State Bar of California

ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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

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

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

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Legislative Developments
AB 1180 (Bradford) California Global Warming Solutions Act of 2006: compliance offsets
The bill would enact requirements for compliance offset protocols if the State Air Resources Board adopted a cap-and-trade program that would allow the use of offsets for compliance under the cap-and-trade program. This would occur under the State Air Resource Board's authority designated by the California Global Warming Solutions Act of 2006, which charged the agency with enacting statewide GHG emissions limits equivalent to that of 1990 by 2020. The Act also authorizes the state board to adopt market-based compliance mechanisms such as the compliance offset protocol. The bill would require that if the board adopted compliance offset protocols, they would need to meet all of the following requirements: (a) the protocol targets reductions from a high global warming potential greenhouse gas; (b) has been approved by a third-party registry as a voluntary protocol and the state board determined has it could be converted into a protocol for the purpose of compliance with the cap-and-trade program; (c) requires measurements and monitoring of GHG emission reductions continuously and in real time; (d) is capable of accurately, reliably, and permanently providing at least 1,000,000 metric tons of carbon dioxide equivalent GHG emission reductions each year; and (e) that the protocol meets the requirements of this division, including California Health and Safety Code sections 38562 and 35570.

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

impacts that would be analyzed in such decisions. If passed, the bill would immediately take effect.

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

Regulatory Updates

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

Particulate Matter ("PM")

In June 2012, the USEPA provided notice of a proposal to modify the primary and secondary NAAQS for $PM_{2.5}$ and PM_{10} in a number of respects, including: revising the annual $PM_{2.5}$ standard, but retaining the 24-hour standard; retaining the 24-hour PM_{10} standard; revising the suite of secondary standards by adding a distinct $PM_{2.5}$ standard to address visibility impairment; modifying the data handling conventions and ambient air monitoring, reporting and network design requirements; and, revising the prevention of significant deterioration permitting program so that it conforms to the proposed NAAQS. For more information, see 77 Fed.Reg. 38890.

Nitrogen Dioxide ("NO_2")

In April 2012, the USEPA published a final rule by which it retained the current NO_2 secondary standards to address the direct effects of exposure to gaseous NO_2 on vegetation, and declined to add new standards to address effects associated with the deposition of NO_2 on sensitive aquatic and terrestrial ecosystems. The USEPA also described, in this notice, a field pilot program being developed to enhance its understanding of the degree of protectiveness that would likely be

afforded by a multi-pollutant standard to address deposition-related acidification of sensitive aquatic systems. For more information, see 77 Fed.Reg. 20218.

Ozone

In May 2012, the USEPA published a final rule revising the regulations implementing the 1997, 8-hour ozone NAAQS in order to address certain limited portions of the regulations that were vacated by the U.S. Court of Appeals for the District of Columbia. The revised regulations: (1) assign Clean Air Act classifications and associated requirements to selected ozone nonattainment areas; (2) address three vacated provisions that provided exemptions from the anti-backsliding requirements; (3) reinstate the 1-hour contingency measures that must be retained until attainment; and, (4) delete an obsolete provision that stayed the USEPA's authority to revoke the 1-hour ozone standard. For more information, see 77 Fed.Reg. 28424.

In May 2012, the USEPA provided notice of its final initial air quality designations for most areas in the United States for purposes of the 2008 primary and secondary NAAQS for ozone. As part of the proposal, six nonattainment areas in California are being reclassified to a higher classification. For more information, see 77 Fed.Reg. 30088.

In May 2012, the USEPA relatedly provided notice of its final rules establishing the air quality thresholds that define the classifications assigned to all nonattainment areas for the 2008 ozone NAAQS. As part of the rulemaking effort, the USEPA also granted reclassification for selected nonattainment areas that voluntarily reclassified under the 1997 ozone NAAQS; established December 31 of each relevant calendar year as the attainment date for all nonattainment areas; and, provided for revocation of the 1997 ozone NAAQS for transportation conformity purposes one year after the effective date of designations for the 2008 ozone NAAQS. For more information, see 77 Fed.Reg. 30160.

Sulfur Dioxide ("SO_2")

In April 2012, the USEPA published a final rule by which it retained the current SO_2 secondary standards to address the direct effects of exposure to gaseous SO_2 on vegetation, and declined to add new standards to address effects associated with the deposition of SO_2 on sensitive aquatic and terrestrial ecosystems. The USEPA also described, in this notice, a field pilot program being developed to enhance its understanding of the degree of protectiveness that would likely be afforded by a multi-pollutant standard to address deposition-related acidification of sensitive aquatic systems. For more information, see 77 Fed.Reg. 20218.

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

California Air Resources Board ("CARB")

In April 2012, the USEPA provided notice of its final action to approve a revision to California's SIP submitted by CARB that concerns two regulations that reduce emissions of diesel PM, NOx,

and other pollutants from in-use, heavy-duty, diesel-fueled trucks and buses, and drayage trucks. For more information, see 77 Fed.Reg. 20308.

In May 2012, the USEPA published notice of its decision to grant a request from the State of California to reclassify the Western Mojave Desert ozone nonattainment area from "Moderate" to "Severe-15" for purposes of the 1997, 8-hour ozone NAAQS. The USEPA made the same reclassification for the Indian country under the jurisdiction of the Twenty-Nine Palms Band of Mission Indians. For more information, see 77 Fed.Reg. 26950.

Department of Pesticide Regulation ("DPR")

In April 2012, DPR provided notice of its proposal to require prohibitions on the use of certain nonfumigants on certain crops in the San Joaquin Valley ozone nonattainment area during May 1 through October 31 if the volatile organic compounds ("VOC") emission limit is triggered. These prohibitions would apply to agricultural use products containing abamectin, chlorpyrifos, gibberellins, or oxyfluorfen. Also, when purchasing or using certain products containing these four active ingredients, the proposed action would require a written recommendation from a licensed pest control adviser and require pest control dealers to provide VOC information to the purchaser. For more information, see Cal. Reg. Notice Register 2012, No. 16-AZ, p. 506.

In April 2012, the USEPA relatedly published a proposal to approve revisions to the Pesticide Element of the California SIP that include regulations adopted by DPR to: (1) reduce VOC emissions from the application of agricultural field fumigants; (2) establish a contingency fumigant emissions limit and allocation system for Ventura; (3) require DPR to prepare and make available to the public an annual pesticide VOC emissions inventory report; and, (4) require recordkeeping and reporting of pesticide usage. The USEPA also published its response to a remand by the Ninth Circuit Court of Appeals of the USEPA's approval of a revision to the California SIP related to reducing VOC emissions from pesticides. For more information, see 77 Fed.Reg. 24441.

Antelope Valley Air Quality Management District ("AVAQMD")

In May 2012, the USEPA provided notice of its direct final action to approve revisions to the AVAQMD portion of the California SIP pertaining to local rules that define terms used in other air pollution regulation in these areas and approving a rule rescission that addresses Petroleum Coke Calcining Operations – Oxides of Sulfur. For more information, see 77 Fed.Reg. 26448, 26475.

Eastern Kern Air Pollution Control District ("EKAPCD")

In May 2012, the USEPA provided notice of its direct final action to approve revisions to the EKAPCD portion of the California SIP pertaining to local rules that define terms used in other air pollution regulation in these areas and approving a rule rescission that addresses Petroleum Coke Calcining Operations – Oxides of Sulfur. For more information, see 77 Fed.Reg. 26448, 26475.

Imperial County Air Pollution Control District ("ICAPCD")

In April 2012, the USEPA published a proposal to approve revisions to the ICAPCD portion of the California SIP concerning NOx emissions from certain boilers, process heaters and steam generators. For more information, see 77 Fed.Reg. 25109.

Northern Sierra Air Quality Management District ("NSAQMD")

In April 2012, the USEPA published notice of its direct final action to approve revisions to the NSAQMD portion of the California SIP concerning negative declarations for VOC source categories. For more information, see 77 Fed.Reg. 23130 and 23192.

Sacramento Metropolitan Air Quality Management District ("SMAQMD")

In April 2012, the USEPA published notice of its direct final action to approve revisions to the SMAQMD portion of the California SIP concerning negative declarations for VOC source categories. For more information, see 77 Fed.Reg. 23130 and 23192.

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

In April 2012, the USEPA published a proposal to approve revisions to the SJVUPACD portion of the California SIP concerning NOx emissions from solid fuel-fired boilers, steam generators, and process heaters. The USEPA also published a related interim final determination to stay the imposition of offset sanctions and to defer the imposition of highway sanctions based on a proposed approval of these revisions. For more information, see 77 Fed.Reg. 24857 and 24883.

In April 2012, the USEPA published a proposal to approve revisions to the SJVUPACD portion of the California SIP concerning VOC emissions from wine storage. For more information, see 77 Fed.Reg. 25384.

In June 2012, the USEPA provided notice of: (1) a proposal to approve revisions to the SJVUAPCD portion of the California SIP pertaining to the incorporation of District Rule 2410, Prevention of Significant Deterioration (77 Fed.Reg. 32493); (2) a proposal to approve revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from the manufacture of polystyrene, polyethylene, and polypropylene products (77 Fed.Reg. 35327); (3) a proposal to approve revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from crude oil production sumps and refinery wastewater separators (77 Fed.Reg. 35329); and, (4) a proposal to approve revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from chipping and grinding activities, and composting operations (77 Fed.Reg. 37359).

Santa Barbara County Air Pollution Control District ("SBCAPCD")

In May 2012, the USEPA provided notice of its direct final action to approve revisions to the SBCAPCD portion of the California SIP pertaining to local rules that define terms used in other air pollution regulation in these areas and approving a rule rescission that addresses Petroleum

Coke Calcining Operations – Oxides of Sulfur. For more information, see 77 Fed.Reg. 26448, 26475.

South Coast Air Quality Management District ("SCAQMD")

In May 2012, the USEPA provided notice of its direct final action to approve revisions to the SCAQMD portion of the California SIP concerning the incorporation of Rule 1315 – Federal New Source Review Tracking System. For more information, see 77 Fed.Reg. 31200.

In June 2012, the USEPA provided notice of: (1) its direct final action to approve revisions to the SCAQMD portion of the California SIP concerning PM emissions from cement manufacturing facilities (77 Fed.Reg. 32398, 32483); and, (2) a proposal to approve revisions to the SCAQMD portion of the California SIP concerning VOC emissions from chipping and grinding activities, and composting operations (77 Fed.Reg. 37359) .

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

In April 2012, the USEPA published notice of its direct final action to approve revisions to the YSAQMD portion of the California SIP concerning PM emissions from any source that emits visible air contaminants. For more information, see 77 Fed.Reg. 23133 and 23193.

Nonroad Engine Pollution Control Standards. In April 2012, the USEPA provided notice of its decision to grant CARB's request for authorization to implement emission standards, and certification and test procedures, for large spark-ignition nonroad engines, and in-use fleet average emission requirements for large- and medium-sized fleets. These requirements will be applicable to fleets comprised of four or more pieces of equipment powered by large spark-ignition engines. For more information, see 77 Fed.Reg. 20388.

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

1) In April 2012, notice of its adoption of final NESHAPs for Polyvinyl Chloride and Copolymers Production (see 77 Fed.Reg. 22848);
2) In June 2012, notice of its proposal to amend the NESHAPs for Stationary Reciprocating Internal Combustion Engines (see 77 Fed.Reg. 33812, 37361).

New Source Performance Standards. In April 2012, the USEPA published a proposal to amend the new source performance standards for hospital/medical/infectious waste incinerators that would eliminate an exemption during startup, shutdown, and malfunction periods from the requirement to comply with standards at all times. The USEPA also proposed to amend its federal plan to implement emission guidelines adopted on October 6, 2009 for this source category. For more information, see 77 Fed.Reg. 24272.

Protection of Stratospheric Ozone. In May 2012, and pursuant to the Montreal Protocol on Substances that Deplete the Ozone Layer, the USEPA published its final rule authorizing uses that qualify for the 2012 critical use exemption and the amount of methyl bromide that may be

produced, imported, or supplied from existing, pre-phaseout inventory for those uses in 2012. For more information, see 77 Fed.Reg. 29218.

Equivalent Methods. In June 2012, the USEPA provided notice of its designation of three new equivalent methods, one for measuring NO_2 and two for measuring Pb. For more information, see 77 Fed.Reg. 32632.

Heavy-Duty Highway Program. In June 2012, the USEPA provided notice of its direct final action of revisions to its heavy-duty diesel regulations that will enable emergency vehicles to perform mission-critical, life-saving work without risking that abnormal conditions of the emission control system could lead to decreased engine power, speed, or torque. For more information, see 77 Fed.Reg. 34130.

