

California Lawyers Association
ENVIRONMENTAL LAW SECTION UPDATE
RECENT JUDICIAL AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the California Lawyers Association 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 January 1 through May 31, 2018.

Please note that all case law and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form.

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 cdawilson@daywilsonlaw.com.

I would like to thank Danielle K. Morone, Michael Haberkorn, Sabrina Teller, Anna Leonenko, Stephanie L. Safdi, Michael Sands, Anthony D. Todero and Amy Hoyt for their contributions to this issue of the *Update*. If you are interested in getting involved in writing for the *Update* or the activities of the Environmental Law Section, please contact me (at the above email) or any other section member. – Cyndy Day-Wilson.

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AGENCY ADMINISTRATION

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Fall 2017 Unified Agenda of Regulatory and Deregulatory Actions. In January 2018, the U.S. Environmental Protection Agency (EPA) provided a notice of availability of its semi-annual regulatory agenda to update the public on recent regulatory agenda that are under development, completed or cancelled. It includes a review of certain regulations with small business impacts. 83 Fed. Reg. 1931.

Fish and Wildlife Service Civil Penalties. In February 2018, the U.S. Fish and Wildlife Service (USFWS) provided notice of a final rule to adjust the statutory civil monetary penalties that may be assessed for violations of Service-administered statutes and their implementing regulations. The adjustments are the result of an annual requirement for inflation. 83 Fed. Reg. 5950.

AIR QUALITY

Recent Court Rulings

No summaries this quarter.

Regulatory Updates

Ambient Air Monitoring Reference and Equivalent Method. In February 2018, the EPA provided notice of the designation of one new reference method for measuring concentrations of nitrogen dioxide in ambient air. 83 Fed. Reg. 6174.

Control Technique Guidelines. In March 2018, the EPA provided notice of, and requested comments on, a proposed withdrawal of the Control Technique Guidelines for the oil and natural gas industry. The recommendations in the Control Technique Guidelines are linked to the 2016 New Source Performance Standards which are currently being reconsidered and address volatile organic compound (VOC) emissions in ozone nonattainment areas. 83 Fed. Reg. 10478.

Cross-State Air Pollution Rule Allowances. In May 2018, the EPA provided notice of data availability on emission allowance allocations to certain units under the Cross-State Air Pollution Rule (CSAPR) trading programs. The data includes preliminary calculations for the first round of allocations of allowances from the CSAPR new unit set-asides for the 2018 control periods. 83 Fed. Reg. 21772.

Emission Standards for the Oil and Natural Gas Sector. In March 2018, the EPA provided notice of a final rule concerning amendments of certain requirements contained in the final rule titled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources.” The amendments concern requirements for collection of fugitive emission components, delayed repairs and monitoring. 83 Fed. Reg. 10628.

Flares at Natural Gas Production Sites. In March 2018, the EPA provided notice of a final action on its review of the existing VOC emissions factor for flares at natural gas production sites. The review did not result in revisions to the existing VOC emissions factor, but the EPA did issue a new total hydrocarbon emissions factor for enclosed ground flare based on the available data. 83 Fed. Reg. 9313.

Formaldehyde Emission Standards for Composite Wood Products. In April 2018, the EPA provided an announcement of a court order and compliance date for the formaldehyde regulations for composite wood products. As a result of the court order, the compliance date for emission standards, recordkeeping, and labeling is June 1, 2018 rather than December 12, 2018. 83 Fed. Reg. 14375.

Guidance Memoranda. In February 2018, the EPA provided notice of issuance of a guidance memorandum titled “Reclassification of Major Sources as Area Sources Under Section 112 of the Clean Air Act,” and the corresponding withdrawal of the memorandum titled “Potential to Emit for MACT Standards-Guidance Timing Issues.” 83 Fed. Reg. 5543.

In March 2018, the EPA provided a notice of availability of a guidance memorandum titled “Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program.” 83 Fed. Reg. 13745.

National Ambient Air Quality Standards (NAAQS).

In January 2018, the EPA:

1. Provided notice of availability of, and requested comments on, responses to certain state and tribal area designation recommendations for the 2015 ozone NAAQS. The responses include the intended designations for the affected areas. 83 Fed. Reg. 651.
2. Provided notice of a final rule establishing the initial air quality designations for certain areas for the 2010 sulfur dioxide primary NAAQS. 83 Fed. Reg. 1098.

In March 2018, the EPA provided notice of a final rule to establish the air quality thresholds that define the classifications assigned to all nonattainment areas for the 2015 ozone NAAQS. In addition, the rule also established the timing of attainment dates for each nonattainment area classification. 83 Fed. Reg. 10376.

In April 2018, the EPA also provided notice of a final action to retain the current standards, without revision, for the NAAQS for oxides of nitrogen (NO₂). The action is based on the EPA’s review of the air quality criteria addressing human health effects of NO₂. 83 Fed. Reg. 17226.

In May 2018, the EPA:

1. Provided notice of a proposed rule to grant a request to reclassify the Eastern Kern County nonattainment area from “Moderate” to “Serious” from the 2008 ozone NAAQS. The proposed rule allows 12 months for the submission of revisions to meet certain additional

requirements for serious ozone nonattainment areas; most of which have already been received. 83 Fed. Reg. 22235.

2. Provided a notice of availability of two final documents titled “Risk and Exposure Assessment for the Review of Primary National Ambient Air Quality Standard for Sulfur Oxides” and “Policy Assessment for the Review of the Primary National Ambient Air Quality Standard for Sulfur Oxides.” 83 Fed. Reg. 22479.

National Emissions Standards for Hazardous Air Pollutants (NESHAP). In January 2018, the EPA provided notice of a rule finalizing amendments to the NESHAP for Off-Site Waste and Recovery Operations. The amendments address continuous monitoring on pressure relief devices on containers – an issue that was raised in a petition for reconsideration of the 2015 amendments. 83 Fed. Reg. 3986.

In March 2018, the EPA:

1. Provided notice of broadly applicable alternative test method approval decisions that were made under the New Source Performance Standards and the NESHAP between January 1 and December 31, 2017. 83 Fed. Reg. 9306.
2. Provided notice of a proposed rule amending the NESHAP for Leather Finishing Operations to address the results of the residual risk and technology review. The amendments would not result in a reduction of emissions of hazardous air pollutants, but would result in improved compliance and implementation of the rule. 83 Fed. Reg. 11314. In May 2018, the comment period for the proposed rule was extended because the supporting document was not included in the March docket. 83 Fed. Reg. 22438.

In April 2018, the EPA:

1. Provided notice of a proposed rule to amend the NESHAP for Wet-Formed Fiberglass Mat Production to address the results of a residual risk and technology review. The revisions include: (i) revising certain emissions provisions; (ii) adding electronic submittal requirements; (iii) revising certain monitoring, recordkeeping, and reporting requirements; and, (iv) other miscellaneous technical and editorial changes. 83 Fed. Reg. 14984.
2. Provided notice of a proposed rule to amend the NESHAP Refinery MACT 1 and Refinery MACT 2 regulations to clarify the requirements and make technical corrections and minor revisions. 83 Fed. Reg. 15458.
3. Provided notice of, and requested comments on, an alternative work practice request to use new technology and work practices developed for removal and replacement of asbestos cement pipe for the Asbestos NESHAP. 83 Fed. Reg. 18042.

In May 2018, the EPA:

1. Provided notice of a proposed rule amending the NESHAP for the Friction Materials Manufacturing Facilities source category. The amendments would address the results of the required residual risk and technology reviews conducted. 83 Fed. Reg. 19499.
2. Provided notice of a proposed rule amending the NESHAP for Surface Coating of Wood Building Products to address results of the required residual risk and technology review.

The proposed rule would: (i) add an alternative compliance demonstration equation; (ii) amend provisions addressing periods of startup, shutdown and malfunction; (iii) amend provisions regarding electronic reporting; and, (iv) make other minor changes. 83 Fed. Reg. 22754.

