State Bar of California

ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from January 1 through May 31, 2017. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at: http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx.

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

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

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cday-wilson@ci.eureka.ca.gov I would like to thank Anthony Todero, Patrick M. Kennedy (Summer Associate), Natalie Williams (Summer Associate), Sarah J. Applegate (Summer Associate), Anna Leonenko, Whit Manley, Danielle K. Morone, Mitchell Tsai, Amanda MacGregor Pearson, Joseph Petta, and Amy Hoyt, for their contributions to this issue of the Update. – Cyndy Day-Wilson.

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No summaries or updates this quarter.

Regulatory Updates

Petition for Emergency Timber Operations. In March 2017, the California Board of Forestry and Fire Protection provided notice of its decision denying a petition for administrative rulemaking

for emergency timber operations. The petition was denied because it did not meet the requirements of clearly and concisely stating what was requested and did not provide the authority that would enable the Board to take the action requested. Cal. Reg. Notice Register 2017, p. 332.

Registered Professional Forester (RPF) and Licensed Timber Operator (LTO) Responsibilities. In May 2017, the Board of Forestry and Fire Protection provided notice of proposed amendments regarding RPF and LTO Responsibilities. The purpose of the proposed amendments are to minimize inequities in Notices of Violation of the Forest Practice Rules, specific to timber operations, as a result of preparatory work that is required to be performed by an RPF. Cal. Reg. Notice Register 2017, p. 805.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Bisphenol A (BPA). In February 2017, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of its intent to repeal prior emergency rulemaking concerning BPA exposure warnings from canned and bottled food and beverages which has since been replaced by regular rulemaking. This action would ensure consistency and reflect OEHHA's intent concerning BPA warning responsibility, methods and content provisions. Cal. Reg. Notice Register 2017, Vol. No. 7-Z, p. 213.

Candy Containing Chili and Tamarind. In April 2017, the OEHHA acknowledged receipt of a petition concerning the lead level in candy containing chili and tamarind, and provided a decision on same. Following review of the petition and related materials, OEHHA has scheduled the matter for public hearing. Cal. Reg. Notice Register 2017, Vol. No. 17-Z, p. 688.

Priority Products List. In March 2017, the Department of Toxic Substance Control provided notice of proposed regulations to identify spray polyurethane foam systems with unreacted *methylene diphenyl diisocyanates* as a priority product. A public hearing was scheduled for May 16, 2017 concerning same. Cal. Reg. Notice Register 2017, Vol. No. 12-Z, p. 442.

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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

California Building Standards. In March 2017, the California Building Standards Commission proposed to adopt, approve, codify, and publish changes to the building standards of the 2016 California Green Building Standards Code. Cal. Reg. Notice Register 2017, Vol. No. 11-Z, p. 367. Note also that rulemaking proceedings are underway with respect to other elements of Title 24, including - but not limited to - the plumbing and electrical codes.

State Lands. In May 2017, the California State Lands Commission provided a notice of decision on a petition requesting changes to the definition of "land owned by the state" and "sold or transferred." The petition was declined because the cited legal authority does not authorize the State Lands Commission to engage in the petitioned rulemaking. Cal. Reg. Notice Register 2017, Vol. No. 21-Z, p. 814.

PROPOSTITION 65

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

List of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. For the OEHHA's most current list of chemicals known to the State to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2017, Vol. No. 4-Z, p. 94.

New Listings. In January 2017, the OEHHA announced that, effective January 27, 2017, *Pertuzumab* and *Vismodegib* have been added to the list of chemicals known to the State to cause reproductive toxicity. Cal. Reg. Notice Register 2017, Vol. No. 4-Z, p. 93.

In April 2017, the OEHHA provided notice that *glyphosate* will be added to the list of chemicals known to the State to cause cancer under the Labor Code mechanism. Cal. Reg. Notice Register 2017, Vol. No. 14-Z, p. 521.

No Significant Risk Level (NSRL). In January 2017, the OEHHA provided notice of proposed amendments to adopt a Proposition 65 NSRL of 180 micrograms per day for *malathion*. Cal. Reg. Notice Register 2017, Vol. No. 3-Z, p. 43.

In April 2017, the OEHHA provided notice of, and requested comments on, proposed amendments to adopt a Proposition NSRL of 1100 micrograms per day for *glyphosate*. Cal. Reg. Notice

Register 2017, Vol. No. 14-Z, p. 515. In May 2017, OEHHA provided notice of a June 7, 2017 public hearing concerning same. Cal. Reg. Notice Register 2017, Vol. No. 20-Z, p. 776.

Notice of Intent to List. In May 2017, the OEHHA provided notice of its intent to list *pentabromodiphenyl ether mixture (CE-71 [technical grade])* as known to the State to cause cancer under the authoritative bodies mechanism. Cal. Reg. Notice Register 2017, Vol. No. 18-Z, p. 712.

Notices of Violation. In May 2017, the OEHHA provided notice of proposed regulations to clarify the content required in notices of violation served on alleged violators of Proposition 65. The clarifications will ensure alleged violators are informed on proper compliance procedures. Cal. Reg. Notice Register 2017, Vol. No. 20-Z, p. 770.

