California Lawyers Association

ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL 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 regulatory developments. This edition of the *Update* reports on cases of significance, and regulatory developments from September 15 through December 31, 2018.

Please note that all case law 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.

The reader should also note that this edition contains two CEQA case summaries that are uncitable and ordered unpublished by the California Supreme Court: *Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 237 Cal.Rptr.3d 313 (previously published at: 26 Cal.App.5th 561) and *Save Lafayette Trees v. City of Lafayette* (2018) 239 Cal.Rptr.3d 222 (Previously published at: 28 Cal.App.5th 622). Both have been included in this issue only for your reading pleasure.

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section of the California Lawyers Association. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cdaywilson@daywilsonlaw.com. I would like to thank Danielle K. Morone, Michael Haberkorn, Sabrina Teller, Michael Sands, and Anthony D. Todero for their contributions to this issue of the Update. If you are interested in getting involved in writing for the Update or the activities of the Environmental Law Section, please contact me (at the above email) or any other section member. – Cyndy Day-Wilson.

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TABLE OF CONTENTS

CALIFORNIA

AGENCY ADMINISTRATION

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

California Environmental Reporting System Data Registry. In November 2018, the California Environmental Protection Agency (CalEPA) provided notice of proposed amendments to the California Environmental Reporting System Data Registry. The amendments are considered non-substantial, and are expected to only have a substantial impact on Unified Program Agencies' ability to maintain parallel data exchange and provide methods to continue to utilize local data reporting and management systems. Cal. Reg. Notice Register 2018, Vol

Federal Regulatory Updates

Privacy Act Regulations. In December 2018, the U.S. Environmental Protection Agency (EPA) provided notice of a direct final rule on revisions to the EPA's Privacy Act regulations in order to exempt a new system of records, EPA-63, the eDiscovery Enterprise Tool Suite, from certain requirements of the Privacy Act because certain records are maintained for use in civil and criminal actions. 83 Fed. Reg. 62716. The EPA provided notice of a proposed rule regarding same. 83 Fed. Reg. 62757.

Unified Agenda of Actions. In November 2018, the EPA provided notice of publication of its Semiannual Agenda of Regulatory and Deregulatory Actions to update the public. The document includes information about regulations that are under development, completed, or have been cancelled since the last agenda. 83 Fed. Reg. 58079.

AIR QUALITY

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Criteria Air Pollutants and Toxic Air Contaminants. In October 2018, the California Air Resources Board (CARB) provided notice of a public hearing to consider proposed regulations for the reporting of criteria air pollutants and toxic air contaminants (TOCs) pursuant to the requirements of AB 617. Cal. Reg. Notice Register 2018, Vol. No. 43-Z, p. 1899.

Enhanced Vapor Recovery. In September 2018, CARB provided notice of a public hearing to consider proposed amendments to Certification Procedures and Definitions for Vapor Recovery Systems at Gasoline Dispensing Facilities. The regulations would standardize gas station nozzle spout dimensions to address storage tank overpressure. Cal. Reg. Notice Register 2018, Vol. No. 36-Z, p. 1412.

Fill Pipes and Openings on Motor Vehicle Fuel Tanks. In September 2018, CARB provided notice of a public hearing to consider approving proposed amendments to California Specifications for Fill Pipes and Openings of Motor Vehicle Fuel Tanks. Cal. Reg. Notice Register 2018, Vol. No. 36-Z, p. 1384.

Light-Duty Engine Packages. In September 2018, CARB provided notice of a public hearing to consider proposed regulations and certification procedures for Light-Duty Engine Packages for New Light-Duty Specially-Produced Motor Vehicles for 2019 and Subsequent Model Years. Cal Reg. Notice Register 2018, Vol. No. 36-Z, p. 1379.

On-Board Diagnostic System Requirements. In September 2018, CARB provided notice of a public hearing to consider proposed amendments to California's Heavy Duty Engine On-Board Diagnostic System Requirements for Passenger Cars, Light-Duty Trucks, and Medium-Duty Vehicles and Engines. Cal. Reg. Notice Register 2018, Vol. No. 39-Z, p. 1690.
Solid Waste Collection Vehicles (SWCV). In December 2018, CARB provided notice of a public hearing on proposed amendments to the On-Road Heavy-Duty Diesel-Fueled Residential and Commercial SWCV regulation. The proposed amendments would add reporting requirements for SWCVs, expand the scope of the regulation to include diesel-fueled on-road single engine heavy cranes, and require reporting from heavy crane owners. Cal. Reg. Notice Register 2018, Vol. No. 49-Z, p. 2172.

Federal Regulatory Updates

Air Emission Sources Testing Regulations. In November 2018, the EPA provided notice of final rule amending existing testing regulations to reflect corrections, updates, and the addition of alternative equipment and methods for source testing of emissions. The revisions would improve the quality of data and provide flexibility in the use of approved alternative procedures. 83 Fed. Reg. 56713.

Cross-State Air Pollution Rule. In December 2018, the EPA provided notice of data availability of preliminary lists of units eligible for second-round allocations of emission allowances for the 2018 control periods from new unit set-asides established under the Cross-State Air Pollution Rule. 83 Fed. Reg. 62860.

Emission Guidelines for Municipal Solid Waste Landfills. In October 2018, the EPA provided notice of a proposed rule to update certain cross-references in the 2016 emission guidelines and compliance times for Municipal Solid Waste Landfills. The proposed revisions would harmonize the proposed new timing and completeness requirements for state and federal plans. 83 Fed. Reg. 54527. In November 2018, the EPA provided notice of a public hearing and extended comment period for same. 83 Fed. Reg. 57387.

National Ambient Air Quality Standards (NAAQS). In November 2018, the EPA provided notice of availability of the draft Integrated Review Plan for the Ozone NAAQS. The document contains the draft plans and schedule for the current review of the air quality criteria and NAAQS for photochemical oxidants, including ozone. 83 Fed. Reg. 55163.

In November 2018, the EPA also provided notice of a proposed rule relating to the attainment date for areas classified as "Moderate" for the 2008 Ozone NAAQS. Specifically, the EPA is proposing to determine that Mariposa County attained the standard by the attainment date, and that San Diego County failed to attain the standard by the attainment date. As a result, San Diego County will be reclassified as "Serious" and a SIP revision must be submitted. 83 Fed. Reg. 56781.

In December 2018, the EPA provided notice of a final rule for the nonattainment area and ozone transport region implementation requirements for the 2015 Ozone NAAQS. The final rule is an update to the implementing regulations for the 2008 Ozone NAAQS and addresses a range of nonattainment area and ozone transport region SIP requirements for the 2015 Ozone NAAQS. 83 Fed. Reg. 62998.

In December 2018, the EPA provided notice of a final rule determining that the existing Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS fully addresses certain states' obligations under the good neighbor provision regarding interstate pollution transport for the 2008 Ozone NAAQS. 83 Fed. Reg. 65878.

National Emission Standards for Hazardous Air Pollutants (NESHAP). In September 2018, the EPA provided notice of a proposed rule concerning the results of the residual risk and technology reviews for three rules: (i) the NESHAP for the Surface Coating on Large Appliances; (ii) the NESHAP for the Printing, Coating, and Dyeing of Fabrics and Other Textiles; and (iii) the NESHAP for the Surface Coating of Metal Furniture. 83 Fed. Reg. 46262.

In October 2018, the EPA provided notice of a final rule concerning amendments to the NESHAP for the Manufacture of Amino/Phenolic Resins. The revisions would revise the maximum achievable control technology standard for continuous process vents at existing affected sources and extend certain compliance dates. 83 Fed Reg. 51842.

In November 2018, the EPA provided notice of a final rule amending the Petroleum Refinery Sector NESHAP and New Source Performance Standards. The amendments clarify requirements, and make other technical corrections and minor revisions. 83 Fed. Reg. 60696.

New Source Performance Standards (NSPS). In November 2018, the EPA provided notice of a proposed rule to amend the 2015 NSPS for new residential hydronic heaters and new forced-air furnaces by adding a "sell-through" period. In addition, the EPA is taking comments on whether a sell-through period is appropriate following the May 2020 compliance date and whether the current minimum pellet fuel requirements should be retained. 83 Fed. Reg. 61574.

In November 2018, the EPA also provided an advance notice of proposed rulemaking concerning the 2015 NSPS for new residential wood heaters, new residential hydronic heaters and forced-air furnaces. The EPA is soliciting comments to improve the standards and related test methods. 83 Fed. Reg. 61585.

NO_X SIP Call. In September 2018, the EPA provided notice of a proposed rule to update the regulations concerning implementation of the NO_X SIP Call. The amendments would: (i) allow states to include alternate forms of monitoring requirements in their SIPs, (ii) rescind the findings of interstate pollution transport obligations with respect to the 1997 8-hour Ozone NAAQS under

the NO_X SIP Call that have been stayed since 2000, and (iii) make other clarifying amendments. 83 Fed. Reg. 48751.

Oil and Natural Gas Sector. In October 2018, the EPA provided notice of a proposed rule to reconsider amendments to certain NSPS for the oil and natural gas sector. This action would make amendments and clarifications as a result of a 2017 reconsideration. 83 Fed. Reg. 52056.

In October 2018, the EPA also provided notice of a public hearing to consider a proposed rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration. 83 Fed. Reg. 54303.

Prevention of Significant Deterioration and Nonattainment New Source Review. In November 2018, the EPA provided notice of a final action lifting the administrative stay and announcing the effective date of a 2009 action titled "Prevention of Significant Deterioration and Nonattainment New Source Review: Aggregation and Project Netting." In addition, the EPA is clarifying the implications of the 2009 action for EPA-approved permitting programs. 83 Fed. Reg. 57324.

Protection of Stratospheric Ozone. In October 2018, the EPA provided notice of a proposed rule to change the legal interpretation of the refrigerant management requirements. The proposed revisions would revise the appliance maintenance and leak repair provisions as well as the list of practices that must be followed in order for refrigerant releases to be considered *de minimis*. 83 Fed. Reg. 49332.

In October 2018, the EPA also provided a determination of acceptability that expands the list of acceptable substitutes pursuant to the EPA's Significant New Alternatives Policy program. The acceptable substitutes are for use in the refrigeration and air conditioning, foam blowing, fire suppression, cleaning solvents, and aerosols sectors. 83 Fed. Reg. 50026.

Reporting Exemption for Air Emissions. In November 2018, the EPA provided notice of a proposed rule to amend the release notification regulations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to add the reporting exemption for air emissions from animal waste at farms. In addition, the EPA proposes to add the definition of animal waste and farm to the EPCRA regulations. 83 Fed. Reg. 56791.

Risk Management Program. In December 2018, the EPA provided notice of a final rule, and effective date, for amendments to the Risk Management Program under the Clean Air Act concerning accidental release prevention requirements. 83 Fed. Reg. 62268.

State Implementation Plan (SIP). In October 2018, the EPA:

1. Provided notice of a proposed rule to approve California SIP revisions to address requirements for the 2005 24-hour fine particulate matter ($PM_{2.5}$) NAAQS in the Los Angeles-South Coast air basin Serious $PM_{2.5}$ nonattainment area. Additionally, the EPA proposed to approve 2017 and 2019 motor vehicle emissions budgets for transportation conformity purposes and inter-pollutant trading ratios for use in transportation conformity analyses. 83 Fed. Reg. 49872.

2. Provided notice of a proposed rule to approve a revision to the Feather Air Quality Management District (AQMD) portion of the California SIP. The revision concerns emissions of oxides of nitrogen (NO_X) from natural gas-fired water heaters, small boilers, and process heaters. 83 Fed. Reg. 49870.

3. Provided notice of a final rule approving and conditionally approving revisions to the San Diego County Air Pollution Control District (APCD) portion of the California SIP. The revisions concern the New Source Review permitting program for new and modified sources of air pollution. 83 Fed. Reg. 50007.

4. Provided notice of a proposed rule to approve revisions to the El Dorado County AQMD portion of the California SIP. The revision concerns the demonstration regarding Reasonable Available Control Technology requirements for the 2008 8-hour Ozone NAAQS and negative declarations for several source categories. 83 Fed. Reg. 50548.

In November 2018, the EPA:

5. Provided notice of a final rule approving a revision to the South Coast AQMD portion of the California SIP. The revision concerns emissions of volatile organic compounds (VOCs) from architectural coatings. 83 Fed. Reg. 61326.

