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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 .

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.

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 Andrew Contreiras, Danielle K. Morone, Michael Haberkorn, Sabrina Teller, Stephanie L. Safdi, 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.

Cyndy Day-Wilson, Esq.
DW LAW
LL.M. Environmental Law
Editor, Co-Author

Case Law and Regulatory Update Authors:

Andrew R. Contreiras
Gatze Dillon & Ballance LLP

Danielle K. Morone
Gatzke Dillon & Ballance LLP

Michael Haberkorn
Gatzke Dillon & Ballance LLP

Sabrina V. Teller
Remy Moose Manley, LLP

Stephanie L. Safdi
Shute, Mihaly & Weinberger LLP

Michael D. Sands
Baird Holm LLP

Anthony D. Todero
Baird Holm LLP

Executive Committee
Nicole Hoeksma Gordon, Chair

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AGENCY ADMINISTRATION

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Federal Regulatory Updates

Rulemaking Process. In June 2018, the U.S. Environmental Protection Agency (EPA) provided an advance notice of, and requested comments on, rulemaking titled “Increasing Consistency and Transparency in Considering Costs and Benefits in Rulemaking Process.” 83 Fed. Reg. 27524. In July 2018, the EPA provided notice of an extended comment period for same in response to public requests. 83 Fed. Reg. 31098.

Unified Agenda of Actions. In June 2018, the EPA provided a 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 and reviews the regulations with small business impacts under Section 610 of the Regulatory Flexibility Act. 83 Fed. Reg. 27197.

AIR QUALITY

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Clean Cars 4 All and Enhanced Fleet Modernization Programs. In June 2018, the Air Resources Board (ARB) provided notice of a public hearing to consider approving proposed guidelines for the Clean Cars 4 All Program and the Enhanced Fleet Modernization (EFMP) Program. The proposed guidelines are intended to satisfy the requirements of legislation to establish the Clean Cars 4 All Program, and codify EFMP Plus-Up as a formal program and change its name. Cal. Reg. Notice Register 2018, Vol. No. 23-Z, p. 889.

Innovative Clean Transit Regulations. In August 2018, the ARB provided notice of a public hearing to consider the proposed innovative clean transit regulation, which would replace the fleet rule for transit agencies. In addition, the notice announced the availability of, and requested

comments on, the draft environmental analysis prepared for the regulation. Cal. Reg. Notice Register 2018, Vol. No. 32-Z, p. 1269.

Federal Regulatory Updates

Ambient Air Monitoring Reference. In June 2018, the EPA provided notice that it has designated one new reference method for measuring concentrations of nitrogen dioxide (NO₂) in ambient air. 83 Fed. Reg. 25451.

Commercial and Industrial Solid Waste Incineration Units. In June 2018, the EPA provided notice of a proposed rule to address issues raised by industry stakeholders concerning new source performance standards and emission guidelines for commercial and industrial solid waste incineration units. The proposed amendments provide necessary clarifications and corrections. 83 Fed. Reg. 28068.

Cross-State Air Pollution Rule (CSAPR). In July 2018, the EPA provided a notice of data availability on emission allowance allocations to certain units under the CSAPR trading programs. The data includes the final calculations for the first round of allocations of allowances from the CSAPR new unit set-asides for the 2018 control periods. 83 Fed. Reg. 35473.

Integrated Science Assessment. In June 2018, the EPA provided a notice of availability of, and requested comments on, the draft document titled “Second External Review Draft Integrated Science Assessment for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter – Ecological Criteria.” The draft document was prepared as part of the review of the secondary National Ambient Air Quality Standards (NAAQS) for oxides of nitrogen, oxides of sulfur, and particulate matter. 83 Fed. Reg. 29786.

That same month, the EPA announced the preparation of an Integrated Review Plan and Integrated Science Assessment as part of the review of the air quality criteria and the NAAQS for ozone and related photochemical oxidants. Interested parties may submit information regarding significant new O₃ research and policy-relevant issues for consideration. 83 Fed. Reg. 29785.

In July 2018, the EPA provided notice of a public meeting to peer review “EPA’s Integrated Science Assessment for Oxides of Nitrogen, Oxides of Sulfur, and Particulate Matter—Ecological Criteria (Second External Review Draft” and “Review of the Secondary National Ambient Air Quality Standards for Ecological Effects of Oxides of Nitrogen, Oxides of Sulfur and Particulate Matter: Risk and Exposure Assessment Planning Document.” 83 Fed. Reg. 31755.

Mercury and Air Toxics Standards. In July 2018, the EPA provided notice of a final rule extending the date that requires Mercury and Air Toxics Standards electronic reports to be submitted as portable document format files using the Emissions Collection and Monitoring Plan System Client Tool. The date has been extended to July 1, 2020. 83 Fed. Reg. 30879.

National Ambient Air Quality Standards.

In June 2018, the EPA:

1. Provided notice of a final rule establishing initial air quality designations for certain areas for the 2015 primary and secondary NAAQS for ozone. Specifically, five nonattainment areas in California are being voluntarily reclassified to a higher classification. 83 Fed. Reg. 25776.
2. Provided notice of its review of the air quality criteria addressing human health effects and the primary NAAQS for sulfur oxides (SO_x). Based on its review, the EPA proposes to retain the current standard without revisions. 83 Fed. Reg. 26752. The EPA also provided notice of a public hearing and an extended comment period for same. 83 Fed. Reg. 28843.
3. Provided notice of, and requested comments on, facilitating the Clean Air Scientific Advisory Committee's consideration of any adverse public health, welfare, social, economic, or energy effects which may result from various strategies for attainment and maintenance of NAAQS. 83 Fed. Reg. 29784.
- 4.

In July 2018, the EPA:

1. Provided notice of a final rule to reclassify the Eastern Kern County nonattainment area from "Moderate" to "Serious" for the 2008 ozone NAAQS. A submittal of revisions to the Eastern Kern portion of the California SIP is due within 12 months to address the additional requirements of Serious ozone nonattainment areas. 83 Fed. Reg. 31334.
2. Provided notice of a proposed rule to determine that the CSAPR Update for the 2008 ozone NAAQS fully addressed certain obligations regarding interstate pollution transport. 83 Fed. Reg. 31915.
3. Provided notice of a final rule to approve a revision of the California SIP to redesignate the Chico nonattainment area to attainment for the 2006 24-hour fine particulate matter (PM_{2.5}) NAAQS. The EPA also took final action to approve the PM_{2.5} maintenance plan and the determination that contributions from motor vehicle emissions in the Chico nonattainment area are insignificant. 83 Fed. Reg. 32064.

National Emissions Standards for Hazardous Air Pollutants (NESHAP). In July 2018, the EPA provided notice of a final rule concerning the residual risk and technology review conducted for the Portland Cement Manufacturing Industry source NESHAP. The final action reflects corrections and clarifications of the rule requirements and provisions. 83 Fed. Reg. 35122.

In July 2018, the EPA also provided notice of a proposed rule to amend the NESHAP Refinery MACT 1. This action would amend the compliance dates for maintenance vents to January 30, 2019. The revisions would not affect any other requirements in the previously published final actions. 83 Fed. Reg. 31939.

In August 2018, the EPA provided notice of a proposed rule concerning amendments to the NESHAP for Clay Ceramics Manufacturing. The proposed amendments would: (i) revise the temperature monitoring methodology used to demonstrate continuous compliance with the dioxin/furan emissions limit of the final rule, (ii) address concerns regarding certain visible emissions monitoring, (iii) amend the requirements for weekly visual inspections of system ductwork and control device equipment for water curtain spray booths, and (iv) amend the NESHAP to include provisions for emissions averaging. 83 Fed. Reg. 42066.

Outer Continental Shelf (OCS) Air Regulations. In June 2018, the EPA provided notice of a proposed rule to update a portion of the OCS Air Regulations pertaining to the requirements for

OCS sources for which the Santa Barbara County Air Pollution Control District (APCD) is the designated corresponding onshore area. The proposed rule would regulate emissions from OCS sources in accordance with the requirements onshore. 83 Fed. Reg. 28795.

Protection of Stratospheric Ozone. In August 2018, the EPA provided notice of a final rule concerning revisions to references for the refrigeration and air conditioning sector to incorporate the latest edition of certain industry, consensus-based standards. EPA has addressed relevant comments received on the rule and finalized the proposed use conditions with no changes. 83 Fed. Reg. 38969.

State Implementation Plans (SIP).

In June 2018, the EPA:

1. Provided notice of a final action to approve a revision to the Butte County Air Quality Management District (AQMD) portion of the California SIP. The revision concerns the New Source Review (NSR) permitting program for new and modified sources of air pollution. 83 Fed. Reg. 26222.
2. Provided notice of a proposed rule to approve a revision to the Placer County APCD portion of the California SIP. The revision concerns the Prevention of Significant Deterioration permitting program for new and modified sources of air pollution. 83 Fed. Reg. 27738.
3. Provided notice of, and requested comments on, a proposed rule to approve and conditionally approve revisions to the San Diego County APCD portion of the California SIP. The revisions concern the NSR permitting program for new and modified sources of air pollution. 83 Fed. Reg. 29483.

In July 2018, the EPA:

1. Provided notice of a final rule to approve a revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns negative declarations for several volatile organic compound (VOC) source categories included in the Reasonably Available Control Technology State Implementation Plan Analysis. 83 Fed. Reg. 31072.
2. Provided notice of a final rule to approve a revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns emissions of VOCs from architectural coatings. 83 Fed. Reg. 32211.
3. Provided notice of a final rule to approve revisions to the Northern Sonoma County APCD portion of the California SIP. The revisions concern the Prevention of Significant Deterioration permitting program for new and modified sources of air pollution. 83 Fed. Reg. 34949.

In August 2018, the EPA:

1. Provided notice of a proposed rule to approve a revision to the South Coast AQMD portion of the California SIP. The revision concerns emissions of VOCs from architectural coatings. 83 Fed. Reg. 39017.

2. Provided notice of, and requested comments on, a proposed rule on a revision of the South Coast AQMD portion of the California SIP. The revision proposes a conditional approval of an update to provisions governing issuance of permits for stationary sources, including review and permitting of major sources and certain major modifications. 83 Fed. Reg. 39012.
3. Provided notice of a final rule to approve revisions to the San Joaquin Valley Unified APCD portion of the California SIP. The revision concerns the 2014 demonstration regarding Reasonably Available Control Technology (RACT) requirements for the 8-hour ozone NAAQS. The EPA is also approving documents that support the RACT demonstration. 83 Fed. Reg. 41006.
4. Provided notice of a proposed rule to approve three California SIP revisions addressing the nonattainment NSR requirements for the 2008 8-hour ozone NAAQS. The revisions address the South Coast AQMD, San Joaquin Valley APCD and Yolo-Solano AQMD. 83 Fed. Reg. 42063.
5. Provided notice of a proposed rule to delete various local rules from the California SIP that were approved in error. The rules include general nuisance provisions, certain federal performance requirements, hearing board procedures, variance provisions, local fee provisions, as well as certain other corrections. 83 Fed. Reg. 43576.
6. Provided notice of a final rule concerning the Placer County APCD portion of the California SIP. The revision concerns the Prevention of Significant Deterioration permitting program for new and modified sources of air pollution. 83 Fed. Reg. 43765.
7. Provided notice of a proposed rule to approve portions of three California SIP revisions. The revisions concern the 2008 8-hour ozone NAAQS in the San Joaquin Valley, California ozone nonattainment area. 83 Fed. Reg. 44528.