Safe Use Determination. In January 2017, the OEHHA provided a notice of issuance of a Safe Use Determination for *diisononyl phthalate* in Phifertex fabric used in outdoor furniture products. The determination was made based on supporting documentation. Cal. Reg. Notice Register 2017, Vol. No. 3-Z, p. 47.

In May 2017, the OEHHA provided a notice of acceptance of a request for a safe use determination for the use of *diisononyl phthalate* in Interface Glabac and Glasbacore modular carpet tile. Comments were requested on same. Cal. Reg. Notice Register 2017, Vol. No. 20-Z, p. 776.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Dogs for Pursuit/Take of Mammals. In February 2017, the Commission provided notice that any interested person may present comments relevant to the action at the March 15, 2017 teleconference or the April 26, 2017 public hearing concerning the use of dogs for pursuit/take of mammals. Cal. Reg. Notice Register 2017, Vol. No. 8-Z, p. 258. In March 2017, the Commission provided notice of an additional hearing regarding same scheduled for April 13, 2017. Cal. Reg. Notice Register 2017, Vol. No. 12-Z, p. 453.

Off-Trail Use. In May 2017, the California Department of Parks and Recreation provided notice of a disapproval decision from the Office of Administrative Law. The Department had proposed to restrict public off-trail use in units classified as natural preserves, cultural preserves and state natural preserves. The action was disapproved based on a failure to comply with the clarity standard. Cal. Reg. Notice Register 2017, Vol. No. 20-Z, p. 777.

Underground Gas Storage (UGS). In May 2017, the California Department of Conservation provided notice of proposed regulations concerning UGS facilities and gas storage wells. The regulations would build upon the emergency rulemaking in place for same, and provide

clarifications and specificity to implement the statutory requirements added by Senate Bill 887. Cal. Reg. Notice Register 2017, Vol. No. 20-Z, p. 759.

Candidate Conservation Agreements with Assurances. In January 2017, the USFWS provided notice of a delay in the effective date of a final rule revising the regulations for candidate conservation agreements with assurances. The delay is in accordance with a memo from the White House. 82 Fed. Reg. 8501. In addition, the USFWS and National Marine Fisheries Services provided notice of a delay in the effective date of a policy concerning same. 82 Fed. Reg. 8501.

Eagle Permits. In January 2017, the USFWS announced that the Office of Management had approved the information collection requirements for the final rule revising regulations for eagle nonpurposeful take permits and eagle nest take permits. 82 Fed. Reg. 7708.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

WATER RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Animal Agriculture. In April 2017, the California Department of Water Resources (DWR) provided its decision concerning a petition received requesting regulation of unreasonable water use by animal agriculture. Based on the information available, the petition was denied because the requested actions exceed DWR's statutory authority. Cal. Reg. Notice Register 2017, Vol. No. 16-Z, p. 588.

Water Loss Audits. In March 2017, the DWR provided notice of, and requested comments on, proposed regulations concerning the conduct of Water Loss Audits and Water Loss Control Reporting. The proposed regulations would require all urban retail water suppliers to conduct annual water loss audits, validate the accuracy of same, and submit for review and posting. Cal. Reg. Notice Register 2017, Vol. No. 9-Z, p. 291.

WATER QUALITY

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Maximum Contaminant Level. In March 2017, the State Water Resources Control Board provided notice of a public hearing to consider proposed *1,2,3-Trichloropropane* maximum contaminant level regulations. Cal. Reg. Notice Register 2017, Vol. No. 9-Z, p. 282.

Clean Water Rule. In March 2017, the EPA and Department of the Army announced its intention to review and rescind or revise the Clean Water Rule based on a presidential directive. 82 Fed. Reg. 12532.

Draft Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity. In February 2017, the EPA provided notice of an extended comment period for the Draft Field-Based Methods for Developing Aquatic Life Criteria for Specific Conductivity in response to stakeholder requests. 82 Fed. Reg. 10767.

Effluent Limitations Guidelines and Standards for the Steam Electric Power Generating Point Source Category. In April 2017, the EPA provided notice of a decision to reconsider the final rule that amends the effluent limitations guidelines and standards for the steam electric point source category under the Clean Water Act. The compliance dates are postponed pending judicial review. 82 Fed. Reg. 19005.

Fluoride Chemicals in Drinking Water. In February 2017, the EPA provided a notice of availability of a document providing reasons for its denial of a petition it received concerning the addition of fluoridation chemicals in drinking water. 82 Fed. Reg. 11878.

Lead in Drinking Water. In March 2017, the EPA provided notice of an extended comment period to "Review Materials to Inform the Derivation of a Water Concentration Value for Lead in Drinking Water." 82 Fed. Reg. 12591.

Microcystins and Cylindrospermopsin. In February 2017, the EPA provided notice of an extended comment period for the Draft Human Health Recreational Ambient Water Quality Criteria and/or Swimming Advisories for Microcystins and Cylindrospermopsin. The extended comment period is in response to stakeholder requests. 82 Fed. Reg. 10766.

National Pollutant Discharge Elimination System. In January 2017, the EPA provided notice of a final permit issuance of the 2017 National Pollutant Discharge Elimination System general permit for stormwater discharges from construction activities to waters of the United States. The permit is issued for 5 years. 82 Fed. Reg. 6534.