Protection of Stratospheric Ozone. In May 2018, the EPA provided a notice of data availability of “The U.S. Phaseout of HCFCs: Projected Servicing Demand in the U.S. Air Conditioning, Refrigeration, and Fire Suppression Sectors (2020-2030).” The draft document is an update to reports EPA has issued in the past. 83 Fed. Reg. 19757.

State Implementation Plans (SIP).

In January 2018, the EPA:

1. Provided notice of a proposed rule to approve revisions to the Yolo-Solano Air Quality Management District (AQMD) portion of the California SIP. The revisions concern the demonstration regarding Reasonably Available Control Technology (RACT) requirements for the 1997 8-hour ozone NAAQS. The previous disapproval for same was withdrawn as the deficiencies have since been addressed. 83. Fed. Reg. 764.
2. Provided notice of a proposed rule to approve a revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns emissions of VOCs from organic liquid storage and transfer operations. 83 Fed. Reg. 1001.

In February 2018, the EPA:

1. Provided notice of a proposed rule to approve an SIP submission regarding certain interstate transport requirements of the Clean Air Act. Specifically, the submission addresses the 2008 ozone NAAQS, the 2006 and 2012 fine particulate matter (PM_{2.5}) NAAQS, and the 2010 sulfur dioxide NAAQS. 83 Fed Reg. 5375.
2. Provided notice of a final rule approving and conditionally approving revisions to the Mojave Desert AQMD portion of the California SIP. The revisions concern the demonstration regarding RACT requirements for the 1997 8-hour ozone and the 2008 8-hour ozone NAAQS in the portion of the Western Mojave Desert ozone nonattainment area. 83 Fed. Reg. 5921.
3. Provided notice of a final rule approving the Reasonably Available Control Measure (RACT)/RACT and Reasonable Further Progress elements of California’s Moderate area plan for the 2006 24-hour PM_{2.5} NAAQS in the Los Angeles-South Coast nonattainment area. In addition, the EPA is finalizing a determination that the State has corrected the deficiency which caused a prior disapproval of the moderate area plan submitted for these NAAQS. 83 Fed. Reg. 5923.
4. Provided notice of a final rule to approve a revision to the Mojave Desert AQMD portion of the California SIP. The revision concerns emissions of VOCs from marine and pleasure craft coating operations. 83 Fed. Reg. 5940.
5. Provided notice of a proposed rule to approve a submittal to revise the California SIP. The submittal concerns State regulations establishing standards and other requirements relating

to the control of emissions from certain new and in-use on-road and off-road vehicles and engines. 83 Fed. Reg. 8403.

In March 2018, the EPA:

1. Provided notice of a proposed rule to approve revisions to the Bay Area AQMD portion of the California SIP. The revisions concern permit program rules governing the issuance of permits for stationary sources, including review and permitting of major sources and major modifications under parts C and D of title I of the Clean Air Act. 83 Fed. Reg. 8822. The EPA also provided notice of an interim final determination to defer sanctions based on the submitted revisions. 83 Fed. Reg. 8750.
2. Provided notice of a final rule approving revisions to the Northern Sierra AQMD portion of the California SIP. The revision concerns emissions of particulate matter from wood burning devices. 83 Fed. Reg. 9213.
3. Provided notice of a proposed rule to approve revisions to the Antelope Valley AQMD portion of the California SIP. The revision concerns emissions of VOC from motor vehicle assembly coating operations. 83 Fed. Reg. 11944.
4. Provided notice of a proposed rule to approve revisions to the Butte County AQMD portion of the California SIP. The revision concerns the New Source Review permitting program for new and modified sources of air pollution. 83 Fed. Reg. 12694.

In April 2018, the EPA:

1. Provided notice of a final action to approve a revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns emissions of VOCs from organic liquid storage and transfer operations. 83 Fed. Reg. 13868.
2. Provided notice of a final rule to approve revisions to the San Diego County Air Pollution Control District (APCD) portion of the California SIP. The revisions concern VOC emissions from polyester resin operations. 83 Fed. Reg. 13869.
3. Provided notice of a final action to approve a revision to the Northern Sierra AQMD portion of the California SIP. The revision concerns emissions of particulate matter from wood burning devices. 83 Fed. Reg. 13871.
4. Provided notice of a proposed rule to approve revisions to the Northern Sonoma 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. 14389.
5. Provided notice of a final rule approving a revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns the demonstration regarding RACT requirements for the 1997 8-hour ozone NAAQS. 83 Fed. Reg. 14754.
6. In April 2018, the EPA provided notice of a final rule finding that California failed to submit a timely revision to the SIP as required to satisfy certain requirements under the Clean Air Act for implementation of the annual 2012 fine particulate matter NAAQS. California has 18-months to make the required complete SIP submission before sanctions

are imposed. If 24 months pass, the EPA will promulgate a federal implementation plan to address any outstanding requirements. 83 Fed. Reg. 14759.

In May, the EPA:

1. Provided notice of a proposed rule to approve revisions to the Yolo-Solano AQMD portion of the California SIP. The revision concerns emissions of VOCs from architectural coatings. 83 Fed. Reg. 19495.
2. Provided notice of a proposed rule to approve revision to the Yolo-Solano AQMD portion of the California SIP. The revision concerns the negative declarations for several VOC source categories included in the RACT SIP Analysis. 83 Fed. Reg. 21235.
3. Provided notice of a proposed rule to approve a revision of the California SIP to redesignate the Chico nonattainment area to attainment for the 2006 24-hour final particulate matter NAAQS. 83 Fed. Reg. 21238.
4. Provided notice of a proposed rule to approve revisions to the San Joaquin Valley Unified APCD portion of the California SIP. The revisions concern the demonstration regarding RACT requirements for the 2008 8-hour ozone NAAQS. 83 Fed. Reg. 22908.
5. Provided notice of a final rule to approve a submittal by California to revise its SIP. The submittal includes regulations establishing standards and other requirements relating to the control of emissions from certain new and in-use on-road and off-road vehicles and engines. 83 Fed. Reg. 23232.
6. Provided notice of a final rule on revisions to the Bay Area AQMD portion of the California SIP. The revisions concern permit program rules governing the issuance of permits for stationary sources and the issuance and banking of Emission Reductions Credits. The revisions also correct certain deficiencies previously identified by the EPA. 83 Fed. Reg. 23372.
7. Provided notice of a final rule approving a revision to the Antelope Valley AQMD portion of the California SIP. The revision concerns the emissions of VOCs from motor vehicle assembly coating operations. 83 Fed. Reg. 24033.

Testing Regulations. In January 2018, the EPA provided notice of a proposed rule correcting and updating regulations for source testing of air emissions. The revisions will improve the quality of data, but will not impose new substantive requirements on source owners or operators. 83 Fed. Reg. 3636.

True Minor Sources in Indian Country. In May 2018, the EPA provided notice of a proposed rule amending the existing National Oil and Natural Gas Federal Implementation Plan that applies to certain true minor sources in the oil and natural gas production and natural gas processing segments of the oil and natural gas sector that are located or expanding in Indian Country. 83 Fed. Reg. 20775.

Volatile Organic Compounds. In May 2018, the EPA provided notice of a proposed rule to revise the regulatory definition of VOC. The proposed rule would add *cis*-1, 1, 1, 4, 4, 4-hexafluorobut-2-ene to the list of compounds excluded from the definition. 83 Fed. Reg. 19026.

ATTORNEY'S FEES

Recent Court Rulings

The First District Court of Appeal determines that a homeowners' association's financial interests in litigation did not preclude a finding of eligibility for "private attorney general" attorneys' fees. *Heron Bay Homeowners Assn. v. City of San Leandro* (2018) 19 Cal.App.5th 376.

Halus Power proposed to install a 100-foot tall wind turbine on its turbine-manufacturing facility in San Leandro, within the San Francisco Bay Estuary, approximately 500 feet from some homes in the adjacent Heron Bay residential neighborhood. The city of San Leandro prepared an initial study and mitigated negative declaration under the California Environmental Quality Act and granted a zoning variance for the turbine installation, over the objections of various state and local agencies, entities, and individual neighbors within the Heron Bay neighborhood. The Heron Bay homeowners association (HOA) sued in Alameda County Superior Court, demanding an EIR be prepared. The trial court granted the petition, finding a fair argument supported by substantial evidence that the turbine could have a significant effect on biological resources (especially birds), noise, and on public views from the anticipated Bay Trail. The city and Halus did not appeal.