6. Provided notice of a proposed rule to approve portions of two SIP revisions submitted for the 2008 8-hour Ozone NAAQS in the San Joaquin Valley ozone nonattainment area. The EPA is proposing to: (i) approve the portion of the 2016 Ozone Plan for the 2008 8-Hour Ozone Standard that addresses the requirement for a base year emissions inventory, (ii) approve the portions of the 2018 Updates to the California SIP that address requirements for a reasonable further progress demonstration and motor vehicle emission budgets, and (iii) conditionally approve portions of the 2018 SIP Update that address requirements for contingency measures for failure to meet certain milestones or attainment. 83 Fed. Reg. 61346.

In December 2018, the EPA:

1. Provided notice of a final rule finding that California failed to submit complete SIPs to implement the 1997, 2006, and 2012 NAAQS for $PM_{2.5}$ in the San Joaquin Valley. If the deficiencies are not corrected within 18 months, then sanctions will begin to apply. 83 Fed. Reg. 62720.
2. Provided notice of a final rule for three SIP revisions addressing the nonattainment new source review requirements for the 2008 8-hour Ozone NAAQS. The revisions address the South Coast AQMD, San Joaquin Valley APCD and Yolo-Solano AQMD portions of the California SIP. 83 Fed. Reg. 64026.
3. Provided notice of a proposed rule to approve certain elements of the SIP revision submitted to address requirements for the 2012 $PM_{2.5}$ NAAQS in Plumas County Moderate $PM_{2.5}$ nonattainment area. 83 Fed. Reg. 64774.

4. Provided notice of a proposed rule to approve a revision to the Antelope Valley AQMD portion of the California SIP. The revision concerns emissions of VOCs from organic liquid loading. 83 Fed. Reg. 64795.
5. Provided notice of a final rule approving a SIP submittal regarding certain interstate transport requirements addressing the 2008 Ozone NAAQS, the 2006 $PM_{2.5}$ NAAQS, and the 2010 sulfur dioxide NAAQS. 83 Fed. Reg. 65093.
6. Provided notice of a final rule to approve a revision to the Feather River AQMD portion of the California SIP. The revision concerns emissions of NO_X from natural gas-fired water heaters, small boilers, and process heaters. 83 Fed. Reg. 66136.

Volatile Organic Compounds. In November 2018, the EPA provided notice of a final rule concerning the regulatory definition of VOCs exemption of *cis-1, 1, 1,4,4,4-hexafluorobut-2-ene.* The compound will be excluded because it makes negligible contribution to tropospheric ozone formation. 83 Fed. Reg. 61127.

ATTORNEY'S FEES

Recent Court Rulings
No Summaries or updates this quarter.

Regulatory Updates
No Summaries or updates this quarter.

CEQA

Recent Court Rulings
The California Supreme Court held that CEQA requires EIRs to make a reasonable effort to substantively connect a project's air quality impacts to the likely health consequences. *Sierra Club v. County of Fresno* (2018) ___Cal.5th___ (Case No. S219783).

The Friant Ranch Specific Plan contemplates the development of an age-restricted community including up to 2,500 residential units, a commercial center, and a neighborhood electric vehicle network on an approximately 942-acre site in unincorporated Fresno County (County). The county was the lead agency for CEQA review of the project and prepared an environmental impact report (EIR). In February 2011, the County Board of Supervisors certified the EIR, adopted a mitigation monitoring program, and approved the specific plan.

Following adoption of the Specific Plan and EIR, the Sierra Club, Revive the San Joaquin, and League of Women's Voters of Fresno (collectively, plaintiffs) filed a petition for writ of mandate challenging the EIR on several grounds. The trial court denied the plaintiffs' petition and upheld the county's approval of the project and EIR. The court of appeal then reversed the decision in part, agreeing with the plaintiffs that the EIR's air quality analysis was inadequate because it failed to correlate the project's emissions to impacts on human health. The court of appeal also held that the EIR's air quality mitigation measures were vague, unenforceable, and lacked specific performance criteria, and that the EIR inadequately explained and supported its conclusion that

the mitigation measures would substantially reduce air quality impacts. The court of appeal directed the county to prepare a revised EIR to address each of these issues. In October 2014, the California Supreme Court granted review.

The first issue considered by the court was which standard of review applies to claims that an EIR's discussion of environmental impacts is inadequate, and, by extension, whether this inquiry is a procedural issue subject to a de novo review or a factual question subject to the more deferential substantial evidence standard. The court acknowledged some ambiguity in discerning the distinction, noting that "the review of such claims does not fit neatly within the procedural/factual paradigm." Relying on *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 403–404, and its more recent decision in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 514–515, the court determined that "whether a description of an environmental impact is insufficient because it lacks analysis or omits the magnitude of the impact is not a substantial evidence question. A conclusory discussion of an environmental impact that an EIR deems significant can be determined by a court to be inadequate as an informational document without reference to substantial evidence." The court concluded that where "a mixed question of law and fact requires a determination whether statutory criteria were satisfied, de novo review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted." The court emphasized that the ultimate determination for the court is whether the EIR serves its purpose as an informational document.

The next issue considered by the court was whether the EIR's air quality analysis complied with CEQA. On this issue, the court stated that an EIR must reflect "a reasonable effort" to discuss the connection between the estimated air pollutant emissions and the associated health impacts. Further, an EIR must show a "reasonable effort to put into a meaningful context" the conclusion that the project will cause a significant air quality impact. According to the court, although CEQA does not mandate an in-depth health risk assessment, it does require an EIR to adequately explain either (a) how emissions numbers translate to or create potential adverse health impacts; or (b) what the agency does know, and why, given existing scientific constraints, it cannot translate potential health impacts further.

With respect to the adequacy of the Friant Ranch EIR, the court noted that the EIR quantified how many tons per year the project will generate of reactive organic gases and nitrogen oxides (ozone precursors), but did not attempt to quantify how much *ozone* these emissions will create. Furthermore, although the EIR explained that ozone can cause health impacts at exposures for 0.10 to 0.40 parts per million, the court found this information to be meaningless in the absence of an estimate of how much ozone the project could generate. The EIR also failed to disclose what levels of exposure PM, carbon monoxide, and sulfur dioxide would trigger adverse health impacts. In short, the court found that the EIR made "it impossible for the public to translate the bare numbers provided into adverse health impacts or to understand why such translation is not possible at this time (and what limited translation is, in fact, possible)."

In addition, the court held that the EIR did not fulfill CEQA's disclosure requirements in that it stated that the air quality mitigation would "substantially reduce" air quality impacts but failed to "accurately reflect the net health effect of proposed air quality mitigation measures."

Finally, the court considered whether a mitigation measure impermissibly deferred formulation of mitigation because it allowed the county to substitute equally or more effective

measures in the future. The court held that this substitution clause did not constitute impermissible deferral of mitigation because it allows for "additional and presumably better mitigation measures when they become available," consistent with CEQA's goal of promoting environmental protection. The court also explained that mitigation measures need not include quantitative performance standards. If the mitigation measures are at least partially effective, they may comply with CEQA, even if the measures will not reduce the project's significant impacts to less-than-significant levels.

The Third District Court of Appeal directed El Dorado County to prepare an EIR after finding that the lay opinions of community members supported a fair argument that a discount store may have significant aesthetic impacts. *Georgetown Preservation Society v. County of El Dorado* (filed Dec. 17, 2018, Case No. C084872) ___ Cal.App.5th ___

In 2015, the Georgetown Preservation Society (Society) filed a petition for writ of mandate challenging El Dorado County's adoption of a mitigated negative declaration and approval of design review for a proposed Dollar General store in downtown Georgetown, a "quaint Gold Rush-era hamlet in rural El Dorado County." The project applicant proposed a 9,100-square-foot retail store with 12,400 square feet of parking on three vacant lots along Georgetown's Main Street. Several local residents opposed the project throughout the review process and submitted comments complaining that the project's size and overall appearance were inconsistent with "look and feel" of historic downtown Georgetown. The trial court found that the many comments of local citizens supported a fair argument that the project may have a significant aesthetic effect on the environment and directed the County to prepare an Environmental Impact Report (EIR). The County and real parties (appellants) appealed.

On appeal, the appellants argued that, in approving the project, the county had reviewed the project for consistency with its Historic Design Guide and found the project substantially complied with all applicable design standards. The appellants contended that the county's finding of compliance with its design guidelines should be entitled to deference and should be reviewed under the substantial evidence standard. The court rejected this argument, drawing a distinction between Planning and Zoning Law findings and the CEQA fair argument standard. The court explained that, although Planning and Zoning law findings are reviewed for substantial evidence, design review is not a substitute for CEQA review and the fair argument standard still applies, even apparently to arguments based on consistency with agency plans and policies. According to the court, although an agency's design review forms part of the body of evidence to consider when determining whether the fair argument standard has been met, the application of design guidelines does not insulate the project from CEQA review at the initial study phase under the fair argument standard. Moreover, the court explained, while design review may provide substantial evidence that aesthetic impacts are less than significant, if contrary evidence meets the fair argument standard, an EIR is required.

Applying the fair argument standard to the project at issue, the court stated it had "little difficulty finding the fair argument standard was met . . . ." The court noted that multiple commentators objected the size and overall appearance of the project, including by some people claiming backgrounds in design and planning. As a result, the court stated, it could not seriously be disputed the low threshold needed to trigger an EIR was met. The court also rejected the appellants' arguments that here the County's design review criteria recommending specific

architectural styles and features constituted a technical subject beyond the credible reach of lay commenters. The court noted that several decisions have found lay commentary on nontechnical matters to be admissible and probative, and may satisfy the fair argument standard. According to the court, while the commenters may have lacked the background to apply the County's design standards, a rational lay person familiar with the area could conclude a 9,100-square-foot chain store may impact the historic district's aesthetic.

Finally, the court rejected an argument by the county that some of the evidence cited from lay persons was not credible. According to the court, the county's decision-makers were obligated to state, in the record and with particularity, which proffered evidence lacked credibility and why. While the appellants asserted that much of the cited testimony lacked basis in facts, the court held that the county could not discount such evidence in litigation after failing to do so in the administrative record. The court added that even if the county had made such determinations here, doing so would have been an abuse of discretion because the court found the testimony constituted substantial evidence supporting a fair argument.

The Third District Court of Appeal held that substantial evidence supported Plumas County's decision to base its General Plan EIR impact analysis on reasonably foreseeable level of growth and development. *High Sierra Rural Alliance v. County of Plumas* (2018) 29 Cal.App.5th 102.

In December 2013, the Plumas County Board of Supervisors certified a programmatic Environmental Impact Report (EIR) and adopted a general plan update (GPU) for the 2035 planning horizon. The GPU expressed the county's aim of focusing new population growth and housing construction to within defined "planning areas" in order to prevent rural sprawl and degradation of the county's natural resources. Accordingly, the county's EIR explained that it was prepared based on the assumption that growth would occur primarily in these planning areas. The High Sierra Rural Alliance (High Sierra) filed a lawsuit challenging the GPU and EIR. High Sierra argued that certain land use policies in the GPU conflicted with the Timberland Productivity Act (Timberland Act) and that the EIR failed to analyze impacts of potential growth outside the designated planning areas. The trial court rejected High Sierra's arguments and denied the petition and complaint in its entirety. High Sierra appealed.

The first issue on appeal was whether the GPU conflicted with the Timberland Act by designating residences and other structures as a "compatible use" on timberland production zoned (TPZ) land. As the court explained, the Timberland Act restricts the use of TPZ land to certain "compatible uses" enumerated in Government Code section 51104. One category of compatible use is a "residence or structure necessary for the management of land zoned as timberland production." High Sierra argued that land use policies in the GPU improperly included residences as a "compatible use" on TPZ lands without regard to whether the residences are "necessary for" the management of TPZ lands. Such a categorical determination, High Sierra argued, conflicted with the Timberland Act.

The Court of Appeal rejected that argument, framing the issue as whether the county was required to recite the language of the Timberland Act in the GPU policies. As the court explained, record evidence demonstrated the county was aware of the Timberland Act's "necessary for" requirements when it was preparing the GPU. In fact, transcripts in the record demonstrated that the county chose to eliminate certain language from the policy at issue because it was redundant

of the Timberland Act requirements. According to the court, High Sierra failed to identify anywhere in the GPU or EIR demonstrating that the county adopted a policy of allowing residences or structures on TPZ land in violation of the Timberland Act. The court held it was not necessary the GPU recite the "necessary for" language of Government Code section 51104.