In June 2012, the USEPA also provided notice of a proposal to: (1) enable emergency vehicles to perform mission-critical, life-saving work without risking that abnormal conditions of the emission control system could lead to decreased engine power, speed, or torque; (2) revise the emission-related maintenance and scheduled maintenance intervals for all motor vehicles and nonroad compression-ignition engines; and, (3) provide short-term relief for nonroad engines from performance inducements related to the emission control system for general purpose nonroad vehicles while operating in temporary emergency service. For more information, see 77 Fed.Reg. 34149.

ATTORNEY FEES

Recent Court Rulings
No Summaries or updates this quarter.

Legislative Developments
No Summaries or updates this quarter.

Regulatory Updates
No Summaries or updates this quarter.

CEQA

Recent Court Rulings.
The Second District Court of Appeal holds an agency has discretion to measure the traffic and air quality impacts of a transit project measured against predicted future "baseline" conditions. *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2012) 205 Cal.App.4th 552

In February 2010, the Authority certified an EIR and approved construction of a 6.6-mile extension of a light-rail line between Culver City and Santa Monica. Neighbors sued. The trial court denied the petition. The neighbors appealed. The Court of Appeal affirmed.

The EIR equated "baseline" conditions with those population and traffic levels expected to exist in 2030. Generally, under CEQA, baseline conditions consist of the environmental setting at the time the analysis is performed, rather than hypothetical conditions at some point in the future. Thus, for a project involving retrofitting an oil refinery, the environmental baseline consisted of actual air pollutant emissions at the refinery, rather than theoretical emissions authorized by the refinery's permits. (*Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310.) Courts have interpreted this case to mean an agency never has discretion to use as its baseline those conditions that are predicted to exist sometime in the future, after the date after the agency certifies an EIR. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48.)

In this case, the Authority used a "future baseline" for purposes of analyzing traffic and air quality impacts. The baseline assumed population and traffic growth as of the year 2030, in addition to planned and funded improvements to the region's transportation system. The year 2030 was selected because it matched the agency's "planning horizon."

The neighbors argued this approach violated the rule established by *Sunnyvale* and *Madera Oversight*. The Court disagreed, stating: "As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public. An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. Many people who live in neighborhoods near the proposed light rail line may wish things would stay the same, but no one can stop change. The traffic and air quality conditions of 2009 will no longer exist (with or without the project) when the project is expected to come on line in 2015 or over the course of the 20-year planning horizon for the project. An analysis of the project's impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later. [¶] Consequently, we reject the notion that CEQA forbids, as a matter of law, use of projected conditions as a baseline. … To the extent *Sunnyvale* and [*Madera Oversight*] purport to eliminate a lead agency's discretion to adopt a baseline that uses projected future conditions under any circumstances, we disagree with those cases." (Emphasis in original.) The Court held that, when supported by substantial evidence, an agency has discretion to use a projected future baseline to assess the traffic and air quality impacts of a long-term transportation infrastructure project. Because substantial evidence supported the Authority's approach in this case, it was upheld.

Petitioner argued the EIR's analysis of cumulative impacts was deficient, citing the fact that the analysis did not include anticipated traffic from a large, mixed-use proposal located near a congested intersection. The Court rejected this argument because the EIR had relied on a summary of projected traffic based on regional plans; under such circumstances, the EIR was not required to also analyze potential traffic from a specific proposal.

Petitioner argued the mitigation measures adopted by the Authority were inadequate. The Court held the measures adopted to address parking impacts, noise and vibration, safety and construction-related street closures did not constitute impermissible deferral.

Petitioner argued the EIR's analysis of alternatives violated CEQA because it did not consider an alternative with grade-separated crossings, rather than at-grade crossings, on a particular segment of the route. Petitioner did not show, however, how such an alternative would have substantial environmental benefits as compared to the project.

Finally, Petitioner argued the project underwent major changes after the Authority released the Draft EIR, triggering the duty to recirculate the document. The new information consisted of grade separation at certain intersections, changes in signal phasing, parking, and noise mitigation. This information did not trigger the duty to recirculate because these changes generally served to lessen the project's impacts.

The First District Court of Appeal rejects a Subdivision Map Act and CEQA challenge to Napa County's adoption of a revised ordinance allowing sequential lot-line adjustments. *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162

In 2009, Napa County adopted an ordinance revising its procedures for approving lot-line adjustments. The revised ordinance allowed sequential lot-line adjustments. The Sierra Club filed a facial challenge to the ordinance. The trial court denied the petition. The Sierra Club appealed.

The county argued the lawsuit should be dismissed because the Sierra Club failed to serve a summons on the county within 90 days, as required by Government Code section 66499.37. The Court of Appeal disagreed. Before the expiration of the 90-day deadline, the county had signed a stipulation extending the deadline to prepare the record of proceedings. Signing the stipulation constituted a general appearance, and waived any irregularities in service of the summons.

On the merits, the Sierra Club argued the ordinance violated the Subdivision Map Act. Government Code section 66412, subdivision (d), as amended by the Legislature in 2001, provides an exemption from the Map Act for lot-line adjustments involving four or fewer existing, adjoining parcels. The county's ordinance authorized sequential lot-line adjustments meeting these requirements. The Court held that, because the express terms of the statute did not exclude sequential lot-line adjustments from the exemption, the county's ordinance was not facially inconsistent with State law.

The county characterized its approval of lot-line adjustments as ministerial, and therefore exempt from CEQA. The Court of Appeal agreed. The ordinance provided that lot-line adjustments were discretionary only where they required a variance, or were processed concurrently with some other discretionary permit (such as a use permit). Lot-line adjustments not requiring a variance or use permit were categorized as ministerial under the county's local procedures implementing CEQA.

The ordinance established 12 criteria used by the county to evaluate whether to approve an application for a lot-line adjustment. The Sierra Club argued these criteria required individualized, discretionary determinations. The Court disagreed, stating: "The fixed approval standards delineate objective criteria or measures which merely require the agency official to apply the local law – e.g., building and zoning code provisions – to the facts as presented in a given lot line adjustment application. [Citation.] The approval process is one of determining conformity with applicable ordinances and regulations and the official has no ability to exercise

discretion to mitigate environmental impacts. [Citations.]" Moreover, the revised ordinance merely codified the county's existing practice of allowing ministerial approvals of sequential lot line adjustments that comply with local codes.

The Third District Court of Appeal rules that a city did not have an adequate basis for withholding documents from the CEQA record based on the "deliberative process" privilege, but the petitioner relinquished its opportunity to show prejudice arising from the trial court's incorrect decision to exclude the documents because the petitioner did not seek writ review of the trial court's ruling. *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296

In 2002, a developer applied to the City of Lodi for a use permit to develop a shopping center on 35 acres of farmland. The anchor tenant was a Wal-Mart Supercenter. The city certified an EIR and approved the project. Two lawsuits followed. The trial court granted the writ on two issues: energy impacts and cumulative urban decay impacts. The city and the "Citizens" stipulated to dismiss the Citizens' lawsuit. In 2007, the city released a revised EIR analyzing energy and urban decay. The EIR also included revised analyses of project objectives, agricultural resources and alternatives. In 2009, the city certified the revised EIR and approved the project. The city filed a motion to discharge the writ. Citizens and Lodi First opposed the motion and also filed new lawsuits. In May 2010, the trial court granted the motion to discharge the writ, and denied the petitions. Citizens and Lodi First appealed.

Lodi First and Citizens argued the trial court erred by failing to augment the record with 22 e-mails and their attachments. The e-mails and attachments were between city staff and their consultants regarding the preparation of the revised EIR. The trial court held they were not part of the record based on the deliberative process privilege. The Court of Appeal ruled that this decision was error. In order to rely on the privilege, the burden was on the city to justify non-disclosure. That justification could not consist of a general assertion of the value of encouraging intra-agency candor. Rather, the city had to show the specific interest in non-disclosure in this case as to each document, and explain why that interest outweighed the countervailing public interest in disclosure.

Nevertheless, reversal was not required because Lodi First, as appellant, could not show prejudice. In this case, Lodi First argued such a showing was impossible because it had never seen the 22 e-mails that were erroneously withheld. The Court of Appeal disagreed, reasoning that Lodi First could have sought writ review of the trial court's decision improperly excluding documents based on the deliberative process privilege. The Court was unwilling to conditionally reverse and remand to provide Lodi First an opportunity to review the e-mails in hopes of establishing prejudice. Nor was the Court willing to exercise its discretion to treat the appeal as equivalent to an extraordinary writ. Lodi's predicament – the inability to show prejudice – was of its own making because it had not sought prompt writ review of the trial court's ruling.

Appellants argued the revised EIR did not analyze a reasonable range of alternatives. The EIR analyzed in detail three alternatives: no project, reduced development, and an alternative location. Although the no project and reduced development alternatives avoided or somewhat reduced the project's significant impacts, the city had sufficient basis to reject them because they would not be as effective at attaining the city's objectives.

Appellants argued the revised EIR was inadequate because it failed to disclose blighted conditions in east Lodi, as described in contemporaneous documents prepared by the city's redevelopment agency. The Court rejected this argument because, as the city's economic consultant pointed out in a memorandum, "blight" was not necessarily the same thing as "urban decay." The revised EIR had, in fact, discussed urban decay in east Lodi.

Appellants argued the city erred by failing to update its economic analysis. The original analysis was performed in 2007, and used data from 2006-2007 to reflect baseline conditions. The analysis stated the region was experiencing strong retail growth. The appellants' economist noted that, by December 2008, the economy had deteriorated and foreclosures were rampant. The city's economist submitted a memorandum explaining why updating the analysis was unwarranted. Because substantial evidence supported the city's decision not to update the analysis, the Court upheld the city's decision.

Appellants argued the revised EIR did not contain sufficient information regarding cumulative impacts to agriculture. The Court disagreed, noting that the EIR provided a list of other projects potentially contributing to the loss of agricultural land. The city required the applicant to acquire a conservation easement on an equivalent amount of land. During the administrative process, Citizens argued the city should have required an easement at a 2:1 ratio. The city's consultant noted that a 1:1 ratio was standard practice, and that a higher ratio was infeasible. Substantial evidence supported the city's decision to stick with the 1:1 ratio.

Finally, Lodi First argued the revised EIR failed to disclose cumulative water supply impacts due to its reliance on groundwater from an over-taxed aquifer. Lodi First pointed to planning documents prepared after the original 2004 EIR indicating that the city was in overdraft conditions. The problem with this argument was that the information was not new; planning documents dating to 1990 showed the city was experiencing groundwater overdraft. The findings and conditions of approval adopted in 2005 and 2009 regarding water supply were not identical, but they were generally consistent with one another. For these reasons, Lodi First's argument was barred by red judicata.

The Third District Court of Appeal rules that a dispute over whether agency approval of an agreement was a "project" under CEQA could not be resolved by demurrer because the trial court could not take judicial notice of the terms of the agreement. *Jamulians Against the Casino v. Iwasaki* (2012) 205 Cal.App.4th 632

Caltrans and the Jamul Indian Tribe reached agreement resolving Federal litigation concerning upgrades to an interchange on State Route 94. The upgrades were designed to facilitate access to a casino proposed by the Tribe. Jamulians Against the Casino sued, alleging Caltrans' approval of the agreement was approval of a "project" that needed to be preceded by CEQA review. Caltrans demurred. The Tribe filed a motion to quash service and to dismiss the complaint on the ground that the Tribe had sovereign immunity, and the case could not proceed in its absence. The trial court sustained Caltrans' demurrer and dismissed the lawsuit. The Jamulians appealed.

The Court of Appeal reversed because a demurrer tested only the sufficiency of the petition, and the trial court's decision turned not only on the allegations in the petition but also on the terms of the contract between Caltrans and the Tribe. Caltrans had requested judicial

notice of the agreement in demurring to the petition, and the Jamulians had not opposed the request. The Jamulians's petition did not attach the agreement, and quoted only isolated passages. Thus, the agreement as a whole was not properly before the trial court, and the trial court erred in considering the agreement's terms in ruling on the demurrer.

The Tribe filed an amicus brief arguing the Court should uphold the trial court's dismissal on the separate ground that the Tribe had sovereign immunity, could not be joined, and was an indispensable party under Code of Civil Procedure section 389, subdivision (b). In view of its decision to reverse the trial court's ruling sustaining Caltrans' demurrer, the Court of Appeal declined to reach the issue. Instead, the Court concluded the trial court ought to consider the factors set forth in section 389, subdivision (b), in the first instance to determine whether the Tribe was an indispensable party.