National Primary Drinking Water Regulations (NPDWR). In January 2017, the EPA provided notice of, and requested comments on, the results of its review of NPDWRs. The review identified

eight NPDWRs as candidates for regulatory revision. The comments will be considered along with data as the EPA proceeds with determining whether further action is needed. 82 Fed. Reg. 3518.

Protective Action Guides and Planning Guidance for Radiological Incidents. In January 2017, the EPA provided a notice of availability of its updated guidance manual titled "Protective Action Guides and Planning Guidance for Radiological Incidents." The update amends chapter 4 to incorporate guidance for radiation protection decisions concerning drinking water. 82 Fed. Reg. 6498.

Use of Lead Free Pipes. In January 2017, the EPA provided notice of, and requested comments on, a proposed rule to make conforming changes to existing drinking water regulations. The proposed changes would establish requirements to assure that individuals purchasing, installing or inspecting potable water systems can identify lead free plumbing materials. 82 Fed. Reg. 4805. In April 2017, the EPA provided notice of a 30-day extension to the comment period for same. 82 Fed. Reg. 17406.

Federal Summaries

Supreme Court

California Supreme Court rules that the EIR prepared for a project located in the coastal zone was deficient because it did not flag areas on the property that would likely be found by the Coastal Commission to constitute "environmentally sensitive habitat areas" (ESHA) under the Coastal Act, and therefore did not consider mitigation measures and alternatives designed to reduce impacts on those areas. *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918

Newport Banning Ranch (NBR) proposed the Banning Ranch project on a 400-acre property located in the coastal zone. The project proposed to develop 1,375 residential units, 75,000 square feet of retail uses, and a 75-room hotel; roughly three quarters of the site would be preserved as open space, and historic oil operations would be consolidated and remediated. The site was in the coastal zone, and therefore required a Coastal Development Permit (CDP) from the Coastal Commission. The EIR prepared by the City of Newport Beach acknowledged the Coastal Commission's jurisdiction, but did not map ESHA on the property; instead, the EIR stated that the Commission would make the determination regarding where ESHA was located in considering NBR's CDP application. The City certified the EIR and approved the project. Banning Ranch Conservancy sued, alleging (1) the EIR was inadequate, and (2) the city had failed to adhere to a policy in its General Plan. The trial court rejected the Conservancy's CEQA claim, but agreed that the city had not complied with its General Plan policy. The Fourth District rejected both the CEQA and General Plan consistency claims. The Supreme Court granted the conservancy's petition for review.

The Supreme Court characterized the "principle issue" as "whether the Banning Ranch EIR was required to identify potential ESHA and analyze the impacts of the project on those areas."

The Court held that CEQA imposed such an obligation on the city, and that the city's failure to do so was "a procedural question subject to de novo review." CEQA directs the lead agency to integrate its environmental review with the permitting and review processes being carried out by other agencies. In this case, the city acknowledged the Coastal Commission's permitting authority, but did not adequately integrate its CEQA review with the requirements of the Coastal Act, despite comments from Coastal Commission staff and others asking that the city take into account the potential presence of ESHA on the property. This, in turn, meant that the EIR did not consider alternatives or mitigation measures designed to avoid or lessen impacts on ESHA. "[T]he regulatory limitations imposed by the Coastal Act's ESHA provisions should have been central to the Banning Ranch EIR's analysis of feasible alternatives." The EIR did not identify which areas might qualify as ESHA, or flag specific areas that had been delineated as ESHA in prior Commission proceedings. "As a result, the EIR did not meaningfully address feasible alternatives or mitigation measures. Given the ample evidence that ESHA are present on Banning Ranch, the decision to forego discussion of these topics cannot be considered reasonable." (Footnote omitted.)

The Court acknowledged that the Coastal Commission would ultimately make the determination whether ESHA was present. That fact, however, did not relieve the city of the obligation to include in the EIR a prediction of where the Commission would find ESHA to be located: "[A] lead agency is not required to make a 'legal' ESHA determination in an EIR. Rather, it must discuss potential ESHA and their ramifications for mitigation measures and alternatives when there is credible evidence that ESHA might be present on a project site. A reviewing court considers only the sufficiency of the discussion." (Footnote omitted.)

The city argued that identifying potential ESHA would be speculative, because only the Commission could make that determination. The Court disagreed. Two small areas on the property had already been designated ESHA in a prior proceeding. A biologist had mapped potential ESHA on the property, and Coastal Commission staff had offered to assist, but the city declined. Thus, the city "did not use its best efforts to investigate and disclose what it discovered about ESHA on Banning Ranch." The city could not deflect this obligation by pointing to the permitting jurisdiction of the Coastal Commission.

That did not mean the city had to accept the ESHA designations and related measures proposed by Commission staff. An agency could disagree with conflicting views, even those advanced by other agencies. But "an EIR must lay out any competing views put forward by the lead agency and other interested agencies. [¶] . . . [B]oth the commissioners and interested members of the public are entitled to understand the disagreements between commission staff and the [c]ity on the subject of ESHA. . . . Rather than sweep disagreements under the rug, the [c]ity must fairly present them in its EIR. It is then free to explain why it declined to accept commission staff suggestions." Although EIR appendices and other documents in the record addressed these issues, this "fragmented presentation" was inadequate, and did not reflect a good-faith effort at full disclosure. The EIR's detailed analysis of biological resources did not suffice, given the project's location in the coastal zone.