Following entry of judgment, the HOA moved for an award of attorneys' fees under Code of Civil Procedure section 1021.5, seeking approximately \$480,000. Halus and the city opposed the motion, contending that the HOA did not have the legal authority to prosecute a case in the public interest; it was motivated only by a desire to protect its members' property values; and this pecuniary interest clearly outweighed the fees the HOA had paid, negating its qualification for fees under section 1021.5.

The trial court granted the fee motion in part, but discounted the award in consideration of the HOA's financial interest in avoiding a reduction in their members' property values, and ultimately awarded about \$180,000. Halus and the city then appealed.

On appeal, they argued that the trial court erred in applying apportionment principles to grant a partial fee award, when it should have considered apportionment of the amount of the fees *only after* determining whether the HOA's financial interest in the litigation was sufficient to disqualify it from any award. The court of appeal disagreed, based on the trial court's conclusion that the "value of the benefit sought" in the litigation was uncertain and that conclusion was supported by substantial evidence. The court noted that membership in the HOA was mandatory and the proposed turbine would have been visible from only a few of the Heron Bay residences, so while the impact on property values of those few properties might be substantially larger, the majority of the HOA members might not have had sufficient incentive to retain counsel for the CEQA litigation if there had not been the possibility of securing a fee award. Furthermore, the HOA's counsel represented the entity on a partially contingent basis, indicating to the court that the HOA and its members did not actually value the "benefit" here sufficiently to undertake the litigation without the fee award incentive.

Additionally, the court noted that it was relevant that the benefit the HOA and its members sought was not "immediately bankable" and could not be used to pay counsel. These factors were pertinent in evaluating whether the personal interests of the HOA's members transcended the litigation costs. Although the trial court did not expressly state a finding on the financial burden element of

section 1021.5, the court found that the trial court’s apportionment discussion was not an abuse of its discretion and supported an implied finding that the HOA had sufficient incentive to bear some, but not all, of the costs of litigation.

The court also rejected the appellants’ alternative argument—that the HOA was ineligible to seek fees because it acted purely out of self-interest, or if it acted for altruistic purposes, that it lacked the authority to do so because its governing documents did not permit it to pursue public interest or environmental litigation. But the court stated that a pecuniary interest in the litigation outcome is not disqualifying, and that the operative inquiry is into the balancing of the financial burden on the petitioner against its personal stake in the lawsuit. In any event, the court noted that property values were not the only interests that the HOA sought to protect; they also expressed concerns about the turbine’s impacts on wildlife, aesthetics, health and noise.

Regulatory Updates

No Summaries or updates this quarter.

CEQA

Recent Court Rulings

The First Appellate District upheld an EIR’s project description and analysis of indirect impacts and GHG emissions for the Southern California International Gateway intermodal cargo project, but ruled that the EIR’s analysis was deficient on the issue of air quality impacts, including cumulative impacts. *City of Long Beach v. City of Los Angeles* (2018) 17 Cal.App.5th 277.

The City of Long Beach challenged the City of Los Angeles’ approval of BNSF Railway Company’s (real party in interest) Southern California International Gateway (“SCIG”) Project. The project would construct a “near-dock” railyard within five miles of the Port to Los Angeles, to receive intermodal cargo—cargo that is transferred in an intact shipping container directly from a port to a railyard. Once complete, 95% of this cargo, which is currently processed at BNSF’s Hobart Yard facility, will be transferred to the SCIG facility. Petitioners alleged multiple deficiencies in the EIR, including the project description, and its analysis of indirect impacts to Hobart Yard, cumulative impacts to air quality, and GHG emissions. After filing suit, the attorney general intervened on behalf of petitioners. After the trial court found for petitioners on all issues, this appeal followed. On appeal, appellant respondents further alleged that the Attorney General, who had not participated in the EIR process, failed to exhaust his administrative remedies, and was thus barred from bringing these claims.

First, the court ruled that the Attorney General was not required to comply with CEQA’s exhaustion requirement before intervening on behalf of the petitioner. The court held that the Attorney General was exempted from the identity and issue exhaustion requirements, because the exemption is consistent with attorney general’s unique authority to protect California’s environment and people. Second, reversing the court below, the court found that the project description was not confusing or misleading. Contrary to petitioner’s assertion that a complete project description should have included the project’s effect on Hobart Yard, the project

description included all activity that was subject to discretionary review, and, unlike other cases, did not conflict with facts contained in the EIR. The court also upheld the EIR's analysis of indirect impacts to Hobart Yard, explaining that substantial evidence supported a finding that freed-up capacity at the yard would occur regardless of whether the SCIG facility is built, and thus, not amount to an indirect environmental impact.

In an extensive discussion, the court struck down the EIR's analysis of direct and indirect impacts to air quality. While the composite model methodology utilized in the EIR was not misleading, the analysis was incomplete because it failed to consider the increase in concentration of emissions in the project area, despite an overall decrease in emissions. Absence of this analysis prevents the public and decision-makers from balancing competing concerns and crafting mitigation measures and alternatives. Similarly, the EIR's analysis of cumulative impacts to air quality was also deficient because it only included a single modeling run for a 50-year time horizon. The court did not specify how many models would suffice, but contended a reasonable selection of benchmark years could be acceptable. Finally, the court upheld the EIR's analysis of GHG emissions, finding that it comported with *Newhall Ranch*. As in *Newhall Ranch*, this EIR utilized a "business-as-usual model" (BAU). The court declined the petitioner's invitation to rule that, as a matter of law, if a project will result in an increase in GHG emissions, it does not comply with AB 32 and related statutes. The BAU model was permissibly applied here, because it was utilized not to demonstrate that the project was consistent with state mandates to reduce emissions by 29% from BAU, but rather, to inform the public that while emissions will exceed baselines levels, resulting in a significant impact, the project is consistent with state and local policies that encourage the adoption of the more efficient use of fossil fuels in transportation. The use of BAU is particularly apt here, as the purpose of the project is to decrease the length of truck trips from 25 miles from the port to under five miles, with attendant decreases in tailpipe GHG emissions.

The Fourth Appellate District upheld San Diego's reliance on the Class 3 categorical exemption to approve a project that would install a wireless telecommunications tower in a dedicated park, finding that the project did not change the use or purpose of the park, such that it would require voter approval. *Don't Cell Our Parks v. City of San Diego* (2018) 21 Cal.App.5th 338.

In June 2014, Verizon applied to construct a wireless telecommunications facility on the outskirts of Ridgewood Neighborhood Park, a dedicated park in the community of Rancho Peñasquitos and adjacent to the Los Peñasquitos Canyon Preserve in the City of San Diego. The project would erect a 35-foot-tall faux eucalyptus tree and a 220-square-foot landscaped equipment enclosure with a trellis roof and a chain link lid, in an existing stand of tall trees. The record showed there was a substantial gap in cell service coverage in the area and that the park was the only property within the intended coverage area that was not an open space preserve or developed with residential uses. The City determined the project qualified for the Class 3 categorical exemption from CEQA as installation of a new, small equipment and facility. The petitioner group appealed the City's CEQA exemption determination to the City Council, which denied the appeal and unanimously determined the project was exempt from CEQA.

Petitioner filed a petition for writ of mandate and complaint for declaratory and injunctive relief, arguing that the wireless facility was not a permissible park or recreational use under City Charter section 55. The section provides that real property that is formally dedicated in perpetuity “for park, recreation, or cemetery purposes” shall not be used for any other purpose, unless approved by two-thirds of the city’s voters. The petitioner also argued that the project required CEQA review because it did not fit within the meaning or use of the Class 3 exemption as a matter of law, the unusual circumstances exception applied, and the project’s placement in a dedicated park precluded the use of the categorical exemption because such a location is of critical concern. The trial court denied the petition and ruled in favor of the respondents. On appeal, the Fourth Appellate District Court of Appeal evaluated whether the project constituted a changed use requiring voter approval, and whether the project was exempted from CEQA.

