permits, and designated certain areas as ecological reserves and wildlife areas. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 42-Z, p. 1530.

Ocean Salmon Recreational Fishing. In December 2012, the California Fish and Game Commission provided notice of a proposal to amend Section 27.80(c) of Title 14 of the California Code of Regulations relative to ocean salmon recreational fishing for the April season *and* the May to November season. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 52-Z, pp. 1847, and 1850.

SOLID WASTE

Recent Court Rulings
No summaries this quarter.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

WATER QUALITY

Recent Court Rulings

The Third District Court of Appeal has held that the Clean Water Act governs indirect pollutant discharges to navigable waters. *Garland v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 557

In 2007, the Central Valley Regional Water Quality Control Board ("Board") issued an order and $250,000 fine against Albert Garland, finding that the approximately 641,000 gallons of "sediment-laden" stormwater flowing off of the construction site he was developing and into adjacent ephemeral drains violated the Clean Water Act. The Board determined that the ephemeral drains were waters of the United States subject to the Act because they were tributaries of the Feather River and Thermalito Afterbay. Garland petitioned for a writ of administrative mandate challenging the order. The trial court denied Garland's petition, concluding that the law and sufficient evidence supported the Board's decision, and Garland appealed.

Garland argued that in order for a watercourse to constitute a "water of the United States" subject to the Clean Water Act ("Act"), the watercourse must be a "relatively permanent, standing or continuously flowing body of water" connected to an interstate navigable water" or have a "significant nexus" to a navigable water, based on the *Rapanos v. United States* (2006) 547 U.S. 715 decision. He appealed the Board's finding that the ephemeral drainages into which he had discharged stormwater runoff were tributaries to downstream navigable waters and therefore constituted "waters of the United States."

Following an analysis of *Rapanos*, the Court held that whether the ephemeral drainage itself constituted "navigable waters" was irrelevant, because the Board's order was also based on an alternative finding that a pollutant discharge had occurred, even if the discharge did not *directly* enter waters of the United States. This determination was consistent with the holding in *Rapanos*, where the Supreme Court distinguished section 1342 of the Act as prohibiting the "addition of any pollutant to navigable waters," and noted that enforcement of that provision did not require a showing that the discharge occurred *directly* from the point source. The Third District noted that Garland had conceded the point by characterizing the issue in his own brief as: "whether ephemeral drainage swales, ditches, and culverts can be found to be 'waters of the United States' governed by the Clean Water Act, based on nothing more than a finding that the *drainages eventually connect the a navigable waterway* during high rainfall events." Additionally, the Court held that *Rapanos* did not foreclose the Act from applying to a downstream wash through man-made conveyances, basing its finding on examples used in the *Rapanos* opinion. The judgment of the Board and trial court was affirmed.

Legislative Developments
No updates this quarter.

Regulatory Updates
No updates this quarter.

WATER RESOURCES

Recent Court Rulings

The Sixth District has upheld a stipulated agreement to define water rights for the Santa Maria Valley Groundwater Basin, determining that the Basin did not have to be in overdraft to create an "actual controversy," that the agreement's provisions applied to non-stipulating parties, that public agencies had established prescriptive water rights by taking groundwater beyond "safe yield" limits for extended periods, and that objectors were entitled to quiet title in their own water rights. *City of Santa Maria v. Adam* (2012) 211 Cal.App.4th 266.

Following several years of intermittent drought and groundwater overdraft, the Santa Maria Valley Water Conservation District ("District") commenced this lawsuit in 1997 to adjudicate water rights in the Santa Maria Valley Groundwater Basin ("Basin"). After four phases of trial, the District, local cities and public water companies, and most of the owners of land overlying the Basin agreed to a stipulation allocating the rights for various groundwater components

(native water, return flows of imported water, and salvaged water). The stipulation acknowledged the paramount overlying rights for stipulating landowners, and gave public water producers no prescriptive rights to groundwater as against stipulating landowners and only appropriative rights to surplus native groundwater. The stipulation also required monitoring and management of groundwater resources by users, including landowners who were not parties to the agreement. The final phase of trial only involved non-stipulating overlying landowners, and the court found that the public water companies had established prescriptive rights to native groundwater by pumping in excess of the Basin's "safe yield" for five continuous years in the past.