By certifying an inadequate EIR, the city abused its discretion. This error was prejudicial because it resulted in inadequate evaluation of project alternatives and mitigation measures, and deprived the Coastal Commission of information relevant to its permitting decision.

The Court reversed the Court of Appeal's judgment. The Court did not address, and "express[ed] no view," on the General Plan consistency claim.

On remand from Supreme Court, First District concludes that a college district erred in relying on an addendum to a negative declaration in view of "fair argument" that removing a campus garden would have a significant impact on campus serenity. *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2017) 11 Cal.App.5th 596

In 2006, the community college district adopted a mitigated negative declaration and approved a facilities master plan. The plan called for demolishing some buildings and renovating others on the College of San Mateo campus. The "Building 20 complex" was among those slated for renovation. In 2011, the district revised the plan. Among other things, the revised plan called for demolishing the Building 20 complex, including the removal of adjacent gardens, and renovating other buildings instead. The district prepared an addendum to the negative declaration. The "Friends" sued. The trial court granted the petition. The First District Court of Appeal affirmed based on its view that the district had to treat the revisions to the plan as an entirely new project, rather than relying on section 21166 and performing supplemental review of the 2006 negative declaration. The Supreme Court granted review. In *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2017) 1 Cal.App.5th 937, the Supreme Court reversed, and sent the case back to the Court of Appeal to determine (1) whether substantial evidence supported the district's decision to invoke the rules governing supplemental review, and (2) whether its addendum to the negative declaration followed those rules.

On the first issue – whether the original environmental document (in this case, the 2006 mitigated negative declaration) retained some informational value relevant to the 2011 modifications to the plan – the Court of Appeal held that the "substantial evidence" test applied. Under this test, if some credible evidence showed that the 2006 negative declaration still had informational value, then the district's decision to rely on section 21166 would be upheld. The Court concluded that the 2006 negative declaration remained relevant because some aspects of the 2006 plan remained unchanged, and because several mitigation measures adopted at that time continued to be relevant to implementation of the plan.

On the second issue, the Guidelines provide that whether a subsequent EIR must be prepared turns on whether "major revisions" of the previous EIR or negative declaration are required. Whether "major revisions" are required turns on whether the underlying document to be supplemented was an EIR or negative declaration. In particular, "once we have determined that the subsequent review provisions apply to a project approved through a negative declaration, our application of the standard of review changes and is less deferential to the agency. It is less deferential because a negative declaration requires a major revision—i.e., a subsequent EIR or mitigated negative declaration—whenever there is substantial evidence to support a fair argument that proposed changes 'might have a significant environmental impact not previously considered in connection with the project as originally approved.' [Citation.]" Thus, "an agency's determination that a major revision to a negative declaration is not required will necessarily lack substantial evidence when a fair argument exists that the project might have a previously unstudied significant environmental impact." (Footnote omitted.)

The Court concluded that the record contained substantial evidence that the planned removal of a portion of the gardens surrounding Building 20 would have a negative aesthetic impact. That evidence consisted of statements by faculty and students stating that the garden was a refuge from the campus' generally sterile environs. Other evidence suggested the Building 20 demolition might harm a nearby Dawn Redwood tree. The comments addressed the aesthetic impact of removing a portion of one of the few remaining green spaces on campus, as opposed to

impacts on "community character" or social concerns. The fact that the gardens to be removed were a small fraction of landscaping and open space on the campus was immaterial in light of evidence suggesting that these gardens were a unique sanctuary. The district therefore erred in relying on an addendum. The Court ordered directed the district to prepare a subsequent EIR or, if the project's possible impacts could be reduced to insignificance, a subsequent mitigated negative declaration.

The Friends argued that CEQA Guidelines section 15164, which authorizes the use of addenda, is unlawful because section 21166 does not refer to addenda. The Court declined to consider this argument in view of its ruling that the addendum in this case was inappropriate in light of the aesthetic impacts of removing a portion of the garden.

Justice Dondero filed a concurring opinion, emphasizing that under section 15164, an addendum can be used only for "minor technical changes or alterations" to a previously approved project. In Justice Dondero's view, the decision to "demolish[] a major building and transform[] into a parking lot an important garden space with unique trees and vegetation" – neither of which had been considered in the original negative declaration – were too major to be addressed in an addendum; rather, the district had to prepare a subsequent negative declaration (if no substantial evidence indicated that the project changes might have significant aesthetic or other impacts) or a subsequent EIR.

Ninth Circuit Court of Appeals

The Ninth Circuit Court of Appeals has held that the Bureau of Reclamation had statutory authority to augment its water releases from the Trinity River to prevent harm to salmon in the Klamath River, and that the release did not violate the Central Valley Project Improvement Act. ***San Luis & Delta-Mendota Water Authority v. Haugrud*****, 848 F.3d 1216 (9th Cir. 2017).**

In late summer 2013 the Bureau of Reclamation ("Bureau") released Trinity River water from Lewiston Dam above and beyond the amount in the agency's applicable water release schedule. After preparing an environmental assessment and finding of no significant impact under the National Environmental Policy Act ("NEPA"), the Bureau released the water to help prevent a mass die-off of salmon downstream in the lower Klamath River. After issuance of the EA and FONSI, the Water Authority, an agency comprised of local water districts that hold contracts for Central Valley Project water that comes from the Trinity, filed suit. The district court denied the Water Authority's claims that the release violated the Central Valley Project Improvement Act ("CVPIA"), yet ruled that the Bureau was not authorized to implement the release to benefit fish in the lower Klamath River, pursuant to a 1955 Act authorizing the secretary of the Interior to "adopt appropriate measures to insure preservation and propagation of fish and wildlife."