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 First Appellate District rejected challenge to EIR for existing oil refinery's propane and butane recovery project. *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214.

The First District Court of Appeal rejected a challenge to an EIR prepared for a project to add gas recovery facilities to an existing oil refinery. The court, applying the "substantial evidence"

test, found that the EIR's description of the project was not misleading, and concluded that the EIR did not need to speculate about the impacts from downstream use of recovered gas on greenhouse gas ("GHG") emissions, and contained sufficient information on the hazards of transporting the gas by rail.

Phillips 66 Company (Phillips) owns two refineries near the cities of Santa Maria and Rodeo, which refine, process, and ship crude oil. The Santa Maria refinery processes crude oil and sends it, via pipeline, to the Rodeo refinery. The Rodeo facility further refines the oil, finishes it into petroleum products, and ships it by rail to Phillips' customers. The Rodeo refinery also processes heavy and light crude oil from a variety of domestic and international sources delivered by ship to an adjacent marine dock. In 2012, Phillips applied to the County of Contra Costa for a land use permit authorizing a propane and butane recovery project at the Rodeo refinery. The project would allow the refinery to recover more propane and butane—normally lost or used during the refining process—and ship it by rail for sale. In June 2013, the County released a draft EIR for the project, and in November of the same year, released a final EIR. In response to comments from the Bay Area Air Quality Management District, the County prepared and issued a Recirculated EIR (REIR) addressing the air and health issues raised by the Air District. In early 2015, the County published a Final REIR and approved the project.

Rodeo Citizens Association and two other groups filed a petition for writ of mandate, alleging the EIR's project description was inaccurate, the EIR failed to address the increased risks of accidents from train derailments or explosions caused by the project, and the EIR insufficiently addressed the project's impacts to public health, air quality, climate change, and cumulative impacts. The trial court found certain deficiencies in the EIR's air quality section, and issued a writ of mandate requiring the County to reconsider that section, but rejected the remainder of petitioners' arguments. Petitioners appealed.

The court of appeal first considered whether the EIR's project description incorrectly defined the project to include only the recovery and sale of propane and butane from refinery fuel gas. According to petitioners, the EIR failed to disclose that the project would change the refinery's crude oil feedstock to non-traditional, more dangerous heavy crudes. The court rejected this argument and extensively quoted from the responses to comments in the Final REIR as substantial evidence that the project was designed to maximize recovery of propane and butane from existing operations, rather than expand refinery capacity. Additionally, the court found that evidence presented by petitioners, which supported an inference that Phillips did intend to change crude oil feedstock at the Rodeo refinery, did not establish any connection between the proposed project and any such change in feedstock. Next, petitioners argued that the EIR failed to address GHG emissions from downstream users who would burn the propane and butane sold as a result of the project. The court again quoted extensively from the Final REIR which discussed several GHG reducing and/or nonfuel uses for both products, but concluded that it would be too speculative to attempt to quantify GHG emissions from downstream users in the EIR. The court noted that the local air district had initially commented on the EIR's GHG analysis and was satisfied with the County's response in the REIR. Thus, the court found, substantial evidence in the record supported the County's conclusions on GHG emissions.

The court also rejected the petitioners' argument that the EIR failed to assess the public and environmental health impacts on a child care center located 500 feet from the rail lines that transport the refined propane and butane. The court held that petitioners waived this argument because they failed to raise it during administrative proceedings. The court also found that the

REIR sufficiently concluded that the “risk zone” for potential impacts arising from the rail transport was approximately 262 feet, which the child care center was well outside of. Finally, the court rejected petitioners’ contention that the EIR’s cumulative hazards analysis was inadequate because it failed to consider the cumulative risk of rail accidents. The Final EIR’s response to comments on this issue explained that most of the projects cited by the commenters were located a substantial distance from the refinery and did not involve the transport of liquid propane gas by rail. Petitioners argued this response was inadequate. The court found, however, that the County’s explanation for why a cumulative analysis for transportation hazards was not included was not unreasonable, which is all that CEQA requires.

The First District Court of Appeal upheld the City of Santa Rosa’s adoption of a negative declaration for a youth treatment center, finding that noise analysis offered by non-expert attorneys was not substantial evidence in support of a fair argument of a potentially significant noise impact from outdoor recreation activities and the parking lot at the center. *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877.

In 2014, Santa Rosa approved plans to convert the shuttered Warrack Hospital to the SAY Organization’s new Dream Center. SAY is a non-profit organization that provides housing, counseling, and job services to youth and families in Sonoma County. The facility would offer temporary housing, job skills training, health services, and enrichment activities. The property is in a developed area, surrounded by two streets, single-family condominiums, and a convalescent hospital. SAY applied for a conditional use permit, rezoning, and design review to implement the project. The City’s initial study/negative declaration concluded there would be no significant impacts, and the planning commission approved the project. Two neighbors appealed the approval to the city council, arguing that the negative declaration failed to adequately consider potential noise impacts. In a letter to the city council, petitioners’ attorney critiqued the city’s findings by citing a previous noise study that was prepared by the same acoustical consulting firm utilized for the project. The cited study measured vehicle noise impacts at a 24-hour convenience/gas station in the city, but did not contain specific calculations. The council denied the appeal and approved the project.

The neighbors filed a petition for writ of mandate seeking to compel the city to prepare an EIR, arguing the negative declaration erroneously found no significant noise impacts. The trial court denied the petition, and the petitioners appealed. On appeal, the First District evaluated whether substantial evidence supported a fair argument that noise impacts from the project’s parking lot and outdoor recreation area could be significant, thus requiring an EIR. Petitioners urged the court to reject the City’s noise study, and rely instead on their independently calculated findings purporting to show the project’s noise levels would be significant. Petitioners also argued that the City’s noise ordinance set the maximum allowable noise levels, and any noise that would exceed those thresholds was a significant impact.

The appellate court rejected all of petitioners’ arguments. First, the court rejected petitioners’ interpretation of the City’s noise ordinance, finding that its “base” noise values set the standard or normally acceptable levels, not maximum allowable levels, and thus, were not significance thresholds for CEQA’s purposes. Furthermore, the ordinance was not as inflexible and quantitative as petitioners alleged, but rather, allowed for experts to consider factors such as the noises’ level, intensity, nature, and duration when determining if impacts would be significant. Under this analysis, petitioners failed to identify any evidence in the record that noise impacts would exceed the allowable threshold. Second, the court rejected petitioners’ contention that their

noise calculations based on another study for a different project were substantial evidence that this project could result in noise impacts. According to the court, a project opponent cannot simply import the values of one study onto those of another, particularly in the absence of qualified expert opinion. Petitioners' convoluted methodology and ultimate conclusions were based on speculation, rested on supposition and hypothesis, and were not confirmed by experts. The analysis also ignored key facts, such as limitations on parking lot use and hours of operation.

The court also noted that petitioners' conclusions, which they drew from the noise study prepared for the other project, were not presented to the City during the approval process, and did not appear in any part of the administrative record; rather, the other study was simply attached to the opponents' comments submitted to the City Council as part of an administrative appeal. Only during appellate briefing did petitioners present the calculations they extrapolated from the other study. For that reason alone, the court stated it was justified in rejecting petitioners' calculations. Given the court's conclusion that the offered evidence lacked the requisite foundation and credibility, petitioners failed to demonstrate, even under the comparatively low fair-argument standard, that further environmental review was required.

The Second District Court of Appeal upheld a determination that a beach restoration project and a corresponding truck hauling settlement agreement, constituted a single project exempt from CEQA review. *City of Ventura v. City of Moorpark* (2018) 24 Cal.App.5th 337.

The State formed the Broad Beach Geologic Hazard Abatement District ("BBGHAD") to restore a 46-acre stretch of beach in Malibu. The project involved placing five "deposits" of sand on the beach at five year intervals. Each 300,000-cubic-yard deposit would generate 44,000 one-way truck trips over the course of three to five months. The City of Moorpark was concerned that the haul trucks would harm the city's residents. To resolve these concerns, Moorpark and BBGHAD entered into a settlement agreement, which restricted the haul routes that BBGHAD could use for the project.

The County of Ventura filed a petition for writ of mandate and request for injunctive and declaratory relief, arguing that the settlement agreement was: (1) a separate project, and thus not exempt from CEQA; (2) preempted by Vehicle Code section 21; (3) an unlawful attempt to exercise the city's regulatory powers outside its limits; and (4) an improper abdication of the city's police power. The trial court denied the petition and request for injunctive relief, and partially denied the request for declaratory relief.

The Second District Court of Appeal upheld the trial court's holding, finding that the project and settlement agreement constituted a single project that was statutorily exempt from CEQA. The court determined that the settlement agreement was part of the whole of the action because it was one piece of a single, coordinated endeavor to address erosion. Applying the test for "separate projects" under *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, the court found: (i) both respondents were proponents of the settlement agreement; (ii) the agreement and beach restoration served a single purpose: to abate a geologic hazard; and (iii) even if the beach restoration could be completed without the settlement agreement, the two became inextricably linked when the Coastal Commission incorporated the agreement into the project's coastal development permit. Thus, the court found the agreement was not a separate project under *Banning Ranch*, and was exempted from CEQA as an improvement undertaken by a geologic hazard abatement district necessary to prevent or mitigate an emergency.

Next, the court disagreed with petitioner's argument that the settlement agreement was preempted by Vehicle Code section 21. The provision only preempts local traffic control

ordinances and resolutions, not contracts such as the settlement agreement. The court also rejected petitioner's contention that the settlement agreement was an unlawful attempt by Moorpark to exercise its regulatory powers outside of its city limits. The prohibition against extraterritorial regulation does not apply to Moorpark's contracting power. The power authorizes the city to enter into contracts that enable it to carry out its necessary functions, including preventing potential public nuisances, such as that which would have occurred by the trucks' road use. Finally, Ventura argued BBGHAD relinquished its police power when it granted Moorpark the power to dictate sand hauling routes that BBGHAD's contractors had to use, rendering the entire agreement void. The court held that BBGHAD was allowed under state law to exercise a portion of the state's police power, but it could not contract away its right to exercise its police power in the future. The determination of haul routes was a police power, and therefore the portions of the settlement agreement that surrendered BBGHAD's discretion to alter those routes in the future were void. The settlement agreement had at least two purposes: (i) to determine permissible and prohibited sand hauling routes, and (ii) to describe the duration of and limited discretion to modify the route restrictions. Only the second purpose was unlawful. Because the unlawful portions was severable, the remainder of the agreement could remain in force. Thus, the court declined to find the agreement void in its entirety.