Two non-stipulating parties, both owners of land overlying the Basin, filed separate appeals from the judgment on four main grounds, claiming that: (1) because the Basin is not currently in overdraft, the court had no power to impose a "physical solution"; (2) there was insufficient evidence for the trial court's award of prescriptive rights to public water producers, and that the court failed to quiet title in appellants' overlying rights due to lack of historic pumping evidence; (3) the public water companies were not entitled to a priority credit in return flows of imported water or salvaged stormwater flows ("developed water"); and (4) four postjudgment rulings approving groundwater management plans were void because the matter had been stayed on appeal.

The Sixth District found that there was no requirement that the Basin be in overdraft for the court to impose a "physical solution" --a framework to monitor the groundwater supply and define user responsibilities in the event that a water shortage is detected. Furthermore, the court found that the monitoring and management requirement imposed on all landowners (including non-stipulating parties) was binding on appellants, particularly where the interests of the decisionmaking parties were aligned with appellants' interests. On the second issue, the Court found that the water companies had met the adversity requirement of prescriptive rights through pumping that exceeded safe yield, and that appellants had received constructive notice of the "open and notorious" use "under claim of right" based on the public concern about groundwater depletion during long-term, severe water shortages in the region. The fact that pumping did not exceed safe yield in surplus years did not constitute "disuse" of the prescriptive right. The court did, however, agree with appellants that they were entitled to quiet title of their overlying rights, despite the lack of proof of prior quantities pumped from the Basin. With respect to the third issue, the Court found that the priority of appellants' overlying right did not extend to water made available by the efforts of another, in this case the imported water recharge and salvage of stormwater flows, and upheld the trial court's findings based on substantial evidence in the record. The Court did note that parties were not entitled to a priority right in an amount of water greater than that actually salvaged, and the judgment was modified to reflect this limitation. Finally, on the fourth issue of postjudgment rulings, the Court held that none of the possible outcomes of the appeal had any potential effect on those postjudgment orders, and therefore the rulings stood. The overall judgment was reversed with directions to modify the judgment on remand.

The Fourth District has upheld the Regional Water Quality Control Board's approval of the National Pollutant Discharge Elimination System (NPDES) permit for a desalination

facility in Carlsbad. *Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region* (2012) 211 Cal.App.4th 557.

This case arose from a challenge to a Regional Water Quality Control Board's order approving an NPDES permit for a desalination facility designed to produce 50 million gallons of desalinated water through an intake of 304 million gallons of seawater per day. In order to avoid harm to marine life, the facility would be constructed next to the Encina Power Station, utilizing the power plant's cooling water discharge as the intake needed to operate the desalination facility and avoid additional seawater intake. In reviewing the NPDES permit application, the Board required a "Minimization Plan" be prepared to reduce impacts to marine life in compliance with Water Code section 13142.5(b). The Minimization Plan was designed to cover operations when the power station's discharge did not provide sufficient water to operate the desalination plant. After reviewing and amending the Minimization Plan, the Board approved the NPDES permit with a requirement that the desalination plant would need to reapply for the permit should it ever have to operate in "stand alone mode," *i.e.* if the Encina Power Station was permanently shut down.

Surfrider challenged issuance of the NPDES, claiming that the Board failed to comply with the requirements of Water Code section 13142.5(b), which provides that "for each new or expanded coastal powerplant or other industrial installation using seawater for cooling, heating, or industrial processing, the best available site design, technology, and mitigation measures feasible shall be used to minimize the intake and mortality of all forms of marine life." Specifically, Surfrider claimed that the Board improperly considered "after-the-fact" restoration measures designed to enhance coastal wetland habitat to offset the mortality resulting from desalination operations. Surfrider argued that these offsetting measures were inconsistent with the statute's requirement that intake and mortality be minimized.

The Fourth District upheld the trial court's finding that the Minimization Plan did not allow for "after-the-fact" mitigation measures *in lieu* of other measures, and cited substantial evidence in the record mandating siting, design, and technological measures designed to minimize intake and mortality as required by the Water Code. The Court further held that these measures were not "illusory," finding that the location of the plant next to the Power Station provided "real and substantive" benefits that would not occur if the facility were located at a different site. The Court also disagreed with Surfrider's contention that the wetland restoration measures were not permitted under Water Code section 13142.5(b) because they did not serve to minimize intake *and* mortality, but rather only addressed mortality. Citing statutory interpretation doctrine, the Court read the statute to require mitigation that *collectively* minimizes intake and mortality, but not that each and every measure is required to address both. The Court also disagreed with Surfrider's assertion that mitigation could not include compensatory measures, finding that "restoration of wetlands falls within the definition of mitigation" and referencing parallel concepts in CEQA. The Court found that the Board had properly considered the applicant's project objectives to assess whether mitigation was feasible, pointing to substantial evidence in the record of extensive and independent analysis supporting the Board's determination. Surfrider also failed to convince the Court that a quantitative analysis of impacts was required, citing to no such authority; additionally, the Court dismissed Surfrider's contention that the Board was required to analyze the facility in stand-alone mode, pointing to the Board's order that expressly