The questions on appeal were (1) whether the 1955 Act gave the Bureau authority to implement the 2013 release, above and beyond the amount designated in the applicable water release schedule, (2) whether the release violated CVPIA, and (3) whether Water Authority had standing to bring a

claim under the Endangered Species Act alleging potential harm to salmon eggs in the Sacramento River.

The court ruled in Bureau's favor on all claims. The court held that the flow release, and "the evil it sought to prevent, fall well within the [1955 Act's] mandate." The Water Authority argued that the CVPIA "repealed or amended" the 1955 Act such that "appropriate measures" to protect fish and wildlife could not longer include additional releases of water from the Lewiston Dam, yet the court rejected this theory on grounds that Congress's intention to repeal the 1955 Act was not "clear and manifest" in the CVPIA. The court also held that the release schedules in the CVPIA did not limit the release here because these schedules were geographically limited to the Trinity Basin and thus did not apply to releases from Lewiston Dam to areas outside the Trinity Basin, including Klamath River. Finally, the court rejected Water Authority's claim that the release violated the Endangered Species Act, on grounds the Water Authority did not have standing. The "posited series of events that must occur before the economic harm is realized" – the alleged potential to adversely impact winter-run and/or spring run salmon egg incubation in 2013 and 2014 in the Sacramento River – "is both too uncertain and too remote to constitute a reasonably probable threat of injury."

Other Federal Cases of Interest

The Third District Court of Appeal has held that in order not to be subject to a reclamation district assessment under Proposition 218, a school district must show by clear and convincing evidence that it would receive no special benefit. *Manteca Unified School District v. Reclamation District No. 17* (2017) 10 Cal.App.5th 730.

In 2008 the Reclamation District ("Reclamation") assessed properties for flood control service, including the School District ("School"). Pursuant to Proposition 218, Reclamation held an assessment ballot proceeding, in which landowners in the district could cast ballot votes for or against the assessment. School cast ballots in favor of the assessment, and the assessment was approved. School paid the assessment invoice for 2008-09 of $99,915.57, and similar amounts in fiscal years 2009-10 and 2010-11. However, in 2011 School claimed in a letter to Reclamation that Water Code section 51200 exempted school district property from such assessment. In December 2011, School sued Reclamation seeking reimbursement of payments and a declaration of exemption from the assessment. Reclamation cross-complained. The trial court found School was exempt under the Water Code provision.

On appeal, the question was whether Water Code section 51200 exempted School from paying assessments legally adopted and levied pursuant to Proposition 218.

The court of appeal reversed after construing the history of apparently conflicting statutory provisions. Water Code section 51200 was adopted in 1951 and grants reclamation districts the authority to assess publicly owned property, with the exception that such assessments shall include all lands owned by public entities within the district other than, among other things, school districts. Yet when Prop. 218 passed in 1996, the rules changed: now publicly owned parcels within a reclamation assessment district would not be exempt unless the agency owner could demonstrate by clear and convincing evidence that the publicly owned parcels receive no special benefit. The

court held that the language of Prop. 218 "supersedes section 51200 in both time and stature." Moreover, Prop. 218 specifically conditioned the continuation of any existing exemption from an existing assessment authority upon a showing of no special benefit. Thus School was subject to the assessment.

Sixth District holds that Santa Cruz County did not engage in "piece-meal" environmental review in adopting three ordinances amending different parts of its zoning ordinance; court also holds that the negative declaration prepared in connection with the ordinance amending development standards for hotels was adequate because whether the ordinance would alter development patterns was speculative. *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266

Santa Cruz County embarked on an effort to overhaul its zoning ordinance. As part of this effort, in 2010 the county adopted amendments to the ordinance to allow for administrative approval of certain minor exceptions to zoning standards, such as reduced setbacks. In 2013, the county extended and expanded these provisions. Also in 2013, the county streamlined its process for approving exceptions to its sign standards. In 2014, the county revised its standards for hotels. Other zoning code amendments in the works addressed wireless communications facilities, permitted uses within various zoning districts, and revised agricultural standards. The petitioner sued, alleging that the county was engaged in piece-meal environmental review because the amendments had to be analyzed as a single project in one over-arching environmental analysis. The petitioner also alleged that the negative declaration adopted by the county to support the amendments to the hotel standards was inadequate. The trial court denied the petition. The petitioner appealed.