The appellate court upheld the trial court’s decision, and found that the project would neither change the use or purpose of the park, nor require CEQA review. First, the court interpreted the language of City Charter section 55, which granted the city manager “control and management of parks” and “recreation activities held on . . . parks.” It also allowed the city council “by ordinance [to] adopt regulations for the proper use and protection of said park property.” The next paragraph of the charter restricts the City’s control and management authority by providing that dedicated parks “shall not be used for any but park, recreation or cemetery purposes” without a vote of two-thirds of the City’s voters (the “changed use restriction”). The court determined that deciding whether, as here, an addition to a dedicated park constitutes a “changed use” necessarily falls within the City’s control and management authority.

The court then examined the record to determine whether it supported a conclusion that the wireless facility does not change the use or purpose of the park. The court noted that the 8.5-acre park contained basketball courts surrounded by a 12-foot fence, circuit training stations, a play structure, and picnic tables bounded by a cement path. The court also noted that the wireless equipment would be installed in an existing stand of trees and would be designed to blend into the environment. Accordingly, the court rejected all of the petitioner’s CEQA arguments, concluding that, although not expressly contemplated by the Class 3 exemption, the project’s equipment was small enough to constitute a “new small facility or structure,” as a matter of law. The court also rejected the argument that the project would have significant impacts under the unusual circumstances exception, relying on evidence in the record showing there were at least 37 similar facilities in other dedicated parks. The project was designed and located to not interfere with park and recreation uses, not impact any special status species, and not cause a significant adverse change to aesthetics. Finally, the court found no evidence that the park was a location “designated” as an “environmental resource of hazardous or critical concern” by any federal, state or local agency, and thus, did not qualify for the “location” exception.

The Second Appellate District upheld the adoption of a tiered mitigated negative declaration for the approval of a 68-unit mixed use project, finding that the infill development project's parking impacts were exempt from environmental review. *Covina Residents for Responsible Development v. City of Covina* (2018) 21 Cal.App.5th 712.

The court also rejected the petitioner's arguments under the Subdivision Map Act, sustaining the city's findings that the tentative map was consistent with the applicable specific plan, including with respect to compliance with the plan's parking standards.

In 2000, the City of Covina adopted a general plan and certified a program EIR for future development within the city. Four years later, the city adopted the Town Center Specific Plan and certified a second-tier EIR, which identified the facilitation of infill development and redevelopment of deteriorated properties, particularly for housing, and reducing vehicle trips, as primary objectives for the specific plan area. In 2012, real party in interest submitted an application to build a mixed-use redevelopment project on a 3.4-acre, multi-parcel site within the specific plan area. The paved, deteriorating site was previously used by a car dealership, surrounded by developed residential and commercial uses, and was located a quarter-mile from the Covina Metrolink station. Over the next two years, the developer worked with city staff, the planning commission and city council to repeatedly redesign the project to address the city's concerns about the project's potential parking deficit. With these changes incorporated, city staff recommended approval of the project, including adoption of a mitigated negative declaration (MND), tiered from the second-tier EIR certified for the applicable specific plan. After approving the project, the city filed a notice of determination, as well as a notice of categorical exemption for a "Class 32" infill project.

Covina Residents for Responsible Development (CRRD), filed a petition for writ of mandate seeking to overturn the city's approval based on three causes of action. First, a CEQA claim alleging that an EIR was required and that the city improperly tiered from the TCSP EIR. Second, a Subdivision Map Act claim alleging that the city failed to make necessary findings, or that the city's findings were not supported by substantial evidence. Third, a due process claim that was abandoned on appeal. CRRD's CEQA claims focused on the project's analysis of parking impacts, which CRRD alleged was legally inadequate. The trial court denied the petition, finding: no fair argument to support the claim that a parking shortage would result in any environmental impacts; any parking impacts were exempt from environmental review under Public Resources Code section 21099; the city properly tiered its review from the specific plan EIR; the city did not violate the Subdivision Map Act; and the record did not indicate anyone had been prevented from speaking at the final council meeting. CRRD appealed.

The Second District Court of Appeal upheld the trial court's decision and found that Public Resources Code section 21099 exempted the project's alleged parking impacts from environmental review. Although the section was enacted after the city had completed its initial study and circulated the proposed MND, the court nonetheless concluded that the project's parking impacts satisfied the statute's requirements. The court held that, in enacting section 21099, the Legislature had endorsed the approach to parking impact analysis in *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, for infill projects near transit hubs, like the project in this case. That is, only the secondary impacts

associated with parking issues need to be analyzed under CEQA. The court noted that the redesigned project met the city's parking requirements in any event, and CRRD failed to provide any evidence of possible secondary effects.

The court also rejected petitioner's argument that, in tiering the project's MND from the specific plan EIR, the city failed to consider additional traffic impacts caused by the parking shortfall. The court found that tiering was appropriate because the project's parking impacts were exempt from CEQA, the approved project complied with the specific plan's parking requirements, and petitioner provided no evidence of any alleged traffic impacts associated with the project's parking. Finally, the court rejected the petitioner's claim that the tentative map was inconsistent with the specific plan, because the claim centered on the alleged parking deficiency, which the court had determined was not an impact.

The Fourth District Court of Appeal upheld the trial court's decision denying a challenge to the City of San Diego's approval of construction of a secondary school and adoption of a mitigated negative declaration. *Clews Land and Livestock v. City of San Diego* (2017) 19 Cal.App.5th 161.

The City of San Diego adopted an MND and approved a project to build the 5,340-square-foot Cal Coast Academy, a for-profit secondary school, on property adjacent to the plaintiffs' (Clews Land and Livestock, LLC, et al. ["Clews"]) commercial horse ranch and equestrian facility. Clews filed a petition for writ of mandate and complaint alleging the project would cause significant environmental impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources. Clews also argued that CEQA required recirculation of the MND, that the project was inconsistent with the applicable community land use plan, and that the City did not follow historical resource provisions of the San Diego Municipal Code. The trial court determined that Clews had failed to exhaust its administrative remedies, and ruled in favor of the City on the merits. Clews appealed and the Court of Appeal upheld the trial court's determinations, finding that the petitioner had failed to properly exhaust its administrative remedies, and that the record did not support a fair argument that the project could have potentially significant impacts relating to fire hazards, traffic and transportation, noise, recreation, and historical resources.

The court first held that Clews failed to exhaust its administrative remedies. The San Diego Municipal Code appeal process provides for two separate procedures—one for appeal of a hearing officer's decision to the Planning Commission, and one for appeal of an environmental determination to the City Council. Because Clews filed only an appeal of the hearing officer's decision, the court determined that Clews failed to exhaust its administrative remedies with respect to adoption of the MND. Clews argued that the City's bifurcated appeal process violated CEQA, but the court found the process was valid. Clews also argued that the City had not provided proper notice of the appeal procedures under Public Resources Code section 21177, subdivision (a), thereby excusing Clews' failure to appeal the environmental determination. The court explained, however, that section 21177 did not apply because Clews' failure to appeal was not a failure to raise a noncompliance issue under that section. Where, like here, a public agency has accurately provided notice of a public hearing, but it misstates the applicable procedures to appeal the decision made at that hearing, the only available remedy is to prevent the public agency from invoking an administrative exhaustion defense through equitable estoppel. Clews had pursued a claim for

equitable estoppel in the trial court and was unsuccessful, and Clews did not challenge that determination with the Court of Appeal. Therefore, the court found, Clews' failure to exhaust could not be excused on an equitable estoppel basis.

Notwithstanding its determination that Clews failed to exhaust its administrative remedies, the court also considered the merits of Clews' claims. The court determined that Clews did not make a showing that substantial evidence supported a fair argument that the project may have a significant effect on the environment. In making its determination, the court emphasized that the project is "relatively modest" and located on already-developed land. Clews argued that the City was required to prepare an EIR due to potentially significant impacts on fire hazards, traffic and transportation, noise, recreation, and historical resources. The court rejected each of Clews' arguments. In part, the court was unpersuaded by Clews' expert's comments because they were "general" and did not have a specific nexus with the project, they focused on the effects of the environment on the students and faculty at the school rather than on the effects of the school on the environment, and they were conclusory and speculative. The court noted that dire predictions by non-experts regarding a project's consequences do not constitute sufficient substantial evidence.