The Fourth District Court of Appeal follows *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 and rules that Public Resources Code section 21166 applies even where the original environmental document was a negative declaration, rather than a full EIR. *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650

In 2006, the Imperial Irrigation District adopted a negative declaration and approved the development and implementation of an "Equitable Distribution Plan," or "EDP." The EDP consisted of a plan to apportion water during years when anticipated demand for water was expected to exceed available supplies – that is, to allocate water during a "supply/demand imbalance." The District Board directed its general manager to prepare rules and regulations to implement the plan. Generally, cut-backs would fall more heavily on agricultural growers of field crops, on the theory that other water users (municipal, industrial, permanent crops) used a smaller proportion of District water and would suffer greater harm from reduced deliveries. In 2007, the District adopted regulations implementing the plan. In 2008, the District adopted revised EDP regulations. The District also approved an "environmental compliance report," which concluded that the revised regulations did not require supplemental environmental review. A coalition of agricultural water users sued. The trial court denied the coalition's CEQA claims. The coalition dismissed without prejudice its remaining, non-CEQA claims and appealed.

First, the Court of Appeal considered whether it had appellate jurisdiction. As noted above, the coalition's lawsuit included non-CEQA claims. The coalition dismissed those claims without prejudice after the trial court ruled on its CEQA claims. The Court noted case law holding that judgments involving stipulated dismissals designed to create appellate jurisdiction are not appealable, where the stipulation facilitates potential future litigation of the dismissed claims by, for example, waiving statute of limitations defenses. In this case, however, there was no such stipulation; rather, the coalition had unilaterally dismissed its non-CEQA claims so it could pursue the appeal. The coalition could therefore appeal the final judgment, notwithstanding the hypothetical possibility that it could re-file the dismissed claims.

The coalition argued that Public Resources Code section 21166 – the statute governing supplemental environmental review – did not apply where, as here, the previous environmental analysis consisted of a negative declaration. The coalition acknowledged that CEQA Guidelines section 15162 applies to negative declarations, and that *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 had upheld this guideline as a reasonable interpretation of section 21166. The coalition argued that *Benton* was wrongly decided. The Court disagreed. Although the text

of section 21166 refers only to EIRs, CEQA Guidelines section 15162 – which extends the applicability of section 21166 to situations in which the previous environmental document was a negative declaration – is consistent with the purposes of the statute, and has consistently been upheld by the courts in the years since *Benton*.

The coalition argued that, even if section 21166 applies, the District should have prepared an EIR due to changes in the way the project would be implemented under the 2008 regulations. The coalition argued the 2008 regulations substantially increased the priority preference for industrial water users over agricultural water users in times of a water shortage. In particular, the coalition argued the 2008 regulations extended the industrial preference from existing to new industrial users. The Court applied the substantial evidence standard of review and rejected this argument, stating that the District had an adequate basis to conclude that the 2008 regulations would actually impose additional restrictions on new industrial users with no history of water use. Thus, the 2008 regulations did not appreciably increase industrial users' priority preference. The Court also rejected the argument that the 2008 regulations differed because they were permanent, whereas the previous, 2007 regulations were not; according to the Court, the record did not support the claim that the 2007 regulations would sunset or otherwise expire.

The coalition argued that the District's approval of a water supply contract for a new geothermal power plant was a changed circumstance requiring supplemental review. The contract called for delivering up to 6,800 acre-feet per year (afy) of water to the plant, subject to cut-backs that might be required under the EDP. This compared to deliveries to industrial users averaging roughly 20,000 afy during 2001-2008. Deliveries to agriculture during this same period averaged 2.5 million afy. Thus, agricultural deliveries dwarfed industrial deliveries. There was no evidence that priority deliveries to the power plant, even if increased, would result in environmental effects. The record showed that industrial deliveries had remained relatively constant in any event.

The First District rules the EIR for the Cal State Hayward Master Plan does not contain an adequate analysis of the impacts of the campus expansion on regional parkland, but upholds the EIR's approach to fire protection services, traffic impacts and mitigation. *City of Hayward v. Trustees of the California State University* (2012) – Cal.App.4th – [2012 Cal.App.LEXIS 761]

The Cal State Hayward campus currently accommodates the equivalent of 12,586 full-time students. The campus' assigned enrollment ceiling is 18,000 students. In 2009, the university trustees certified a program EIR and approved a master plan setting forth various new and upgraded facilities to accommodate such an expansion. The City of Hayward and neighbors sued. The trial court granted the petition on a variety of grounds. The trustees appealed. The First District Court of Appeal reversed on all issues save one: park impacts.

First, the EIR concluded the expansion of the campus would result in increased demand for fire protection services provided by the city. This increased demand would require new personnel and equipment, which would necessitate expanding an existing fire station, or constructing a new one. Given the city's urban character, and the small size of a new or expanded facility, the EIR concluded the impact of such construction would be insignificant. The city argued the EIR lacked evidence to support this conclusion because no specific site for a station had been identified. The Court disagreed. The university had no control over where a

new or expanded station would be constructed. Nevertheless, in light of the small size of such a facility, and the city's urban character, substantial evidence supported the EIR's conclusion that the impact of constructing the facility would be insignificant.

Second, the city argued the university had an obligation to provide funding to the city to mitigate the impact of longer fire response times triggered by the expansion. The Court rejected this argument. The EIR acknowledged that response times might increase, and that such an increase might cause harm. But the need for increased fire protection services was not an environmental impact. The Supreme Court's decision in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 focused on whether the university was legally prohibited from providing funding for off-site improvements, where the EIR identified public service impacts as significant. In this case, the EIR concluded the impact was less than significant, so the obligation to provide mitigation did not arise. According to the Court, "[a]lthough there is undoubtedly a cost involved in the provision of additional emergency services, there is no authority upholding the city's view that CEQA shifts financial responsibility for the provision of adequate fire and emergency response services to the project sponsor. The city has a constitutional obligation to provide adequate fire protection services. Assuming the city continues to perform its obligations, there is no basis to conclude that the project will cause a substantial adverse effect on human beings."

Third, the EIR identified a potential location for the development of affordable housing for university faculty and staff. The traffic analysis included potential trips from housing project. The EIR stated that further, project-specific review would be performed if the university decided to go forward with the housing project; the analysis would focus on the impact of project-related traffic on narrow residential streets in the area. The city and neighbors argued the university should have performed this analysis as part of the EIR. The Court disagreed, citing the programmatic nature of the EIR, and the commitment to perform further review when the university proposed to go forward with the housing project.

Fourth, the EIR concluded the project would result in significant and unavoidable traffic impacts. To lessen these impacts, the EIR identified, and the university adopted, a transportation demand management or "TDM" program to encourage the use of carpooling and transit. The TDM program listed various options, incorporated quantitative criteria to measure success, and included a time-line for developing the program. The Court ruled the TDM program did not constitute impermissible deferral of mitigation.

Finally, the EIR stated the expansion of the campus, and the related increase in students, faculty and staff, would not have a significant impact on the use of off-campus recreational resources. The EIR stated that, because on-site recreational resources were ample, students' use of off-site parks was "nominal," and even if the campus were to expand, such use would continue to be nominal in the future. The Court held this analysis was insufficient. No data was provided on the overall usage or capacity of the neighboring parks. Moreover, the types of recreational amenities available on campus differed from those provided by the neighboring parkland. For these reasons, "the EIR fail[ed] to meaningfully inform or analyze the extent of the impact the master plan is likely to have on the neighboring parklands."

The California Supreme Court rules that the requirement to exhaust administrative remedies applies where the agency relies on a categorical exemption, if the agency holds a

public hearing to receive comment on its exemption determination. *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281

In 2006, a developer applied to Alameda County for an 11-lot subdivision. The county distributed notice of the hearing to consider the application. The notice and staff report stated the project qualified for the Class 32 exemption for infill projects in urban areas within cities on sites of less than five acres in size. At the planning commission's hearing, area residents complained about the loss of views, incompatibility, increased traffic, and inadequate parking. In 2007, the Planning Commission approved the project. Tomlinson appealed the decision to the County Board of Supervisors. The Board rejected the appeal. Tomlinson sued, alleging the project was not categorically exempt because, among other things, the Class 32 exemption applies only to cities, not to counties (like Alameda). The trial court denied the petition based on Tomlinson's failure to exhaust administrative remedies. The Court of Appeal reversed, holding the exhaustion requirement does not apply where the lawsuit involves an agency's decision to rely on a categorical exemption. The Supreme Court granted review.

CEQA's exhaustion requirement is set forth in Public Resources Code section 21177, subdivision (a), which states that a lawsuit alleging a public agency's failure to comply with CEQA may be brought if "the alleged grounds for noncompliance with [CEQA] were presented to the public agency orally or in writing by any person during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination." CEQA does not provide for a public comment period where the agency relies on a categorical exemption. But the latter provision – "prior to the close of the public hearing on the project before the issuance of the notice of determination" – applied, even though no "notice of determination" was filed. ". . . [T]he exhaustion requirement's application is conditioned upon the holding of public hearings to present any objections to or concerns about the proposed project, thus confirming that what matters is the opportunity for comment at such public hearings, not the filing of a notice of determination." In this case, the county held such a hearing, so the exhaustion requirement applied.

Tomlinson alleged that, even if the exhaustion requirement applied, the objections at the county's hearings satisfied the exhaustion requirement. Tomlinson also argued the exhaustion requirement should not apply because the county misled them by deliberately misstating the requirements of the Class 32 exemption. The Court declined to reach either argument; instead, it remanded the case to the Court of Appeal to consider them.

The First District Court of Appeal holds that the trial court did not abuse its discretion in awarding attorneys' fees under Code of Civil Procedure section 1021.5 to a lawyer who was also a named petitioner. *Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988

The City of Healdsburg certified an EIR and approved the "Saggio Hills Resort" development. The citizens sued. The trial court ruled the EIR was deficient. The citizens filed a motion for an award of attorneys' fees under Code of Civil Procedure section 1021.5. The trial court awarded $382,190. The city and the developer appealed the award.

The city and developer argued the trial court erred in awarding fees to Janis Grattan because she was both an attorney and a party to the action; Grattan was a member of the

"citizens," and had signed the verification to the petition. In *Trope v. Katz* (1995) 11 Cal.4th 274, the California Supreme Court held that an attorney litigating *in propria persona* is not eligible for an award of attorneys' fees. The First District distinguished *Trope*, holding that where an attorney is representing the public interest, the fact that she is also a named petitioner does not disqualify her from obtaining a fee award under section 1021.5. The record supported the trial court's conclusions that Grattan had an attorney/client relationship with the coalition, and that she had taken on the case on a contingency basis.

The Second District Court of Appeal rules that the trial court properly dismissed a CEQA petition challenging an agency's actions implementing a decision to make an historic structure available for lease, where the lawsuit was filed more than 180 days after the initial decision to lease the property. *Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College Dist.* (2012) 206 Cal.App.4th 1036

In 2001, the Los Angeles Community College District acquired a two-acre site containing an historic structure, with the aim of rehabilitating the building as part of a community college campus. In 2008, the districted concluded it lacked funding to proceed. In late 2009, the district board approved interim use of the property, authorizing a five-year lease to a tenant providing educational services, approved a contract for design work so the building would suit the tenants' use, and acquired an adjacent property. The coalition sued. In 2010, while the first lawsuit was pending, the district approved amendments to the acquisition agreement and the design contract. The coalition filed a second lawsuit. The trial court sustained a demurrer dismissing the second CEQA lawsuit because it was filed more than 180 days after the district's 2009 approvals. The coalition appealed the dismissal of the second lawsuit.

The coalition argued that the district's actions in 2010 in furtherance of the 2009 approvals should be annulled because the district did not analyze the impacts resulting from proposed changes in the use of the historic building. The Court disagreed. There was no dispute that CEQA's 180-day statute of limitations applied. The only issues were when the 180-day period commenced, and whether the district's 2010 approvals re-started the clock for a second CEQA challenge.

Under CEQA, the statute of limitations begins to run the date the agency first approves a project. "Project" means the whole of the action, even if that action is subject to numerous approvals that occur over a period of time. In this case, the district board approved the project when, in July 2009, it adopted a resolution directing that the district would make the site available for rent to organizations providing educational services and, later in 2009, approved the $400,000 contract for design services and acquired the adjacent property. Those actions triggered the 180-day statute of limitations for a CEQA challenge.