First, the petitioner argued the various amendments to the zoning code were, in fact, a single "project" under CEQA that had to be analyzed in a single program EIR, citing CEQA Guidelines sections 15168 and 15378. The court regarded this claim as raising a question of law that the court reviewed independently. The Court, relying on the Supreme Court's two-part test in *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396, held that the three ordinances did not need to be analyzed as a single project. As the court explained, "[t]he key term here is 'consequence.' Thus, the issue is whether changing or reforming certain zoning regulations—for example, altering the density requirements for hotels and reducing the required number of parking spaces per hotel room—are reasonably foreseeable *consequences* of the other regulatory reforms challenged by [the petitioner], such as eliminating the need to obtain a variance for certain signs, or expanding administrative approval of minor exceptions to the entire county. We do not believe they are. . . . [T]he regulatory reforms operate independently of each other and can be implemented separately." (Footnote omitted, emphasis in original.) The court distinguished various cases in which piece-mealing was found because actions were functionally linked with one another. In this case, all the ordinances served the same, general objective: updating and modernizing its zoning ordinance. But the overarching goal was not analogous to development of a single, specific development project. Rather, the ordinances consisted of unrelated reforms in the service of a general goal. The approval of one ordinance did not beget the approval of another. Moreover, performing a single environmental analysis of the county's overarching goal, before even considering any amendments, would be "meaningless" because the county's proposal was not fixed and would evolve over time.

The petitioner argued the county also had an obligation to consider the cumulative effects of the ordinances. The court declined to reach this argument because the petitioner raised it only in its reply brief. Moreover, at the time the county considered the ordinances, "other regulatory reforms that may have cumulative impacts had not yet come to fruition. When future reforms are considered for environmental review, the cumulative impacts of all related reforms, as articulated in the CEQA Guidelines, will be examined."

Second, the petitioner challenged the negative declaration adopted to support the county's approval of amendments to development standards for hotels. The amendments reduced the county's existing hotel density requirement of 1,300 square feet per habitable room to 1,100 square feet per habitable room, eliminated a three-story height limit, and relaxed standards for required parking. The county's initial study/negative declaration concluded these amendments would not have environmental impacts because future hotel projects would still undergo review. The county took the position that there was no way to know the number of additional hotel rooms that might be authorized as a result of the amendments; rather, the impacts of additional rooms would be examined in the context of specific development proposals. The county surveyed owners of vacant land with zoning that authorized hotels, but none had applications on file, or disclosed plans to sell their land or to submit applications in the future.

The petitioner argued the negative declaration was flawed because it failed to account for the impacts of future development authorized by the amendments. The court acknowledged that, where a project may induce growth, the agency is not excused from performing environmental review simply because there is some uncertainty about what shape that future development may take. Rather, the agency must do its best to identify and analyze those impacts that are a reasonably foreseeable consequence of the project. "Thus, the issue is whether increased hotel developments, such as hotels proposed at higher densities than before, are a reasonably foreseeable consequence of the ordinance." The petitioner argued that the county "ignor[ed] its own stated reasons for pursuing the ordinance—to facilitate growth." The record did contain some evidence that the county adopted the ordinance in hopes of stimulating the development of hotels. But such hopes did not mean that hotel development was reasonably foreseeable. Moreover, the impacts of an increase in the number of hotel rooms could not meaningfully be analyzed except in the context of a specific proposal. Nor was there any evidence of imminent development; rather, the county investigated the plans of landowners with suitable zoning, and did not identify any reasonably foreseeable proposals. There was thus no evidence that the amendments would actually result in changed development patterns.

Finally, the court found that the petitioner had failed to carry its burden to show the existence of a "fair argument" of potentially significant impacts that would occur if county adopted the hotel ordinance. The petitioner cited evidence in the record suggesting that the ordinance would encourage development of higher-density hotels. But this evidence amounted to unsupported speculation. The county investigated whether increased development would result from the ordinance and concluded, based on this investigation, that no applications were forthcoming or foreseeable. Thus, "[a]t this point, environmental review of potential future developments would be an impossible task, because it is unclear what form future developments will take. The suggested environmental impacts are simply not reasonably foreseeable at this time, and evaluation of the impacts would be wholly speculative."

On remand from Supreme Court, First District concludes that a college district erred in relying on an addendum to a negative declaration in view of "fair argument" that removing a campus garden would have a significant impact on campus serenity. *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2017) 11 Cal.App.5th 596

In 2006, the community college district adopted a mitigated negative declaration and approved a facilities master plan. The plan called for demolishing some buildings and renovating others on the College of San Mateo campus. The "Building 20 complex" was among those slated for renovation. In 2011, the district revised the plan. Among other things, the revised plan called for demolishing the Building 20 complex, including the removal of adjacent gardens, and renovating other buildings instead. The district prepared an addendum to the negative declaration. The "Friends" sued. The trial court granted the petition. The First District Court of Appeal affirmed based on its view that the district had to treat the revisions to the plan as an entirely new project, rather than relying on section 21166 and performing supplemental review of the 2006 negative declaration. The Supreme Court granted review. In *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2017) 1 Cal.App.5th 937, the Supreme Court reversed, and sent the case back to the Court of Appeal to determine (1) whether substantial evidence supported the district's decision to invoke the rules governing supplemental review, and (2) whether its addendum to the negative declaration followed those rules.

On the first issue – whether the original environmental document (in this case, the 2006 mitigated negative declaration) retained some informational value relevant to the 2011 modifications to the plan – the Court of Appeal held that the "substantial evidence" test applied. Under this test, if some credible evidence showed that the 2006 negative declaration still had informational value, then the district's decision to rely on section 21166 would be upheld. The Court concluded that the 2006 negative declaration remained relevant because some aspects of the 2006 plan remained unchanged, and because several mitigation measures adopted at that time continued to be relevant to implementation of the plan.