After rejecting High Sierra's Timberland Act claims, the court went on to consider High Sierra's claim that the county violated CEQA by failing to assess the impacts of development outside the designated "planning areas." High Sierra argued that policies in the GPU invited unmitigated rural sprawl in the form of thousands of new residences or structures on resource lands outside of designated planning areas. The court rejected High Sierra's arguments and held that the county properly focused its analysis on reasonably foreseeable growth occurring under the GPU based on substantial evidence in the record supporting the county's population growth and development estimates. The county relied on estimates formulated by the Department of Finance and Caltrans to determine the county's population may reasonably be expected to grow just 0.7 percent annually through 2050. Based on this minimal population growth, the draft EIR explained that full-build out under the GPU would not occur for over three hundred years. The court also agreed that historical trends and experience supported the county's determination that reasonably foreseeable growth will occur almost exclusively with the designated planning areas. The court rejected High Sierra's argument that rampant sprawl would occur under the new GPU policies as unsupported speculation, noting that CEQA does not require agencies to assume an unlikely worst-case scenario in their environmental analysis.

Finally, the court held that the county did not violate CEQA by failing to recirculate the EIR. High Sierra argued that recirculation was required to allow public comment on the potential for sprawl under the new policies, new maps in the final EIR, and building intensity standards. Addressing these arguments in turn, the court held that the draft EIR did not misrepresent the scope of the project as limiting the bulk of future development to within the planning areas; the information provided by the new maps was disclosed in the draft EIR and did not change the scope of the project; and the addition of maximum size *restrictions* in the form of building intensity standards in the final EIR did not constitute significant new information which rendered the DEIR fundamentally inadequate as an informational document.

The First District Court of Appeal held that the 90-day statute of limitations period set forth in the Planning and Zoning Law, Government Code section 65009, did not apply to CEQA cause of action. *Save Lafayette Trees v. City of Lafayette* (2018) 239 Cal.Rptr.3d 222 (Previously published at: 28 Cal.App.5th 622) **NOTE: The Court of Appeal granted rehearing on November 26, 2018 and this case is classified as uncitable.**

On March 27, 2017, the City of Lafayette (city) approved an agreement with Pacific Gas and Electric Company (PG&E) that conditionally authorized the removal of up to 272 trees from PG&E's local natural gas pipeline rights-of-way. City staff and PG&E disagreed regarding whether or not PG&E was subject to permitting requirements in the city's tree protection ordinance. Rather than requiring PG&E to obtain a tree removal permit, PG&E and city staff agreed to process the project under a provision of the City's municipal code allowing the removal of protected trees "to protect the health, safety and general welfare of the community."

Petitioners Save Lafayette Trees, Michael Dawson and David Kosters (petitioners) filed a lawsuit challenging the city's approval of the tree removal agreement. The petition alleged that the

city failed to comply with the Planning and Zoning Law and CEQA in approving the tree removal agreement. The petition also alleged that the city violated petitioners' due process rights by failing to provide sufficient notice of the city council meeting at which the agreement was approved. The petition was filed on June 26, 2017, 90 days from the city's approval of the agreement, and served the following day.

PG&E filed a demurrer to the petition, which the city joined, contending that the challenge was time barred under Government Code section 65009, subdivision (c)(1)(E), which requires that an action challenging a decision on a zoning permit be filed and served within 90 days. The trial court sustained the demurrer without leave to amend and dismissed the petition in full. This appeal followed.

On appeal, the appellate court affirmed in part and reversed in part. First, the appellate court agreed with the trial court that the petitioners' Planning and Zoning Law claims were time barred under Government Code section 65009(c)(1)(E). The court explained that the 90-day limit in that section applies broadly to any action challenging a decision by a legislative body regarding a permit provided for by a local zoning ordinance. In this case, the court concluded the city's tree ordinance is a zoning ordinance, codified in the "Planning and Land Use" title of the city's municipal code. Although the city entered an agreement for the removal of trees rather than issuing a "permit," the court concluded there was no meaningful difference between the two in this instance, thus, section 65009(c)(1)(E) applied.

In holding that the 90-day limitations period in section 65009(c)(1)(E) applied to petitioners' Planning and Zoning Law claims, the court rejected several of the petitioners' arguments that section did not apply. First, the court rejected an argument that section 65009 was restricted to decisions involving housing. According to the court, although one of the legislative findings refers to the housing crisis in California, the courts have interpreted the statute as applying to challenges to a broad range of local zoning and planning decisions. Second, the court rejected an argument that section 65009 did not apply because the city council was not acting in one of the statutorily enumerated roles when it approved the agreement (i.e., a board of zoning adjustment, zoning administrator or board of appeal). The court explained that it is the underlying decision being reviewed, not the reviewing body, that determines the applicability of section 65009. Third, the court rejected the petitioners' argument that its action was subject to the longer, 180-day statute of limitations provided by the city's municipal code for actions challenging a decision of the city council. The court agreed with the trial court that the municipal code section directly conflicted with Government Code section 65009 and was therefore preempted. Finally, the court rejected petitioners' due process claim alleging that strict compliance with the statute should be excused because the City failed to provide sufficient notice of the city council meeting. The court found that the city satisfied the public notice requirements of the Brown Act and the petitioners failed to allege sufficient facts to support its contention its members were entitled to personal notice.

With regard to the petitioners' CEQA claim, the court of appeal reversed the trial court's order. Under Public Resources Code section 21167, subdivision (a), an action "alleging that a public agency is carrying out or has approved a project that may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days from the date of the public agency's decision to carry out or approve the project." Under Public Resources Code section 21167.6, subdivision (a), a complaint or petition shall be served not later than 10 business days from the date the action was filed. After finding these sections could not be reconciled with the 90-day limit in section

65009, the court held that the more specific Public Resources Code provisions govern and therefore the petition was timely filed and served.

The Fourth District Court of Appeal held that San Diego County's climate change guidance document contains improperly adopted thresholds of significance in violation of CEQA and a previously issued writ of mandate. *Golden Door Properties LLC v. County of San Diego* (2018) 27 Cal.App.5th 892.

In 2011, San Diego County adopted an update to its 1978 General Plan. The county certified an environmental impact report (EIR) for the General Plan update, which, as relevant here, incorporated mitigation measures to address greenhouse gas (GHG) emissions. Specifically, the county adopted Mitigation Measure CC-1.2, which required the county to prepare a climate action plan and to adopt GHG emissions targets and deadlines for achieving emissions reductions. The County also adopted Mitigation Measure CC-1.8, which required the county to revise its guidelines for determining the significance of GHG emissions based on the climate action plan. The county subsequently adopted a climate action plan; however, the plan was set aside in 2013 after being successfully challenged by the Sierra Club.

While the Sierra Club case was pending on appeal, the county adopted the 2013 Guidelines for Determining Significance for Climate Change (2013 Guidelines). The Sierra Club challenged the 2013 Guidelines in a supplemental writ petition, which the parties stipulated to stay pending the appeal. Then, in 2014, the court of appeal upheld the trial court's decision setting aside the county's climate action plan. On remand, the trial court issued a supplemental writ directing the county to set aside both the climate action plan and the 2013 Guidelines.

In 2016, while the county was in the process of preparing a new climate action plan, the county published a new guidance document titled "2016 Climate Change Analysis Guidance Recommended Content and Format for Climate Change Analysis Report in Support of CEQA Document" (2016 Guidance). In one section of the document, the county provided guidance for identifying and justifying the significance criteria selected and noted that the significance criteria and analysis may vary based on project type. In a later section titled "Significance Determination," however, the 2016 Guidance stated that "[t]he County Efficiency Metric is the recognized and recommended method by which a project may make impact significance determinations." Both the Sierra Club and Golden Door Properties, LLC challenged the 2016 GHG Guidance document. The trial court granted the petitions, finding that the 2016 GHG Guidance included an improperly adopted threshold of significance, violated the general plan EIR mitigation measures, was not supported by substantial evidence, and violated the previous writ of mandate. The county appealed.

On appeal, the court first addressed the issue of ripeness. The county argued that the action was not ripe for review because it was still developing the climate action plan and because the controversy did not involve application of the 2016 Guidance to a specific project. The court disagreed, finding that the situation here involved a threshold of significance that would "be used routinely to determine environmental effects…" and was thus generally applicable. The court found that, although the 2016 GHG Guidance acknowledged that other methods for determining significance may apply, the efficiency metric was stated to be "the recognized and recommended method" for determining GHG significance, making it generally applicable. Moreover, the court added, the case involved an active dispute about the county's compliance with the earlier writ, as well as whether the county's actions comply with CEQA, which were issues of public interest.

Turning to the merits, the court first considered whether the 2016 Guidance was a threshold of significance and therefore subject to CEQA's requirements for public review of general use significance thresholds. The county argued that the 2016 GHG Guidance did not set a threshold of significance, but rather provided a recommended method for evaluating GHG emissions. The court disagreed and found that, because the 2016 GHG Guidance provided one "recognized and recommended" efficiency metric to measure the significance of a project's GHG emissions, the efficiency metric was a threshold of significance. The court found that the issuance of efficiency metric thus violated CEQA because the county had failed to follow the adoption procedures for such thresholds laid out in CEQA Guidelines section 15064.7, which require formal action after a public review process. The court also found that the publication of the 2016 Guidance violated Mitigation Measure CC-1.8, which required the county to adopt guidance after the adoption of, and based on, the climate action plan.

In addition to finding that the 2016 Guidance threshold violated the EIR mitigation measures and CEQA's procedural requirements, the court held that the county's efficiency metric was not supported by substantial evidence. Specifically, the court held that the county needed to support the efficiency metric with substantial evidence establishing a relationship between the statewide data used to establish the metric and the county's reduction targets. The 2016 GHG Guidance stated that the efficiency metric represented the county's "fair share" of statewide emissions mandates, but, according to the court, did not explain how. Additionally, the efficiency metric was recommended for use with all projects, but the court found that the 2016 GHG Guidance failed to explain why the efficiency metric (based on service population) would be appropriate across all project types.

Finally, the court agreed with the plaintiffs that the county had improperly "piecemealed" environmental review because the 2016 GHG Guidance preceded the completion of the climate action plan. The court applied the law-of-the-case doctrine and stated that its previous decision held that the climate action plan and the updated county guidance were a single project for CEQA purposes. For that reason, the climate action plan and updated guidance must be publicly reviewed and adopted by the county together. Moreover, because the climate action plan had not been adopted when the 2016 GHG Guidance was issued by the county, issuance of the 2016 GHG Guidance document violated the writ.

The Fourth District Court of Appeal held that petitioners' CEQA and Water Code claims were barred by res judicata. *Inland Oversight Committee v. City of San Bernardino* (2018) 27 Cal.App.5th 771.

In 1982, the City of San Bernardino (city) approved a specific plan and EIR for a residential development project in the city's Highland Hills area. In 1985, the city amended the specific plan to allow for the construction of multi-family units in place of certain single family homes. A local homeowner association (HOA) filed a lawsuit against the city and the developer. The parties resolved the lawsuit through a settlement agreement. As relevant to this appeal, in a subsequent addendum to the settlement agreement, the parties stipulated that future changes meeting specified criteria (i.e., did not increase the level of development or result in greater environmental impacts) would be processed as ministerial "minor modifications" and would be exempt from further CEQA review.

In 2014, First American Title Insurance Company (First American), the developer's successor in interest, sought approval to develop a modified version of the project, relying on the minor modification process. The city retained an environmental consultant to evaluate the project's consistency with the stipulated approvals process. After concluding that the project met the minor modification criteria, the city's development director approved the modified project. The HOA appealed the approval to the planning commission and city council, both of which upheld the director's approval.

In June 2015, First American and the city filed a motion seeking to confirm that the proposed modifications complied with the settlement agreement requirements and that no further CEQA review was necessary. The court granted the motion, which was later affirmed on appeal. In that case, the court of appeal held that the HOA failed to demonstrate any error in the trial court's ruling the modified project was properly approved as a "minor modification."

Prior to the trial court's ruling on the motion filed by First American and the city, the HOA and two environmental groups, CREED-21 and the Inland Oversight Committee (plaintiffs), filed a petition for writ of mandate alleging that the city's approval of the modified project violated CEQA and the Water Code. Specifically, the plaintiffs alleged that the modified project required further CEQA review, and that the project should not have been approved without conducting a water supply assessment. The trial court sustained the respondents' (city and First American) demurrer without leave to amend, finding the plaintiffs' claims were barred by res judicata. The plaintiffs appealed.

On appeal, the court affirmed the trial court's decision and held that the plaintiffs' claims were barred by res judicata because the issue of whether further CEQA review was required for the project was resolved in the related action. Under the doctrine of res judicata, a valid, final judgment on the merits is a bar to subsequent action by parties or their privies for the same cause of action. In California, whether causes of action in two suits are the same for the purpose of res judicata depends on whether they involve the same primary right. The court explained that, in the CEQA context, the same primary right is at issue if the actions involve the same general subject matter, provided that they are not distinct episodes of noncompliance. Here, the court held that the allegations of noncompliance with the settlement agreement were the same in both the present suit and the related matter. In both cases it was alleged that the city violated CEQA by failing to conduct further environmental review for the project. As the court held in the related matter, the modified project was a minor modification, thus no further environmental review was required.