The coalition argued the execution and final Board approval of the lease in 2010 triggered a new 180-day statute of limitations. The Court rejected this argument, noting that the impacts of the interim use had already been identified, and that the execution of the lease did not constitute a substantial change in the original project. Indeed, the petition challenging the 2010 approvals did not allege that the project had substantially changed from 2009 to 2010. The board's 2009 resolution directed staff to make space available, but provided that the execution of a lease was subject to board approval; despite the requirement for board approval of the lease, the board nevertheless committed to make the property available in 2009, so that is when

"approval" of the project occurred. The same was true with respect to the acquisition of the adjacent property. The commitment occurred in 2009, and the 2010 decisions to amend the acquisition agreement and to provide additional funding did not change the character of the project, or constitute new project approvals. Instead, they were merely steps to implement the decision to acquire the property. Similarly, although the district approved changes in the contract with the design firm approved in 2010, the coalition did not allege that these changes would not have an impact on the environment. Finally, the Court ruled the trial court did not abuse its discretion in declining to provide the coalition with leave to amend its petition.

The Second District Court of Appeal holds an agency has discretion to measure the traffic and air quality impacts of a transit project measured against predicted future "baseline" conditions. *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth.* (2012) 204 Cal.App.4th 1480

In February 2010, the Authority certified an EIR and approved construction of a 6.6-mile extension of a light rail line between Culver City and Santa Monica. Neighbors sued. The trial court denied the petition. The neighbors appealed. The Court of Appeal affirmed.

The EIR equated "baseline" conditions with those population and traffic levels expected to exist in 2030. Generally, under CEQA, baseline conditions consist of the existing environmental setting at the time the analysis is performed, rather than hypothetical conditions at some point in the future. Thus, for a project involving retrofitting an oil refinery, the environmental baseline consists of actual air pollutant emissions at the refinery, rather than theoretical emissions authorized by the refinery's permits. (*Communities for a Better Environment v. South Coast Air Quality Management Dist*. (2010) 48 Cal.4th 310 (*CBE*).) Courts have interpreted this case to mean an agency never has discretion to use as its baseline those conditions that are predicted to exist sometime in the future, after the date after the agency certifies an EIR. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48.)

In this case, the Authority used a "future baseline" for purposes of analyzing traffic and air quality impacts. The baseline assumed population and traffic growth as of the year 2030, in addition to planned and funded improvements to the region's transportation system. The year 2030 was selected because it matched the agency's "planning horizon." The neighbors argued this approach violated the rule established by *Sunnyvale* and *Madera Oversight*.

The Court rejected this argument, stating: "As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public. An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. Many people who live in neighborhoods near the proposed light rail line may wish things would stay the same, but no one can stop change. The traffic and air quality conditions of 2009 will no longer exist (with or without the project) when the project is expected to come on line in 2015 or over the course of the 20-year planning horizon for the project. An analysis of the project's impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later. [¶] Consequently, we reject the notion

that CEQA forbids, as a matter of law, use of projected conditions as a baseline. Nothing in the statute, the CEQA Guidelines, or *CBE* requires that conclusion. To the extent *Sunnyvale* and [*Madera Oversight*] purport to eliminate a lead agency's discretion to adopt a baseline that uses projected future conditions under any circumstances, we disagree with those cases." (Emphasis in original.) The Court held that, when supported by substantial evidence, an agency has discretion to use a projected future baseline to assess the traffic and air quality impacts of a long-term transportation infrastructure project. Because substantial evidence supported the Authority's approach in this case, it was upheld.

The Sixth District Court of Appeal rules that, in a project involving restoration and sale of an historic mansion, the city had a sufficient basis for rejecting as economically infeasible alternatives involving retaining ownership of the mansion. *The Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603

The Flanders Mansion is an historic, 1920s-era Tudor Revival residence. The City of Carmel-by-the-Sea owns the mansion. The site is surrounded by a 35-acre nature preserve, also owned by the city. The city certified an EIR and approved the sale of the mansion in view of the substantial cost of implementing necessary repairs. The Foundation sued. The trial court granted the petition. Both sides appealed.

First, the Foundation argued the EIR did not contain an adequate analysis of potential future uses of the mansion in light of the Surplus Lands Act. Under that statute, when a local agency wishes to dispose of surplus property, the agency must offer to sell or lease the property to other agencies for use as affordable housing or for park purposes before the property can be sold to a private party. The EIR recognized the sale of the property would be subject to the act. The Foundation argued, and the trial court agreed, that the EIR was deficient because it did not analyze the impacts of potential uses for the property authorized under the act. That was so because an agency buying under the act would not be subject to mitigation measures or conservation easements adopted by the city when it approved the sale. The Court of Appeal disagreed, holding that the city had authority to require, as conditions of sale, adherence to these measures and easements. Moreover, the city did not have to analyze the impacts of using the mansion as affordable housing because the record supported the city's conclusion that this use was not reasonably foreseeable in view of the high cost of rehabilitating the mansion and complying with adopted mitigation measures.

Second, during the CEQA process, a commenter asked the city to consider reducing the size of the parcel sold with the mansion. The Court ruled the Final EIR's response was inadequate. Reducing the size of the parcel would also reduce one of the project's significant and unavoidable impacts: a reduction in public parkland. The Final EIR had not provided a complete response to this proposal.

Third, the Foundation argued the city erred by failing to include an economic feasibility analysis in the EIR. That analysis was prepared by a real-estate consultant to address the economic feasibility of the various alternatives analyzed in the EIR. The Court ruled the city could rely on information in the record in making its feasibility determinations, regardless of whether that information appeared in the EIR itself.

Fourth, the EIR analyzed alternatives focusing on restoring and leasing the mansion for residential or non-residential use, or doing nothing (no project). All these alternatives were environmentally superior to the proposed project. The city rejected them, however, as economically infeasible, citing the consultant's feasibility report. The issue for the Court was whether this report constituted substantial evidence supporting the city's decision. The Court ruled that it did. The report estimated that restoration would cost $1.4 million, and lease payments would not enable the city to recoup this cost for many years. Selling the mansion would recover these costs, however, because the appraised value of the restored mansion was estimated at $4 million. Doing nothing meant the city would incur ongoing maintenance costs, with no revenue to cover them. Under such circumstances, the city acted within its discretion in rejecting these alternatives.

Finally, the Court ruled that substantial evidence supported the city's adopted statement of overriding considerations. The city acted within its discretion in deciding to sell the mansion, subject to mitigation measures and easements requiring its sensitive restoration. Although the city could have retained ownership of the restored the building (alternatives the city rejected as infeasible), that did not mean the city could not cite restoration in its list of project benefits, even if the city intended to sell the restored mansion.

The First District Court of Appeal rules that a County Board of Supervisors did not need to hear an appeal of a decision to certify an EIR for modifications to a solid waste facility permit approved by the County's local enforcement agency. *No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573

The Redwood Landfill is an existing landfill located in northern Marin County. In 1999, the landfill operator applied to revise the landfill's solid waste facility permit. The application sought to expand the landfill's capacity and to adjust landfill operations. Marin County Environmental Health Services (EHS), the local permitting agency under State law, prepared and certified the Final EIR. The petitioners tried to appeal that decision to the County Board of Supervisors. The county rejected the appeal because EHS was the final decision-maker. In December 2008, EHS approved the permit amendments. The petitioners sued. The trial court ruled the county had erred by rejecting the appeal to the Board of Supervisors. The trial court did not reach the merits with respect to the adequacy of the EIR. The county and applicant appealed.

The Court of Appeal reversed. EHS was lead agency as the designated local enforcement agency under the California Integrated Waste Management Act. As such, its decision to certify the EIR was not appealable to the Board of Supervisors. Public Resources Code section 21151, subdivision (c), provides that, if an EIR is certified by a non-elected decision-making body within a local lead agency, then that certification may be appealed to the local lead agency's elected decision-making body. That section did not apply, however, because EHS was a separate, distinct entity vested with authority over the permit and, as such, EHS had no elected decision-making body. The trial court erred in directing the Board of Supervisors to consider the appeal.

The county and applicant asked the Court of Appeal to reach the merits of the petitioners' attack on the EIR. The Court of Appeal declined, and sent the case back to the trial court to be heard on the merits.

The Fifth District Court of Appeal affirms a trial court's decision to augment the record with documents that the agency said it never received, finds an irrigation district has standing to bring a CEQA lawsuit, and holds an agency cannot reject comments as incredible for purposes of the "fair argument" standard of review unless the agency makes express credibility findings during its administrative process. *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187

A developer proposed a 160-lot subdivision on 44 acres of fallow farmland adjacent to the City of Selma. The project proposed to rely on groundwater provided by a local private water company. Analyses showed the conversion of the property from agricultural to urban uses would cause a net increase of roughly 80 acre-feet per year in groundwater use. An irrigation district submitted data showing the groundwater basin is in an overdraft condition, with groundwater levels expected to decline further in the future. The city circulated an initial study and draft mitigated negative declaration. Comments were submitted stating the conversion of land to urban uses was having a cumulative impact on groundwater levels. The district asked the city to prepare an EIR to address these and other issues. The city adopted the negative declaration and approved the project. The district sued. The trial court granted the petition. The city appealed.

The city argued the trial court erred by augmenting the record with two documents pertaining to groundwater overdraft in the area. At trial, the district had moved to augment the record with the documents based on a declaration signed by a district employee stating she had submitted the documents to the city's planning commission. The city filed declarations stating the commission did not receive the documents. The Court held that, consistent with its recent decision in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, a trial court's ruling on a motion to augment the record is subject to the "substantial evidence" standard of review on appeal. Because the trial court had discretion to find the district employee's declaration to be more credible than those of the city, the Court of Appeal upheld the trial court's decision to augment the record with the documents.

The city argued the district did not have standing to bring the lawsuit. The Court rejected this argument, holding that (1) under Water Code section 22650, the district had authority to bring a lawsuit concerning any issue in which it had a beneficial interest, (2) the district did not need to have jurisdiction over a natural resource affected by the project in order to have a beneficial interest, and (3) the district's groundwater recharge program provided the district with a sufficient interest in groundwater to give the district a beneficial interest in the project, insofar as the project had the potential to contribute to groundwater overdraft conditions.

The city argued the record did not contain a "fair argument" that the project might have significant environmental effects. The city argued it had discretion to determine whether the comments constituted "substantial evidence" based on the credibility of the comments. The Court held this discretion applied only to legitimate issues of credibility. In order to reject evidence as incredible, the agency had to identify that evidence, and explain why it lacked credibility, during the administrative process itself; only then would it be appropriate to ignore such evidence for purposes of applying the fair argument standard.

The California Supreme Court grants petition for review in *Berkeley Hillside* case.

In early 2012, the First District Court of Appeal held that the "fair argument" standard governs judicial review of the "unusual circumstances" exception to categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c). (*Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656.) On May 23, 2012, the California Supreme Court granted a petition for review of this decision, so the First District's opinion is no longer good law. A synopsis of the case is included in this issue below.

The First District Court of Appeal adopts a new test for the application of the "unusual circumstances" exception to categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c). *Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656

Homeowners in the Berkeley hills applied to demolish their house, and to construct a new house with an attached, ten-car garage; taken together, the house and garage were 9,872 square feet in size. The city concluded the project fell within the Class 3 (new construction of small structures) and Class 32 (infill) categorical exemptions. Although most neighbors supported the proposal, others in the city did not. The opponents hired an engineer, who submitted letters stating the grading required would result in unstable conditions and could cause landslides during an earthquake. The homeowners' engineer submitted a report stating the opponents' engineer had misread the plans. Other engineers and planners also stated the opponents' engineer was off base. The city approved the permits. An unincorporated association sued. The trial court denied the petition. The association appealed.

On appeal, the association conceded that the project fell within the Class 3 and Class 32 categorical exemptions. The association argued, however, that the city violated CEQA because the record showed the project fell within the exception to the categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c). That section establishes what has generally been described as a two-step test: an activity that would otherwise be categorically exempt is not exempt if (1) there are "unusual circumstances," and (2) those unusual circumstances create a "reasonable possibility" that the activity will have a significant effect on the environment.

The Court of Appeal collapsed this two-part test into a single inquiry: whether there is substantial evidence that proposed activity may have an effect on the environment. According to the Court, if there is such evidence, then by definition the circumstances are "unusual." That is because categorical exemptions adopted by the Resources Agency are designed to cover categories of projects that do not normally result in significant environmental effects. Thus, "once it is determined that a proposed activity may have a significant effect on the environment, a reviewing agency is precluded from applying a categorical exemption to the activity."