required a new NPDES permit should the Encina Power Station be permanently shut down. The judgment was affirmed.

Legislative Developments

No updates this quarter.

Regulatory Updates

Delta Stewardship Council. In November 2012, the Delta Stewardship Council provided notice of its proposal to adopt and implement the *Draft Delta Plan*, which includes a suite of regulatory policies designed to ensure achievement of two coequal goals: (1) providing a more reliable water supply for California, and (2) protecting, restoring, and enhancing the Delta ecosystem. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 48, p. 1739.

NOTE: In December 2012, the Office of Administrative Law provided notice of a proposal to undertake a rulemaking action that would specify those factors the Office will consider in determining whether "good cause" has been demonstrated for an earlier effective date than the one specified in Government Code section 11343.4(a) for a regulation or order of repeal. This action has been triggered by Senate Bill No. 1099 (Wright), which provides that – effective January 1, 2013 – regulations or orders of repeal required to be filed with the Secretary of State become effective on a quarterly basis. For more information, see Cal. Reg. Notice Register 2012, Vol. No. 52-Z, p. 1835.

Regulatory Flexibility Act Section 610 Reviews. See "Air Quality," above.

Logging Roads. In December 2012, the U.S. Environmental Protection Agency provided notice of its final rule revising the Phase I stormwater regulations to clarify that stormwater discharges from logging roads do not constitute stormwater discharges associated with industrial activity and that a National Pollutant Discharge Elimination System ("NPDES") permit is not required for these discharges. For more information, see 77 Fed.Reg. 72970.

Offshore Oil and Gas Exploration, Development and Production Operations. In December 2012, the U.S. Environmental Protection Agency, Region 9, provided notice of its proposal to reissue its general NPDES permit (No. CAG280000) for discharges from offshore oil and gas exploration, development and production facilities located in federal waters off the coast of southern California. For more information, see 77 Fed.Reg. 75429.

Federal Summaries

Supreme Court

No summaries or updates this quarter.

Ninth Circuit Court of Appeals

Air Quality

Recent Court Rulings

The Ninth Circuit Court of Appeals has upheld a ruling of the U.S. EPA's Environmental Appeals Board finding that the requirement to use best available control technology ("BACT") does not apply to support vessels unattached to an exploratory drillship, and that a 500-meter exemption from ambient air quality standards is lawful. *Resisting Environmental Destruction on Indigenous Lands, et al. v. U.S. Environmental Protection Agency* (December 26, 2012) --- F.3d ----, 2012 WL 6685435 (C.A.9).

In the case, the U.S. EPA's Environmental Appeals Board ("EAB") upheld EPA's grant of two air permits authorizing exploratory oil drilling operations in the Arctic Ocean by a drillship and its associated fleet of support vessels. Since 1990, the EPA has been responsible for regulating air pollution from offshore sources on the Outer Continental Shelf ("OCS") under the Clean Air Act. The permits required the oil company (Shell) to comply with BACT requirements for the drillship and the supply vessel whenever it is tied to the drillship. However, the permits did not include BACT requirements for the remaining vessels in the associated fleet. The permits also allowed the drillship an area with a 500-meter radius, measured from the center of the drillship, that is exempt from "ambient air" standards.

Environmental groups petitioned the Ninth Circuit for review of the EAB orders upholding the permits. The petition challenged: (1) the determination that support vessels, unlike the drillship itself, do not require BACT to control emissions; and (2) the exemption of the area within a 500-meter radius of the drillship from ambient air quality standards.