In addition, the court of appeal held that the environmental plaintiffs' claims were also barred by res judicata based on privity. Privity exists if the party's interests are so similar that the party in the prior action was the current party's virtual representative. The court found that standard was met here because the environmental groups and the HOA both opposed the project and sought to invalidate its approvals. Even accepting the contention that the environmental groups were acting in public interest while the HOA acted in its own private interest, the court concluded that the plaintiffs failed to articulate how those interests were not aligned in this case.

Additionally, the court held that the plaintiffs' Water Code claims were properly dismissed by the trial court. As stated by the court, the plaintiffs' Water Code allegations rested on the assertion that the modified project was subject to CEQA. Because the project was not subject to further CEQA review, the preparation of a water supply assessment was not required.

The Second District Court of Appeal upheld the City of Los Angeles' interpretation of its charter, allowing a General Plan amendment for a transit-oriented development project. *Westsiders Opposed to Overdevelopment v. City of Los Angeles* (2018) 27 Cal.App.5th 1079.

In 2013, Real Parties in Interest Dana Martin, Jr., Philena Properties, L.P. and Philena Property Management, LLC (Philena) applied to develop a mixed-use, transit oriented development project on the site of a former car dealership in West Los Angeles. The project site is located on the corner of Bundy Drive and West Olympic Boulevard, less than 500 feet from a light rail station. As part of its land use application, Philena requested that the City of Los Angeles change the site's general plan designation from light industrial to general commercial. The city prepared an EIR for the project and approved the project and the general plan amendment. Westsiders Opposed to Overdevelopment (Westsiders) sued, challenging the amendment as a violation of City Charter provisions for general plan amendments. The trial court denied the petition for writ of mandate, finding that the city did not exceed its authority under the charter or abuse its discretion in approving the general plan amendment. Westsiders appealed.

As relevant here, Los Angeles City Charter section 555 governs general plan amendments. Section 555, subdivision (a), allows the general plan to be amended "by geographic area, provided that the . . . area involved has significant social, economic or physical identity." Subdivision (b) states, in pertinent part, that "[t]he Council, the City Planning Commission or the Director of Planning may propose amendments to the General Plan." Westsiders argued that both of these provisions prevented the City from approving the general plan amendment in this case. Specifically, Westsiders alleged that the general plan could not be amended for a single project or parcel because it is not a large enough "geographic area" with "significant social, economic or physical identity" as required by section 555(a). Westsiders also argued that, by requesting the general plan amendment, Philena effectively "initiated" the amendment in violation of section 555(b).

The court of appeal began its analysis with a discussion of the applicable standard of review. The court held that because Westsiders were challenging a general plan amendment, Government Code section 65301.5 required that the city's action be reviewed under Code of Civil Procedure section 1085, which governs traditional mandamus. The court rejected the argument that, because the general plan amendment was for a single project, review should be under Code of Civil Procedure section 1094.5 or administrative mandamus. In discussing the appropriate standard of review, the court also recognized that charter cities are presumed to have power over municipal affairs, and that any limitation or restriction on that power in the charter must be clear and explicit. The court added that, while construing the charter was a legal issue subject to de novo review, the city's interpretation of its own charter is entitled to great weight unless it is clearly erroneous, and must be upheld if it has a reasonable basis.

Affirming the trial court's decision, the court concluded that the plain meaning of the terms "geographic area" and "significant social, economic or physical identity" did not contain any clear and explicit limitation on the size or number of parcels involved when amending the general plan by geographic area. Further, the court found that the city's determination that the site had significant economic and physical identity because it was one of the largest underutilized sites with close proximity to transit in West Los Angeles, and that the project would be the first major transit-oriented development, satisfied the charter requirements. The court rejected Westsiders'

argument that, in considering whether a geographic area has "significant social, economic or physical identity," the city may not consider the proposed project and future uses of the site.

Next, with regard to Westsiders' claim based on section 555, subdivision (b), the court also rejected their argument that, by filling out a land use application requesting that the city amend the general plan, Philena had illegally "initiated" the amendment. Similar to its analysis of subdivision (a), the court found that section 555, subdivision (b) contained no clear and explicit limitation on who could *request* that the city amend the charter. According to the court, the city followed the procedures required by the charter because, after Philena made its request, it was the planning director who formally initiated the amendment process.

In addition, the court rejected Westsiders' argument that the city was required to make specific findings that the project site constituted a "geographic area" or that the lot has "significant economic or physical identity." The court held that because amending the general plan is a legislative act, the city was not required to make explicit findings to support its decision. Moreover, the court added, the city did make findings; it just did not use the exact language of the charter. The court rejected Westsiders' argument that the city's use of the word "unique" in discussing the site's identity (as opposed to "significant") made its "findings" inadequate. The court found that the city's analysis showed that the site had significant economic and physical characteristics and met the requirements of Charter section 555.

Finally, the court rejected Westsiders' argument that the city impermissibly "spot-zoned" the project site through the general plan amendment. The court found that Westsiders had failed to raise this argument in the trial court and was thus barred from raising it on appeal.

The Second District Court of Appeal reversed a decision holding that revisions to a commercial development project to include a specific plan amendment constituted a "new project" under CEQA and held that supplemental review under Public Resources Code section 21166 applied. *Citizens Coalition Los Angeles v. City of Los Angeles* (2018) 237 Cal.Rptr.3d 313 (previously published at: 26 Cal.App.5th 561). [NOTE: The Supreme Court denied review and ordered the case not to be published, on Nov. 20, 2018.]

Target Corporation (Target) applied to build a Super Target at the intersection of Sunset Boulevard and Western Avenue in Hollywood. The 75-foot tall, three-story building would include a Super Target on the third floor, parking on the second floor, and a ground floor with several smaller retail stores, a transit kiosk, and a pedestrian plaza. The City of Los Angeles certified an environmental impact report (EIR) for the project and granted eight variances from the applicable Vermont/Western Transit Oriented District Specific Plan (Specific Plan). Shortly after Target began construction of the project, several community associations (plaintiffs) filed petitions for writ of mandate challenging the City's approval. The plaintiffs alleged that: (1) the City's EIR violated CEQA, and (2) the city council's grant of variances were not supported by substantial evidence, in violation of the Los Angeles Municipal Code. The trial court partially denied and partially granted the petition. The trial court ruled that the EIR was adequate, but that six of the eight variances were not supported by substantial evidence and ordered construction of the project to cease.

While the parties' appeals were pending, the City amended the Specific Plan to create a new subarea, "Subarea F," that would allow projects similar to Target's to be built in parts of the

Specific Plan area without the need for variances. The City also changed the designation of project site, making it the only Subarea F. While two other locations in the Specific Plan area could qualify for the Subarea F designation, the designation was restricted to commercial uses over 100,000 square feet and no qualifying projects were in place or proposed at those locations when the amendment was adopted. The City prepared and approved an addendum to the Target project EIR, defining the revised project as the Specific Plan amendment and the remaining construction activities for the Target project. The same plaintiffs challenged the City's approval of the Specific Plan amendment and addendum, alleging that the City (1) violated CEQA by relying on an addendum rather than preparing a new, subsequent or supplemental EIR; and (2) committed impermissible "spot zoning" by amending the Specific Plan to impose less onerous zoning requirements to the project site alone. The trial court held that the City violated CEQA because the Specific Plan amendment was an independent project, making it inappropriate to rely on an addendum. The trial court declined to reach the spot zoning issue. The City and Target appealed from the judgment.

On appeal, the parties raised two issues: Did the City's reliance on an addendum violate CEQA, and did the City engage in impermissible spot zoning? With regard to the addendum issue, the court of appeal began its analysis by evaluating the effect of the Specific Plan amendment, noting that it placed only the project site into the new subarea F. While two other locations in the Specific Plan area did meet the some of the requirements to be included, the court explained, they did not meet the minimum commercial square footage requirement and no qualifying projects had been proposed to the City. As a result, the court rejected the plaintiffs' characterization of the amended as a free-floating zone encompassing several potentially qualifying properties.

Next, in determining whether CEQA's supplemental review provisions applied, the court found that there had been prior CEQA review for the Target project. Citing the California Supreme Court's decision in *Friends of College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, the Court explained that the question was thus whether the previous environmental review document "retains any relevance in light of the proposed changes." The court rejected the argument that, because the previous CEQA analysis was limited to a specific development project and the current project deals with a more generalized program, the section 21166 supplemental review provisions were inapplicable. According to the court, the primary consideration for determining whether section 21166 applies is whether the previous environmental document retains any relevance, not the type of project for which it was generated or the label assigned. Here, the court concluded, the environmental impact of the Super Target was part of the analysis of the environmental impact of the Specific Plan amendment, thus the original EIR retained relevance.

Having determined that CEQA's supplemental review provisions applied, the court went on to consider whether the City complied with those provisions in adopting the addendum. The court held that the City's decision to rely on an addendum was supported by substantial evidence, and rejected several of the plaintiff's arguments to the contrary. First, plaintiffs argued that the addendum did not discuss the Specific Plan amendment, which the court found to be factually inaccurate. Second, they argued that the City intended further development in the Specific Plan area through the new subarea based on language the City used in describing the requirements of the new subarea. The court found that the cited language did not negate the substantial evidence supporting the City's finding that no additional development was foreseeable. Third, plaintiffs argued that additional development projects at the two locations that could qualify for the new

subarea, and any other locations that could be "cobbled together" were reasonably foreseeable consequences of the Specific Plan amendment that required a subsequent or supplemental EIR. The court found that whatever incentive for development the amendment created, evidence of that incentive did not overcome the substantial evidence supporting the City's determination such development was not foreseeable. Lastly, plaintiffs argued that de novo review should apply because the challenge to the amendment required the court to construe its meaning. The court found that the issue before it involved the amendment's environmental impact, not its meaning, and thus review was for substantial evidence.

While the issue was not addressed by the trial court, the court of appeal also denied plaintiff's "spot zoning" claim. Applying the analysis in *Foothill Communities*, the court found that the Specific Plan amendment did create a zoning "island," however, it was unclear whether the zoning was less or more stringent than the surrounding parcels. Regardless, the court stated, the question was whether the zoning decision creating the "island" was arbitrary, irrational or unreasonable. The court found that, under that standard, the spot zone was valid. Furthermore, the City's determination that the amendment was in the public interest was supported by substantial evidence, and the Specific Plan, as amended, remained compatible with the City's general plan. The court rejected plaintiffs' challenge to the City's alleged motive in amending the Specific Plan, and plaintiffs' questioning of whether the Specific Plan amendment represented good policy, as neither issue was appropriate for the court's inquiry.

Note: This decision was subsequently ordered unpublished.

The First District Court of Appeal held that local residents' concerns over a mixed-use project in a historic district supported a fair argument that the project may have significant aesthetic and traffic impacts. *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129.

The City of Fremont prepared an initial study and mitigated negative declaration for a mixed-use development project consisting of 85 townhomes and retail space on a vacant six-acre site located in the city's Niles historical district. Several Niles residents opposed the project on the grounds that it was inconsistent with the Niles Historical Overlay District policies: they argued the townhomes were too tall, the project was too dense, and that the architectural style of the buildings was incompatible with the surrounding area. Local residents also objected to the project's density on the grounds it would create traffic and parking problems in the Niles district. Members of the city's historical architectural review board largely agreed with the residents' concerns and recommended denial of the project. The planning commission voted unanimously in favor of approval, however, and the city council adopted the MND and approved the project. Protect Niles filed a petition for writ of mandate to compel the city to set aside the approval and prepare an EIR. The trial court found substantial evidence supported a fair argument that the project may have significant aesthetic and traffic impacts and ordered an EIR be prepared prior to approving the project. The developer appealed.

The first issue on appeal was mootness. In the time since the trial court's decision the city published a draft EIR for a revised version of the project. Protect Niles moved to dismiss the developer's appeal on the ground it became moot when the city voluntarily complied with the writ and published a draft EIR for the revised project. The appellate court denied Protect Niles' motion, finding that while the *city* voluntarily complied with the trial court's directive to prepare an EIR,

the appellant in this case was the developer. According to the court, the developer's submission of a revised application did not mean the original project had been withdrawn or that its legal arguments had been abandoned. If the developer were to prevail on appeal, the original approval would be restored.