The Court held the record contained a "fair argument" that the proposed house would have significant environmental effects. First, the record showed the size of the house in that location was, in itself, an unusual circumstance as a matter of law. (It is unclear why the Court undertook this inquiry, given that the Court had earlier held that this inquiry is irrelevant under its new formulation of the test under section 15300.2, subdivision (c).) Second, the letters submitted by the opponents' engineer constituted substantial evidence of a fair argument that the

proposed construction would require massive grading and be seismically unstable. Although other engineers and the city's planning department stated that the letters of the opponents' engineer were based on an incorrect reading of the plans, such disagreement did not mean the comments of the opponents' engineer were insubstantial. Rather, the city needed to prepare a full EIR to resolve the differences of opinion between experts. (The Court did not address whether the comments of the opponents' engineer might not constitute a "fair argument" because, at least according to other commenters, they lacked a factual foundation.)

The First District Court of Appeal upholds the use of tolling agreements in CEQA litigation. *Salmon Protection and Watershed Network v. County of Marin* (April 20, 2012) – Cal.App.4th – [2012 Cal. App. LEXIS 458]

In 2007, Marin County certified an EIR and approved an update to its General Plan. The county entered into a tolling agreement with the Salmon Protection and Watershed Network extending the statute of limitations for a lawsuit challenging the EIR. The county and SPAWN were unable to reach agreement and, in 2010, SPAWN sued. A group of property owners filed a complaint in intervention alleging that SPAWN's petition was time-barred because CEQA does not allow parties to enter into tolling agreements. The property owners alleged that SPAWN's lawsuit focused on policies applicable to, and created uncertainty about the permitted use of, their land. The trial court sustained demurrers and dismissed the property owners' complaint. The landowners appealed.

The landowners argued the need for prompt resolution of CEQA disputes trumped the ability to enter into tolling agreements. The Court disagreed. CEQA contains a number of policies and procedures designed to expedite litigation. CEQA also contains provisions encouraging settlement. Those competing policies were not incompatible with one another. The agency or real party in interest could decide whether to enter into a tolling agreement, or to press for expeditious resolution of the case by adhering to CEQA's various deadlines. The interveners were not necessary or indispensable parties in a lawsuit challenging the General Plan update, so their consent to the tolling agreement was not required. At most, the interveners were incidentally affected by the adoption of the General Plan update. The same was true with respect to claims under the Planning and Zoning Law, subject to the 90-day statute of limitations established by Government Code section 65009; there, too, the agency had discretion to extend the deadline by entering into a tolling agreement. For these reasons, the tolling agreement between SPAWN and the county was valid, and the trial court was correct in dismissing the landowners' complain in intervention.

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
Draft National Water Program 2012 Strategy, Response to Climate Change. In April 2012, the USEPA announced the availability of a draft long-range strategy that addresses climate change's effects on the hydrological background in which the USEPA's programs function. For more information, see 77 Fed.Reg. 19661.

New Stationary Source Standards. In April 2012, the USEPA published a proposal to establish new source performance standards for CO_2 emissions from new, fossil fuel-fired, electric utility generating units ("EGUs"). The proposal would require new, fossil fuel-fired EGUs greater than 25 megawatt electric to meet an output-based standard of 1,000 pounds of CO_2 per megawatt-hour, based on the performance of widely-used natural gas combined cycle technology. For more information, see 77 Fed.Reg. 22392, 26476.

Mandatory Reporting Rule. In May 2012, the USEPA provided notice of its proposal to amend certain provisions of the reporting rule to provide greater clarity and flexibility to facilities for certain source categories that will be required to report data for the first time in September 2012. The USEPA also proposed confidentiality determinations for four new data elements for the fluorinated gas production source category, as well as a revision to Table A-7 pertaining to a data element input used in the emission calculation for that same source category. For more information, see 77 Fed.Reg. 29935.

COASTAL RESOURCES

Recent Court Rulings
***Samson v. City of Bainbridge Island*, 2012 U.S. App. LEXIS 12170 (9th Cir. 2012)**

The United States Court of Appeals for the Ninth Circuit affirmed the District Court for the Western District of Washington's ruling that the City of Bainbridge Island validly enacted moratorium ordinances that were nonarbitrary and manifestly related to the City's legitimate municipal interests. Specifically, the Ninth Circuit held the City did not violate the Samsons' constitutional rights. *Samson v. City of Bainbridge Island*, 2012 U.S. App. LEXIS 12170 (9th Cir. 2012),

The Samsons wanted to build a pier or dock on their property, which was located in Blakely Harbor in the City of Bainbridge Island ("City"). In 2001, the City imposed a moratorium on constructing these types of structures in the area. The City asserted this moratorium was "necessary for the protection of the public health, safety, property, or peace." Shortly afterward, the City passed an additional ordinance expanding the scope of the moratorium by applying it to permit applications for a broader range of construction projects

anywhere on the island. Weeks later, the City narrowed the moratorium so it prohibited only new over-water structures and new shoreline armoring.

In November 2001, residents sued the City, claiming the moratorium was illegal. *See Biggers v. City of Bainbridge Island*, 162 Wn.2d 683, 169 P.3d 14, 17-19 (Wash. 2007). In 2003, the state superior court ruled on the *Biggers* case, holding the City had overstepped constitutional limits. The City appealed to the Washington Court of Appeals, moving to stay the superior court's judgment. The City then adopted an ordinance extending the moratorium again.

The City then amended its Shoreline Master Program, which placed a permanent ban on new dock construction in Blakely Harbor. The restrictions were identical to the moratorium. During this time, the *Biggers* case reached the Washington Supreme Court, and the court held that the moratorium was unconstitutional. The Washington Court of Appeals, however, later upheld the City's changes to the Shoreline Master Program. This ruling prevented the Samsons from building a pier or dock, and the Washington Supreme Court denied review.

The Samsons and other property owners filed multiple actions against the City in county court while the *Biggers* case was still pending, alleging a variety of state-law claims as well as federal constitutional claims under 42 U.S.C. § 1983. The City removed the cases to federal court, which consolidated the actions. The district court granted summary judgment in favor of the City, holding that the property owners had not raised a genuine issue of fact on their claims. The Samsons appealed to the Ninth Circuit Court of Appeals.

The Ninth Circuit denied the Samsons' substantive due process and procedural due process claims. The court held the City did not violate the Samsons' due process rights because none of the City's actions were arbitrary in the constitutional sense. Regarding the procedural due process claim, the Ninth Circuit affirmed the district court's ruling that the City's ordinances applied generally to all owners of shoreline property on the island and that the City enacted the ordinances through lawful legislative acts. Because the City did not violate Samsons' rights, the Ninth Circuit affirmed the summary judgment in favor of the City.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates

Gray Wolf. In April 2012, the California Fish and Game Commission ("CFGC") provided notice that it received a petition from the Center for Biological Diversity and others – on March 12, 2012, to list the Gray wolf as endangered under the California Endangered Species Act ("CESA"). For more information, see Cal. Reg. Notice Register 2012, No. 15-Z, p. 494.

San Francisco Bay-Delta Longfin Smelt. In April 2012, the U.S. Fish and Wildlife Service ("USFWS") announced its 12-month finding on a petition to list the San Francisco Bay-Delta distinct population segment of the longfin smelt as endangered or threatened under the federal Endangered Species Act ("ESA") and designate critical habitat. The USFWS announced that listing is warranted, but presently precluded by higher priority actions; as a result, the smelt will be added to the candidate species list and its listing status will be addressed through the annual Candidate Notice of Review process. For more information, see 77 Fed.Reg. 19756.

Munz's Onion and San Jacinto Valley Crownscale. In April 2012, the USFWS published a proposal to revise the critical habitat for Munz's onion and San Jacinto Valley crownscale, all of which would be located in Riverside County. The USFWS specifically proposed to designate 889 acres of critical habitat for Munz's onion, and 8,020 acres for San Jacinto Valley crownscale. For more information, see 77 Fed.Reg. 23008.

5-Year Reviews. In April 2012, the USFWS published notice that it was initiating 5-year reviews for 25 species under the ESA, and had completed 5-year reviews for 28 species. All such species are located in California and/or Nevada. For more information, see 77 Fed.Reg. 25112.

Publication of Textual Boundary Descriptions. In May 2012, the USFWS and National Marine Fisheries Service ("NMFS") provided notice of its final rule pertaining to the publication of textual descriptions of proposed and final critical habitat boundaries in the Federal Register. The final rule is designed to be more user-friendly than previous practices, as well as more efficient and cost effective. For more information, see 77 Fed.Reg. 25611.

Sonoran Desert Area Bald Eagle. In May 2012, the USFWS provided notice its determination that the Sonoran Desert Area population of the bald eagle is not a distinct population segment, such that the petition for listing should be denied. For more information, see 77 Fed.Reg. 25792.

San Clemente Island Plant Species. In May 2012, and in response to reclassification petitions, the USFWS provided notice of its proposal to change the listing status of the San Clemente Island lotus and San Clemente Island paintbrush from endangered to threatened. The USFWS also found that reclassification of the San Clemente Island bush mallow presently is not warranted. For more information, see 77 Fed.Reg. 29078.

Northern Spotted Owl. In June 2012, the USFWS published notice of the availability of a draft economic analysis and draft environmental assessment for the proposed, revised, critical habitat designation for the northern spotted owl. For more information, see 77 Fed.Reg. 32483.

Inyo California Towhee, Arroyo Toad, Indian Knob Mountainbalm, Modo Sucker, Lane Mountain Milk-Vetch, and Santa Cruz Cypress. In June 2012, the USFWS provided notice

of its finding that the petition to delist the Inyo California towhee, and reclassify the arroyo toad, Indian Knob mountainbalm, Modo sucker, Lane Mountain milk-vetch, and Santa Cruz cypress, is warranted. With publication of the notice, the USFWS initiated status reviews for these taxa. For more information, see 77 Fed.Reg. 32922.

Ptarmigan. In June 2012, the USFWS provided notice of its finding that the petition to list the southern white-tailed ptarmigan and Mt. Rainier white-tailed ptarmigan is warranted, and commencement of a status review. For more information, see 77 Fed.Reg. 33143.

Western Snowy Plover. In June 2012, the USFWS published its final rule designating revised critical habitat for the Pacific Coast distinct population segment of the western snowy plover in the amount of approximately 24,527 acres throughout Washington, Oregon, and California. For more information, see 77 Fed.Reg. 36728.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

AB 2082 (Atkins) - Prohibits constructing or maintaining any structures on land that is under State Land's jurisdiction and ownership without first obtaining all necessary permits/authorizations and establishes civil penalties for violations of such requirements. Exempts infrastructure (telephone poles, wires, pipelines, etc.) owned by an electrical or gas corporation, as defined in the statute. Requires notice and hearing before such penalties may be levied. Passed Assembly, presently in Senate Appropriations.

AB 2609 (Hueso)

AB 2609 is an act to amend Section 102 of, to add Sections 101.5, 107, and 108 to, and repeal Section 106 of, the Fish and Game Code and to amend Section 87200 of the Government Code, relating to the Fish and Game Commission. The California Constitution establishes the five-member Fish and Game Commission, with members appointed by a Governor and approved by the Senate. Existing law requires the Commissioners to elect one of their members as President and one as Vice-President. This Bill would modify the election provisions to instead require that Commissioners annually elect one of their members as President and one as Vice-President by a concurrent vote of at least three Commissioners. The Bill would also prohibit a President or Vice-President for serving more than two consecutive years and would prohibit the Commission from adopting or enforcing any other policy or regulation that would make a Commissioner ineligible to be elected as President or Vice-President of the Commission. The Bill would also require the Commission to adopt a Code of Conduct that requires a Commissioner to adhere to prescribed principles and, by July 1, 2013, to adopt rules to govern the business practices and processes of the Commission. The Bill would also subject Commissioners to certain provisions of the Political Reform Act of 1974 by adding members of the Commission to those specified officers who must publicly identify a financial interest giving rise to a conflict of interest or potential conflict of interest, and recuse themselves accordingly.

AB 2402 (Huffman):
This bill has been significantly amended since its introduction in February 2012. As of July 3, 2012, this bill would make certain changes to the administration of the California Department of Fish and Game. For example, it would require the Department, rather than the Fish and Game Commission, to establish a list of threatened and endangered species, and would require an interested person to petition the Department, rather than the Commission, to consider a petition for listing of the species. The bill would also rename the Department to the Department of Fish and Wildlife. It would also require the Department to and the Commission to develop a strategic plan to implement reform proposals. The bill is currently set for hearing before the Senate Appropriations Committee on August 6, 2012.