The court rejected Clews' claim that noise from the project would impact the adjacent business's operations, finding that impacts on another business's economic viability do not require an EIR under CEQA because they do not necessarily affect the environment in general. Clews argued that by adding a shuttle bus plan and describing the school's intent to close on red flag fire warning days *after* circulation of the MND, the City substantially revised the MND and was required to recirculate the draft prior to certification. The court rejected these contentions, explaining that the added plans were purely voluntary and were not added to reduce significant effects on the environment, and thus could not constitute mitigation measures. The court further rejected Clews' claim that the City did not follow its historical resource regulations and guidelines. The court found that Clews merely critiqued the City's reliance on a regulation exemption, and failed to address the substance of the exemption or show that the City was required to apply the regulations' specific procedures. Finally, the Court rejected Clews' argument that the project conflicted with the Carmel Valley Neighborhood 8 Precise Plan's open space designation of the site, as well as the multifamily residential zoning at the project site. With respect to the plan's open space designation, the court held that the City's determination was reasonable, and that Clews did not address the City's reasoning or explain how the City abused its discretion. Rather, the court found that City reasonably relied upon the fact that the property was already developed, would make use of a previously-capped swimming pool, and would not impact or be developed on undisturbed open space. The court further explained that consistency of the zoning ordinance with the plan was not an issue – instead, the issue was whether the project was consistent with the Precise Plan's open space designation.

The Fifth Appellate District upheld the City of Visalia's certification of an EIR for its general plan update, finding that although the EIR did not analyze the potential for urban decay, the record contained no substantial evidence that a land use policy restricting the size of commercial tenants in a neighborhood commercial area would result in urban decay. *Visalia Retail, L.P. v. City of Visalia* (2018) 20 Cal.App.5th 1.

The City of Visalia prepared an EIR for an update to its general plan, which included updating the land use policy at issue. The policy set a 40,000-square-foot maximum for shopping center tenants located in neighborhood commercial zones. Petitioners argued that the policy's EIR was inadequate because it failed to consider the physical urban decay impacts that would result from the size restriction. To support their argument, petitioners submitted a report prepared by a real estate broker, which contended that, instead of building smaller stores, grocers would refuse to relocate to neighborhood commercial centers altogether, which would ultimately discourage infill development and result in frequent vacancies and limited economic activity.

Petitioners filed a petition for writ of mandate in the superior court, seeking to invalidate the city's certification of the final EIR and adoption of the general plan update. Petitioners asserted that the city failed to comply with CEQA, that the general plan update was inconsistent, and that the city failed to properly notice its city council meeting, during which the final EIR was certified. Ruling in favor of the city, the trial court rejected each of petitioners' claim. On appeal, the appellate court evaluated whether the general plan was internally inconsistent and whether the city violated the notice requirements set forth in the Planning and Zoning Law.

First, the court rejected petitioner's argument that the EIR inadequately analyzed the general plan's impact on urban decay. The court found that the real estate broker's report did not provide the requisite basis for petitioners' challenge because its analysis of causation was speculative and the potential economic consequences did not indicate that urban decay would result. The court distinguished its decision in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, where it held that an EIR was fatally defective for failing to analyze two shopping centers' individual and cumulative potential to indirectly cause urban decay. The court emphasized that an urban decay analysis is required when substantial evidence suggests that a project's social and economic effects will result in physical changes. Here, the court found that the record lacked such evidence and petitioners failed to make a sufficient showing otherwise. The court also found that the size restriction was not inconsistent with the general plan's stated goal of encouraging infill development. Finally, the court held that the City did not violate the 10-day notice requirement set forth in Planning and Zoning Law by failing to re-notice additional meetings on the general plan amendment.

The Sixth Appellate District upholds county's categorical exemption determination for microcell transmitter project, finding that the cumulative impact, location, and unusual circumstances exceptions did not apply. *Aptos Residents Association v. County of Santa Cruz* (2018) 20 Cal.App.5th 1039.

The Santa Cruz County zoning administrator approved a microcell transmitter project proposed by real party Crown Castle. The project would install thirteen microcell transmitters as part of a Distributed Antenna System (DAS) to expand wireless coverage in the Day Valley area of Aptos. Each microcell would attach an antenna to a utility pole, located in the County's public right-of-way. The County approved real party's eleven permit applications (one for each microcell unit), finding that the project fell within CEQA's Class 3 categorical exemption for small structures. Petitioner, Aptos Residents Association, appealed the approval to the planning commission. The commission denied the appeal, and the county board further declined to take jurisdiction over the appeal.

Petitioner filed a petition for writ of mandate, alleging the County violated CEQA by failing to undertake an environmental impact analysis of the project. Petitioner contended the County: (1) improperly segmented each portion of the project, by considering each microcell individually; (2) failed to consider the cumulative impacts of a potential, separate cell transmitter project in a nearby area; (3) neglected to apply the “location” exception to the project. Petitioner also argued that the project is subject to the “location” and “unusual circumstances” exceptions to the Class 3 exemption because of the surrounding environment’s sensitive nature. Lastly, petitioner alleged that the county board had abused its discretion in declining to take jurisdiction of petitioner’s appeal.

The Sixth Appellate District Court of Appeal upheld the lower court’s judgment rejecting petitioner’s contentions. With respect to “piecemealing,” the court held that the county had not improperly segmented the project. The applicant’s filing of separate permit applications and the county’s issuance of a separate permit and exemption for each project were not evidence of piecemealing. The court found that throughout the administrative proceedings, the county had considered the entire group of microcell units to be one project. The court further held that the board did not abuse its discretion in finding that new evidence submitted by petitioner about a potential, neighboring transmitter project was not significant new evidence relevant to its decision. The court found that an alleged phone call between the potential project developer and board staff was too vague to support a finding that a possible AT&T project would be of “the same type in the same place.” The court also found that the location exception to the exemption did not apply. The court rejected petitioner’s argument that the Residential Agricultural zoning classification designated the area “an environmental resource of hazardous or critical concern” because nothing in the statement of the purpose for that zoning district indicated as much. Finally, the court found that the unusual circumstances exception also did not apply because petitioner produced no evidence to suggest that it is unusual for small structures to be used to provide utility extensions in a rural area or in an area zoned Residential Agricultural.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter

Regulatory Updates

Carbon Pollution Emission Guidelines. In February 2018, the EPA provided notice of three listening sessions and a reopened public comment period for the proposal announcing the intention to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 83 Fed. Reg. 4620.

Greenhouse Gas Emissions Standards for Model Year 2022-2025 Light-Duty Vehicles. In April 2018, the EPA provided a notice of withdrawal of a Final Determination of the mid-term evaluation of greenhouse gas emission standards for model year 2022-2025 light-duty vehicles. The withdrawal is based on recent information that concludes the current standards may be too stringent. 83 Fed. Reg. 16077.

U.S. Greenhouse Gas Emissions and Sinks: 1990-2016. In February 2018, the EPA provided a notice of availability, and requested comments on, the Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990—2016. 83 Fed. Reg. 5422.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

The Third District Court of Appeal has held that a petition to delist coho salmon south of San Francisco from the list of endangered species was properly denied where it did not contain sufficient scientific evidence to justify the delisting. *Central Coast Forest Assn. v. Fish & Game Comm.* (January 5, 2018) 18 Cal.App.5th 1191.

In the case, the Fish and Game Commission denied respondents' petition to remove (delist) coho salmon south of San Francisco from the list of endangered species in California. Respondents owned and harvested timber from lands in the area of the coho salmon spawning streams in the Santa Cruz Mountains. The trial court overturned the Commission's decision denying the delisting and the Commission appealed.