Turning to the merits of the case, the appellate court affirmed the trial court's decision and held that there was substantial evidence of a potentially significant adverse aesthetic impact on the Niles historical district. The court first found that a project's visual impact on a surrounding officially-designated historical district is an appropriate aesthetic impact for review under CEQA, separate from an analysis of the project's impact on historical resources. Turning to the evidence, the court found that although the initial study concluded the project was aesthetically compatible with the Niles HOD, several members of the architecture review board and residents commented that the project was actually inconsistent with the Niles HOD. Multiple comments were submitted that opposed the height, density, massing, and architectural style of the project. Others argued the project was too modern and would detract from the historical small town feeling of Niles. While the court recognized aesthetic judgements are "inherently subjective," in this case, the court found that the comments "were not solely based on vague notions of beauty or personal preference, but were grounded in inconsistencies with the prevailing building heights and architectural styles of the Niles" neighborhood.

In affirming the trial court's decision with respect to aesthetics impacts, the appellate court rejected several of the developer's arguments that the project's impacts would be less than significant. First, the court rejected an argument that the project could not have an adverse aesthetic impact because it is upgrading the project site from a vacant lot to a new development. By that logic, the court explained, construction of any nature on a vacant lot would not have an adverse aesthetic impact. Second, the court rejected an argument that impacts on the historical district could not be significant because the project is on the outer edge of the district and outside its commercial core. The court explained that the project site is a recognized "gateway" to the Niles district, lies entirely within the historical district, and abuts the commercial core. Third, the court rejected an argument that the conclusions of the architectural review board did not constitute substantial evidence to support a fair argument of a significant impact. As the court explained, it was not just the board's final vote to disapprove that Protect Niles relied on, but also the members' underlying judgments. According to the court, the "collective opinions" of the architectural review board members regarding the project's compatibility with the Niles HOD amounted to substantial evidence of the Project's potentially significant aesthetic impacts.

With regard to potential traffic impacts, the court of appeal also affirmed the trial court's decision that the record established a fair argument of significant traffic impacts from the project. First, throughout the review process local residents and city officials expressed concerns based on personal knowledge that a new intersection created by the project would create traffic safety hazards. These concerns were bolstered by the city's own traffic study, which concluded a left turn lane was warranted for the intersection at issue under national guidelines. City staff decided not to require a left turn pocket lane, however, and instead imposed mitigation requiring adequate sight lines be maintained. Residents refuted staff's conclusions with testimony that drivers regularly do not adhere to posted speed limits in the area and that sight lines may be insufficient if multiple drivers were queued at the intersection to turn left. These "fact-based" comments, the court concluded, offered substantial evidence supporting a fair argument the new intersection would create significant traffic safety risks.

Public comments were also submitted that the project would increase traffic congestion on streets in the project vicinity already suffering from unacceptable levels of service. While the developer argued that the city's expert traffic study concluded that project traffic would result in a decrease in level of service ("LOS") from level E to F and, under the city's thresholds of significance, such a decrease in LOS was not a significant impact, the court rejected this argument. The court stated that the city's significance thresholds do not necessarily shield the city from the EIR requirement, and unusual circumstances may render generally applicable thresholds inadequate. Here, the court held, the residents' "fact-based comments" were sufficient to support a fair argument that project may have significant adverse impacts on congestion in the project vicinity notwithstanding the city's LOS threshold.

The First District Court of Appeal upheld an EIR for the San Francisco 2004 and 2009 Housing Elements, rejecting a challenge to the use of a future-conditions baseline for assessing the plan's traffic and water supply impacts. *San Franciscans for Livable Neighborhoods v. City and County of San Francisco* (2018) 26 Cal.App.5th 596.

In 2009, a writ of mandate was issued directing the City of San Francisco to set aside the adoption of its 2004 general plan housing element update and to prepare an environmental impact report (EIR). By the time that writ of mandate was issued, however, the city was already in the process of preparing its updated 2009 housing element. Consequently, the city decided to combine the environmental review of the two versions and prepared a single EIR addressing both the 2004 and 2009 housing elements. The city adopted the 2009 Housing Element and EIR in June 2011. San Franciscans for Livable Neighborhoods (SFLN) filed a lawsuit challenging the EIR on multiple grounds. The trial court issued an order finding that the EIR mostly complied with CEQA, however, the court held that the EIR's analysis of alternatives and the findings regarding mitigation measures were inadequate and not supported by substantial evidence. SFLN appealed.

On appeal, SFLN challenged the EIR's compliance with CEQA on several grounds, including that (1) the EIR used improper baselines when analyzing impacts, (2) failed to disclose potential impacts, and (3) failed to consider feasible alternatives that would reduce the project's significant impacts.

With respect to the EIR's baselines, SFLN argued that the Housing Element EIR improperly analyzed the project's traffic and water impacts by using future conditions projected by the Association of Bay Area Governments rather than existing environmental conditions. The court concluded that the City was "within its discretion to adopt a baseline calculation forecasting traffic and water impacts in 2025" rather than "comparing the existing conditions with and without the Housing Element." Discussing the rule described in *Neighbors for Smart Rail v. Exposition Metro Line Construction* Authority (2013) 57 Cal.4th 439, the court found that substantial evidence supported the City's determination that an existing-conditions baseline would be misleading as to traffic and water supply impacts. The court also rejected SFLN's corollary argument about the baseline for land use and visual resources impacts, noting that the EIR did compare the changes in the Housing Element to the existing environment.

Next, the court addressed SFLN's challenges to the EIR's analysis of various resource impacts. The court held that substantial evidence supported the EIR's analysis, explaining that: (1) the EIR reasonably concluded that the 2009 Housing Element would not result in significant impacts on visual resources or neighborhood character because there would be no changes to

allowable land uses or building heights, and residential growth would be directed to areas with existing residential uses; (2) the EIR for the Housing Element was not required to study traffic impacts of specific development projects in the pipeline because those projects were proceeding under their own EIRs or CEQA documents; (3) the EIR for the Housing Element was not required to establish a *likely* source of water and satisfied CEQA by acknowledging the possibility of a post-2030 water supply shortfall during a multiple-dry-year event and discussing the water rationing plan that would balance supply and demand; and (4) the city did not abuse its discretion in determining that the Housing Element was consistent with ABAG's Land Use Policy Framework because policies would further the goals of the Framework by placing housing near transit and encouraging infill development.

Third, the court turned to SFLN's argument that the EIR failed to consider feasible reduced-density alternatives. The EIR analyzed three alternatives, including a No Project Alternative, a 2004 Housing Element Alternative, and an Intensified 2009 Housing Element Alternative. The 2004 Housing Element Alternative was identified as the environmentally superior alternative because it would reduce the sole significant and unavoidable impact (cumulative impact on transit) even though it would not reduce the impact to a less than significant level. The court concluded that this was a reasonable range of alternatives. In particular, the court approved of the city's explanation in responses to comments that the reduced density alternatives suggested by SFLN would not add any meaningful analysis to the EIR because they would not reduce the project's potential cumulative transit impacts. The court also found that substantial evidence supported the EIR's conclusion that the SFLN-proposed alternative dubbed the No Additional Rezoning Alternative was infeasible because increasing the density of two major projects within existing neighborhoods as suggested would require rezoning.

Finally, the court rejected SFLN's argument that the city should have considered additional mitigation measures to reduce transit impacts. The EIR explained that the only way to eliminate the significant transit impacts would be to increase the number of transit vehicles or reduce transit travel time. Since funding for these measures was uncertain and cannot be guaranteed, the EIR deemed them infeasible. Although SFLN suggested two mitigation measures, one was simply a permutation of the No Project Alternative and the other was infeasible because it involved imposing transit impact fees that the city had already decided would be infeasible because they cannot be guaranteed.

The Fourth District Court of Appeal held that the addendum process under CEQA Guidelines section 15164 fills a procedural gap in the statute and is not invalid. *Save Our Heritage Organisation v. City of San Diego* (2018) 28 Cal.App.5th 656.

In 2012, the City of San Diego certified an environmental impact report (EIR) and approved a project to restore pedestrian and park uses in Balboa Park's Central Mesa. Save Our Heritage Organisation (SOHO) filed a petition for writ of mandate challenging the project on multiple grounds related to the project's effects on the environment, historical resources, and land use. The superior court granted the petition on some of the grounds asserted and directed the city to rescind the project approval. The real party in interest and SOHO each appealed the judgement. The court of appeal reversed and upheld the city's EIR and project approval.

While the appeals were pending, several physical changes occurred to the project's environmental setting. The city removed parking spaces, signage, and plants from the area; traffic

patterns were reconfigured; and planters, benches, tables, and chairs were added, among other maintenance-type work. Several modifications were made to the project. The city prepared an addendum to the EIR addressing modifications to the project. The addendum concluded that none of the conditions requiring preparation of a subsequent or supplemental EIR were satisfied, and the city incorporated findings to that effect into its resolution adopting the addendum.

SOHO challenged the addendum on the grounds that CEQA Guidelines section 15164, which authorizes the addendum process, was invalid. In discussing the validity of Guidelines section 15164, the court began with an explanation of the difference between quasi-legislative rules (those adopted pursuant to delegated lawmaking power) and interpretive rule (those in which an agency interprets a statute's meaning and effect). The court noted that the California Supreme Court has not decided which category the CEQA Guidelines fall under; however, the court explained that making the distinction what not necessary here because, either way, SOHO failed to establish that section 15164 was invalid.

In holding that the addendum process is valid, the court determined that Guidelines section 15164 is both (1) consistent with and not in conflict with CEQA; and (2) reasonably necessary to effectuate the statute's purpose. The court explained that the Resources Agency promulgated section 15164 to implement Public Resources Code section 21166, which sets forth the circumstances under which an agency must prepare a subsequent or supplemental EIR. According to the court, section 21166 creates a presumption against further environmental review once an EIR has been finalized. Although section 21166 does not expressly authorize the addendum process, the court explained, Guidelines section 15164 fills the gap in the CEQA process for projects with a previously certified EIR requiring some revisions, but which do not warrant the preparation of a subsequent or supplemental EIR. Moreover, the court said, Guidelines section 15164 is consistent with and furthers the objectives of Public Resources Code section 21166 because it requires an agency to substantiate its reasons for determining why project revisions do not necessitate further environmental review.

The court rejected the argument that the lack of public review renders the addendum process inconsistent with CEQA. According to the court, the absence of public review reflects the nature of an addendum as a document describing revisions too inconsequential to warrant further review. The court pointed to the analogous statute for recirculation of a Final EIR, which only requires public recirculation where revisions add significant new information. Finally, the court noted that Guidelines section 15164 has been in place since 1983 and the Legislature has not modified CEQA to eliminate the addendum process.

The final issue on appeal was whether the City failed to proceed in the manner required by law by failing to make new findings under Public Resources Code section 21081. Section 21081 provides that a public agency shall not approve or carry out a project from which an EIR has been certified unless the agency makes specific findings with respect to the project's significant effects. According to the court, neither the Public Resources Code nor the Guidelines suggest new findings are required when an addendum is prepared. Moreover, the court explained, the purpose of the findings is to show the agency has properly considered a project's significant effects, but an addendum is only proper where no new significant impacts are discovered. Therefore, the court held, new findings are not required when approving an

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms. In September 2018, CARB provided notice of a public hearing to consider proposed amendments to the California Cap on Greenhouse Gas (GHG) emissions and Market-Based Compliance Mechanisms Regulation. Cal. Reg. Notice Register 2018, Vol. No. 36-Z, p. 1392.

GHG Emissions Reporting. In September 2018, CARB provided notice of a public hearing to consider proposed amendments to the existing regulation for the Mandatory Reporting of GHGs. The proposed amendments would carry out the goals of AB 32, maintain an accurate reporting program, and support the Cap-and-Trade regulation. Cal. Reg. Notice Register 2018, Vol. No. 36-Z, p. 1419.

Federal Regulatory Updates

Electric Utility Generating Units. In September 2018, the EPA provided notice of a public hearing for its proposed Emission Guidelines for Greenhouse Gas Emissions (GHGs) from Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program. The comment period for same is being extended by 1 day to allow for a 30 day public comment period following the public hearing. 83 Fed. Reg. 45588.

In December 2018, the EPA provided notice of a public hearing for a proposed rule titled "Review of Standards of Performance for GHG Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." 83 Fed. Reg. 65617.

Light-Duty Vehicle GHG Program. In October 2018, the EPA provided notice of a proposed rule concerning technical corrections to the light-duty vehicle GHG emissions standards regulations. The corrections pertain to, and correct, how auto manufacturers calculate certain credits. 83 Fed. Reg. 49344. In November 2018, the EPA provided notice of an extended comment period for same. 83 Fed. Reg. 55837.