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

Regulatory Updates

Waterfowl Hunting. In May 2012, the CFGC provided notice of a proposed rule to amend Section 502 of Title 14 of the California Code of Regulations, as that section relates to waterfowl hunting. The CFGC specifically proposed to: (1) increase the possession limit for brant, ducks, and geese in all zones; (2) revise the language in the Balance of State Zone Late Season goose hunt; (3) revise the language in the North Coast and Imperial County Special Management Areas Late Season goose hunt; and, (4) provide a range of waterfowl hunting season lengths. For more information, see Cal. Reg. Notice Register 2012, No. 18-Z, p. 590.

Bass. In June 2012, the CFGC provided notice of a proposal to amend Sections 27.65 and 28.30 of Title 14 of the California Code of Regulations pertaining to kelp bass, barred sand bass, and spotted sand bass. The proposed regulatory amendments would increase the minimum size limit for all three species, reduce the bag limit for all three species, and implement a spawning season closure for barred sand bass only. For more information, see Cal. Reg. Notice Register 2012, No. 23-Z, p. 749.

Upland Game Birds. In June 2012, the CFGC published notice of its proposal to amend Section 300 of Title 14 of the California Code of Regulations pertaining to upland game birds. The proposed regulatory amendments would provide for: (1) a range of permit numbers for the 2012 sage-grouse hunting season; (2) a junior hunting season for quail on the Mojave National

Preserve; and, (3) an increase in fall season length and season limit for wild turkey. For more information, see Cal. Reg. Notice Register 2012, No. 24-Z, p. 774.

ENERGY

Recent Court Rulings

No summaries or updates this quarter

Legislative Developments

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

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

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

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

that benefit communities where electrical utility customers live, especially in the most impacted and disadvantaged communities.

SB 1455 (Kehoe) Alternative (non-petroleum) Vehicle Fuels.
This bill would create additional reporting requirements for the California Energy Commission and the Air Resources Board (ARB). Beginning on November 1, 2015, and every two years thereafter, ARB and the Commission would be required to report on the state's alternative transportation fuel use within the Commission's integrated energy policy report, pursuant to Public Resources Code section 25302. The report must include the quantity of alternative transportation fuel used in the state during the preceding years. The report must also incorporate the Commission's findings of how new and existing investment programs, federal fuel policies, and existing state policies could increase alternative transportation fuel use. The Commission and ARB would be required to measure in-state job creation in the alternative fuel industry, alternative fuel market penetration, the increase in access to alternative fuels and vehicles for residents, and the vulnerability of residents to petroleum price spikes. The Commission and ARB must also add a price range of petroleum and alternative fuels to the economic analysis used to develop and amend ARB regulations.

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

Regulatory Updates
No summaries or updates this quarter.

FEES/TAXES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
AB 467 (Eng) – Department of Public Health, Groundwater Cleanup Funds
The existing section 75101(a) requires the California Department of Public Health (CDPH), in collaboration with Department of Toxic Substances Control (DTSC) and the State Water Resources Control Board (SWRCB), to adopt regulations governing repayment of costs recovered from parties responsible for contamination.

AB 467 would amend section 75101(a)(2) by adding subsections (B)-(F). The amended section 75101(a)(2) would allow the previously required cost recovery regulations to be initially passed as emergency regulations pursuant to Government Code section 11340 et seq. CDPH would then be required to adopt permanent regulations within 180 days of the effective date of the emergency regulations. The bill would also establish the Groundwater Contamination Prevention Account in the State Treasury, and would set guidelines for the expenditure of Account funds. CDPH would be required to pass regulations authorizing it to enter into agreements with grantees, which recover funds from responsible parties, to allow the grantees to use those recovered funds for ongoing treatment and remediation activities. CDPH would be authorized to enter into an MOU with SWRCB for administering the recovered funds. The bill would allow CDPH to keep up to 3% of recovered funds for use in covering administrative costs.
AB 467 is proposed as an urgency statute. Accordingly, the bill requires a two thirds approval in each house and will take effect immediately if passed. The Senate Appropriations Committee placed the bill on the suspense file on 7/02/12. Final disposition will be known on or before 8/17/12.

AB 1701 (Wieckowski, Smyth) Underground storage tanks: local agencies.

Provides for state certification of cities and counties to oversee the cleanup of underground storage tanks (USTs). Specifically, this bill:
1) Requires a city or county to apply to the State Water Resources Control Board (SWRCB) to be certified to implement the local UST cleanup programs.
2) Provides that only a certified city or county is authorized to implement the local UST oversight cleanup program after July 1, 2013.

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

Regulatory Updates
No summaries or updates this quarter.

INSURANCE COVERAGE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

LAND USE

Recent Court Rulings
Sumner Hill Homeowners' Ass'n v. Rio Mesa Holdings, LLC, 205 Cal. App. 4th 999 (Cal. Ct. App. 2012)

The Court of Appeal reversed the trial court and held that covenants, conditions, and restrictions placed on the land in a subdivision did not apply to outlots—lots outside the residential area. It also reversed the trial court regarding road ownership and determined the defendants did not hold fee title of the land. *Sumner Hill Homeowners' Ass'n v. Rio Mesa Holdings*, 205 Cal. App. 4th 999 (Cal. Ct. App. 2012).

Homeowners alleged their property was part of a private, gated community that would give them unrestricted access to the San Joaquin River. Killkelly Road, a dirt road inside the gated residential area, provided access to the river. Rio Mesa Holdings ("Rio Mesa"), a

developer, purchased the land surrounding the subdivision. Rio Mesa planned to allow public access to the river through the subdivision. Rio Mesa also constructed a gate to prevent the homeowners from accessing Killkelly Road.

Individual homeowners and the Homeowners Association, sued Rio Mesa and Tesoro Viejo, Inc. ("Tesoro"). The homeowners asked the court to confirm their right to maintain the subdivision as a private, gated community with access to the river via Killkelly Road. The homeowners also asked for damages arising from slander of title and related torts. Rio Mesa and Tesoro cross-complained, asking the court to determine the public had a right to access the river via Killkelly Road and that the subdivision map should be reformed or amended to ensure this.

The trial court held for the homeowners, declaring the land to be a private, gated community, and finding the homeowners had easement rights to use Killkelly Road to access the river. The court also denied the defendants' claim that the public should be able to access the river. The jury awarded damages to the homeowners for slander of title and nuisance. Defendants appealed, and plaintiffs cross-appealed.

The Court of Appeal affirmed the trial court's judgment in part and overruled it in part. The Court of Appeal only certified two out of six issues for publication. The first was whether the public had a right to access the portion of the San Joaquin River that could be reached only through the subdivision. Rio Mesa relied on the law of navigability when asking the court to determine the specific portion of the river was open to the public. The court stopped short of deciding this issue because other issues were dispositive (i.e. the statute of limitations ran regarding changes to the subdivision map), but the court took the opportunity to point out the uncertainty regarding the law of navigability.

The second issue was whether a cause of action for slander of title could be maintained if the only pecuniary damages plaintiffs proved were attorney fees incurred to clear the title. The court held these damages were sufficient where the slander is by means of a recorded instrument.

The four remaining issues were not certified for publication. The court addressed the issue of ownership and easement rights as to the roads. It held the defendants did not have fee title to all the roads in the subdivision and that the plaintiffs had private easement rights. Another issue was whether the subdivision could be maintained as a private, gated community, and the court found it could. On the issue of whether or not covenants and restrictions applied to the area outside the 49-lot residential area, the court held they did not extend to land outside the area. Finally, the court held the punitive damages awarded to the plaintiff did not violate federal constitutional standards.

The Court of Appeal held that—with a few exceptions—the orders from the trial court were correct. Some of these exceptions include the issue of road ownership and the developmental restrictions placed on the defendants.

Legislative Developments

AB 1570 (Perea) – Amendment to CEQA adding new section 21167.6.2, which would allow a project applicant, at its cost, to elect to have lead agency prepare CEQA record of proceedings at

commencement of CEQA review process. If CEQA review proceeds under such an election, the lead agency will be required to post the environmental document and all materials cited or relied upon electronically contemporaneously with their submittal or release. The lead agency will be required to then certify its record of proceedings within 30 days of project approval. Disputes regarding content of the record will be resolved by any reviewing court. The applicant's costs of preparing the record as the agency's CEQA review process proceeds will not be a recoverable cost in any litigation that may be filed after project approval.

SB 1148 (Brownley):
This bill would provide that no conservation bank, mitigation bank, or conservation and mitigation bank is operative, vested, or final, nor bank credits issued, until the Department of Fish and Game has approved the bank in writing and a conservation easement has been recorded on the site. The bill would authorize the Department to adopt and amend guidelines and criteria to amend provisions relating to the Department's review of a bank. In addition, the bill would require the Department to follow certain procedures and authorize the Department to charge and adjust specified fees to cover the reasonable costs of the Department reviewing various documents when a person is interested in establishing a bank. The bill would also require a number of changes in the Department's management and role under the Marine Life Protection Act and the Trout and Steelhead Conservation and Management Planning Act of 1979. The bill also authorizes the state and those acting as trustees for fish and wildlife to recover damages in a civil action against any person or local agency that unlawfully or negligently takes or destroys any wildlife, including but not limited to, a bird, mammal, fish, reptile, or amphibian protected by state law. The bill is currently sitting in the Senate Appropriates Committee.

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

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

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

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

AB 890. Environment: CEQA exemption: roadway improvement (Olsen).
As originally drafted (2/17/2011), this bill would have created a new statutory exemption to the California Environmental Quality Act for a project or activity undertaken by a city or county

within an existing roadway right-of way that includes (but is not limited to) shoulder widening, guardrail improvement, minor drainage, culvert replacement, traffic signal modification, and safety improvements.
The bill has since been narrowed to apply to a project or activity to repair, maintain, or make minor alterations to an existing roadway if: a) the activity is initiated by a city or county to improve public safety; b) the project does not cross a waterway, and involves negligible or not expansion of existing use. The exemption would sunset on January 1, 2026.

AB 1549 (Gatto)
Common Interest Developments; Expedited Review
This bill would require the Office of Permit Assistance ("Office") to provide information to developers explaining the permit approval process at the state and local levels, or assist them in meeting statutory environmental quality requirements, and would prohibit the Office or the state for incurring any liability as a result of the provisions of this assistance. The bill requires the Office to assist state and local agencies in streamlining the permit approval process, and an applicant in identifying any permit required by a state agency for the proposed project. The bill would authorize the Office to call a conference of the parties at the state level to resolve questions or immediate disputes arising from a permit application for a development project. The bill also requires the Office to develop guidelines providing technical assistance to local agencies for establishing and operating expedited development permit processes.

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

Regulatory Updates

Environmental Justice. In June 2012, and as part of its ongoing efforts under Plan EJ 2014 to integrate environmental justice into all of its programs, the USEPA published a solicitation request for comment on the ways in which the USEPA and permit applicants can meaningfully engage historically under-represented communities in the permitting process. The USEPA also announced the availability of draft best practices for applicants of USEPA-issued permits that encourage applicants to reach out to neighboring communities. For more information, see 77 Fed.Reg. 38051.

PROPOSITION 65

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates

No Significant Risk Levels ("NSRL"). In April 2012, OEHHA provided notice of a proposal to adopt an updated NSRL for polychlorinated biphenyls ("PCBs") of 0.35 micrograms per day. OEHHA also proposed to adopt a specific regulatory level having no observable effect for PCBs. For more information, see Cal. Reg. Notice Register 2012, No. 15-Z, p. 489.

In June 2012, OEHHA published notice of its proposal to adopt a NSRL for tris (1,3-dichloro-2-propyl) phosphate of 5.4 micrograms per day. The proposal is based on a carcinogenicity study in rodents. For more information, see Cal. Reg. Notice Register 2012, No. 22-Z, p. 718.

Maximum Allowable Dose Levels ("MADLs"). In April 2012, OEHHA provided notice of a proposal to adopt a MADL for methanol. As background, MADLS assist interested parties in determining whether warnings are required for exposures to chemicals listed as known to the state to cause reproductive toxicity, and whether discharges of listed chemicals to sources of drinking water are prohibited. By this notice, OEHHA provided information regarding the scheduling of a public hearing and extension of the public comment period. For more information, see Cal. Reg. Notice Register 2012, No. 16-Z, p. 528.

SOLID WASTE

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

WATER RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
AB 2398 (Hueso): Water Recycling Act of 2012.
Organizes and coordinates various statutory references to recycled water and clarifies certain State Board processes. Approved by Assembly. Referred to Senate Natural Resources & Water, and Environmental Quality, Committees. No hearing dates set.