On appeal, the Fifth District reversed the judgment, holding that the petition did not contain sufficient scientific evidence to justify the delisting when considered in light of the Commission's scientific report and expertise. There was conclusive evidence in the form of coho salmon museum specimens collected in 1895 from four adjacent streams in Santa Cruz County that coho salmon inhabited the streams prior to the beginning of hatchery activity in 1906, and it was unchallenged that a population of coho salmon bearing genetic markers similar to each other and to the remaining Central California Coast coho evolutionary significant unit currently inhabited streams south of San Francisco.

The court held that the term “native species” in the definition of “endangered species” (Fish & G. Code, section 2062) means native to California. Moreover, the term “range” in that definition means current range. Coho were a native species south of San Francisco; respondents had not offered sufficient evidence that the current inhabitants of the streams south of San Francisco were directly the result of out-of-state hatchery stock. Therefore, there was insufficient evidence that the delisting might be warranted. The court agreed with the Commission that a portion of an endangered species may be delisted only if it can be defined as a separate species, subspecies, or evolutionary significant unit that is not endangered.

Regulatory Updates

Critical Habitat Boundaries. In April 2018, the USFWS provided notice of a final rule concerning a technical amendment. The amendment removes the textual descriptions of critical habitat boundaries from those designations for mammals, bird, amphibians, fishes, clams, snails, arachnids, crustaceans, and insects for which the maps have been determined to be sufficient to stand alone as the official delineation of critical habitat. 83 Fed. Reg. 18698.

Eureka Dune Grass. In February 2018, the USFWS provided notice of reclassifying the Eureka dune grass from an endangered to a threatened species. This action is based on the evaluation of the best available scientific and commercial information including comments received. 83 Fed. Reg. 8576.

Eureka Valley Evening-Primrose. In February 2018, the USFWS provided notice of removal of the Eureka Valley evening-primrose from the federal list of endangered and threatened plants. This action is based on the evaluation of the best available scientific and commercial information including comments received. 83 Fed. Reg. 8576.

San Fernando Valley Spineflower. In March 2018, the USFWS provided a notice of the withdrawal of a proposed rule to list the San Fernando Valley spineflower as a threatened species. The withdrawal is based on a conclusion that the threats to the species are no longer as significant as they were believed to be when the proposed rule was issued. 83 Fed. Reg. 11453.

Wild Fauna and Flora. In January 2018, the USFWS provided a notice of invitation to provide information and recommendations on animal and plant species to be considered as candidates for U.S. proposals to amend Appendices I and II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora. 83 Fed. Reg. 3179.

ENERGY

Recent Court Rulings

The California Court of Appeal reversed the trial court and held that an issue is ripe for review when the consequence of a deferred decision will cause uncertainty in the law and when there is widespread public interest in resolving the legal issue. *Communities for a Better Environment v. State Energy Resources Conservation and Development Commission* (2018) A141299

The State Energy Resources Conservation and Development Commission (Energy Commission) has exclusive power to license and certify thermal power plants over 50 megawatts capacity. Public Resources Code section 25531 provides that Energy Commission certification decisions can only be reviewed by the Supreme Court of California and that the Energy Commission's factual findings are final and not subject to review.

Communities for a Better Environment and Center for Biological Diversity (Communities) filed a lawsuit in trial court claiming that section 25531 subdivisions (a) and (b) are unconstitutional because it makes Energy Commission decisions reviewable only by the Supreme Court and limits the scope of Supreme Court's review. The trial court found that there was no actual existing controversy and therefore not ripe for review. The trial court dismissed with prejudice.

Communities appealed the trial court's judgement. The issue on appeal is the trial court's ripeness determination. The Energy Commission argues that the claim seeks an advisory opinion on the validity of a statute without any dispute regarding a decision made by the Energy Commission. The court of appeal determined that the constitutional challenge to section 25531 will come up in every future proceeding for review of an Energy Commission decision. The court of appeal also found that the constitutional issue is not dependent on the facts of any Energy Commission decision. The court of appeal concluded that the trial court has jurisdiction to review the dispute in this case because "the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." The court of appeal reversed the trial court's judgment.

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

No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Alternative Testing Methods Draft Strategic Plan. In March 2018, and as required by the TSCA, the EPA provided notice of the development of a Strategic Plan to promote the development and implementation of alternative test methods and strategies to reduce, refine or replace vertebrate animal testing. 83 Fed. Reg. 10717.

Chloroform Integrated Risk Information System Assessment. In January 2018, the EPA provided notice of a public comment period associated with the Systematic Review Protocol for the Integrated Risk Information System Chloroform Assessment. 83 Fed. Reg. 4480.

Hazardous Waste Management System. In January 2018, the EPA provided notice of a final rule establishing the methodology for the user fees applicable to manifests submitted to the national electronic manifest system. This action also announces the date the system will be operational as well as final decisions and regulations relating to the proposed rule. 83 Fed. Reg. 420.

In March 2018, the EPA provided notice of a proposed rule concerning the disposal of coal combustion residuals (CCR) from electric utilities. The proposed rule would address provisions of a final rule that was remanded back to the EPA in 2016, add six provisions establishing

alternative performance standards for certain CCR units, and make additional revisions based on comments received. 83 Fed. Reg. 11584.

List of Categorical Non-Waste Fuels. In March 2018, the EPA provided notice of a final rule issuing amendments to the Non-Hazardous Secondary Materials regulations. The EPA added the following railroad ties to the categorical non-waste fuel list: processed creosote-borate, copper naphthenate and copper naphthenate-borate treated railroad ties under certain conditions. 83 Fed. Reg. 5317.

Federal Agency Hazardous Waste Compliance Docket. In May 2018, the EPA provided notice of the 33rd update to the Federal Agency Hazardous Waste Compliance Docket. This update includes 5 Federal facility additions, 2 Federal facility deletions and 1 correction to the previous update. 83 Fed. Reg. 20813.

National Priorities List. In January 2018, the EPA provided notice of a final rule adding four sites to the General Superfund section of the National Priorities List. 83 Fed. Reg. 2549. In January 2018, the EPA also provided notice of a proposed rule to add ten sites to the General Superfund section of the National Priorities List. 83 Fed. Reg. 2576.

Pollutant Measurement Methods from Various Waste Media. In March 2018, the EPA provided notice of a final rule revising the EPA's Method 301 "Field Validation of Pollutant Measurement Methods from Various Waste Media" to correct and update the method. In addition, the EPA is clarifying the regulatory applicability of the method as well as its suitability for use with other regulations. 83 Fed. Reg. 12118.

Recycling. In March 2018, the EPA provided notice of a proposed rule to add hazardous waste aerosol cans to the universal waste program under the federal Resource Conservation and Recovery Act regulations. 83 Fed. Reg. 11654.

Solid Waste Definition. In May 2018, the EPA provided notice of a final rule revising regulations associated with the definition of solid waste under the Resource Conservation and Recovery Act. The revisions implement vacatur orders by the U.S. District Court of Appeals, District of Columbia. 83 Fed. Reg. 24664.

Toxic Substance Control Act (TSCA) User Fees. In February 2018, the EPA provided notice of a proposed rule to set user fees for certain information submittals that require an Administrator's review and for manufacturers of chemical substances that are subject to a risk evaluation. The EPA is also considering updating other user fee regulations under this same rulemaking. 83 Fed. Reg. 8212.

In April 2018, the EPA provided notice of a 30-day extended comment period for same and the availability of "Supplemental Analysis of Alternative Small Business Sized Standard Definitions and their Effect on TSCA User Fee Collection." 83 Fed. Reg. 17782.

Uranium. In January 2018, the EPA provided notice of a 30-day comment period for the release of the draft Integrated Risk Information System Assessment Plan for uranium. 83 Fed. Reg. 4479.

INSURANCE COVERAGE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

LAND USE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

MINING

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

PLANNING AND ZONING

Recent Court Rulings

No summaries this quarter.

Regulatory Updates

No summaries or updates this quarter.