Renewable Fuel Standard Program. In December 2018, the EPA provided notice of a final rule establishing 2019 annual percentage standards for certain fuels. In addition, the EPA established the applicable volume of biomass-based diesel for 2020. 83 Fed. Reg. 63704.

COASTAL RESOURCES

Recent Court Rulings
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

State Regulatory Updates
Coast Yellow Leptosiphon. In September 2018, the California Fish and Game Commission (Commission) provided notice of findings concerning a petition to list the coast yellow leptosiphon. Following review of information in the petition and record, the Commission found that listing the coast yellow leptosiphon as an endangered species under the California Endangered Species Act (CESA) is warranted. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1603.
Crotch Bumble Bee. In November 2018, the Commission provided notice of the receipt of a petition to list the Crotch bumble bee as endangered under CESA. The California Department of Fish and Wildlife (CDFW) will review the petition and provide an evaluation and recommendation to the Commission. Cal. Reg. Notice Register 2018, Vol. No. 45-Z, p. 1986.

Franklin's Bumble Bee. In November 2018, the Commission provided notice of the receipt of a petition to list Franklin's bumble bee as endangered under CESA. CDFW will review the petition and provide an evaluation and recommendation to the Commission. Cal. Reg. Notice Register 2018, Vol. No. 45-Z, p. 1986.

Lassics Lupine. In September 2018, the Commission provided notice of findings concerning the Lassics lupine. The Commission reviewed the information in the petition and record and found that adding Lassics lupine to the list of endangered species under CESA is warranted. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1611.

Northern California Summer Steelhead. In October 2018, the Commission provided notice of the receipt of a petition to list the northern California summer steelhead as endangered under CESA. CDFW will review the petition and provide an evaluation and recommendation to the Commission. Cal. Reg. Notice Register 2018, Vol. No. 43-Z, p. 1915.

Purple Sea Urchin. In November 2018, the Commission provided notice of proposed amendments to increase recreational take of purple sea urchin. The amendments are necessary to protect the historic and valuable ocean habitat on the northern California coast. Cal. Reg. Notice Register 2018, Vol. No. 47-Z, p. 2046. In December 2018, the Commission provided notice of a public hearing concerning same. Cal. Reg. Notice Register 2018, Vol. No. 52-Z, p. 2283.

Suckley Cuckoo Bumble Bee. In November 2018, the Commission provided notice of the receipt of a petition to list the Suckley cuckoo bumble bee as endangered under CESA. CDFW will review the petition and provide an evaluation and recommendation to the Commission. Cal. Reg. Notice Register 2018, Vol. No. 45-Z, p. 1986.

Tricolored Blackbird. In September 2018, the Commission provided a notice of findings concerning the tricolored blackbird. The Commission reviewed the information in the petition and record and found that adding the tricolored blackbird to the list of threatened species under CESA is warranted. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1614.

Western Bumble Bee. In November 2018, the Commission provided notice of the receipt of a petition to list the western bumble bee as endangered under CESA. CDFW will review the petition and provide an evaluation and recommendation to the Commission. Cal. Reg. Notice Register 2018, Vol. No. 45-Z, p. 1986.

Federal Regulatory Updates

Pacific Marten. In October 2018, the U.S Fish and Wildlife Service (USFWS) provided notice of a proposed rule to list the coastal distinct population segment of the Pacific marten as a threatened species under the Endangered Species Act. 83 Fed. Reg. 50574.

San Joaquin Valley Giant Flower-Loving Fly. In December 2018, the USFWS provided notice of a 12-month finding concerning the San Joaquin Valley giant flower-loving fly. Following review of the information available, the USFWS found that listing the San Joaquin Valley giant flower-loving fly as an endangered or threatened species is not warranted at this time. 83 Fed. Reg. 65127.

ENERGY

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Appliance Efficiency Regulations. In November 2018, the California Energy Commission provided notice of its intent to adopt, and a public hearing on, regulations for commercial and industrial air compressors. The proposed regulations would provide revised definitions, data reporting requirements and efficiency standards for certain air compressors in California. Cal. Reg. Notice Register 2018, Vol. No. 46-Z, p. 2016.

FEES/TAXES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

FISHING RIGHTS

Recent Court Rulings
No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings
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.

State Regulatory Updates

Federal Regulatory Updates
Compliance Docket. In October 2018, the EPA provided notice of the thirty-fourth update of the Federal Agency Hazardous Waste Compliance Docket. The docket is used to identify federal facilities that may pose a threat to public health or welfare and the environment. The revisions in this update include 9 additions, 6 deletions, and 3 corrections since the last update. 83 Fed. Reg. 54347.

Potential Candidate Chemicals. In October 2018, the EPA provided notice of availability of "A Working Approach for Identifying Potential Candidate Chemicals for Prioritization." The document provides the initial steps in evaluating the safety of existing chemicals and includes a longer-term risk-based approach for considering all Toxic Substance Control Act (TSCA) active chemicals. 83 Fed. Reg. 50366.

TSCA Fees. In October 2018, the EPA provided notice of a final rule establishing fees applicable to the submittal and review of information under the TSCA. The fees will defray part of the EPA cost of administering TSCA. 83 Fed. Reg. 52694.

INSURANCE COVERAGE

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

LAND USE

Recent Court Rulings
No summaries or updates this quarter.

State Regulatory Updates
California Green Building Standards Etc. In September 2018, the California Building Standards Commission (CBSC) provided notice, on behalf of the Division of the State Architect, of a proposal to adopt, approve, codify, and publish changes to building standards related to the 2018 California Green Building Standards code (CALGreen Code). Note also that additional rulemaking proceedings are underway with respect to other elements of Title 24, including - but not limited to - the plumbing, mechanical and electrical codes. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1515. That same month, the CBSC provided notice of a proposed action concerning building standards related to CALGreen editorial and non-substantive code updates. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1534.

In September 2018, the CBSC also provided notice, on behalf of the Housing and Community Development, of a proposal to adopt, approve, codify, and publish changes to building standards related to the 2019 California Green Building Standards Code. Cal. Reg. Notice Register 2018, Vol. No. 37-Z, p. 1568.

Federal Regulatory Updates

MINING

Recent Court Rulings

Regulatory Updates
No summaries or updates this quarter.

PLANNING AND ZONING

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

PROPERTY RIGHTS/FEDERAL TORT CLAIMS

Recent Court Rulings

The Second District Court of Appeals held that the trial court correctly applied the Judicial Deference Rule to uphold a determination by a homeowners association that the owners of a lot in a residential subdivision did not violated the covenants, conditions, and restrictions of the homeowners association by operating a vineyard on their property, and in the alternative that, as a matter of law, the owners' operation of the vineyard did not constitute a prohibited business or commercial activity, and therefore did not violate the covenants, conditions, and restrictions. *Eith v. Ketelhut* (Cal. Ct. App. 2018) 2d Civil No. B272028, 2018 WL 6599175.

Jeffrey and Marcella Ketelhut owned property in a residential subdivision (Los Robles Hills Estates) that was managed by a homeowners association (the "HOA") and was subject to a recorded declaration of covenants, conditions, and restrictions (the "CC&Rs"). The CC&Rs prohibited "any business or commercial activity" on property located in the subdivision. The Ketelhuts' operated a vineyard on their property—growing grapes on the property, then transporting them offsite to a winery where the grapes were used to produce wine. The wine was then bottled and transported to an offsite storage place. Neighbors in the subdivision complained to the HOA that the Ketelhuts' operating the vineyard on their property violated the CC&Rs because it constituted a "business or commercial activity." The Board of Directors of the HOA (the "Board") decided that the vineyard operation on the Ketelhuts' property did not constitute a business or commercial activity, and therefore did not violate the CC&Rs. The neighbors then filed a complaint against the Ketelhuts, the HOA, and the members of the Board (collectively, the "Defendants"). The trial court invoked the Judicial Deference Rule and deferred to the Board's determination in favor of the Defendants.

The issues decided by the Second District Court of Appeals were: (1) whether the trial court was correct in applying the Judicial Deference Rule and deferring to the Board's judgment, and, alternatively, (2) whether, as a matter of law, the Ketelhuts' vineyard operation constituted a prohibited business or commercial activity that violated the CC&Rs.

The court affirmed the trial court's finding, holding the trial court was correct in applying the Judicial Deference Rule to the Board's determination that the Ketelhuts' vineyard operation did

not violate the CC&Rs. The Judicial Deference Rule states that "[w]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise." *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249, 253. The court made clear that it was not deferring to the Board's interpretation of the CC&Rs, as such interpretation constituted a legal question to be decided by the court. The court ultimately agreed with the Board's reasoning that the vineyard was not prohibited by the CC&Rs because it did not affect the residential character of the community. The court then deferred to the Board's application of its interpretation of the meaning of the CC&Rs to decide that the vineyard did not violate the prohibition against business or commercial activity. The court made an alternative holding that, as a matter of law, the Ketelhuts' operation of the vineyard was not a prohibited business or commercial activity because it did not affect the community's residential character. The court stated that when construing a contract, a court should adopt a construction which will make the contract reasonable, fair and just, and avoid a construction which would result in an absurdity. *Wright v. Coberly-West Co.* (1967) 250 Cal.App.2d 31, 35-36. The court recognized that growing grapes on the property was integral to the Ketelhuts' winemaking business, but stated that absurd consequences would flow from construing the CC&Rs as prohibiting any business or commercial activity whatsoever irrespective of its effect on the residential character of the community.

The Sixth District Court of Appeal held that the petitioner's claim that an Environmental Impact Report was required under the California Environmental Quality Act was not a cognizable claim on appeal because the petitioner failed to timely file an appeal to a final judgment that the trial court had mischaracterized as a "Peremptory Writ of Mandate of Interlocutory Remand for Reconsideration of Potential Noise Impacts." *Alliance of Concerned Citizens Organized for Responsible Development v. City of San Juan Bautista* (2018) 29 Cal.App.5th 424.

In 2014, the City of San Juan Bautista (the "City") and its city council (collectively, the "Respondents") approved a developmental project that consisted of a fuel station, convenience store, and quick serve restaurant. The Alliance of Concerned Citizens Organized for Responsible Development ("ACCORD") subsequently filed a petition that, among other things, sought to force Respondents to vacate project approvals and compel the preparation of an Environmental Impact Report (an "EIR") under the California Environmental Quality Act ("CEQA"). In March 2016, the trial court granted a so-called “Peremptory Writ of Mandate of Interlocutory Remand for Reconsideration of Potential Noise Impacts,” which required Respondents to set aside the resolutions, reconsider the significance of the project’s potential noise impacts, take further action consistent with CEQA, and file a return to the writ. ACCORD did not appeal the March 2016 decision. In December 2016, the trial court entered a "Final Judgment on Petition for Writ of Mandamus," which stated that Respondents had filed a supplemental return demonstrating compliance with the peremptory writ and CEQA. ACCORD appealed the December 2016 decision on the following grounds: (1) the City was required to prepare an EIR because there was substantial evidence in the record supporting a fair argument that the proposed project may have

significant, unmitigated traffic and noise impacts and that (2) the project violated the City's municipal code governing "formula retail businesses."

The issues decided by the Sixth District Court of Appeal were: (1) whether the March 2016 decision was in fact the final judgment, (2) whether the December 2016 decision was an order after judgment, and (3) the proper scope of appellate review.

In the first instance, the court held the March 2016 decision was the final judgment for appeal purposes because the substance of the decision was that of a final judgment. The court reasoned that the March 2016 decision was substantively a final judgment because it disposed of all CEQA and non-CEQA issues raised by the petition and concluded that Respondents had not complied with CEQA with respect to the potential noise impacts of the project. Thus, all that remained for the trial court was the need to make a determination *in the future* regarding the Respondent's compliance with the peremptory writ. The court further held that the December 2016 decision could not be the final judgment, regardless of its title, because an order regarding adequacy of a return is an order relating to enforcement of a judgment. Therefore, the December 2016 decision was actually an appealable post-judgment order. Finally, the court held that its review was limited to the December 2016 decision. The court stated that in the absence of statutory authorization, neither the trial nor appellate courts may extend or shorten the time for appeal, even to relieve against mistake, inadvertence, accident, or misfortune. The court's holding that the December 2016 decision was mischaracterized as the final judgment therefore did not authorize the court to extend the time for ACCORD to appeal the March 2016 decision.