Regarding application of BACT to the support vessels, the Clean Air Act is ambiguous with respect to BACT's application to vessels not attached to an OCS source; that is, vessels not attached to the subsoil and seabed of the OCS. Because the Act is ambiguous, the Court's review was to assess whether the EPA's construction of the statute is "permissible" or "reasonable." In this regard, EPA provided its interpretation of the relevant statute and regulations, and explained that emissions from the associated fleet had been accounted for or attributed to the OCS source (the drillship and supply vessel). As such, the Court deferred to EPA's "reasonable construction" that BACT does not apply to mobile support vessels unattached to the drillship and affirmed the EAB ruling.

As to the 500-meter exemption from ambient air quality standards, the Clean Air Act does not define "ambient air," although EPA regulations define the term as "that portion of the atmosphere, external to buildings, to which the general public has access." Relatedly, EPA's "longstanding interpretation" regarding exemptions from the ambient air quality standards is described in a 1980 letter from a former EPA Administrator, stating that an "exemption from ambient air is available only for the atmosphere over land owned or controlled by the source and to which public access is precluded by a fence or other

physical barriers." Noting that an agency's interpretation of its own regulations is "controlling unless 'plainly erroneous or inconsistent with the regulation,'" the Court upheld the exemption, explaining that the essence of the EPA's regulatory definition links ambient air to public access, and because the EPA conditioned Shell's permit and ambient air exemption on the establishment of an effective safety zone that precludes public access, the grant is consistent with the regulation. As such, the Court affirmed the EAB ruling on this issue.

Attorney's Fees

Recent Court Rulings

The Ninth Circuit Court of Appeals has ruled that the District Court did not abuse its discretion in denying a party's motion for attorneys' fees under the Equal Access to Justice Act ("EAJA"). *Western Watersheds Project v. Ellis* (October 9, 2012) 697 F.3d 1133.

In the case, environmental plaintiffs successfully challenged the renewal of grazing permits by the Bureau of Land Management ("BLM"). Following entry into a settlement agreement resolving attorneys' fees and costs up through that stage of the litigation, a massive wildfire swept through the subject area. Thereafter, BLM began issuing authorizations for grazing on the unburned areas, and plaintiffs sought an injunction against grazing in these areas. The district court ruled that the government had to reduce the grazing in the unburned areas to provide needed wildlife habitat. However, the court observed that the government would act in good faith to reduce grazing and, therefore, denied as unnecessary plaintiff's request for a formal injunction against all grazing pending reexamination of the grazing authorizations. On motion for attorneys' fees under the EAJA, the district court denied the motion and plaintiffs appealed.

Under the EAJA, the court is required to award fees and costs to the "prevailing party other than the United States…unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." In determining whether the position of the U.S. was substantially justified, a court must look "both to the government's position during litigation and to 'the action or failure to act by the agency upon which the civil action is based.'" A position is substantially justified if it has a "reasonable basis in both law and fact." The government has the burden to show that its position was substantially justified.

On appeal, plaintiffs argued that the district court did not evaluate the reasonableness of BLM's litigation position in defending the grading authorizations such that the government's position was not substantially justified. The Ninth Circuit disagreed, explaining that while BLM had made the same error in legal interpretation post-fire as it did in the pre-fire litigation, BLM was not "blatantly disregarding the court's prior decision." Rather, BLM was "scrambling to salvage something from a disaster." On that basis, the Court ruled that there was no abuse of discretion in the district court's denying fees.

Endangered Species

Recent Court Rulings

The Ninth Circuit has held that a "no jeopardy" determination in a Biological Opinion may not rely on unenforceable "background" conservation actions in place of project mitigation elements enforceable under the Endangered Species Act. *Center for Biological Diversity v. Bureau of Land Management*, 698 F.3d 1101 (9th Cir. 2012).

Petitioners bought suit under the Endangered Species Act (ESA) challenging the decision of the Bureau of Land Management (BLM) to authorize a natural gas pipeline. The pipeline would extend 678 miles from Wyoming to Oregon, crossing federal land and 209 rivers and streams containing threatened and endangered fish species. The Biological Opinion concluded the project would not jeopardize those species or their habitat. The project proponent had proposed voluntary conservation actions to mitigate the project's impacts, but did not include the actions as project elements.

Four issues were presented: (1) whether the Biological Opinion's "no jeopardy" determination was arbitrary and capricious due to its reliance on proposed, voluntary conservation actions not enforceable under the ESA; (2) whether the Biological Opinion adequately considered the potential impacts of withdrawing groundwater from wells along the pipeline; (3) whether the Incidental Take Statement used the wrong method to calculate the number of fish likely to be killed; and (4) whether the Incidental Take Statement was flawed in placing no limit on the number of eggs and fry of threatened trout to be taken.