POLANCO REDEVELOPMENT ACT

Recent Court Rulings

The California Court of Appeals concludes direct causation of pollution by a chemical manufacturer is not required to be liable under California's Polanco Redevelopment Act. *City of Modesto v. Dow Chemical Company*, 19 Cal. App. 5th 130 (Ct. App. 2018)

The City of Modesto ("City") filed a nuisance action against 28 defendants, including dry cleaning businesses in the City and manufacturers of perchloroethylene ("PCE"), a chemical used to dry clean clothing. The City alleged the defendants contaminated the City's groundwater with PCE and sought recovery under numerous theories, including relief available under the Polanco Redevelopment Act ("Act"). The Act authorized agencies to remedy contamination and recover the costs from any "responsible parties." Dow Chemical, a manufacturer of PCE, argued they were not a responsible party under the Act because they merely produced the chemical and were not involved in the chemical's disposal. The claims under the Act were tried in separate trial courts, which ultimately resulted in different outcomes. One trial court concluded that to determine if a defendant is a responsible party, all conduct of the defendant must be taken into consideration. Because Dow Chemical encouraged the dry cleaning businesses to rely on their advice and guidance, which included the disposal that resulted in the contamination, they were responsible parties. The second trial court concluded Dow Chemical was not a responsible party. This court required a showing of special causation; an affirmative step in assisting or creating a nuisance.

On appeal, the California Court of Appeals for the First District decided which test was proper in determining whether the Dow Chemical Company was a "responsible party" under the Polanco Act, which provides damages for hazardous waste cleanup.

The California Court of Appeals concluded the Act did not require a showing of special causation in order to be a responsible party. The court reasoned the proof of causation under the Act should be analogous to similar actions. By comparing causation standards in malpractice, wrongful death, and negligence actions the court found circumstantial evidence sufficiently allowed the jury to decide if the manufacturer was liable for the contamination of the groundwater. In order to be a responsible party under the Act, the manufacturer of the product must be more than a passive supplier, however, a direct chain of causation is not required. The court ruled that in consideration of the evidence as a whole, Dow Chemical's actions were a substantial factor in causing the contamination.

PROPERTY RIGHTS/FEDERAL TORT CLAIMS

Recent Court Rulings

No summaries this quarter.

PROPOSITION 65

Recent Court Rulings

The California Court of Appeal held that under Proposition 65 and Labor Code section 6382, a delegation of authority to an outside agency was not unconstitutional because the statutory scheme provides standards and safeguards to ensure that the delegated authority is not abused or applied arbitrarily. *Monsanto Company v. Office of Environmental Health Assessment* (2018) F075362

Monsanto Company manufactures glyphosate, a widely used herbicide chemical. Glyphosate has been reviewed and studied to determine if it's a carcinogen since 1974. The reviewing agencies, including the Environmental Protection Agency and the Office of Environmental Health Assessment (the Office), have previously concluded that there was no evidence that glyphosate causes cancer. In 2015, the International Agency for Research on Cancer (IARC) published a 2015 Monograph with a determination classifying glyphosate as "probably carcinogenic to humans." The Office published a Notice of Intent to List glyphosate, concluding that the 2015 Monograph brought glyphosate within listing requirements under Proposition 65. Monsanto County and intervenors (Appellants) filed a complaint to stop the listing determination, challenging the listing mechanism of Labor Code section 6382 that is incorporated by reference under Proposition 65. The trial court dismissed concluding that Appellants failed to establish facts sufficient to support any their claims.

Proposition 65 incorporates Labor Code section 6382 when listing chemicals known to cause cancer. Labor Code section 6382 provides that a substance is hazardous "if listed as a human or animal carcinogen by the International Agency for Research and Cancer." As a result, if a substance is listed by IARC, then it must be added to Proposition 65 list of chemicals known to the state to cause cancer. Appellants first claim that the listing mechanism referenced in Labor Code section 6382 violates article II, section 12 of the California Constitution. The issue was whether the IARC is a private corporation within the meaning of the Constitution. The court of appeal concluded that IARC does not qualify as a private corporation under article II, section 12, therefore there is no claim for relief. The court of appeal affirmed the trial court's dismissal of the claim.

Appellants next claim that the Labor Code listing mechanism is an unconstitutional delegation of rulemaking authority because it delegates a quasi-legislative listing authority without adequate safeguards. The court of appeal stated that the issue is whether the statutory standards and safeguards ensure that the delegated authority is not abused or made arbitrarily. The court of appeal concluded that the statutory scheme provides substantial directions for determining when a chemical must be listed and that there are sufficient safeguards to prevent potentially arbitrary determinations. The court of appeal affirmed the trial court and held that there has not been an improper delegation. The court of appeal also rejected Appellants claims that the listing mechanism violates procedural due process and that the listing mechanism violates the Guarantee Clause of the United States Constitution. The court of appeal affirmed the trial court's judgement.

Regulatory Updates

No summaries or updates this quarter.

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

The Sixth District Court of Appeal held that a taxpayer had standing to bring a conflict of interest claim to contest a water district's acquisition of real property, and the taxpayer is not required to bring a validation action under the California Water Code. *Holloway v. Showcase Realty Agents, Inc.* (2018) 22 Cal.App.5th 758.

Showcase Realty ("Showcase") facilitated the San Lorenzo Valley Water District ("District") in acquiring real property in Boulder Creek, California. A taxpayer of the District filed a claim contesting the acquisition by the District, claiming the contract was void under Government Code 1090 because one of the District's directors, Terry Vierra, was an *interested party* due to his partial ownership in Showcase, and because his wife was the listing agent for the acquired property. The trial court granted a motion to dismiss by the District, Showcase, and Vierra on the grounds that the taxpayer did not have standing to assert a claim.

The issues before the Sixth District Court of Appeal were: (1) whether the taxpayer had standing under California Government Code section 1092 to bring an action for conflict of interest, and (2)

whether the taxpayer was required to bring a validation action to challenge the real estate contract under the California Code of Civil Procedure section 863.

In the first instance, the court reversed the trial court's order, holding the taxpayer had standing to contest the real estate acquisition by the District. The court recognized that California law provides that "a taxpayer may not bring an action on behalf of a public agency unless the governing body has a duty to act, and has refused to do so. If the governing body has discretion in the matter, the taxpayer may not interfere." *Gilbane Building Co. v. Superior Court*, 223 Cal.App.4th 1527, 1532 (2014). However, the court stated that in California, a contract is void, not merely voidable, when a public officer is an interested party thereto. Further, whether a contract is void was not a matter of the District's discretion. The District had a duty to avoid the real estate contract because Vierra was a District director with a personal financial interest in the contract. Therefore, the taxpayer had standing to bring the claim when the District failed to avoid the acquisition.

In the second instance, the court held the taxpayer was not required to bring a validation action because the validation statutes did not apply to the taxpayer's claim seeking to invalidate the District's acquisition of the real estate. The validation statutes apply to "contracts" entered into by a county water district. To avoid any undue burden on the taxpayers challenging government actions, the court narrowly defined the term "contracts" to only include contracts in the nature of, or directly related to, a public agency's bonds, warrants or other evidences of indebtedness.

Regulatory Updates

No summaries or updates this quarter.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Clean Water Act (CWA). In February 2018, the EPA requested comments on statements regarding the CWA and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection in the jurisdictional surface water may be subject to CWA regulations. The EPA is specifically seeking comments providing clarification or suggesting revisions are needed. 83 Fed. Reg. 7126.

Effluent Guidelines. In May 2018, the EPA provide a notice of availability of the EPA's Final 2016 Effluent Guidelines Program Plan. The Plan identifies existing industrial categories selected for effluent guidelines or pretreatment standards and provides a schedule for their development. 83 Fed. Reg. 19282.

Electronic Reporting. In April 2018, the EPA provided notice of an approval of California's request to revise its National Primary Drinking Water Regulations Implementation EPA-authorized project to allow electronic reporting. 83 Fed. Reg. 14272.

Other Federal Summaries of Interest

Endangered Species

The Ninth Circuit Court of Appeals has held that the U.S. Forest Service's (USFWS) Lonesome Wood Vegetation Management 2 Project is based on the best scientific data available under the Endangered Species Act (ESA) and, therefore, USFWS properly concluded reevaluation in response to contrary evidence was not necessary. *Native Ecosystems Council v. Marten* (9th Cir. February 22, 2018) 883 F.3d 783.