The Second District Court of Appeal upheld the State Lands Commission's reliance on CEQA's "existing facilities" categorical exemption to approve the Diablo Canyon nuclear power plant lease extensions. *World Business Academy v. California State Lands Commission* 24 Cal.App.5th 476.

Pacific Gas & Electric (PG&E) owns and operates the Diablo Canyon nuclear power plant in San Luis Obispo County. The plant is partially situated on state-owned submerged tidal lands managed by the State Land Commission. In 1969 and 1970, the State Lands Commission issued PG&E two long-term leases for the lands, which were scheduled to expire in 2018 and 2019. In 2015, PG&E applied to the Commission to extend the leases by five years, so that the leases would expire at the same time as the permits issued by the federal Nuclear Regulatory Commission. The State Lands Commission approved the lease extensions and found that no CEQA review was required under the Class 1 "existing facilities" categorical exemption.

Petitioners filed a petition for writ of mandate in August 2016, arguing that the Commission violated CEQA and the public trust doctrine. Petitioners alleged that the lease replacement did not qualify for the "existing facilities" exemption, and even if it did, the "unusual circumstances" exception applied. The trial court denied the petition, and petitioner appealed.

The Second District Court of Appeal upheld the trial court's decision, finding that the Commission did not violate CEQA or the public trust doctrine. First, the court rejected the petitioner's assertion that the plant was not an exempted "existing facility." Per section 15301 of the CEQA Guidelines, the existing facilities exemption includes "the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The lease replacement plainly fit within these terms because it would not expand the use or operation of the existing nuclear power plant facility.

The court also rejected petitioner's contention that the "unusual circumstances" exception precluded the Commission's reliance on the exemption. Per CEQA Guidelines section 15300.2, subd. (c), the exception applies "where there is a reasonable possibility that the activity will have

a significant effect on the environment due to unusual circumstances.” The party challenging the exemption based on that exception must show: (1) that the project has some feature that distinguishes it from others in the exempt class, such as its size or location, and (2) that there is a reasonable possibility of a significant effect on the environment due to that unusual circumstance. The court found it unnecessary to determine whether the lease replacement presented unusual circumstances because, even assuming the existence of “unusual circumstances,” appellant failed to establish that there was a fair argument that any environmental impacts may occur. In making this determination, the court emphasized that the project was simply a lease replacement, and the environmental impacts alleged by appellant were not a change from the leases’ current preexisting conditions. Appellant argued that the Commission applied the wrong “baseline” to its analysis by failing to consider the impacts of seven additional years of operations, and new evidence concerning seismic risks, increased cancer rates, worsening marine conditions, the deteriorating condition of the plant and related safety impacts, and other impacts. The court rejected each argument, finding that, in the absence of substantial evidence indicating increased effects, each environmental impact was incident to, and part of the plant’s current baseline operations.

Finally, the court held that the Commission did not abuse its discretion in finding that the lease extensions were consistent with the public trust. The Commission considered the facts before it and balanced public trust rights in conducting its review. Petitioner failed to cite any authority to support the contention that the Commission failed to perform a factual evaluation that considered the cumulative environmental impacts from continued operation. Towards this end, petitioner did not clarify why the alleged baseline error in the Commission’s CEQA analysis undermined its public trust analysis.

The Second District Court of Appeal held that well construction permits issued by San Luis Obispo County were ministerial, and therefore did not trigger CEQA. *California Water Impact Network v. County of San Luis Obispo* (2018) 25 Cal.App.5th 666.

In 2016, the County of San Luis Obispo issued permits to four agricultural companies to install irrigation wells for their properties’ vineyard operations. The county did not conduct a CEQA review prior to issuing the permits. CA Water Impact Network petitioned for a writ of mandate, challenging the well permits. Petitioner alleged the County’s discretionary decision to issue permits for groundwater extraction required environmental review. The County and real parties in interest demurred, arguing the permit issuance was purely a ministerial function. The trial court sustained the demurrer and entered judgment denying the petition. The petitioner appealed, arguing that Chapter 8.40 of the San Luis Obispo County Code, which seeks to prevent groundwater pollution and contamination during well construction, required the County to conduct further environmental review.

The Second District Court of Appeal affirmed the trial court’s dismissal of the petition. Under Chapter 8.40, the County “shall” issue a permit if the well complies with County and state standards. The standards incorporated by reference consist of bulletins issued by the Department of Water Resources, which address various matters such as well seal depths, distances from potential sources of contaminations, licensing requirements, and more. The court analogized these standards to building permits, which are presumed to be ministerial. The Code and DWR bulletins focused on objective standards designed to protect groundwater quality when constructing,

repairing, or closing wells. Nothing in the Code or bulletins addressed the regulation of groundwater quantity. The County could not, for example, adopt a condition limiting the amount of water pumped as a means of preserving groundwater resources. Petitioner cited no case law where a landowner who sought to construct a well was subject to any environmental review. Here, based on its review of the ordinance, the court found that as long as the technical standards and objective measurements are met, the county must issue a well permit to any applicant. This process leaves scant room for the public agency to impose its personal judgment and discretion. Further, the court determined that an instruction to applicants to include all necessary information to ensure that groundwater resources are protected did not transform the inquiry into a discretionary review. The subcontext of this provision is whether groundwater will be protected from contamination or pollution during well construction, not from depletion by overuse.

Finally, the court noted that the Sustainable Groundwater Management Act does regulate groundwater supply and seeks to prevent groundwater depletion. However, SGMA is not incorporated into the county's well construction ordinance. The petitioner could address their environmental goals regarding groundwater depletion as the county implements SGMA.

The Second District Court of Appeal upheld award of costs incurred by agency after taking over preparation of administrative record that petitioner elected, but failed, to prepare.
LandWatch San Luis Obispo Co. v. Cambria Comm. Serv. Dist. (2018) 25 Cal.App.5th 638.

In January 2014, the Cambria Community Services District ("District") approved an emergency water supply project. The District did not perform environmental review under CEQA. In October 2014, LandWatch sued and elected to prepare the record. In anticipation of the need to prepare the record, LandWatch also sent the District a letter under the Public Records Act asking for the related documents. The District responded in November 2014 and sent LandWatch the documents. One month later, the District informed LandWatch that additional documents had been identified, and that the District would provide them upon payment. LandWatch did not request the additional documents from the District until March 2015. The District regathered the documents and produced them in April 2015. In August 2015, LandWatch produced a draft index to the record. The District responded by noting that the index was both over- and under-inclusive. That same date, the District produced its own index and certified the record it had prepared. LandWatch filed a motion to include additional documents post-dating the January 2014 approval date. The trial court ordered the District to certify an appendix consisting of the additional documents. Weeks passed, and LandWatch did not prepare the appendix. The District wrote that it would prepare the appendix itself. Only then did LandWatch prepare its own, competing appendix, which it lodged in February 2016 – one month before the trial. The court accepted the District's appendix, and rejected the one prepared by LandWatch. Following trial, the court denied the petition. The District filed a memorandum of costs seeking approximately \$39,000, including ~\$4,000 for preparing the certified record, and ~\$27,000 for preparing the appendix. LandWatch moved to tax costs. The trial court awarded the District approximately ~\$21,000 (~\$4,000 for preparing the certified record; ~\$14,000 for preparing the appendix – half of the District's requested amount; and ~\$3,000 for other items). LandWatch appealed.

On appeal, the Second District Court of Appeal evaluated whether the trial court appropriately awarded the District fees for preparing the administrative record and appendix. LandWatch argued that, because it had elected to prepare the record, the District ought not to recover any record-related costs. The appellate court upheld the trial court's fee award, finding

that the District acted properly in preparing the record and appendix, and seeking the recoverable costs.

First, the court noted that in electing to prepare the record, LandWatch was required to do so within 60 days. LandWatch missed this deadline. LandWatch argued the District was to blame for the delays. The court disagreed. The trial court, as trier of fact, had concluded otherwise. The trial court found that the District acted properly in preparing the record, particularly because LandWatch's unreasonable delay and failure to meet the 60-day deadline forfeited their right to do so. The court further noted that the trial court has the discretion to award an agency costs for preparing the record, even if a petitioner elects to do so. Here, the District had a right to a timely record. LandWatch also argued that the District ought not to recover costs associated with the appendix of post-approval documents because the District had resisted LandWatch's efforts to augment the record with them. The Court was unmoved. The trial court had ordered the preparation of the appendix at LandWatch's insistence. Thus, the appellate court found LandWatch's assertion that the appendix was not part of the record was merely a tactic to escape costs. The trial court had awarded the District all of its costs for preparing the record, and half of its costs for preparing the appendix. LandWatch argued the 50% award for preparing the appendix was arbitrary, and fell short of the trial court's obligation to determine whether record-related costs were reasonable. The Court of Appeal disagreed, concluding that if anything a 50% award was too low. Finally, LandWatch argued the trial court erred in awarding the District's court-call, copying and transcription costs. The Court noted that the trial court had already reduced the costs as requested by LandWatch, or had ample basis for finding the costs to be reasonable.

The First District Court of Appeal finds a “fair argument” that a mixed-use project in an historic district might have significant aesthetic impacts on the historic character of the community due to the project’s size and scale. *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129.

The City of Fremont adopted a zoning overlay district to protect the historic character of the community of Niles, a small commercial strip dating to the 19th century. A developer proposed a 98-unit mixed-use project on a vacant six-acre property at the gateway to this district. Neighbors complained about the height and density of the project and alleged that it was incompatible with the area and would increase traffic congestion. The city's architectural review board recommended denying the project. The planning commission recommended approval, and the city council adopted a mitigated negative declaration and approved the project. Neighbors sued. The trial court found that the record contained a “fair argument” of potentially significant impacts relating to aesthetics and traffic, and granted the writ. The developer appealed.

Meanwhile, the city published a draft EIR for the project. The neighbors moved to dismiss the appeal as moot because the city had decided to comply with the trial court's writ. The appellate court declined to dismiss the appeal, because the city was not a party to the appeal. The developer's submittal of a revised application did not mean the original project was abandoned. Moreover, the appeal was not moot because, were the developer to prevail, the city's original approvals would be reinstated regardless of the new application.