The Fourth District Court of Appeals in California held that a Planned Residential Development ("PRD") was permissible in a Residential Conservation ("RC") Zone. *Friends of Riverside's Hills v. City of Riverside*, 26 Cal.App.5th 1137 (2018).

In November of 2013, the Lofgrens submitted an application to the Riverside City Planning Commission for a PRD permit to subdivide 12.41 acres into seven lots in an RC Zone. An RC Zone is an area established to protect "prominent ridges, hilltops and hillsides, slopes, arroyos, ravines and canyons, and other areas with high visibility or topographic conditions that warrant sensitive development from adverse development practices." In order to qualify for a PRD permit in an RC Zone, an applicant must satisfy several criteria, including retaining the unique natural features of the site and remaining sensitive to the natural topographic features of the site by clustering homes in less steep locations. The planning commission unanimously voted to recommend approval of the Lofgrens' PRD permit application and issue a California Environmental Quality Act ("CEQA") negative declaration for the project, thereby not requiring an environmental impact report ("EIR"). The City, as a condition to obtaining a grading permit, recommended the Lofgrens recorded a final tract map and provide evidence that the steeper portions of the property were preserved in open space. The Friends of Hillside ("FRH") raised several objections to the PRD permit including that the parcel was too small to support a six-lot development as proposed by the Lofgrens, that the project would require excessive grading in violation of the municipal code, and that the project posed potentially significant environmental impacts under CEQA because it violated grading provisions. When the City approved the project, the FRH filed a petition for writ of mandate asking the trial court to set aside the City's negative

declaration and permit approval and to require the City to conduct an EIR. The trial court denied the petition and FRH appealed.

At issue first was whether excessive grading and failure to cluster lots in less steep portions of the site violated the municipal code land use provisions. The Court also addressed whether the project violated RC Zone standards by failing to obtain variances for lot sizes that were less than two acres. The last issue was whether the City abused its discretion when it approved the project.

The Court first held that the site did not violate the municipal code's land use provisions. It noted that the record contained no evidence of land use violations, and the FRH's claims that the development might violate municipal land use codes in the future were not grounds for an EIR. The Court also found that the requirement to obtain variances for lots less than two acres did not apply to PRDs, but rather to conventional residential developments, which permit only one home for every two acres and don't allow for clustering of homes as a PRD does. The Court lastly found that the City did not abuse its discretion when approving the project because it did not violate the municipal code. The FRH argued that the record did not contain evidence that the average natural slopes of the lots supported a benchmark density of five lots in the PRD. The Court found that a map submitted by a professional engineer constituted substantial evidence to support the benchmark density of five lots, thereby affirming the lower court decision and permitting the Lofgrens' PRD.

PROPOSTITION 65

Recent Court Rulings
No summaries or updates this quarter.

State Regulatory Updates
Clear and Reasonable Warnings. In November 2018, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of proposed amendments to the regulations concerning the responsibility of providing consumer product exposure warnings. The amendments are a result of questions received and additional input from stakeholders. Cal. Reg. Notice Register 2018, Vol. No. 46-Z, p. 2025.

Intent to List. In October 2018, OEHHA provided a notice of intent to list *bevacizumab* as known to the state to cause reproductive toxicity (developmental and female endpoints) under the formally required to be labeled or identified listing mechanism. Cal. Reg. Notice Register 2018, Vol. No. 40-Z, p. 1770.

In November 2018, OEHHA provided notice of its intent to list *p-chloro-a,a,a-trifluorotoluene* as known to the state to cause cancer under the authoritative bodies listing mechanism. Cal. Reg. Notice Register 2018, Vol. No. 47-Z, p. 2055. In December 2018, OEHHA provided notice of an extended public comment period for same. Cal. Reg. Notice Register 2018, Vol. No. 50-Z, p. 2221.

Level of Exposure to Chemicals Causing Reproductive Toxicity. In October 2018, OEHHA provided notice of proposed amendments to the Level of Exposure to Chemicals Causing Reproductive Toxicity and calculating intake by the average consumer of a product. Cal. Reg. Notice Register 2018, Vol. No. 40-Z, p. 1760.

List of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. For OEHHA's most current list of chemicals known to the state to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2018, Vol. No. 43-Z, p. 1916.

Listed Chemicals. In November 2018, OEHHA provided notice that effective November 23, 2018, gentian violet and *N-nitrosohexamethyleneimine* would be added to the list of chemicals known to the state to cause cancer under the State's Qualified Expert list mechanism. Cal. Reg. Notice Register 2018, Vol. No. 47-Z, p. 2055.

Maximum Allowable Dose Levels. In October 2018, OEHHA provided notice of proposed maximum allowable dose levels (MADL) for *n-hexane*. The proposed oral MADL is 28,000 micrograms per day and the proposed inhalation MADL is 20,000 micrograms per day. Cal. Reg. Notice Register 2018, Vol. No. 40-Z, p. 1764.

Nickel. In October 2018, OEHHA provided notice of the addition of *Nickel (soluble compounds)* to the list of chemicals known to the state to cause reproductive toxicity (developmental and male reproductive endpoints) under the State's Qualified Expert listing mechanism. Cal. Reg. Notice Register 2018, Vol. No. 43-Z, p. 1916.

RESOURCE CONSERVATION

Recent Court Rulings
No summaries or updates this quarter.

Federal Regulatory Updates

Collision Risk Model for Eagle Fatalities. In November 2018, the USFWS provided notice of a reopened comment period for the collision risk model that predicts the number of golden and bald eagles that may be killed at new wind facilities. The USFWS is providing additional requested information and allowing a 30 day review of same. 83 Fed. Reg. 56365.

SOLID WASTE

Recent Court Rulings
No summaries or updates this quarter.

Federal Regulatory Updates

Municipal Solid Waste Landfill Criteria. In December 2018, the EPA provided an advance notice of proposed rulemaking to the criteria for Municipal Solid Waste Landfills to support advances in effective liquids management. The EPA provided the analysis of preliminary research, and seeks additional scientific studies, data and input. 83 Fed. Reg. 66210.

WATER RESOURCES AND RIGHTS

Recent Court Rulings

The Third District Court of Appeals in California held that an increase in water rates was subject to voter referendum. *Wilde v. City of Dunsmuir*, 29 Cal.App.5th 15 (2018).

In 2015, the City of Dunsmuir formed a committee to assess the City's water infrastructure needs. The committee concluded that a 105-year-old water storage tank and other water main sections needed replacement. The City enacted Resolution 2016-02, adjusting water rates so that at the end of five years, the City's rates would give it the minimum local share needed to meet federal grant requirements. Wilde gathered signatures calling for a referendum to repeal the resolution, but the City refused to place the referendum on the ballot based on Proposition 218, which provides that administrative acts are not subject to the referendum process. Wilde filed a petition for writ of mandate to place her referendum on the ballot. While the petition was pending, Wilde gathered signatures for an initiative to amend the City's water rate structure, and the City placed the initiative on the ballot as Measure W. The voters rejected Measure W.

At issue was whether the appeal was moot because the voters rejected the ballot initiative, whether Resolution 2016-02 was subject to voter referendum, and whether Resolution 2016-02 was legislative rather than administrative in nature.

The Court first concluded that the appeal was not moot because the initiative sought to replace the City's water rate system with a different set of rates, but the referendum sought to repeal Resolution 2016-02. The Court then concluded that Resolution 2016-02 was subject to voter referendum because Proposition 218 contained no negative language that limited power of the voters and could not be read to repeal California voters' referendum power to challenge local resolutions and ordinances. Finally, the Court held that Resolution 2016-02 was legislative and not administrative because it prescribed a new policy to replace the storage tank and water mains, and did not merely pursue a plan already adopted by a legislative body. The City further argued that Resolution 2016-02 was not subject to referendum because of the essential government service exception that prohibits referendum relating to essential government services. The Court determined that replacement of the storage tank and water mains was not an essential government function, but rather an improvement, and thus was subject to referendum.

Third District Court of Appeal held that the Plaintiffs County of Butte, County of Plumas and Plumas County Flood Control and Water Conservation District could not proceed with a challenge to the licensing of a hydroelectric dam. The Plaintiffs argued that the licensing process should be stayed so that regulators could properly consider the impact of climate

change on the operation of the dam. Subject matter jurisdiction was lacking under the circumstances here. *County of Butte v. Department of Water Resources* (December 20, 2018).

The Department of Water Resources (DWR) applied to the Federal Energy Regulatory Commission (FERC or Commission) to extend its federal license to operate Oroville Dam and its facilities as a hydroelectric dam. The project is referred to as the Oroville Facilities Project (sometimes also Project or Settlement Agreement (SA)) by which the affected parties agree to the conditions for the extended license. "The SA includes Appendix A, which incorporates all of the . . . measures that the Settling Parties believe to be under FERC's jurisdiction." The objective of the Project is the continued operation of the Oroville Facilities for power generation and the implementation of conditions for the extended license.

The plaintiffs brought this action in the superior court to stay the license procedure on the premise the environmental effects of relicensing the dam concern the *operation* of the dam and that jurisdiction to review the matter lies in the state courts pursuant to the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; hereinafter CEQA). They claim that a CEQA document offered to support the DWR's application to FERC failed to consider the impact of climate change on the operation of the dam for all the purposes served by the dam. The superior court dismissed the complaint on the ground that predicting the impact of climate change is speculative. The plaintiffs appealed.

A federal license is required by the Federal Power Act (16 U.S.C. § 791a et seq.; hereinafter FPA) for the construction and operation of a hydroelectric dam. The license is issued by FERC. With one relevant exception, the FPA occupies the field of licensing a hydroelectric dam and bars review in the state courts of matters subject to review by FERC. (See, e.g., *First Iowa Hydro-Electric Cooperative v. Federal Power Com.* (1946) 328 U.S. 152 [90 L.Ed. 1143] (*First Iowa*).) The reason is that a dual final authority with a duplicate system of state permits and federal licenses required for each project would be unworkable. In this case the duplicate authority involves the separate NEPA (National Environmental Protection Act) and CEQA reviews of the SA. (*Ibid*.) The plaintiffs rely on CEQA case authority to stay the relicensing procedure pending *state* judicial review of the DWR's approval of the project. (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 (*Santiago County*).) Plaintiff Butte County requested that the state court "[e]njoin DWR's project until and unless respondent [DWR] lawfully approves the project in the manner required by CEQA . . . ." Plaintiff County of Plumas requested that: "Respondents and real parties in interest . . . suspend all activity under the certification that could result in any change or alteration in the physical environment until respondent has taken actions that may be necessary to bring the certification into compliance with CEQA."

The exception to preemption lies with the state's authority to impose more stringent water quality conditions on the license than federally required pursuant to section 401 (33 U.S.C. § 1341; hereinafter section 401) of the Clean Water Act (33 U.S.C. § 1251 et seq.). In California the authority to establish the conditions is vested in the state water pollution control board (now State Water Resources Control Board (SWRCB)). (Wat. Code, § 13160 et seq.) The conditions must be set forth in a certificate to be incorporated in the license. The environmental predicate for the certificate is set forth in Appendix A of the SA in both NEPA and CEQA reviews of the conditions

for the license. To avoid duplication of federal and state environmental reviews, the jurisdiction to review the conditions lies with FERC.

Oroville Dam was completed in 1968 as part of the State Water Project (SWP). It blocks access to 66.9 miles of high-quality habitat for anadromous fish (salmon & steelhead). FERC licenses are conditioned on the adoption of a plan for the "adequate protection, mitigation, and enhancement of fish and wildlife . . . and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . . ." (16 U.S.C. § 803(a)(1).) The Feather River Fish Hatchery was built to compensate for the loss of spawning grounds resulting from the construction of Oroville Dam.

The DWR proposed, in fulfillment of the environmental requirements of section 803 of title 16 of the United States Code, that new measures be taken to improve the conditions of fish and wildlife affected by the presence of the dam. The measures included a commitment by DWR to develop plans to enhance, protect, restore, and/or create habitat within the FERC boundary to be set forth in a certificate. Those plans, referred to as the "New Project License," were subject to CEQA environmental review when implemented. The DWR has selected a federal alternative procedure, an SA, for the fulfillment of its obligations. The SA involves the agreement of the parties affected by the extended license.