On the second issue, the Guidelines provide that whether a subsequent EIR must be prepared turns on whether "major revisions" of the previous EIR or negative declaration are required. Whether "major revisions" are required turns on whether the underlying document to be supplemented was an EIR or negative declaration. In particular, "once we have determined that the subsequent review provisions apply to a project approved through a negative declaration, our application of the standard of review changes and is less deferential to the agency. It is less deferential because a negative declaration requires a major revision—i.e., a subsequent EIR or mitigated negative declaration—whenever there is substantial evidence to support a fair argument that proposed changes 'might have a significant environmental impact not previously considered in connection with the project as originally approved.' [Citation.]" Thus, "an agency's determination that a major revision to a negative declaration is not required will necessarily lack substantial evidence when a fair argument exists that the project might have a previously unstudied significant environmental impact." (Footnote omitted.)

The Court concluded that the record contained substantial evidence that the planned removal of a portion of the gardens surrounding Building 20 would have a negative aesthetic impact. That evidence consisted of statements by faculty and students stating that the garden was a refuge from the campus' generally sterile environs. Other evidence suggested the Building 20 demolition might harm a nearby Dawn Redwood tree. The comments addressed the aesthetic impact of removing a portion of one of the few remaining green spaces on campus, as opposed to

impacts on "community character" or social concerns. The fact that the gardens to be removed were a small fraction of landscaping and open space on the campus was immaterial in light of evidence suggesting that these gardens were a unique sanctuary. The district therefore erred in relying on an addendum. The Court ordered directed the district to prepare a subsequent EIR or, if the project's possible impacts could be reduced to insignificance, a subsequent mitigated negative declaration.

The Friends argued that CEQA Guidelines section 15164, which authorizes the use of addenda, is unlawful because section 21166 does not refer to addenda. The Court declined to consider this argument in view of its ruling that the addendum in this case was inappropriate in light of the aesthetic impacts of removing a portion of the garden.

Justice Dondero filed a concurring opinion, emphasizing that under section 15164, an addendum can be used only for "minor technical changes or alterations" to a previously approved project. In Justice Dondero's view, the decision to "demolish[] a major building and transform[] into a parking lot an important garden space with unique trees and vegetation" – neither of which had been considered in the original negative declaration – were too major to be addressed in an addendum; rather, the district had to prepare a subsequent negative declaration (if no substantial evidence indicated that the project changes might have significant aesthetic or other impacts) or a subsequent EIR.

The Ninth Circuit Court of Appeals dismissed challenges brought by the State of Arizona to a Federal Implementation Plan ("FIP") promulgated under the Clean Air Act by the EPA*Arizona ex rel Darwin v. Environmental Protection Agency*, 852 F.3d 1148 (9th Cir. 2017).

In 2011, Arizona submitted to the EPA a State Implementation Plan ("SIP") to reduce emissions from various industrial sources within the state. The SIP consisted of Best Available Retrofit Technology analyses and determinations for multiple stationary sources of emissions (including a cement kiln and several copper smelters operated by petitioners), Reasonable Progress Goal ("RPG") analyses and determinations, and long-term strategies for making reasonable progress toward meeting visibility goals. The EPA rejected these portions of Arizona's SIP, claiming them to be inadequate and noncompliant with the Clean Air Act, and issued a Federal Implementation Plan ("FIP"), after a notice-and-comment period, to correct the SIP. The final FIP promulgated a set of numerical goals with respect to the RPGs, imposed an emissions control efficiency for selective non-catalytic reduction ("SNCR") technology, established limits for emissions of particulates as well as nitrogen and sulfur oxides, and eliminated the affirmative defense to excess emissions due to malfunctions that had previously appeared in the EPA's proposed FIP.

The State of Arizona (among others) petitioned the Ninth Circuit to review the final FIP, claiming the issuance of the FIP to replace portions of Arizona's SIP constituted invalid agency action. Specifically, the petitioners claimed: (1) the EPA's RPGs were arbitrary and capricious because Arizona residents would have to pay hundreds of millions of dollars to improve air visibility by only a trivial amount; (2) the EPA overstepped its authority in imposing SNCR controls on the cement kilns because, in conducting a balancing test to decide whether to implement a RPG control, it placed too little emphasis on the potential improvement in visibility through the use of SNCR controls, which petitioners claimed would be marginal; (3) the EPA's limits on particulate, nitrogen oxide, and sulfur oxide emissions were arbitrary or capricious

because the copper smelters at issue were already in compliance with the limits imposed by the final FIP; and (4) the EPA's decision to eliminate from the FIP the proposed affirmative defense to excess emissions due to malfunctions was procedurally and substantively invalid because the EPA spontaneously and unilaterally removed the defense.