Turning to the merits, the court concluded that the project's visual impact on its setting – in this case, an historic commercial “main street” recognized as sensitive by the city – was a proper

subject of review, over and above the analysis of the project's impact on historic resources. According to the court, the record "clearly" contained a fair argument that the project would have a significant aesthetic impact on the historic district. The city's initial study found that the project was aesthetically compatible with the district because it reflected the architectural style of the industrial buildings that previously occupied the site, and the city's design guidelines recognized that architecture within the district was varied. Members of the architecture review board and of the public, however, stated that the project was too tall and dense, and inconsistent with Niles' village-like character. These complaints continued even after the developer modified the project. The court recognized the "inherently subjective" nature of aesthetic judgments, but 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 [district] neighborhood and commercial core." Commenters included members of the city's historic architectural review board, who recommended denial.

The court rejected the developer's various arguments that the project's aesthetic impact was not significant. First, although the site was largely vacant and unkempt, that did not automatically mean that development of the site would be an upgrade. Second, the site, though on the edge of the historic district, was nevertheless located at a recognized gateway to Niles, and was within the district's boundaries. Third, the architectural review board's recommendation to deny the project was not a bare conclusion, but was supported by record evidence of the board members' (whom the court presumed to have historic aesthetic expertise) underlying aesthetic judgments about the effect of the project. Thus, the board's "collective opinions" on project compatibility with the historic overlay district were substantial evidence supporting a fair argument that the project may have significant aesthetic impacts. Though the court noted that, were the city to prepare an EIR, the city could conclude that the project would not have a significant impact on aesthetics "because aesthetics is an inherently subjective assessment."

The court also found that the record contained a fair argument concerning traffic safety, based on "fact-based comments" from the neighbors regarding local safety concerns and driving habits. These were substantial evidence supporting a fair argument that a new intersection at the project entrance could have significant traffic impacts. The record also contained a fair argument based on city staff's and residents' fact-based testimony that the project could contribute to existing traffic congestion.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Low-Emission Vehicle III Greenhouse Gas (GHG) Emissions. In August 2018, the ARB provided notice of a public hearing to consider proposed amendments to the Low-Emission Vehicle III GHG Regulation. The proposed amendment would make clarifications to the “deemed to comply” option. The ARB may also consider other changes, including flexibilities that would allow for continued compliance with federal standards or reward national actions to promote cleaner vehicles. Cal. Reg. Notice Register 2018, Vol. No. 32-Z, p. 1263.

Federal Regulatory Updates

Electric Generating Units (EGUs). In August 2018, the EPA provided notice of a proposed rule concerning EGUs. The proposed revisions include: (i) replacing the Clean Power Plan with revised emissions guidelines that inform the development, submittal and implementation of state plans to reduce greenhouse gas emissions from certain EGUs; (ii) new regulations that provide direction on the implementation of emission guidelines; and (iii) revising the NSR program to help prevent NSR from being a barrier to the implementation of efficiency in projects at EGUs. 83 Fed. Reg. 44746.

Renewable Fuel Standard Program. In July 2018, the EPA provided notice of a proposed rule concerning the annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in 2019. 83 Fed. Reg. 32024.

In August 2018, the EPA provided notice of a determination that certain fuels produced from distillers sorghum oil via certain processes meet the lifecycle GHG emissions reduction threshold of 50 percent required for advanced biofuels and biomass-based diesel under the Renewable Fuel Standard Program. 83 Fed. Reg. 37735.

Safer Affordable Fuel-Efficient Vehicles (SAFE). In August 2018, the EPA and National Highway Traffic Safety Administrative (NHTSA) provided notice of proposed rulemaking titled the “Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks.” If finalized, the rule would amend certain existing Corporate Average Fuel Economy and tailpipe carbon dioxide emissions standards for passenger cars and light trucks and establish new standards for models years 2021 through 2026. 83 Fed. Reg. 42986. In August 2018, the EPA and NHTSA also provided notice of public hearings and a notice of availability of NHTSA’s Draft Environmental Impact Statement regarding same. 83 Fed. Reg. 42817.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

State Regulatory Updates

Coast Yellow Leptosiphon. In August 2018, the Fish and Game Commission provided notice of its intent to add Coast Yellow Leptosiphon to the list of endangered plants. The primary threats and additional information can be found in the report “Status Review of Yellow Leptosiphon (*Leptosiphon croceus*).” Cal. Reg. Notice Register 2018, Vol. No. 35-Z, p. 1347.

Humboldt Marten. In August 2018, the Fish and Game Commission provided notice of an August 23, 2018 meeting where final consideration on a petition to list the Humboldt marten as a threatened or endangered species will be heard. Cal. Reg. Notice Register 2018, Vol. No. 33-Z, p. 1313.

Lassics Lupine. In August 2018, the Fish and Game Commission provided notice of its intent to add Lassics lupine to the list of endangered plants. The primary threats and additional information can be found in the report “Status Review of Lassics lupine (*Lupinus constancei*).” Cal. Reg. Notice Register 2018, Vol. No. 35-Z, p. 1347.

Upper Klamath-Trinity River Spring Chinook Salmon. In August 2018, the Fish and Game Commission provided a notice of receipt of a petition from the Karuk Tribe and the Salmon River Restoration Council to list the Upper Klamath-Trinity River spring Chinook salmon as an endangered species under the California Endangered Species Act. The petition was transmitted to the California Department of Fish and Wildlife for review. The evaluation and recommendation on the petition will be reviewed at a later date. Cal. Reg. Notice Register 2018, Vol. 33-Z, p. 1313.

Federal Regulatory Updates

Applegate’s Milk-Vetch. In June 2018, the U.S. Fish and Wildlife Service (USFWS) provided notice of the initiation of a 5-year status review of the Applegate’s Milk-Vetch. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Clara Hunt’s Milk-Vetch. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Clara Hunt’s Milk-Vetch. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Compensatory Mitigation Policy. In July 2018, the USFWS provided a notice of withdrawal of the Endangered Species Act Compensatory Mitigation Policy. The policy is being withdrawn because it does not have authority to require “net conservation gain” under the Endangered Species Act, and the policy is inconsistent with current Executive branch policy. 83 Fed. Reg. 36472.

Eagles. In June 2018, the USFWS provided a notice of availability of, and requested comments on, a summary report of an analysis predicting the number of golden and bald eagles that may be killed at new wind facilities. The analysis was prepared to update prior data and is based on a collision risk model used by the EPA for the predictions. 83 Fed. Reg. 28858.

Hidden Lake Bluecurls. In June 2018, the USFWS provide notice of a final rule removing the plant Hidden Lake bluecurls from the Federal list of endangered and threatened plants on the basis of recovery. The rule further announced the availability of a post-delisting monitoring plan for same. 83 Fed. Reg. 25392.

Howell's Spineflower. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Howell's Spineflower. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Indian Knob Mountainbalm. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Indian Knob Mountainbalm. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Interagency Cooperation. In July 2018, the USFWS provided notice of a proposed rule to amend regulations concerning interagency cooperation. The amendments would improve and clarify the interagency consultation processes and make them more efficient and consistent. 83 Fed. Reg. 35178.

Island Rush Rose. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Island Rush Rose. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Kneeland Prairie Penny-Cress. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Kneeland Prairie Penny-Cress. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

La Graciosa Thistle. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the La Graciosa Thistle. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Listing Species and Designating Critical Habitat. In July 2018, the USFWS and National Marine Fisheries Service provided notice of proposed amendments to regulations concerning the procedures and criteria used for listing or removing species from the List of Endangered and Threatened Wildlife and Plants and designating critical habitat. In addition, several technical revisions will be made. 83 Fed. Reg. 35193.

Mitigation Policy. In July 2018, the USFWS provided a notice of withdrawal of the Mitigation Policy that guided recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitat. The policy is being withdrawn because it is no longer appropriate to retain the "net conservation gain" standard throughout various Service-related activities and is inconsistent with current Executive branch policy. 83 Fed. Reg. 36472.

Mountain Yellow-Legged Frog. In July 2018, the USFWS announced the availability of, and requested comments on, a draft recovery plan for the Southern California distinct population segment of the Mountain Yellow-Legged Frog. 83 Fed. Reg. 34155.

Nipomo Mesa Lupine. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Nipomo Mesa Lupine. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Oregon Vesper Sparrow. In June 2018, the USFWS provided a notice of 90-day findings on the petition to list the Oregon Vesper Sparrow as an endangered or threatened species. Based on the review of the information in the petition, the USFWS found that the petitioned action may be warranted and requested any information relevant to whether the species falls within the definition of either endangered or threatened. 83 Fed. Reg. 30091.

Peirson's Milk-Vetch. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Peirson's Milk-Vetch. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Pitkin Marsh Lily. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Pitkin Marsh Lily. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Prohibitions to Threatened Wildlife and Plants. In July 2018, the USFWS provided notice of a proposed rule concerning the regulations for prohibitions to threatened wildlife and plants. The revisions would extend most of the prohibitions for activities involving endangered species to threatened species, but would not alter the prohibitions for species already listed. 83 Fed. Reg. 35174.

Scotts Valley Spineflower. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Scotts Valley Spineflower. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Sebastopol Meadowfoam. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Sebastopol Meadowfoam. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Sonoma Sunshine. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Sonoma Sunshine. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Stebbins' Morning-Glory. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Stebbins' Morning-Glory. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Western Lily. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Western Lily. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

White Sedge. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the White Sedge. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

Yreka Phlox. In June 2018, the USFWS provided notice of the initiation of a 5-year status review of the Yreka Phlox. In connection with the review, submission of any new information on the species is requested. 83 Fed. Reg. 28251.

ENERGY

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FEES/TAXES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FISHING RIGHTS

Recent Court Rulings

FOREST RESOURCES

Recent Court Rulings

State Regulatory Updates

Exemption Amendments. In June 2018, the Board of Forestry and Fire Protection provided notice of exemption amendments for the forest practice regulations applicable to certain timber management. The amendments would clarify the fuel treatment standards of 1038(j), extend the sunset date for Drought Mortality Amendments, and implement standardized notification procedures. Cal. Reg. Notice Register 2018, Vol. No. 22-Z, p. 858.

SRA Fire Safe Regulations, 2020. In August 2018, the Board of Forestry and Fire Protection provided notice of a proposed action to amend the requirements for fire safe development in the State Responsibility Area for consistency with related statutes and codes and to meet the needs of current firefighting apparatus. The effective date would be set concurrently with the triennial California Fire Code update. Cal. Reg. Notice Register 2018, Vol. No. 32-Z, p. 1282.