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

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

Existing law establishes the Salton Sea Restoration Council, a state agency within the Natural Resources Agency (NRA) charged with overseeing the restoration of the Salton Sea. AB 939 would eliminate the existing Council and establish the Salton Sea Authority, a local joint powers authority responsible for the restoration efforts. The authority would be comprised of Imperial and Riverside counties, the Imperial Irrigation District, the Coachella Valley Water District, and the Torres Martinez Desert Cahuilla Indian Tribe. The bill specifies required restoration efforts, requires the authority to develop a restoration plan, and requires the authority to present its restoration plan to the Governor and the Legislature by June 30, 2014. The bill would also require the Departments of Fish and Game and Water Resources to provide staff services, upon request of the authority, to carry out the authority's assigned functions. The Directors of Fish and Game and Water Resources would also be authorized to enter into agreements with other state agencies to provide the authority with staff services.

If the Commission on State Mandates determines that the bill contains costs mandated by the state, local agencies will be reimbursed for those costs pursuant to section 17500 et seq. of the Government Code.

Regulatory Updates
No summaries or updates this quarter.

WATER QUALITY

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
AB 640 (Logue): Water discharges: mandatory minimum civil penalties.
Increases the size of small community facilities that are allowed to use mandatory minimum civil penalties (MMPs) for remediation of water code violations. Specifically, this bill expands the definition of small community publicly owned treatment works (POTWs) that are allowed to use

MMPs for remediation of water code violations by increasing the allowable population serving the small community POTW from 10,000 to 20,000 persons.

Regulatory Updates

Withdrawal of Federal Criteria. In April 2012, the USEPA published a proposal to withdraw human health and aquatic life water quality criteria presently applicable to certain waters of California's San Francisco Bay because California has adopted and the USEPA has approved relevant state criteria. For more information, see 77 Fed.Reg. 20585.

Unregulated Contaminant Monitoring Regulation. In May 2012, the USEPA complied with the 1996 amendments to the Safe Drinking Water Act by published the third Unregulated Contaminant Monitoring Regulation, which establishes criteria for monitoring up to 30 unregulated contaminants. For more information, see 77 Fed.Reg. 26072.

Hydraulic Fracturing Guidance. In May 2012, the USEPA published a notice requesting comment on a draft document that describes its Underground Injection Control Program guidance for the permitting of oil- and gas-related hydraulic fracturing using diesel fuels where the USEPA is the permitting authority. In the draft document, the USEPA provides its interpretation on the applicability of the San Drinking Water Act relative to underground injection control permitting. For more information, see 77 Fed.Reg. 27451.

Testing Procedures. In May 2012, the USEPA provided notice of its adoption of modified testing procedures approved for analysis and sampling under the Clean Water Act that previously were proposed on September 23, 2010. For more information, see 77 Fed.Reg. 29758.

Carbaryl. In May 2012, the USEPA announced the availability of final national recommended water quality criteria for the protection of aquatic life from the effects of carbaryl. For more information, see 77 Fed.Reg. 30280.

Logging Roads. In May 2012, and in response to the recent *Northwest Environmental Defense Center v. Brown* decision issued by the Ninth Circuit Court of Appeals, the USEPA published notice of its intent to expeditiously propose revisions to its Phase I stormwater regulations to specify that stormwater discharges from logging roads are not stormwater discharges associated with industrial activity. The USEPA relatedly requested comment on approaches for addressing water quality impacts associated with discharges of stormwater from forest roads. For more information, see 77 Fed.Reg. 30473.

Federal Summaries

Supreme Court

No summaries or updates this quarter.

Ninth Circuit Court of Appeals

Coastal Resources

Ninth Circuit largely upholds State of Hawaii Department of Land and Natural Resources' regulations and associated guidelines requiring permits for commercial weddings on public beaches in response to First Amendment and other constitutional challenges thereto. *Laki Kaahumanu et al. v. State of Hawaii* (2012) 682 F.3d 789 (9th Circuit, June 6, 2012).

Over 200 public beaches in Hawaii are under the jurisdiction of the State's Department of Land and Natural Resources ("DLNR") upon which many commercial companies provide services for recreational activities. During the late 1990s and 2000s, these largely unregulated services began to negatively impact public beaches as a result of congestion associated with such commercial enterprises (e.g., kayak and surf schools operating and storing equipment on public beaches, hotels setting out chairs and umbrellas in the early morning before the arrival of the general beach-going public, etc).

As a result, DLNR began to regulate commercial activities on unencumbered public beaches in November 2002 by prohibiting commercial activities of any kind without a written permit. Then, on August 1, 2008, DLNR began to require permits for commercial weddings under the same regulations developed in November 2002. Permits can be secured by applying by mail or by way of a "Wiki Permits" website (95% of permit applications were sought/acquired through the website).

So long as permit applicants complete the application, pay the applicable fee ($0.10 per square foot of requested beach area; $20 minimum per event), demonstrate proof of insurance naming State of Hawaii as an additional insured (of at least $300,000 per incident and $500,000 aggregate) and agree to indemnify and hold DLNR harmless for loss or damage arising out of actions by the applicant, a permit is issued. Once issued, permittees are required to comply with the permit's general terms and conditions, including the prohibition against placing certain accessories, structures and other equipment on or within the secured beach area (e.g., arches, tables, tents and the like were prohibited but loose flowers, unamplified musical instruments, chairs for elderly/infirm/disabled, podiums and cake stands were permitted). Otherwise, the terms and conditions did not limit the number of people who could be involved in a public beach wedding or restrict the apparel or speech of any of the wedding participants. Finally, the terms and conditions enabled the DLNR Chairperson to revoke and terminate a permit at anytime for any reason or to impose additional terms and conditions as deemed necessary in his/her sole and absolute discretion.

Plaintiffs (a Native Hawaiian pastor and a wedding and event professionals association) filed suit in federal district court in Hawaii in January 2009, alleging that DLNR's permit requirements unduly burden their right to organize and participate in weddings on unencumbered state beaches, in violation of the First Amendment, equal protection, and due process. On cross-motions for summary judgment, the district court granted summary judgment to DLNR, holding that unencumbered beaches in Hawaii are not a traditional public forum, and even if they were, DLNR's regulations and associated guidelines are reasonable time, place and manner regulations.

On appeal, the Ninth Circuit first addressed whether plaintiffs demonstrated standing under Article III. Citing factual evidence demonstrating that the application of DLNR's regulations to commercial weddings resulted in economic injury to wedding vendors, the court held that plaintiff event and wedding professionals association has Article III standing (both for the association and its members) and that having so held it need not reach the question of the other plaintiff's Article III standing.

On the merits, the Ninth Circuit framed its analysis by posing and answering three questions – do wedding ceremonies constitute "speech" protected by the First Amendment; what is the nature of the forum; and are the challenged restrictions on commercial weddings permissible in the forum? On the first question, the court rejected DLNR's suggestion that wedding ceremonies do not implicate First Amendment protected speech because they are personal, private and non-political communication. After demonstrating that the First Amendment's protections extend beyond political speech to include expressive conduct so long as that conduct conveys a particularized message, the court had no difficulty concluding that wedding ceremonies are protected expression under the First Amendment given the clear and particularized message expressed when citizens enter into marriage, one of the basic and fundamental civil rights. Next, the court assumed (without deciding) that the unencumbered state beaches were traditional public fora and thus applied the most exacting test enabling the government to exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Finally, after concluding that the plaintiffs may bring only an as-applied challenge to the regulations (with one exception, see below), the court concluded that as applied to the plaintiffs the regulation's permit requirement, limitation on wedding ceremony accessories and insurance and indemnification requirement were reasonable time, place and manner restrictions for a traditional public forum. Specifically, the court held that the permitting requirement served a compelling governmental interest (regulation of competing and overlapping uses of Hawaii's public lands/beaches), that the permitting requirement and permit conditions were content-neutral and narrowly tailored to further that interest (permit, which is easily acquired and printed online, required for commercial activity on beach without regard to content of speech), and that there were ample alternative channels for expression (non-commercial weddings remained unregulated, and commercial beach or beach-related wedding available on county beaches or private property next to any beach).

Finally, the court acknowledged the plaintiffs' right to bring a facial challenge regarding the discretion DLNR has reserved to revoke a permit, and add to its terms and conditions. In analyzing this aspect of the action, the court assumed that the state's unencumbered beaches were nonpublic for a such that restrictions on access must be reasonable in light of the purpose served by the forum and viewpoint neutral. Despite the fact that DLNR had yet to use the discretionary power to revoke or change a commercial wedding permit, the court held that by conferring this unbridled discretion on a DLNR licensing official the regulations created the danger of self-censorship/government censorship, which danger, in and of itself, could cause a citizen to hesitate to express, or refrain from expressing his or her viewpoint for fear of adverse government action such as the denial or revocation of a permit. Thus, because the standardless discretion also makes it difficult to detect, and protect the public from, unconstitutional

viewpoint discrimination, the court held that the discretionary power afforded by the permit's terms and conditions is inconsistent with the First Amendment.

In sum, the court held that DLNR's regulation requiring permits for commercial weddings on unencumbered state beaches was valid as it is narrowly tailored to a significant governmental interest, is content-neutral, leaves amble alternative spaces for hosting a wedding, and does not vest too much discretion in the government official when issuing the permits, but that the grant of unbridled discretion to DLNR to revoke, or add terms to, a permit was an invalid restraint on the First Amendment.

Forest Resources

Ninth Circuit Upholds Award of $28.8 Million for "Intangible Environmental Damages" Resulting From Negligently Caused Wildfire. *United States v. CB Constructors Inc.* (9th Cir. 2012) 2012 WL 2477710.

In June of 2002 Defendant CB & I Constructors, Inc. ("CBI") negligently caused a wildfire that burned roughly 18,000 acres (28 square miles) of the Angeles National Forest, an important environmental and recreational resource for Southern Californians. The National Forest covers roughly 650,000 acres in the San Gabriel Mountains and represents about 70 percent of all open space in Los Angeles County. It also offers a refuge for native plants and animals, including several threatened and endangered species. In April of 2002 a county water district hired Merco Construction Engineers ("Merco") to build four water storage tanks for a housing project on private land about a half-mile from the National Forest. Merco subcontracted with CBI to construct two of the steel tanks. On June 5, 2002, a crew from CBI worked in over 100-degree weather to perform tasks that posed known fire hazards. In addition, Merco and CBI had failed to take several recommended fire prevention precautions, such as clearing brush 100 feet from the tanks, regularly watering dry vegetation, or keeping a fire watch on the ground while the crew worked on the roof. One CBI crew member was using an electric grinder that created a trail of sparks and hot metal slag, which ignited some dry brush next to the crew. By the time the crew descended from the roof, the fire was already out of control. It took federal, state, and county firefighters a week to contain the fire, costing roughly $6.6 million in fire suppression costs.

The United States brought a civil action against CBI and Merco to recover tort damages for harm caused by the fire. The jury awarded $7.6 million in fire suppression, emergency mitigation, and resource protection costs, and awarded $28.8 million in intangible environmental damages. CBI filed a motion for judgment as a matter of law and also moved for a new trial or remittitur, solely attacking the award for intangible environmental damages.

CBI first argued that intangible noneconomic damages are not compensable in tort suits alleging harm to property. The Court ruled that nothing in California law prevented the federal government from recovering intangible, non-economic environmental damages for a negligently set fire. Citing California's general tort statute (Civil Code section 3333); California's specific statutory provision governing liability for negligently set fires (Health & Safety Code section 13007); as well as a long line of California and federal cases, the Court concluded that California

embraces broad theories of tort liability that enable plaintiffs to recover full compensation for all the harms they suffer.

Next, CBI argued that the government did not produce sufficient evidence for the jury to determine the amount of environmental damages in a rational way. The Court upheld the district court's determination, finding that where, as here, the property at issue has no market equivalent, the plaintiff's damages must be ascertained in some other rational way and need not be determined through a precise mathematical calculation. The evidence about the "nature and character" of the damaged National Forest environment—namely causing 18,000 acres of land to become unusable, destruction and harm to animal habitats, soils, and plant life, destruction of a historic mining camp, and harm to the endangered California red-legged frog—provided a rational way for the jury to calculate the award.
Finally, CBI argued that the jury award was grossly excessive. CBI based its argument on the fact that the government suggested during closing arguments that the jury could determine the amount of intangible environmental damages by applying a "multiplier of two or three" to the hard economic damages. The amici curiae noted that multipliers are traditionally reserved for punitive, rather than compensatory, damages. However, the district court specifically instructed the jury that punitive damages were not authorized, and it seemed clear that the jury had not used a multiplier (which would have necessitated a very unlikely multiplier of 3.77109669) and instead calculated the damages based an even number of $1600 per acre for the 18,000 acres. The Court found that given the extent of the environmental harm caused by the fire, the damage award of $1600 per acre was not grossly excessive or against the clear weight of the evidence presented. Therefore, the trial court did not abuse its discretion by denying the motion for a new trial or remittitur.