The Court concluded that the plaintiffs could not challenge the environmental sufficiency of the SA in the state courts because jurisdiction to review the matter lies with FERC and plaintiffs did not seek federal review as required by 18 Code of Federal Regulations part 4.34(i)(6)(vii) (2003). Moreover, the plaintiffs did not challenge and could not challenge the SWRCB Certificate itself in their pleadings because it did not exist at the time this action was filed. The extended license issues upon the filing of a certificate and that cannot be delayed beyond one year from the date of a request for the certificate. "Section 401(a)(1) requires that a State 'act on a request for certification[] within a reasonable period of time (which shall not exceed one year) after receipt of such request,' or else 'the certification requirements of this subsection shall be waived . . . .' " (*Alcoa Power Generating Inc. v. FERC* (D.C. Cir. 2011) 643 F.3d 963, 972.) It is only after the issuance of the license that the Certificate may be implemented.

Accordingly, the court concluded that it had no jurisdiction over the matter and returned the case to the trial court with an order to dismiss the complaint for lack of subject matter jurisdiction.

The Fifth Appellate District concludes that a public agency is estopped from disqualifying Best Best & Krieger LLP as another agency's counsel in the Antelope Valley Groundwater Adjudication (AVGA) cases. *Antelope Valley Groundwater Cases (December 20, 2018).*

Nearly 20 years ago, the first of numerous lawsuits was filed which ultimately became this consolidated proceeding known as the Antelope Valley Groundwater Adjudication (AVGA) cases. In 2004, lawyers with the law offices of Best, Best & Krieger, LLP (BB&K), who were representing another public entity interested in the AVGA cases, were asked to also undertake prosecuting the interests of respondent Los Angeles County Water District No. 40 (District No.

40). BB&K agreed and began representing District No. 40 in 2004 and has continued in that role to the present time.

Appellant Antelope Valley—East Kern Water Agency (AVEK) was not a named party in any of the lawsuits in the early years. AVEK had an existing relationship with BB&K: AVEK had retained BB&K in 1987 to act as AVEK's general counsel, and Michael Riddell, a member of BB&K, acted as general counsel for AVEK from 1987 until January 2016.

Approximately two years after BB&K began representing District No. 40, AVEK became enmeshed in the AVGA cases. AVEK retained separate attorneys to protect its interests in that litigation. Ten years later, after the bulk of the AVGA litigation was completed, AVEK decided to terminate BB&K as its general counsel and, for the first time, demanded that BB&K voluntarily recuse itself from further representing District No. 40 in the AVGA cases. BB&K declined AVEK's demand and, six months later, AVEK filed its motion seeking an order disqualifying BB&K from further representing either District No. 40 or any other party to the AVGA cases. The trial court denied the motion, and the present appeal challenges the order denying the motion.

AVEK's argument appears to contend the absence of a *written* consent by AVEK to BB&K's representation of District No. 40 is dispositive, and the trial court erred in considering any circumstances beyond that single fact when it evaluated AVEK's motion. From that predicate, AVEK argues automatic disqualification of BB&K from further representation of District No. 40 was mandatory, and reversal is therefore required.

The Court thus concluded that there was substantial evidence to support the trial court's conclusion AVEK effectively consented to BB&K's representation of District No. 40, and its inordinate delay in seeking disqualification estops AVEK from seeking to disqualify District No. 40's chosen counsel.

Third District Court of Appeal reverses and remands trial courts interpretation of Mill Creek water rights decree of 1920. *Orange Cover Irrigation District v. Los Molinos Mutual Water Company* (December 12, 2018)

By a stipulated decree issued in 1920, the Tehama County Superior Court adjudicated water rights in Mill Creek. It declared the natural flow of the water up to a total rate of 203 cfs had been appropriated by the parties appearing before it for use upon their and other persons' lands. The decree entitled these original owners of the water rights and their successors to continue diverting from Mill Creek a total of 203 cfs of water, and it allotted them shares in the amount of water each could divert. It entitled the owners to use or dispose of their share of water in any manner, at any place, or for any purpose, or in accordance with whatever agreement the owners may make with any other person or entity.

As part of the decree, the court also appointed a water master of Mill Creek to implement its order. The decree gave the water master exclusive authority to divert and apportion the water during the irrigation season according to the decree's terms, measure the diversions, and control and superintend the diversions and the gates and ditches used to divert the water.

The owner of an appropriative right to water in Mill Creek sought declaratory relief to determine whether, under the judicial decree that established the right, it could: (1) use water appropriated to it on a year around basis and not only during the irrigation season; (2) use or transfer its water outside of the creek's watershed; and (3) make these changes in the use and location of use without obtaining prior approval of the creek's water master or the superior court.

The trial court declared the decree did not give the owner these rights. The Court of Appeal agreed with the Orange Grove Irrigation District that the trial court's holding was incorrect: the court created a condition that did not exist in the decree, and it did so based on a misunderstanding of the extent of control the decree granted to Los Molinos Mutual Water Company and of the operation of Water Code section 1706. Accordingly, the Court reversed and remanded the trial court's judgment and remanded for further proceedings.

State Regulatory Updates

Schedule of Fees. In November 2018, the Department of Water Resources provide notice of proposed regulations that define a methodology for establishing the annual schedule of fees. A public hearing will be held regarding same. Cal. Reg. Notice Register 2018, Vol. No. 47-Z, p. 2049.

Federal Regulatory Updates

Oil and Gas Wastewater Management. In September 2018, the EPA provided notice of a public meeting to obtain input on its Study of Oil and Gas Extraction Wastewater Management. The study evaluates approaches to managing conventional and nonconventional oil and gas extraction wastewaters generated at onshore facilities. 83 Fed. Reg. 44876.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Public Health Goals. In October 2018, OEHHA announced the availability of a draft technical support document for proposed public health goals (PHG) for the four regulated *trihalomethanes* (THMs) in drinking water. The proposed PHGs are 0.4 parts per billion (ppb) for chloroform, 0.5 ppb for bromoform, 0.06 ppb for bomodichoromethane, and 0.1 ppb for dibromochloromethane. OEHHA will hold a public workshop concerning same. Cal. Reg. Notice Register 2018, Vol. No. 40-Z, p, 1772.

Public Water System. In October 2018, the Office of Administrative Law provided a notice of disapproval decision concerning a State Water Resources Control Board (SWRCB) regulatory action. The SWRCB proposed to adopt regulations governing public water system implementation of point-of-use and point-of-entry treatment devices in lieu of centralized treatment. The disapproval was given because the proposed regulations failed to comply with the Administrative

Procedures Act standards for clarity and necessity. Cal. Reg. Notice Register 2018, Vol. No. 43-Z, p. 1940.

Federal Regulatory Updates

Municipal Solid Waste Landfill Criteria. In December 2018, the EPA provided an advance notice of proposed rulemaking to the criteria for Municipal Solid Waste Landfills to support advances in effective liquids management. The EPA provided the analysis of preliminary research, and seeks additional scientific studies, data and input. 83 Fed. Reg. 66210.

Federal Case Summaries of Interest

Clean Air Act

The Ninth Circuit Court of Appeals has held that Oregon's Clean Fuels Program did not violate the Commerce Clause and was not preempted by the Clean Air Act because it distinguishes fuels based on carbon intensity not location of origin. *American Fuel and Petrochemical Manufacturers v. O'Keefe* (9th Cir. Sept 7, 2018) 903 F.3d 903.

In this case, the State of Oregon created the Oregon Clean Fuels Program (Oregon Program), which is modelled after California's Low Carbon Fuel Program. The Oregon Program requires regulated entities to keep the average carbon intensity of transportation fuels below annual limits. To determine a fuel's carbon intensity, the program utilizes a lifecycle analysis to estimate total emissions from production, storage, transportation, and use. The program then establishes a credit trading system. Regulated entities obtain credits for fuels below the limit, and can buy and sell the credits to maintain the necessary average. Plaintiffs challenged the Oregon Program arguing that it violates the dormant Commerce Clause because it discriminates against out-of-state fuels and is preempted by the Clean Air Act. The trial court granted a motion to dismiss to Oregon upholding the Oregon Program on all claims.

On appeal, the Ninth Circuit affirmed the trial court, holding that the Oregon Program did not violate the dormant Commerce Clause and was not preempted by the Clean Air Act. First, the court held that the Oregon Program did not facially discriminate against out-of-state fuels because it discriminated between fuels based solely on lifecycle greenhouse gas emissions – not state of origin. Second, the court held that certain statements by the Oregon Governor and some legislators that the Oregon Program would have in-state economic benefits do establish a discriminatory purpose. The objectives identified in the legislation relate to environmental goals. Third, the court held that the Oregon Program did not have a discriminatory effect on out-of-state entities because all fuels can receive credits and all entities can participate in the credit system – regardless of origin. Although the lifecycle emissions analysis accounts for emissions from transportation, several out-of-state fuels received lower scores than in-state fuels due to other factors. The Oregon Program does not artificially increase the scores of in-state fuels. Finally, the court held that the Oregon Program is not designed to favor a uniquely in-state industry because bio-fuels do not uniquely originate in Oregon. The court then held that the Oregon Program is not preempted by

the Clean Air Act because it only preempts state regulations of fuels if the EPA Administrator has declared regulation unnecessary, which had not occurred.

Fish and Wildlife

The United States Supreme Court has held that the U.S. Fish and Wildlife Service (FWS) may designate "critical habitat" if it is habitat or habitable for the species and that a decision of the FWS not to exclude an area for economic reasons is subject to judicial review. *Weyerhaeuser Co. v. United States Fish and Wildlife Service* (Nov 27, 2018) 139 S. Ct. 361.

In this case, the FWS determined that an area in Louisiana, known as Unit 1, was essential for conservation of the dusky gopher frog and designated Unit 1 as "unoccupied critical habitat" under the Endangered Species Act (ESA). But to support the species on Unit 1, some habitat modifications were necessary. The frog requires ephemeral ponds surrounded by open-canopy longleaf pine forest, which had been converted to a timber plantation. The FWS determined that habitat modifications were reasonable and designated Unit 1 as unoccupied critical habitat. Second, the FWS considered the economic impact of the designation. It determined that the impact was not disproportional to the conservation benefits and, therefore, declined to exclude Unit 1 from the critical habitat area. The Weyerhaeuser Company, petitioner and owner of a section of Unit 1, argued that "critical habitat" must be habitable for the species and that the FWS failed to adequately weigh economic impacts.

The Fifth Circuit rejected petitioner's arguments. First, it concluded that the ESA imposes no "habitability" requirement. Rather, the ESA expressly defines "critical habitat" to include "specific areas outside the geographic area occupied by the species . . . upon a determination by the Secretary that such areas are essential for the conservation of the species." Second, it concluded that the decision whether to exclude an area from a critical habitat designation due to economic impacts is a matter of agency discretion that is not reviewable. The ESA provides that the FWS "*may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of" of designation." The ESA does not mandate exclusion under any circumstances

On appeal, the Supreme Court *vacated* the Fifth Circuit's opinion. The Supreme Court held that "critical habitat" must be interpreted as a sub-category of "habitat" and, therefore, must qualify as "habitat" to qualify as "critical habitat." The ESA does not separately define the term "habitat," so the Supreme Court remanded the issue for further proceedings based on the Court's conclusion that "habitat" requires some measure of habitability. The Supreme Court further held that the FWS's decision whether to exclude an area from the critical habitat designation due to economic impacts is subject to judicial review.

The Ninth Circuit Court of Appeals has held that an Environmental Protection Agency (EPA) interpretation of a State Implementation Plan receives judicial deference and, in so doing, denied a petition for review of EPA's approval of Montana's State Implementation Plan. *Montana Environmental Information Center v. Thomas* (9th Cir. Aug 30, 2018) 902 F.3d 971.

In this case, a petitioner challenged as arbitrary and capricious the EPA's approval of a revision to Montana's State Implementation Plan. The petitioner argued that the Montana Department of Environmental Quality (Montana DEQ) interpreted the term "actual emissions" in the Implementation Plan less stringently than did the EPA. Under the Clean Air Act, "actual emissions" represent the baseline emissions that the EPA must use for certain permit approvals when analyzing potential emissions increases. The Montana State Implementation Plan defined "actual emissions" to mean the emissions of "a two-year period which precedes" construction, and the EPA interpreted this phrase to mean the two years immediately preceding construction. But in an unrelated case, the Montana DEQ counsel expressed its interpretation as *any* preceding two-year period. Petitioner argued that the State Implementation Plan was not in conformance because the Montana DEQ's interpretation was contrary to the EPA's.

On review, the Ninth Circuit rejected the petition for review. It held that judicial deference applied to the EPA's – not the Montana DEQ's – interpretation of the State Implementation Plan because, once approved, a State Implementation Plan becomes federal law under the Clean Air Act. The court concluded that the language was ambiguous and the EPA's interpretation was reasonable. Therefore, the EPA's interpretation controls and the Montana DEQ's contrary interpretation is irrelevant to the EPA's approval of the State Implementation Plan.