Timberland Conversion Exemptions. In June 2018, the Board of Forestry and Fire Protection provided notice of amendments to the Timberland Conversion Exemptions. The amendments would provide maintenance of the comprehensive regulatory scheme allowing a clear and consistent application and enforcement of less than three-acre Conversion Exemptions. Cal. Reg. Notice Register 2018, Vol. No. 22-Z, p. 864.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

State Regulatory Updates

Idle Wells. In July 2018, the Department of Conservation provided notice of its intent to adopt regulations concerning idle wells. The proposed regulations are a result of AB 2729's requirement for the Department of Conservation to update the idle well regulations including appropriate testing and remediation as well as establishing requirements for operators to submit engineering analyses for certain idle wells that have been idle for 15 years. Cal. Reg. Notice Register 2018, Vol. No. 30-Z, p. 1154.

Federal Regulatory Updates

Alternative Test Methods Strategic Plan. In June 2018, the EPA provided a notice of availability of a document titled "Strategic Plan to Promote the Development and Implementation of Alternative Test Methods Supporting the Toxic Substances Control Act (TSCA)." In addition, response to comments on the draft document are also available. 83 Fed. Reg. 30167.

CERCLA/EPCRA. In August 2018, the EPA provided notice of revisions to implement the vacatur of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) and Emergency Planning and Community Right-to-Know Act (EPCRA) administrative reporting exemption regulations as ordered by the U.S. Court of Appeals for the District of Columbia. The rule also incorporates CERCLA revisions enacted by the Fair Agricultural Reporting Method Act. 83 Fed. Reg. 37444.

Dust-Lead Hazard Standards. In July 2018, the EPA provided notice of a proposed rule to lower the dust-lead hazard standards from 40 µg/ft² to 10 µg/ft² on floors and 250 µg/ft² to 100 µg/ft² for window sills. 83 Fed. Reg. 30889.

Hazardous Waste Management System. In July 2018, the EPA provided notice of final rule concerning the disposal of coal combustion residuals (CCR) from electric utilities. This action would finalize certain revisions to criteria in the 2015 CCR that were proposed in March 2018. 83 Fed. Reg. 36435.

Mercury. In June 2018, the EPA provided notice of a final rule concerning certain reporting requirements that will provide information to assist in the preparation of an "inventory of mercury supply, use, and trade in the United States," where mercury is defined as elemental mercury and a mercury compound. 83 Fed. Reg. 30054.

Nonylphenol Ethoxylates (NPEs). In June 2018, the EPA provided notice of a final rule to add a NPEs category to the list of toxic chemicals subject to reporting. The EPA is adding this chemical category because it has determined that NPEs meeting certain toxic criteria and are highly toxic to aquatic organisms. 83 Fed. Reg. 27291.

Risk Management Program Reconsideration. In July 2018, the EPA provided notice that it was supplementing the record for the proposed Risk Management Program (RMP) Reconsideration rule. The supplement includes the addition of the November 2017 version of the RMP database to the rulemaking docket. As a result the comment period has been extended to allow time for review. 83 Fed. Reg. 34967.

TSCA Chemical Substances. In June 2018, the EPA provided notice of a guidance document titled "Guidance for Creating Generic Names for Confidential Chemical Substance Identity Reporting under TSCA." The guidance document is a requirement under the TSCA and provides

information to assist companies in creating structurally descriptive generic names as needed. 83 Fed. Reg. 30173.

In June 2018, the EPA also provided a notice of availability of a unique identifier (UID) assignment and application policy. The EPA determined that it will use a numerical identifier that incorporates the year the CBI claim was asserted and apply the UID to non-confidential information related to the chemical substance, except in certain situations. 83 Fed. Reg. 30168.

In August 2018, the EPA provided notice of an extended comment period on problem formulations for the risk evaluations to be conducted for the first ten chemical substances and the document “Application of Systematic Review in TSCA Risk Evaluations.” The comment period is extended by an additional 21 days in response to requests for same. 83 Fed. Reg. 38691.

INSURANCE COVERAGE

Recent Court Rulings

Regulatory Updates

No summaries or updates this quarter.

LAND USE

Recent Court Rulings

State Regulatory Updates

Building Standards. In July 2018, the Building Standards Commission provided notice of a proposed action to the building standards of the Department of Housing and Community Development regarding amendments to the 2016 California Building Code and 2016 California Residential Code

Federal Regulatory Updates

Brownfields Utilization, Investment and Local Development (BUILD) Act. In June 2018, the EPA provided notice of, and requested comments on, development of policy and guidance to implement the BUILD Act. Specifically, the EPA is requesting comments on: (i) the authority to increase the per-site cleanup grant amounts to \$500,000; (ii) the new multi-purpose grant authority; and (iii) the new small community assistance grant authority. 83 Fed. Reg. 29782.

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

PROPOSITION 65

Recent Court Rulings

The First District Court of Appeal has held that the 1989 decision to set the safe harbor level for Proposition 65 warnings for lead exposure at 0.5 micrograms/day was not arbitrary and capricious. *Mateel Environmental Justice Foundation v. Office of Environmental Health Hazard Assessment* (2018) 24 Cal. App. 5th 220.

Proposition 65 requires companies to provide a clear and reasonable warning before exposing individuals to listed carcinogens or reproductive toxins. Health & Saf. Code § 25249.6. But a warning is not required if an exposure to a reproductive toxin falls under the statutory safe harbor threshold (the “maximum allowable dose level” or “MADL”), set at one one-thousandth of the level at which the chemical will have no observable carcinogenic effect (the “no observable effect level” or “NOEL”). *Id.* at § 25249.10(c). Following lead’s listing as a known carcinogen and reproductive toxin, the lead agency charged with implementing Proposition 65 (the predecessor to respondent Office of Environmental Health Hazard Assessment (“OEHHA”)) adopted regulations in 1989 governing lead exposure warnings. Recognizing the dearth of human data on reproductive effects of lead, the agency found it appropriate to use occupational exposure limits as a surrogate NOEL. It thus used the “permissible exposure limit” (“PEL”) for lead set by the United States Occupational Safety and Health Administration (“OSHA”) of 500 micrograms and divided it by 1,000 to derive an MADL for lead of 0.5 micrograms/day. OSHA found that its PEL would result in a mean average blood lead level for workers of 35 micrograms/100 grams, though it found 30

micrograms/100 grams to be the blood lead level that would minimize adverse reproductive health effects. Mateel Environmental Justice Foundation sued OEHHA in 2015 seeking to invalidate the allegedly arbitrary and capricious safe harbor regulation. The trial court denied Mateel's motion for judgment on the pleadings and entered judgment in favor of OEHHA, and Mateel appeal.

On appeal, the principal questions were whether OEHHA abuse its discretion in setting the NOEL blood lead level at 30 micrograms per 100 grams and in setting the MADL at exposure to 0.5 micrograms of lead per day.

The appellate court affirmed judgment in favor of OEHHA. The court first rejected Mateel's argument that OEHHA violated Proposition 65 in adopting a surrogate NOEL based on OSHA's PEL when the data and studies before OSHA showed reproductive effects at blood lead levels below 30 micrograms/100 grams. The court explained that Proposition 65 requires the agency to base the NOEL on evidence and standards of comparable scientific validity to those that formed the scientific basis for the chemical's listing. Health & Saf. Code § 25249.10(c). The agency had relied on OSHA's evidence to make its lead listing decision, so the evidence was not only comparable but was the same evidence, and it appeared to be comprehensive, scientifically appropriate, and even cutting edge for its time. Moreover, OSHA's statements about possible neurological and developmental effects at infant blood lead levels below 30 micrograms/100 grams concerned postnatal exposures, but Proposition 65 is concerned solely with prenatal exposures. Second, the court rejected Mateel's argument that even if OEHHA could use the 30 micrograms/100 grams OSHA blood level target as a "surrogate" NOEL, it abused its discretion in basing the MADL on the PEL, since the PEL was not actually set to achieve that blood level. Although OSHA found that its PEL would result in a higher average blood level for workers of 35 micrograms/100 grams, its model assumed that industrial exposures at the PEL were occurring on top of workers' background blood lead levels based on prior exposures. But while OSHA was concerned with total blood lead levels in setting the PEL, Proposition 65 is concerned only with blood lead levels that result from an isolated exposure caused by a particular business. The record also shows that OEHHA was aware of the contribution of background exposures to the PEL and took that into account in its NOEL decision. In a footnote, the court noted that nothing in its opinion should discourage OEHHA from revisiting its MADL for lead based on current science showing that blood lead levels of 30 micrograms/100 grams are not protective of reproductive health.

Regulatory Updates

Alcoholic Beverages. In August 2018, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of its intent to modify the listing of alcoholic beverages as known to the state to cause cancer under the Labor Code listing mechanism. The current listing of "Ethanol in Alcoholic Beverages" will be modified to "Alcoholic Beverages." Cal. Reg. Notice Register 2018, Vol. No. 31-Z, p. 1241.

Chemicals in Coffee. In June 2018, the OEHHA provided notice of the proposed adoption of a new section stating that exposures to Proposition 65 listed chemicals in coffee that are produced as part of the processes of roasting coffee beans and brewing coffee pose no significant risk of cancer. Cal. Reg. Notice Register 2018, Vol. No. 25-Z, p. 954.

Clear and Reasonable Warnings. In June 2018, the OEHHA provided notice of an extended comment period and a public hearing for proposed rulemaking to modify the safe-harbor warning

content for on-product warnings for exposures to listed chemicals in pesticides. Cal. Reg. Notice Register 2018, Vol. No. 23-Z, p. 903.

Hazard Identification Materials. In August 2018, the OEHHA provided a notice of availability of hazard identification documents titled “Evidence of the Carcinogenicity of N-Nitrosohexamethyleneimine” and “Evidence on the Carcinogenicity of Gentian Violet.” The documents will be considered by the Carcinogen Identification Committee at the November 1, 2018 meeting. Cal. Reg. Notice Register 2018, Vol. No. 33-Z, p. 1314.

Nickel and Nickel Compounds. In July 2018, the OEHHA provided a notice of availability of “Evidence on the Development and Reproductive Toxicity of Nickel and Nickel Compounds.” The Development and Reproductive Toxicant Identification Committee will hold a meeting to consider the possible listing of nickel and nickel compound. Cal. Reg. Notice Register 2018, Vol. No. 30-Z, p. 1189.

Public Health Goals (PHGs). In June 2018, the OEHHA provided a notice of availability of, and requested comments on, the revised draft technical support document on the proposed updates of the PHGs for *cis*- and *trans*-1,2-dichloroethylene in drinking water. The revised document proposes an updated PHG of 13 parts per billion (ppb) for *cis*-1,2- dichloroethylene and 50 ppb for *trans*-1,2- dichloroethylene. Cal. Reg. Notice Register 2018, Vol. No. 22-Z, p. 876. In July 2018, the OEHHA announced the availability of a technical support document

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

WATER RESOURCES AND RIGHTS

Recent Court Rulings

State Regulatory Updates

Federal Regulatory Updates

Waters of the United States. In July 2018, the EPA provided notice of supplemental proposed rulemaking to clarify, supplement and seek additional comment on a 2017 proposal to repeal the 2015 Rule Defining Waters of the United States. Repeal of the 2015 Rule would restore the regulatory text that existed prior to the 2015 Rule. 83 Fed. Reg. 32227.