NEPA

Ninth Circuit finds that the United States Forest Service violated NEPA when it approved the 2004 Framework amendment to the Sierra Nevada Forest Plan by failing to analyze the environmental consequences of the 2004 Framework on individual fish species.

Pacific Rivers Council v. United States Forest Service, 2012 U.S. App. LEXIS 12553 (9th Circuit, June 20, 2012, Order withdrawing prior opinion issued February 3, 2012, denying rehearing and reissuing opinion without substantive change).

The Sierra Nevada Mountains form one of the longest continuous mountain ranges in the lower 48 states, stretching for more than 400 miles from Southern California northward to the California-Oregon border. The United States Forest Service ("Forest Service") manages eleven separate national forests covering nearly 11.5 million acres of these mountain lands under the Sierra Nevada Forest Plan ("Forest Plan"), a Land Resource Management Plan ("LRMP") formulated and promulgated pursuant to the National Forest Management Act. LRMP's guide all management decisions within the forests subject to the Plan and individual projects are developed according to the guiding principles and management goals expressed in the LRMP.

The Sierra Nevada Ecosystem Project, a study commissioned by Congress, concluded in 1996 that the aquatic and riparian systems are the most altered and impaired habitats in the Sierra. In

response, the Forest Service issued a detailed Final Environmental Impact Statement ("2001 EIS") recommending amendments to the Forest Plan intended in part to conserve and repair the Sierra's aquatic and riparian ecosystems. For example, the 2001 EIS included 64 pages of detailed analysis of the environmental consequences of the amendments on 34 different fish species (9 species listed as federally threatened and endangered, 11 sensitive fish species and 14 moderate and high vulnerability fish species). In January 2001 the Forest Service adopted a modified version of the preferred alternative recommended in the 2001 EIS. This amendment to the Forest Plan and 2001 EIS was prepared and adopted under the administration of President Clinton and is referred to as the "2001 Framework."

In November 2001, under the administration of the newly elected President Bush, the Chief of the Forest Service asked for a review of the 2001 Framework and in January 2004, the Forest Service issued a Final Supplemental Environmental Impact Statement ("2004 EIS") recommending significant changes to the 2001 Framework. The Regional Forester adopted Alternative 2 from the 2004 EIS shortly thereafter, and in response to over 6,000 administrative appeals, the Forest Service Chief approved that decision without change in November 2004. This is referred to as the "2004 Framework." The 2004 Framework differed substantially from the 2001 Framework, including significant increases in logging and logging-related activities and changes in grazing standards for commercial and recreational livestock. Specifically, the 2004 Framework significantly reduced grazing restrictions and allowed 4.9 billion more board feet of timber to be harvested, 90 more miles of new roads and reconstruction of 855 more miles of existing roads than under the 2001 Framework.

Pacific Rivers Council ("Pacific Rivers"), a public interest environmental organization, brought suit in federal district court challenging the 2004 Framework as inconsistent with the National Environmental Protection Act ("NEPA") and the Administrative Procedure Act, alleging that the Forest Service failed to adequately analyze the environmental consequences of the 2004 Framework for fish and amphibians. The district court granted summary judgment to the Forest Service on cross-motions for summary judgment and Pacific Rivers timely appealed to the Ninth Circuit.

On appeal, Pacific Rivers alleged that the 2004 EIS fails to take a "hard look" at the environmental impact of the 2004 Framework on fish and amphibians. The Forest Service disagreed, and argued, for the first time on appeal, that Pacific Rivers lacks standing under Article III of the Constitution.

The Ninth Circuit first addressed Pacific Rivers' standing and, pointing to declarations in the record regarding the Pacific Rivers' Chairman's and members' use and enjoyment of areas throughout the Sierra Nevada as well as the breadth of the Forest Plan amendments proposed in the 2004 Framework, held that Pacific Rivers had Article III standing to challenge the 2004 Framework under NEPA. In so holding, the Ninth Circuit rejected the Forest Service's reliance on *Summers v. Earth Island Inst.* (2009) 555 U.S. 488 and argument that because Pacific Rivers challenges amendments to a LRMP rather than a specific project under the LRMP, it failed to allege a threat of a "concrete and particularized" injury that is "actual or imminent." The court distinguished the case from *Summers* and cited its *Salmon River Concerned Citizens v. Robertson* (9th Cir. 1994) 32 F.3d 1346 and *Sierra Forest Legacy v. Sherman* (9th Cir. 2011) 646

F.3d 1161 decisions to support its finding that the harm flowing from a failure to comply with NEPA in formulating the 2004 Framework was sufficient to confer standing to bring a facial challenge to the 2004 Framework, independent from specific implementing projects.

On the merits, the Ninth Circuit found that the 2004 EIS failed to adequately analyze the 2004 Framework's impacts on fish species. Indeed, despite promising such an analysis the 2004 EIS contains no analysis whatsoever of individual species of fish. Citing its decision in *Kern v. Bureau of Land Mgmt.* (9th Cir. 2002) 284 F.3d 1062, the Ninth Circuit held that the Forest Service was required to analyze impacts on individual fish species if it was "reasonably possible" to do so, and pointed to the Forest Service's extensive analysis of impacts to fish species in its 2001 EIS (64 pages of analysis on 35 different species) as well as the 2004 EIS's analysis of impacts to six species of amphibians to demonstrate why it was also reasonably possible for the Forest Service to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS. The Ninth Circuit also rejected what it called the Forest Service's "fall-back" argument – that even if reasonably possible, it satisfied NEPA's hard look requirement by two Biological Assessments ("BA") that were incorporated by reference in the 2004 EIS. Specifically, the court ruled that this fall-back argument failed for three reasons: (1) if the BAs were truly intended to serve as the impact analysis of the 2004 Framework on fish species, the 2004 EIS should have described and analyzed the BAs in the text and included the BAs themselves in an appendix to the 2004 EIS (instead of simply incorporating them by reference) in order to adequately inform the decision makers and the general public as required by NEPA; (2) even if the BAs had been included, they could not have satisfied NEPA's hard look requirement as the BAs functioned solely as a trigger to the consultation process required under Section 7 of the Endangered Species Act and contained no impact analysis themselves (the Biological Opinions issued by the U.S. Fish and Wildlife Service in response to the BAs were not included or referenced in any form in the 2004 EIS); and (3) even if the BA's could have satisfied NEPA's hard look requirement, they applied only to federally threatened and endangered fish species, and said nothing whatsoever about the other sensitive and moderate/high vulnerability fish species previously analyzed in the 2001 EIS.

Finally, the Forest Service determined that the 2004 EIS adequately analyzed the 2004 Framework's impacts on amphibians. The court reviewed the 2004 EIS's discussion of the potential grazing and prescribed fire/logging impacts on 6 frog species as well as the mitigation strategies to minimize the environmental consequences of the 2004 Framework on the frogs. The court rejected Pacific Rivers' contention that the Forest Service was required to provide further analysis given that the 2004 Framework delegated significant decision making authority to local managers citing repeated commitments in the 2004 EIS and in the Forest Service's appellate brief that additional NEPA analysis will occur at the project-level when it can better examine the effects of a particular grazing or other site-specific project.

Accordingly, the Ninth Circuit reversed in part and affirmed in part, and remanded the case back to the district court. Circuit Judge N. R. Smith authored a substantial dissent, criticizing the majority for reinventing the arbitrary and capricious standard of review and not deferring to the Forest Service's reasonable decision.

Water Quality

The Ninth Circuit Upholds U.S. Army Corps' Determination That Upgrades to Hydroelectric Power Plant Fall Within the Scope of General Nationwide Permits. *Snoqualmie Valley Preservation Alliance v. United States Army Corps of Engineers* (9th Cir. 2012) 2012 WL 2384159.

Puget Sound Energy ("PSE") maintains and operates a hydroelectric power plant at the Snoqualmie Falls in the state of Washington. The Snoqualmie River must pass through a narrow channel before reaching the falls, creating a bottleneck during heavy rains, and subjecting the City of Snoqualmie to persistent and significant flooding. As part of an upgrade to the plant, PSE plans to lower the dam located in the channel above the falls to mitigate the upstream flooding problems. In 1991 PSE proposed the plant upgrade, which the Federal Energy Regulatory Commission ("FERC") approved in a 2004 license. Because the plant upgrade involves the excavation and fill of wetlands, PSE also had to obtain a permit under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, from the U.S. Army Corps of Engineers ("Corps"). PSE obtained verification from the Corps that it could proceed under nationwide permits ("NWPs"), rather than applying for an individual permit, which would have required review under the National Environmental Policy Act ("NEPA"). The Snoqualmie Valley Alliance ("Alliance"), filed suit challenging the Corps' decision. The trial court granted summary judgment in favor of the Corps, and the Alliance appealed.

The Alliance first argued that hydropower projects can only be authorized if they fall under NWP 17, the only nationwide permit that specifically references hydropower projects but which only applies to hydropower projects having less than 5000 kW of total generating. The Court rejected the Alliance's argument finding that NWP 17 is silent concerning hydropower projects of more than 5000 kW, and no language within NWP 17 prevents the Corps from applying other permits to hydropower projects that meet the standards of other permits. The Court also held that the Corps' 1991 decision that hydropower plants above 5000 kW should not be automatically determined to have "minimal adverse environmental effects" was not a determination that all hydropower projects above 5000 kW must go through the individual permit review process, but instead, was a determination that such projects must qualify under another NWP if they are to qualify at all. Finally, the Court found that the action taken by the Corps was consistent with the Corps' past practices and own guidance documents.

The Alliance also claimed that the Corps erred in verifying that NWPs 3 and 39 authorize the project. The Court upheld the Corps' interpretation of its own regulations in applying NWPs 3 and 30, finding the interpretation was neither plainly erroneous or inconsistent with the Corps' regulations. NWP 3(a) authorizes discharges from the "replacement of any previously authorized, currently serviceable, structure. . . provided that the structure . . . is not to be put to uses differing from those uses specified or contemplated for it in the original permit or the most recently authorized modification" and "[m]inor deviations in the structure's configuration . . . including those due to changes in materials, construction techniques, or current construction codes or safety standards that are necessary to make the . . . replacement are authorized." The Court found that the Corps' determination that the removal of the old dam and construction of the new dam at a lower height was consistent with NWP 3 since the new dam will serve the same

purpose as the old dam in the hydropower project. The Court also found the deviations in the dam's structure qualified as a change to "current construction codes or safety standards," since the regulatory history of the permit suggests a general "public safety" rationale suffices to bring a replacement project with minor deviations under NWP 3, and protecting the upper valley from excessive flooding qualifies as a "public safety" concern.

The Court also found that the modifications to the power plant intakes and powerhouse structures fell within the scope of NWP 39. NWP 39 authorizes "[d]ischarges of dredged or fill material into non-tidal waters of the United States for the construction or expansion of commercial and institutional building foundations and building pads and attendant feature that are necessary for the use and maintenance of the structures." Examples of commercial developments include "industrial facilities" and examples of institutional developments include "public works buildings." The Court held that PSE's project involved the construction of "attendant features," here the intakes, tailraces, and powerhouses, which "are necessary for the use and maintenance" of the hydropower plant, and that the structure qualified as an "industrial facility," as a type of commercial development.

The Alliance also argued that the Corps' Verification Letter did not contain sufficient articulation of the basis for its decision. The Court rejected this argument, finding that the Verification Letter did state reasons for the action taken and that the decision was amply supported by facts in the administrative record. Further, the Court pointed out that the NWP verification process is much simpler than the individual permit process, and an elaborate analysis of the applicable regulations and facts would be contrary to the purpose of the NWPs—which are meant to enable the Corps to quickly reach determinations regarding activities that will have minimal environmental impacts. The Court declined to impose a new requirement of a full and thorough analysis of each general condition in the NWPs, since in most cases a permittee is not required to supply the Corps with information about how the project will satisfy each general condition.

Finally, the Court swiftly rejected the Alliance's argument that the Corps violated NEPA by failing to prepare an Environmental Assessment or Environmental Impact Statement, which are required for individual permits. Because the Corps did not violate the CWA by allowing PSE to proceed under the three NWPs, it did not violate NEPA, since verifying that permittees can proceed under an NWP does not require a full NEPA analysis at the time of verification.