In the case, the Canada lynx were listed as a threatened species under the ESA in 2000 and in 2007 the Lynx Amendments were adopted to govern the management of Canada lynx habitat. The USFWS subsequently approved the Lonesome Wood Vegetation Management 2 Project (Project) to reduce the threat to wildlife in a populated area of the Gallatin National Forest in Montana. Environmental groups brought suit to enjoin the Project contending that it violated the ESA, National Forest Management Act (NFMA), the National Environmental Policy Act, and the Administrative Procedures Act. The district court initially enjoined the Project but eventually granted the Forest Service's motion for summary judgment and dissolved the injunction.

On appeal, the Ninth Circuit affirmed the district court's summary judgment order and order dissolving the injunction. The court declined to overrule USFWS' determination that a thesis outlining important predictors for overall lynx reproductive success did not require the Service to reevaluate its approval of the Project. The court also rejected arguments that USFWS failed to comply with the obligation to ensure species viability, and that USFW failed to comply with Gallatin Forest Plan obligation to monitor population trends for two management indicator species. Finally, the court rejected plaintiff's challenge that USFWS failed to take a "hard look" at the Project and did not act arbitrarily and capriciously.

The Ninth Circuit Court of Appeals has held that the decision by the U.S. Fish and Wildlife Service (USFWS) to end a southern sea otter translocation program was lawful. *Cal. Sea Urchin Comm. v. Bean* (9th Cir. March 1, 2018) 883 F.3d 1173.

In the case, plaintiffs brought suit challenging a USFWS determination that a sea otter translocation program was a failure and, therefore, terminated the program. Pursuant to discretionary authority granted by Congress, in 1987 USFWS created an experimental reserve population of southern sea otters some distance from the main population. In 2012, USFWS deemed the program a failure and terminated it. Fishing industry groups brought action on multiple grounds challenging the USFWS decision to end the program. The District Court ruled in favor of USFWS and plaintiffs appealed.

On appeal, the Ninth Circuit held that the fishing industry groups had standing to challenge USFWS' decision to end the translocation program based on harms the groups suffered because of sea otter predation of shellfish, an alleged concrete and particularized harm. On the merits, the court held that USFWS' decision to terminate the program pursuant to failure conditions set out in agency regulations was lawful in that it was reasonable to interpret the applicable law as implicitly giving USFWS the authority to terminate the program when it determined that the purposes of the

statute would no longer be served or when continuation would be at odds with the goals of the Endangered Species Act or Marine Mammals Protection Act. Lastly, the court held that there was no violation of the non-delegation doctrine as the relevant statute provided appropriate guiding principles.

NEPA

The Ninth Circuit Court of Appeals has affirmed a district court grant of spill and fish monitoring injunctions and dismissed appeal of a National Environmental Policy Act (NEPA) disclosure order. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (9th Cir. April 2, 2018) 886 F.3d 803.

In the case, three federal agencies joined by intervenor defendants challenged injunctions issued by the district court to protect salmon and steelhead species listed under the Endangered Species Act (ESA). At the request of the National Wildlife Federation and the State of Oregon (the plaintiffs), the district court ordered the agencies to conduct certain spill operations and fish monitoring operations at dams and related facilities in the Federal Columbia River Power System. The district court also directed the agencies to disclose to plaintiffs' information on planned projects at certain dams in order to ensure that major expenditures do not bias the preparation of an environmental impact statement (EIS) under NEPA. On appeal, the Ninth Circuit affirmed the district court's grant of the spill and fish monitoring injunctions, but it dismissed the appeal of the NEPA disclosure order.

The Ninth Circuit held that the district court did not err in issuing spill and fish monitoring injunctions to protect the listed species under the ESA because a previous remand order to the agencies was not a final order. The court also held that the district court did not abuse its discretion in granting the spring spill injunction because the district court was not required to find likely irreparable harm for purposes of an ESA injunction. Lastly, the Ninth Circuit held that the district court's order regarding disclosure of planned dam projects pursuant to NEPA was not properly before the court because it was an order related to the progress of the litigation and not a reviewable interlocutory order.

TAKINGS

Recent Court Rulings

The United States Court of Appeals for the Federal Circuit held that the government's failure to properly maintain the Mississippi River-Gulf Outlet channel was not a basis for takings liability. *St. Bernard Par. Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018).

The Army Corps of Engineers constructed, operated, and maintained the Mississippi River-Gulf Outlet Channel ("MRGO") pursuant to Congressional authorization. The MRGO provided a direct connection between the port of New Orleans and the Gulf of Mexico. Properties located in the St.

Bernard Parish and Lower Ninth Ward areas near the MRGO were flooded during Hurricane Katrina in 2005. The owners of such properties filed claims in the Court of Federal Claims against the government, alleging the flooding constituted a taking of their property under the Fifth Amendment because it was a consequence of the construction, operation, and improper maintenance of the MRGO. The Claims Court found a taking occurred and awarded compensation.

The issue before the United States Court of Appeals for the Federal Circuit was whether increased flooding from the MRGO constituted a temporary taking under the Fifth Amendment.

The court reversed the findings of the Claims Court, and held no taking had occurred because the government cannot be held liable on a takings theory for inaction, and the government action in constructing and operating the MRGO was not shown to be the cause of the flooding. The court stated that takings liability must be premised on affirmative government acts, not mere inaction. It cited the Supreme Court case of *United States v. Spontenbarger* for the notion that "when undertaking to safeguard a large area from existing flood hazards, the Government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect." 60 S.Ct. 225, 265 (1939). Thus, the government's construction and failure to maintain the MRGO could not be the basis of takings liability; rather, the plaintiff's sole remedy lied in tort. However, the Court awarded no such remedy because the property owners failed to establish a causal link between the totality of government action over time and the injury caused by the flooding.

The United States Supreme Court holds the Gun Lake Trust Land Reaffirmation Act, a statute that bars federal courts from considering any suits related to a property held in trust for the benefit of a Native American Indian Tribe, is a valid exercise of congressional power and does not violate Article III of the constitution. *Patchak v. Zinke*, 138 S.Ct. 897 (Feb. 27, 2018)

David Patchak challenged the Gun Lake Trust Land Reaffirmation Act ("Act"), which prohibits Federal courts from considering any suits relating to the Bradley Property, claiming that the Act violated Article III of the constitution. Patchak initially sued the Secretary of the Interior under the Administrative Procedure Act, alleging the Secretary did not have the authority to take property into trust for an Indian Tribe. The tribe subsequently built a casino on the land held in trust. The United States Supreme Court considered Patchak's initial suit in *Match-E-be-Nash-She-Wish Bank of Pottawatomis Indians v. Patchak*, and decided Patchak had requisite standing for the suit to move forward. While Patchak's initial suit was pending, Congress enacted the Act, which prohibited Federal courts from hearing suits related to the Bradley Property. Thus, the district court dismissed Patchak's suit for lack of subject matter jurisdiction. The Court of Appeals for the D.C. Circuit affirmed, reasoning Article III does not prohibit Congress from enacting new laws.

On appeal, the United States Supreme Court considered whether the provision of the Act that prohibited Federal courts from hearing any suits regarding the Bradley Property held in trust violated Article III of the Constitution, which provides Congress may not direct the result of any pending litigation.

The Supreme Court affirmed the D.C. Circuit's dismissal under the Act. First, the Court concluded the law did not infringe on judicial power because Congress changed the law, rather than compelling a finding under old law. Further, the Act stripped the Federal court's jurisdiction, which the Court reasoned was a valid exercise of congressional power. Next, the Court rejected Patchak's argument that the Act directed courts to dismiss lawsuits under old law. The Court explained that the statute was constitutional because it directed courts to apply a new legal standard. The mandatorily imposed consequences were not a violation of the separation of powers. Lastly, the Court declined to find the Act interfered with the Patchak's initial suit. Reasoning Patchek's initial suit was pending and not final, the court stated Article III does not prevent Congress from changing a case's governing law. Therefore, the Court held the Act did not violate Article III of the Constitution.