WATER QUALITY

Recent Court Rulings

State Regulatory Updates

Underground Injection Control Regulations. In July 2018, the Department of Conservation provided notice of its intent to adopt updated regulations concerning underground injection control. The proposed regulations would update the Natural Resource Divisions' underground injection control regulations with improved, more transparent standards that better align with modern industry practices, and better implement the commitments expressed in the Primacy Agreement. Cal. Reg. Notice Register 2018, Vol. No. 30-Z, p. 1161.

Federal Regulatory Updates

Clean Water Act Hazardous Substances Spill Prevention. In June 2018, the EPA provided notice of a proposed action intended to comply with a consent decree between the EPA and litigants concerning regulations to prevent and contain Clean Water Act hazardous substance discharges. The EPA is proposing no new requirements and providing an opportunity for public comment on the proposed approach. 83 Fed. Reg. 29499.

Federal Case Summaries of Interest

Energy

The Federal Circuit Court of Appeals held that the residual method of calculation under I.R.C. § 1060 was the appropriate method for calculating grant-eligible assets of windfarms for purposes of the American Recovery and Reinvestment Act (“ARRA”) when the windfarms were purchased for the purpose of receiving grants. *Alta Wind I Owner Lessor C v. U.S.*, 897 F.3d 1365 (Fed. Cir. 2018).

In 2009, Congress enacted Section 1603 of the ARRA. Section 1603 provides that certain renewable energy facilities, including wind farms, are able to obtain cash grants from the federal government. The amount of the grant is determined using the basis of the tangible personal property of the facility with certain exclusions. Between 2010 and 2012, Plaintiff Alta (“Alta”) acquired six completed wind farms from developer Terra-Gen Power LLC (“Terra-Gen”). Notably, however, the wind farms were not yet in use, but Terra-Gen had an agreement with Southern California Edison (“SCE”), where SCE would purchase the wind farms’ entire electricity output for a period of roughly 24 years after the windfarms were put into use. Alta acquired the wind farms through an agreement with Terra-Gen, who was not able to utilize the ARRA grants. Pursuant to the agreement, Alta leased back five of the six wind farms to Terra-Gen to operate. The agreement included an indemnity provision providing that Terra-Gen would cover the shortfall that would occur if the Treasury did not accept Alta’s use of unallocated purchase price to determine the grant amount. Alta applied for \$706 million in grants from the Treasury, a number that it calculated using the unallocated method of calculation, which KPMG reviewed and approved as valid. The Treasury then awarded Alta approximately \$495 million, and Alta sued the government for an additional \$206 million. The government counterclaimed, asserting that it overpaid Alta \$59 million based on the residual method of calculation under I.R.C. § 1060. The Federal Claims Court concluded that the unallocated method was appropriate and found that there were no peculiar circumstances inflating the purchase price. The government appealed.

The issue on appeal was whether the unallocated method of calculating the grant amount used by Alta was the correct method, or whether the government’s residual method calculation under I.R.C. § 1060 is the correct method.

The Federal Court of Appeals held that the residual method of calculation under I.R.C. § 1060 was the proper method of calculating basis and therefore the grant amount and remanded back to the Federal Claims Court for further proceedings. The Court reasoned that I.R.C. § 1060(a) requires that the residual method be used to calculate basis for any transfer that constitutes a trade or business. A trade or business is any group of assets to which goodwill or going concern value attach under. Alta argued that because the wind farms were not yet in operation when purchased, goodwill and going concern value could not attach at the time of the transaction. The Court disagreed, looking to the Treasury regulations that set out a non-exhaustive list of factors that indicate that goodwill or going concern value attach. The factors included “the presence of any intangible assets,” “the existence of an excess of the total consideration over the aggregate book value of the tangible and intangible assets purchased,” and “related transactions, including lease agreements, licenses, or other similar agreements between the purchaser and seller.” The Court pointed out that the purchase price of the wind farms was significantly higher than the book value and Alta had a leaseback agreement with Terra-Gen. Additionally, the SCE’s agreement to purchase all electrical output for 24 years indicated an intangible asset. Overall, the Court concluded that both goodwill and going concern value were present at the time of purchase and

before the business actually began operating, and that therefore the residual value calculation under I.R.C. § 1060 was the appropriate method to calculate the value of the grant. The Court remanded to the Federal Claims Court to assess the grant-eligible assets using the residual method.

- Addison Fairchild and Michael Sands

Forest Service

The Ninth Circuit Court of Appeals has held that the U.S. Forest Service’s Environmental Impact Statement (EIS) improperly analyzed road mileage increases and that environmental group could proceed with claim despite not commenting on the Draft EIS. *Alliance for the Wild Rockies v. Savage* (9th Cir. July 26, 2018) 897 F.3d 1025.

In the case, Alliance for the Wild Rockies (Alliance) challenged the Forest Service’s EIS prepared for the East Reservoir Project, which involved various forest management activities including road construction and maintenance. In “Access Amendments” developed in coordination with the U.S. Fish and Wildlife Service (FWS), the applicable Forest Plan prohibited any increase of road mileage above the designated baseline of 1,123.9 miles within a protected area for the Cabinet-Yak grizzly bear—a threatened species. Rather than analyzing whether the resulting road mileage would exceed this baseline, the Forest Service subtracted the miles of “undetermined” roads to be removed from the miles to be added. The District Court granted summary judgment in favor of the Forest Service because it found that this calculation demonstrated no net increase in road mileage.

On appeal, the Ninth Circuit held that Alliance did not waive its claim by failing to object during review of the Draft EIS because Alliance raised the issue when the Forest Service first divulged this aspect of the project in the Final EIS. The Court further held that the Forest Service acted arbitrarily and capriciously in preparing the EIS by failing to analyze whether total road mileage would exceed the 1,123.9-mile limit. The Court ruled that the Forest Service’s comparison of the project’s road mileage reductions and increases was insufficient because the record did not indicate whether all reductions consisted of roads in the FWS’s baseline.

The Ninth Circuit Court of Appeals has held that the U.S. Forest Service (Forest Service) and the Bureau of Land Management’s (BLM) violated their obligations to independently review a pipeline project and improperly relied on an Environmental Impact Statement (EIS) prepared by the Federal Energy Regulatory Commission (FERC). *Sierra Club, Inc. v. United States Forest Serv.* (9th Cir. July 27, 2018) 897 F.3d 582.

In the case, the Forest Service issued a decision approving a pipeline project and amending the related Land and Resource Management Plan (Forest Plan) for consistency with the project. BLM likewise issued a decision approving the pipeline project through portions managed by the Army Corps of Engineers. As required, FERC had first issued a Certificate of Public Convenience and Necessity for the pipeline project along with an EIS, with the Forest Service and BLM serving as cooperating agencies. The Forest Service commented on the draft EIS to raise concerns regarding

sediment containment and sediment load in downstream waters. FERC did not change these figures, but the Forest Service and BLM relied on the EIS to issue decisions of approval. Petitioners sought review directly in the Ninth Circuit, which had original jurisdiction under the Administrative Procedure Act.

On petition, the Ninth Circuit vacated the Forest Service's and BLM's decisions of approval on several bases. First, the Court held the Forest Service violated its obligation under NEPA to independently review the EIS and ensure it is adequate for its purposes. Specifically, the Forest Service failed to explain its reasons for abandoning sediment concerns or concluding that those concerns were alleviated. Second, the Court ruled the Forest Service violated the National Forest Management Act when it amended the Forest Plan without analyzing whether the purpose of the amendments, i.e., to reduce restrictions for a specific project, were consistent with agency regulations. Finally, the Court ruled that BLM violated the Mineral Leasing Act (MLA) because it failed to demonstrate that alternatives were impractical that would make greater use of existing rights-of-way. Instead, BLM relied on the alternatives analysis in the EIS without considering the MLA's higher bar.

In summary, the court held that the Forest Service and BLM cannot rely upon an EIS that does not satisfy the independent obligations of the agencies' governing statutes and regulations and that Forest Service regulations require the agency to analyze both the effect and purpose of certain Forest Plan amendments.

The Ninth Circuit Court of Appeals has held that the U.S. Forest Service's (Forest Service) adoption of a "restoration project" violated the National Forest Management Act (NFMA) because the project was inconsistent with the applicable Land and Resource Management Plan (Forest Plan), but that the Forest Service properly tiered under the NEPA. *Alliance v. United States Forest Serv.* (9th Cir. August 13, 2018) 899 F.3d 970.

In the case, the Forest Service approved the Lost Creek-Boulder Creek Landscape Restoration Project, a plan for an area within the Payette National Forest. The project land area included land under two "management prescription categories" (MPC) of the Payette Forest Plan: MPC 5.1 for "restoration" and MPC 5.2 for "commercial production." In the restoration plan, the project eliminated MPC 5.2, and designated the entire area MPC 5.1, and also adopted a new definition of "old forest habitat" that differed from the Forest Plan. The Forest Service also adopted an EIS, which incorporated analysis (tiered) from a prior project. Petitioners challenged the approval as inconsistent with the Forest Plan and in violation of NEPA. The District Court granted summary judgment to the Forest Service on all claims.

On appeal, the Ninth Circuit reversed the trial court in part, ruling that the project was inconsistent with the Forest Plan but also that the Forest Service's tiering did not violate NEPA. Specifically, the Court held that Forest Service approval of the project was arbitrary and capricious because eliminating one MPC in favor of another resulted in an inconsistency with the Forest Plan. The two designations had different specific standards, guidelines, and desired conditions such that specific limitations, advised courses of action, and long-term goals for the land would change. Further, the Court held that the project's definition of "old forest habitat" was inconsistent with the Forest Plan because it resulted in different requirements in such a habitat. Finally, the Court

held that the Forest Service properly incorporated the analysis in a previous EIS because, even though it was not directly applicable, the Forest Service updated as needed.

Fish and Wildlife

The Ninth Circuit Court of Appeals has upheld the U.S. Fish and Wildlife Service’s (FWS) interpretation of the term “range,” but found arbitrary and capricious the FWS’s decision not to list as threatened or endangered a population of the arctic grayling. *Center for Biological Diversity v. Zinke* (9th Cir. August 17, 2018) 900 F.3d 1053.