The court held that BLM had violated its duties under the ESA. The Biological Opinion was arbitrary and capricious because the Opinion's "no jeopardy" determination was based on conservation actions classified as "cumulative effects" rather than "interrelated actions." Actions classified under the cumulative effects designation are not enforceable under the ESA, thus a project proponent's failure to complete the proposed actions is not subject to the Act's penalty or citizen suit provisions. Either the conservation measures should have been classified as enforceable, "interrelated" actions, or else the measures should not have been considered in the Biological Opinion's "no jeopardy" determination.

The court also held that the Opinion was arbitrary and capricious in failing to consider the potential impacts of withdrawing groundwater for the project, where groundwater depletion would have plausible effects on surface water levels.

The Biological Opinion properly relied on an earlier biological opinion in calculating incidental fish take levels, and its failure to numerically limit the take of fish eggs and fry was not arbitrary and capricious because the impracticability of doing so was "self evident."

The Ninth Circuit Court of Appeals has ruled that a Biological Opinion prepared in connection with a natural gas pipeline project was arbitrary and capricious and the related record of decision must be set aside. *Center for Biological Diversity v. U.S. Bureau of Land Management, et al.* (October 22, 2012) 698 F.3d 1101.

In the case, the Bureau of Land Management ("BLM") authorized a project to construct, operate and maintain a natural gas pipeline extending a distance of 678 miles, from Wyoming to Oregon. The right-of-way for the pipeline encompasses approximately 2,300 acres of federal lands and crosses 209 rivers and streams that support federally endangered and threatened fish species. The Biological Opinion prepared for the project by the U.S. Fish and Wildlife Service ("FWS") under the Endangered Species Act ("ESA") determined the project "would adversely affect" nine federally endangered and threatened species and five designated critical habitats. However, the FWS concluded that the project "would not jeopardize these species or adversely modify their critical habitat." Petitioners challenged the Biological Opinion and its accompanying Incidental Take Statement on multiple grounds.

The Ninth Circuit ruled that the Biological Opinion's "no jeopardy" and "no adverse modification" determinations were arbitrary and capricious in that they relied on protective measures set forth in a conservation action plan ("CAP") not enforceable under the ESA. The CAP measures should have been treated as part of the proposed project, reviewed as such in the Biological Opinion, and, if accepted as

adequate, enforceable under the ESA if not carried out, rather than categorizing them as background "cumulative effects" and taking them into account in the jeopardy determination.

The Court also ruled that the Biological Opinion did not take into account the potential impacts of withdrawing millions of gallons of groundwater from wells along the pipeline. For example, the withdrawal of over 40 million gallons of groundwater from a single source could have affected listed fish species by affecting surface water levels and, therefore, the withdrawal constituted a "relevant factor" under the ESA's consultation provisions in determining whether the project would result in jeopardy to listed species or adverse modification of those species critical habitat. Accordingly, the Court ruled that the FWS acted unreasonably when it did not discuss the potential impacts of groundwater withdrawals on listed species occupying the project's action areas, or, alternatively, explain why the withdrawals likely would not have such impacts.

The Court also rejected certain arguments, ruling that the FWS did not act arbitrarily and capriciously under the ESA consultation provisions in relying on an older, accurate biological opinion to estimate incidental fish take levels associated with a certain construction method used to cross bodies of water during project construction. Additionally, the Court ruled that the Incidental Take Statement, which did not place any limit on the number of "eggs and fry" of threatened Lahontan cut-throat trout to be taken during construction was not arbitrary and capricious since the impracticability of placing numerical limits was self-evident, and the use of "habitat characteristics' as a proxy for numerical limits was permissible.

Energy

Recent Court Rulings

The Ninth Circuit has held that the Bonneville Power Authority's discretion to enter contracts using "sound business principles" allows the Authority to charge below-market rates to "direct service" industrial customers. *Alcoa, Inc. v. Bonneville Power Authority*, 698 F.3d 774 (9th Cir. 2012).