In the case, plaintiffs challenged the FWS’s 2014 decision not to list the arctic grayling as an endangered or threatened species under the Endangered Species Act (ESA). Previously in 2010, the FWS had issued a ruling that listing the species was warranted but was precluded by higher priority actions. In compliance with a broader settlement, the FWS revisited its decision in 2014 at which time the FWS decided that listing the species was not warranted. Also in 2014, the FWS promulgated a final rule interpreting the term “range” in the phrase “significant portion of its range” to include only a species’ current range – not its historical range. Accordingly, its 2014 decision not to list the arctic grayling considered only whether the arctic grayling was in danger within its current range. Plaintiffs argued that this interpretation was unreasonable and that FWS’ decision not to list the species was arbitrary and capricious on several grounds. The District Court granted summary judgment to FWS on all grounds.

On appeal, the Ninth Circuit affirmed in part and reversed in part. First, the Ninth Circuit upheld under *Chevron* deference the FWS’s interpretation that “range” means only the species’ current range. This rule was similarly upheld by the D.C. Circuit in *Humane Society of the United States v. Zinke* (D.C. Cir. 2017) 865 F.3d 585. Second, the Ninth Circuit held that the FWS’s decision not to list the arctic grayling was arbitrary and capricious. Although agencies may choose which experts to rely upon, the Court found that the FWS without explanation ignored biological research and data, some of which the agency had relied upon in its 2010 decision. Additionally, the Court found that the FWS failed to explain why uncertainties related to climate change impacts on certain waterways justified inaction in this case.

NEPA

The Ninth Circuit Court of Appeals has held that environmental organizations had standing to challenge the U.S. Army Corps of Engineer’s decision to issue a permit for the Newhall Ranch project under Section 404 of the Clean Water Act but that the Corps’s decision did not violate the Clean Water Act, National Environmental Policy Act, or Endangered Species Act. *Friends of the Santa Clara River v. United States Army Corps of Engineers*, 887 F.3d 906 (9th Cir. 2018).

Starting in the 1990s, Newhall Land and Farming (“Newhall”) and Los Angeles County began developing a land use plan to guide the development of the Newhall Ranch Project, a large-scale development in the northwestern part of the county alongside the Santa Clara River. The county’s

revised specific plan for the project provided for development of more than 21,000 residential units and 5.5 million square feet of mixed commercial, office, and retail uses in a series of interrelated villages. In December 2003, Newhall applied to the Corps for a permit for the project under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, which allows the “discharge of dredged or fill material into the navigable waters at specified disposal sites.” The Corps’s final environmental impact statement discussed potential impacts on Southern California steelhead, an endangered species with habitat downstream of the project, but concluded that though stormwater runoff from the project carrying dissolved copper could reach the habitat, it would not adversely affect the steelhead. The Corps also conditioned the Section 404 permit on a project alternative that reduced the project’s developable acreage and impacts on water quality, while increasing the project’s cost per acre by 5.7%. Two environmental groups then sued the Corps, alleging that its issuance of the Section 404 permit violated the Clean Water Act (“CWA”), National Environmental Policy Act (“NEPA”), and Endangered Species Act (“ESA”). The district court granted summary judgment for the Corps, and plaintiffs appealed.

On appeal, the questions were: (1) whether plaintiffs had standing to bring their NEPA and ESA claims, (2) whether the Corps failed to select the least environmentally damaging practicable alternative in issuing the Section 404 permit in violation of the Clean Water Act, and (3) whether the Corps erred in determining that the project will have no effect on steelhead in violation of the ESA and NEPA.

The court concluded that plaintiffs had standing but that the Corps complied with all three statutes, and it therefore affirmed the grant of summary judgment. As to standing, the court explained that because plaintiffs alleged violations of procedural rights under NEPA and the ESA, they must only show a reasonably probability that the challenged agency action would threaten their concrete interests (not that the alleged procedural deficiency—the inadequate analysis of impacts on steelhead—threatened their interests, as the Corps contended). The court held that plaintiffs made that showing since they had concrete interests in recreation and aesthetics in the project area and the issuance of the Section 404 permit would threaten those interests. As to the CWA claim, the court rejected plaintiffs’ argument that the Corps unduly narrowed the range of available alternatives considered for the project by incorporating Newhall’s project objectives and the County’s specific plan objectives in determining the overall project purpose. Rather, the Corps must consider both sets of objectives, and it was not arbitrary and capricious for it to reject alternatives on the grounds that they failed to meet those objectives. The court also held that the Corps did not err in considering the financial impact of further avoidance or in the method in which it considered project costs. As to the ESA and NEPA, the court held that the Corps did not err in determining that the project would not adversely effect steelhead since the data showed that concentrations of dissolved copper in discharges from the project would be within the background range already observed in the Santa Clara River and well below the state water quality limit. The court also held that the Corps did not err in declining to rely on a technical memorandum on sublethal impacts of dissolved copper on steelhead smolt, since it could reasonably conclude that the memorandum did not contain the best scientific data available for the project.

Trail Development

The Ninth Circuit Court of Appeals held that landowners abutting a railroad corridor that the County turned into a hiking and biking trail did not have any property interest in the land that was previously granted as an easement to the government because the Trails Act created a new easement and did not render old railroad easements abandoned. *Hornish v. King Cty.*, 899 F.3d 680 (9th Cir. 2018).

In 1887, Seattle, Lake Shore & Eastern Railway Company (SLS&E), which later became a part of BNSF Railway Company ("BNSF") constructed a railroad corridor (the "Corridor") along the eastern shoreline of Lake Sammamish. SLS&E obtained the Corridor land through a collection of railroad easements. Plaintiff-Appellant Hornish owns property adjacent to a portion of the Corridor that SLS&E obtained through a quitclaim deed. Non-Hornish Plaintiff-Appellants also own properties adjacent to portions of the Corridor, all of which were obtained through one chain of title conveyed in March 1888. In 1997, BNSF conveyed its ownership interests in the Corridor to the Land Conservancy of Seattle and King County ("TLC") through a quitclaim deed. During the same year, TLC initiated the "railbanking" process by petitioning the Surface Transportation Board ("STB") for an exemption to allow TLC to abandon the Corridor for active rail service and assume responsibility as the interim trail sponsor under the Trails Act. The STB agreed and designated King County as the trail sponsor. The agreement executed conveyed all of TLC's ownership interests in the Corridor through a quitclaim deed. King County then constructed a hiking and biking trail in the Corridor.

Plaintiff-Appellants filed a suit to obtain declaration of their rights in the Corridor and to quiet their title in the Corridor. King County filed a motion to dismiss for lack of standing, arguing that Plaintiff-Appellants did not demonstrate that they had an ownership interest in the Corridor. Appellants sought leave to file a proposed amended complaint, which the court denied. The court allowed Plaintiff-Appellants leave to file a different amended complaint that would address the standing problem, which they did. King County then answered and brought quiet title and declaratory judgment counterclaims. The district court dismissed Plaintiff-Appellants' claims with prejudice, and granted summary judgment to King County. Plaintiff-Appellants appealed. The issues on appeal were: (1) whether a federal court had jurisdiction pursuant to 28 U.S.C. § 1331, and (2) whether the Plaintiff-Appellants had property interests in the Corridor.

The Ninth Circuit Court of Appeals determined that it had jurisdiction pursuant to 28 U.S.C. § 1331. The Court looked to *Grable*, which held that federal jurisdiction exists over a state law claim if a federal issue is necessarily raised, actually disputed, substantial, and capable of resolution in a federal court. *Grable & Sons Metal Pords., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). The Court found that the declaration sought in the Plaintiff-Appellants' complaint turned on interpretation of federal law. Additionally, the federal government had a strong interest in facilitating trail development and encouraging energy efficient transportation use, as well as in preserving established railroad rights-of-way for any necessary future reactivation of rail service. The Court therefore determined that it had jurisdiction over the claim. The Court then turned to the question of whether the Plaintiff-Appellants had a property interest in the Corridor, and therefore standing. Under Washington law, an easement is established only to the extent that it accomplishes the purpose for which it was claimed. If an easement is abandoned, then the right-of-way automatically reverts to the reversionary interest holders. The

Court found that the Plaintiff-Appellants did not have a property interest in the Corridor because the easement had not reverted because it was never abandoned. Instead, the Trails Act created a new easement in addition to the old railroad easement. This meant that the railroad and its successors had both an easement for railroad purposes and a new easement for recreational trail purposes. The Plaintiff-Appellants therefore lacked standing because they did not have property interests in the land. As a result, the Court quieted title in King County.

- Addison Fairchild and Michael Sands

Transportation

The First Circuit Court of Appeals held that a facility engaged in repairing and repackaging wood pellets was engaged in a form of transportation and therefore was subject to review from the Surface Transportation Board (“STB”) pursuant to the Interstate Commerce Commission Termination Act (“ICCTA”). *Del Grosso v. Surface Transp. Bd.*, 898 F.3d 139 (1st Cir. 2018).

In 1996, the ICCTA gave the Surface Transportation Board (“STB”) exclusive jurisdiction over rail carrier transportation both between states and within states that are a part of the interstate rail network. Grafton & Upton Railroad Company (“G&U”) operate a facility involving the transport of wood pellets in Upton, Massachusetts. When the wood pellets arrive at G&U’s facility, G&U removes the broken pellets and re-presses the broken pellets into whole pellets. It then places all of the pellets into 40-pound bags, stacks the bags on pallets, shrink wraps the pallets, and loads the pallets onto flatbed trucks for delivery to retail stores. Petitioners from Upton, Massachusetts, sought to prevent G&U’s facility operations by asserting that they were not a part of transportation under the ICCTA, but rather were manufacturing that would place G&U’s operations under local zoning law. The STB found that the activities at the G&U facility qualified as transportation, giving the STB jurisdiction. The Petitioners appealed.

The issue on appeal was whether the operations at the G&U facility in Upton, Massachusetts, constituted transportation.

The First Circuit Court of Appeals determined that G&U’s facility operations were a part of transportation, and therefore were subject to STB jurisdiction. The ICCTA defines transportation to encompass facilities and equipment related to movement of passengers and property and services related to that movement. Specifically, services related to that movement include “receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and interchange of passengers and property.” The Court noted that the list was not exhaustive and therefore created a broad definition of transportation. The Court analyzed whether G&U’s facility engaged in transportation using those factors. The Court first noted the processes at G&U’s facility make it easier for continued shipment, as the wood pellets cannot be directly shipped in the state that they arrive in. Further, the bagging, palletizing, and shrink-wrapping were not manufacturing, as they did not change the nature of the composition of the wood pellets. The Petitioners argued that the process G&U used to recreate the pellets was considered manufacturing. The Court

disagreed, stating that the method was entirely different from the original manufacturing of the pellets, as it only required putting broken pellets back together as opposed to the initial process, which required adding wood to raw materials and hammering, drying, and steaming the pellets. The Court concluded that the STB was correct in determining that G&U's operations were a part of transportation and denied Petitioners petition for review.