Petitioners, "preferred" power customers of the Bonneville Power Authority (BPA), brought suit challenging a BPA contract with Alcoa under which BPA could sell Alcoa power at a below-market rate for "direct service" industrial customers. Petitioners claimed that BPA failed to maximize profits as required by statute and that the contract would violate their "preferred" status by raising their energy rates. This would conflict with BPA's mandate to provide power at the lowest possible rates. Alcoa, as intervenor, challenged BPA's application of an "equivalent benefits standard" to its contract, which would require BPA to ensure that it receive an equivalent or higher benefit in exchange for the rate provided to Alcoa.

The issues presented were (1) whether BPA violated its statutory responsibilities in agreeing to sell power at the "direct service" rate to Alcoa pursuant to the terms of the contract; (2) whether BPA erred in adopting the equivalent benefits standard; and (3) whether BPA's determination that the Alcoa contract fell under the "no new resource" NEPA categorical exclusion, 10 C.F.R. Pt. 1021, Subpt. D, App. B4.1, was arbitrary and capricious.

Two of three judges held that the BPA, a federal agency, had acted within its discretion with regards to all of petitioners' and Alcoa's claims. Before reaching the merits of the claims concerning the "initial" contract period, the court held that even though it could not offer relief as to parts of the contract that had already been performed, the controversy was not moot because it met the "capable of repetition while evading review" exception to the mootness doctrine. On the merits, the court held that BPA had acted within its authority under 16 U.S.C. section 838g to use sound business principles and was not statutorily

required to maximize profits; had not erred in calculating its expected profit under the contract; had not abused its discretion by including a waiver of claims provision in the contract; and had not acted arbitrarily and capriciously by applying the equivalent benefits standard, as the contract did not require BPA to sell power to Alcoa.

The court held that, with regard to the second contract period—which had not yet begun—petitioners lacked standing, since the commencement of the second period was not guaranteed and was therefore too speculative. The court also held that BPA had acted within its discretion in categorically excluding the contract from an EIS obligation under NEPA.

In dissent, Judge Bea countered that BPA had not exercised sound business principles because it had violated its statutory obligation to recoup the costs of providing power to customers. He also contended that petitioners had standing as to their challenges to the second contractual period, since BPA and Alcoa were certain to enter into a second period and the Administrative Procedure Act's remedy for final agency actions would be insufficient to repair petitioners' losses.

Land Use

Recent Court Rulings

The United States Court of Appeals for the Ninth Circuit held that prohibition of agnostics and homosexuals from membership at public facilities on properties leased by the City of San Diego to the Desert Pacific Council, a nonprofit charter of Boys Scouts of America, does not violate the California or federal Constitutions. *Barnes-Wallace v. City of San Diego,* (2012) 2012 U.S. App. Lexis 26016 (no official reporter citation available).

Desert Pacific Council, a nonprofit corporation chartered by the Boys Scouts of America, rents the Camp Balboa property from the City of San Diego for one dollar per year. In return, the Council operates Camp Balboa and the Youth Aquatic Center. Both the camp and center are public facilities. Based on Boy Scout policy, however, the Council prohibits atheists, agnostics and homosexuals from membership or volunteering and requires members affirm belief in God. The plaintiff families, which include either lesbians or agnostics, claimed they or their sons would not, and possibly could not, use the facilities because of the discriminatory policy.

The plaintiff families sued in federal district court claiming the City's lease of public land to an organization that excludes persons because of their religious or sexual orientations violates various state and federal constitutional provisions and state contract law. The district court held that the plaintiff families had standing for their constitutional claims as municipal taxpayers and found that the leases violated the federal Establishment Clause and California No Aid and No Preference Clauses. The district court found that the leases were in violation because they were exclusively negotiated with the Council and Boy Scouts and secular organizations were not given the full opportunity to negotiate leases for those properties. In an amended final judgment, the district court enjoined the leases. The City settled with the plaintiff families and the Council and Boy Scouts appealed.

On appeal, the Ninth Circuit reversed. The Court found no violations of the No Aid and No Preference Clauses of the California Constitution because the leases constitute, at most, indirect or incidental aid by the City for a religious purpose. The Court also reversed the district court's holding with regard to the federal Establishment Clause finding that the leasing practices and actual administration of the facilities did not include religious indoctrination and did not define aid to recipients by reference to religion. The Court affirmed the dismissal of state and federal Equal Protection claims, San Diego

Human Rights Ordinance claim and breach of contract claim for lack of standing. The Court reasoned that, because the plaintiff families never applied for membership or to volunteer at the facilities, they could not show they received different treatment based on religious or sexual orientation.