- Addison Fairchild and Michael Sands

Water Quality

The Ninth Circuit Court of Appeals has held that a county violated the Clean Water Act by discharging pollutants from its wells into the Pacific Ocean even though the pollutants reached the ocean indirectly through groundwater flows. *Hawai'i Wildlife Fund v. County of Maui*, 886 F.3d 737 (9th Cir. 2018).

The County of Maui ("County") owns and operates four wells at a wastewater treatment facility. The County was injecting an average of 3 to 5 million gallons of treated sewage into groundwater via the wells each day. The County had known since the facility's inception that the wells were hydrologically connected to the Pacific Ocean. According to the County's expert, when the wells inject 2.8 million gallons of effluent per day into groundwater, the flow of effluent into the ocean is approximately 3,456 gallons per meter of coastline per day. A 2013 government study found that 64% of wastewater injected into wells 3 and 4 discharged into the ocean. It also found that wells 1 and 2 would inject wastewater into the ocean were the substantial flow of effluent from wells 3 and 4 not diverting their path. Four environmental groups sued the County, claiming that its unpermitted discharge of effluent from the wells into the ocean violated the Clean Water Act ("Act"). The district court entered summary judgment for plaintiffs, and the County appealed.

On appeal, the questions were: (1) whether an unpermitted indirect discharge of effluent into the ocean violates the Act, and (2) whether the Act provided fair notice of the prohibition on indirect discharge such that a sanction could be imposed without violating due process.

The Ninth Circuit affirmed the district court's summary judgment rulings as to all four wells. Section 1311(a) of the Act prohibits the "discharge of any pollutant by any person" unless that person has obtained a National Pollution Discharge Elimination System ("NPDES") permit. A party violates the Act if it does not have an NPDES permit but nevertheless discharges a pollutant into navigable waters from a point source, where a point source is defined as "any discernable, confined and discrete conveyance." The County conceded that the wells qualified as point sources but contended that they must convey pollutant directly into navigable waters to violate the Act. The court disagreed, reasoning that the County was reading the word "directly" into the statute and that precedent confirms that an indirect discharge suffices for liability to attach. The court also rejected the County's argument that the Act categorically excludes well disposals from NPDES permitting requirements, interpreting the plain language of the statute to require a permit whenever a disposal of pollutants into a well constitutes a discharge into navigable waters, as in the instant case. Finally, the court held that because a reasonable person would have understood the Act to

prohibit the County's conduct, the County had fair notice, and enforcement of the Act thus did not violate due process.

The Ninth Circuit has held that pipes, ditches, and channels that discharge pollutants from non-concentrated aquatic animal production facilities qualify as “point sources” under the Clean Water Act. *Olympic Forest Coalition v. Coast Seafoods Co.*, 884 F.3d 901 (9th Cir. 2018).

Coast Seafood Company (“Coast”) owns and operates a cold-water oyster hatchery—the world’s largest shellfish hatchery—adjacent to Quilcene Bay near the north end of Hood Canal in Washington State. Olympic Forest Coalition sued Coast under the Clean Water Act (“Act”), contending the hatchery was discharging a variety of pollutants into Quilcene Bay through pipes, ditches, and panels with the required National Pollution Discharge Elimination System (“NPDES”) permit. After Olympic Forest sued, Coast obtained an opinion from the Washington Department of Ecology that the hatchery does not require an NPDES permit because it does not qualify as a concentrated aquatic animal production facility (“CAAPF”) under 40 C.F.R. § 122.24 and because a report commissioned by Coast showed that the facility was unlikely to alter Quilcene Bay water quality. Coast moved to dismiss, arguing that a hatchery can be required to obtain an NPDES permit only if it is a CAAPF, which its hatchery is not. The district denied Coast’s motion and certified for interlocutory appeal the question for interlocutory appeal.

On appeal, the question was whether an NPDES permit is required for discharges through pipes, ditches, and channels from an aquatic animal production facility that is not a CAAPF.

The district court affirmed the denial of Coast’s motion to dismiss. The Clean Water Act prohibits “the discharge of any pollutant by any person” unless in compliance with an NPDES permit. 33 U.S.C. § 1311(a). In particular, discharges from “point sources” must obtain an NPDES permit. The Act defines a point source as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel . . . [or] concentrated animal feeding operation” (“CAFO”). 33 U.S.C. § 1362(14). A CAAPF is a subcategory of concentrated animal feeding operation defined by EPA regulations, 40 C.F.R. § 122.24. Reasoning that the use of the word “any” in the point source definition was intended to be broad and all-encompassing, the court held that the plain meaning of the Act makes both “pipes, ditches, channels” and “concentrated animal feeding operations” point sources. Thus, pipes, ditches, and channels that discharge pollutant from a facility that is not a CAFO are point sources for which an NPDES permit is required. The court furthermore held that EPA’s CAFO regulations did not bear on the question whether “pipes, ditches, [and] channels” from facilities that are not CAFOs are point sources, and thus there was no relevant EPA interpretation to defer to. The court also disagreed with Coast that a non-concentrated aquatic animal production facility is necessarily not a significant contributor of pollution, reasoning that Olympic Forest had alleged the opposite in its complaint and that its allegations must be accepted as true at the motion to dismiss stage.

The Second Circuit of Appeals has held that a state waives water quality certification requirements under Section 401 of the Clean Water Act if it fails to act on a request for certification within one year receipt of that request, regardless whether the request is

complete. *New York State Department of Environmental Conservation v. Federal Energy Regulatory Commission*, 884 F.3d 450 (2d Cir. 2018).

The owner of an electric power generation facility under construction in Orange County, New York contracted with Millennium Pipeline Company, LLC (“Millennium”) to build a pipeline to connect the plant with Millennium’s existing interstate natural gas pipeline. On November 13, 2015, Millennium filed an application with the Federal Energy Regulatory Commission (“FERC”) under section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), requesting authorization to construct the pipeline and related facilities. Because the pipeline would cross several streams, Millennium was also required to apply to the New York State Department of Environmental Conservation (“Department”) for water quality certification under Section 401 of the Clean Water Act, 33 U.S.C. § 1341(a)(1), to confirm that the pipeline would comply with applicable water quality standards. Millennium submitted its application for a water quality certification to the Department on November 18, 2015, and the Department received it on November 23, 2015. The Department twice notified Millennium that it deemed its application incomplete, first pending FERC’s environmental assessment and then pending Millennium’s provision of additional environmental impact information. Millennium submitted its final response in August 2016. On August 30, 2017, almost a year after FERC issued a certificate approving the project, the Department denied Millennium’s application, concluding that FERC’s environmental assessment had failed to evaluate downstream greenhouse gas emissions. Millennium successfully petitioned FERC to determine that the Department had waived its authority under the Clean Water Act through its delay, and the Department filed a petition for review of FERC’s order with the Second Circuit.

On petition for review, the questions were: (1) whether the Department waived its right to act on Millennium’s water quality certification request by failing to act on it within one year of its receipt, and (2) whether FERC had jurisdiction to regulate the pipeline under the Natural Gas Act.

The Second Circuit held that the Department waived certification requirements and that FERC had jurisdiction over Millennium’s application and thus denied the petition for review. The court reasoned that the plain language of Section 401 of the Clean Water Act outlines a bright-line rule that the timeline for a state’s action regarding a request for certification “shall not exceed one year” after “receipt of such request.” 33 U.S.C. § 1341(a)(1). The rule did not provide that the limitations period begins to run only for complete applications. If it did, states could delay certification by requesting supplemental information indefinitely. The court further reasoned that the one year limit would not undermine public notice and comment or force the state to render premature decisions because the state could simply deny an application without prejudice if it deemed it incomplete or request that the applicant withdraw and resubmit the application. As to FERC’s jurisdiction, the court explained that the Natural Gas Act provides FERC with plenary authority over transportation of natural gas in interstate commerce. Because the pipeline at issue would link to interstate pipelines and thus transport gas in interstate commerce as part of an integrated system, the court held that FERC had jurisdiction to regulate it.

Water Resources

The U.S. Supreme Court has held that challenges to the 2015 Waters of the United States Rule, which defines the statutory term “waters of the United States” for purposes of the Clean Water Act, must be brought in federal district court because the rule falls outside the enumerated categories of actions for which review lies directly and exclusively in the federal courts of appeals. *National Association of Manufacturers v. Department of Defense*, 138 S.Ct. 617 (2017).

The statutory term “waters of the United States” delineates the jurisdictional scope of many of the Clean Water Act’s (“Act”) provisions. In 2015, the U.S. Environmental Protection Agency (“EPA”) and Army Corps of Engineers promulgated the Waters of the United States Rule (“WOTUS Rule”) to define the statutory term. The WOTUS Rule divides waters into those that are categorically jurisdictional, categorically excluded for the Act’s jurisdiction, and those that require a case-specific showing. Several parties, including the National Association of Manufacturers (“NAM”) challenged the Rule in federal district courts. Many of those parties, though not NAM, also filed petitions for review in federal courts of appeals to preserve their challenges in the event the district court suits were dismissed for lack of jurisdiction under 33 U.S.C. § 1369(b)(1), which enumerates categories of challenges to EPA actions under the Act for which direct and exclusive jurisdiction lies in the U.S. Courts of Appeals. The appellate actions were consolidated, and the Sixth Circuit Court of Appeals entered a nationwide stay of the Rule. NAM intervened in the Sixth Circuit and, along with several other parties, moved to dismiss for lack of jurisdiction. The Sixth Circuit denied the motions to dismiss, and the Supreme Court granted certiorari.

Before the Supreme Court, the question was whether the WOTUS Rule falls within either of two enumerated categories of EPA actions that must be challenged directly in federal courts of appeals: (1) actions “approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345,” § 1369(b)(1)(E), or (2) actions “issuing or denying any permit under Section 1342 of this Title,” § 1369(b)(1)(F), where Section 1342 governs the National Pollutant Discharge Elimination System (“NPDES”) program.

The Supreme Court reversed the judgment of the Sixth Circuit and remanded the case with instructions to dismiss the petitions for review for lack of jurisdiction. The Court held that the WOTUS Rule, as a regulatory definition, is not an “effluent limitation,” which the Act defines as “any restriction . . . on quantities, rates, and concentrations” of certain pollutants “which are discharged from point sources into navigable waters.” § 1362(11). Nor is it an “other limitation” within the meaning of § 1369(b)(1)(E), which, the Court reasoned, must impose some type of restriction on the discharge of pollutants. The WOTUS Rule does no such thing. The Court further held that the Rule neither issues nor denies a permit under the NPDES permitting program, which authorizes the discharge of pollutants into certain waters under specified conditions. Because the Rule does not fall within any § 1369(b)(1) category, review must be sought in federal district court through an Administrative Procedure Act challenge, 5 U.S.C. § 704.