The Ninth Circuit held, because petitioners had not presented to the EPA their challenges to the EPA's numerical RPGs, or to the EPA's elimination of the affirmative defense of malfunction, as required under 42 U.S.C. § 7607, the petitioners were barred from judicially challenging those portions of the FIP. With respect to the EPA's imposition of SNCR controls on the cement kiln, the Court held the EPA's use of a model to calculate the benefits of SNCR controls was a permissible exercise of agency discretion and did not constitute an arbitrary or capricious act. On petitioners' challenge to the EPA's limits on particulate and oxide emissions, the Court found the limits to be reasoned, deliberate, and sensitive to data. The Court noted, while the copper smelters were currently in compliance with the limit, nothing would have prevented them from exceeding that limit in the future. As such, the Court dismissed each of petitioners' claims.

The EPA did not violate the rulemaking process under the Clean Air Act when it adopted a rule for emissions for the Navajo generating station. *The Hopi Tribe v. U.S. EPA,* 851 F. 3d 957 (9th Cir. 2017).

Under the Clean Air Act ("CAA"), the EPA has authority to directly administer haze reduction efforts on tribal lands through federal implementation plans adopted through a formal rulemaking process. In 2013, the EPA proposed a rule to eliminate emissions from the conventional coal-fired Navajo Generating Station ("Station") by closing the Station on or before 2044. The rule targeted the Station because its emissions contribute to haze that impacts views of the Grand Canyon. The Station is fueled by coal from the Kayenta Mine, located on Hopi Tribe ("Tribe") lands, and royalties from coal provide significant revenue for the Tribe. The Station employs nearly 70% of the Tribe's working members. The Tribe opposed the rule and sought to avoid closure of the Station, in part through its participation in the comment periods convened by the EPA throughout the extended rulemaking process, and through informal meetings with EPA personnel for years prior to the adoption of the rule.

In connection with the EPA's notice of proposed rulemaking, a Technical Working Group ("TWG") convened by the Department of the Interior ("Interior") developed the substance of the proposed rule. The TWG was composed of a group of stakeholders led by the utilities that operate the Station, but did not include the Tribe.

In order to establish the baseline expectation for a reduction in emissions under the CAA, the EPA must identify the "best available retrofit technology" ("BART"). The EPA must consider and analyze five factors when determining BART. 42 U.S.C. § 7491(g)(2). Once BART is established, the five factors need not be analyzed as to a proposed rule if the EPA finds the proposed rule achieves "greater reasonable progress" in reducing emissions, which is referred to as a "BART alternative." 40 C.F.R. § 51.308(e)(2). The EPA analyzed the five factors to establish BART for the Station, and then found the content of the proposed and final versions of the rule for the Station was a BART alternative.

The Tribe filed suit against the EPA, asserting the Tribe's exclusion from the TWG violated the trust relationship between the United States and Indian tribes. The Tribe also alleged the EPA failed to analyze the TWG's proposed rule under each of the five factors before adopting it as the final rule.

First, the Court held because the TWG was convened by Interior, and the Tribe failed to name Interior as a party, the TWG participation issue was not properly presented. The Court further held the Tribe's informal meetings, and notice of and participation in the EPA's formal comment period, were sufficient to show no violation of the trust relationship. Second, the Court held the CAA does not require analysis of the BART factors when evaluating a BART alternative. In summary, the *Hopi Tribe* case reaffirms the necessity of naming as a party to a suit each agency against which a claim is made, and the application of the regulations governing the analysis of the BART factors under the CAA.

The Third District Court of Appeal held the State Air Resources Board had the authority to implement an auction system to distribute emissions allowances, and the auctions system was not a tax. *Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 216 Cal. Rptr. 3d 694 (Cal. Ct. App. 2017).

A simple majority vote of both legislative houses passed the California Global Warming Solutions Act of 2006 (the "Act"), which requires covered entities to reduce greenhouse gas ("GHG") emissions. The Act designated the State Air Resources Board (the "Board") with monitoring and regulating GHG emissions, and the Board implemented a "cap-and-trade" program, imposing a cap on the aggregate GHG emissions covered entities may emit. The Board issues a certain number of allowances (an authorization to emit one metric ton of carbon dioxide equivalent of GHGs), and the total value of allowances is equal to the amount of the cap. Allowances are tradable. Covered entities may buy, bank, or sell allowances to comply with the Act. The Board distributes some allowances for free, retains some, and auctions the rest.

The California Chamber of Commerce (among others) sued the Board, alleging the auctions exceeded the Board's authority under the Act, and the auctions were a tax that violated the two-thirds supermajority requirement of the California Constitution. The trial court rejected both claims, and the plaintiffs appealed.

The Third District Court of Appeal affirmed. The court found the Legislature vested the Board with extremely broad discretion to create a system to distribute allowances. The absence of a reference to auctions did not mean the auctions exceeded the Board's authority. Additionally, the Legislature knew the Board's system of distribution might include auctions, and the Lesiglature did not direct the Board to distribute allowances to covered entities for free. Lastly, the Legislature ratified the auctions when it subsequently enacted four bills allocating the revenues from the auctions. Through broad statutory language, legislative history, and subsequent legislative action, the court found the Board did not exceed its authority by selling allowances at auctions.

On the second issue, the court held the auction system was not an unconstitutional tax. First, purchasing allowances at auction is a voluntary business decision, whereas taxes are

compulsory. A covered entity may comply with the Act by reducing its emissions, purchasing allowances from third parties, using banked allowances from previous years, and purchasing or earning emissions credits from voluntary reductions in emissions outside of capped sectors. Moreover, the Act contemplates some businesses may choose not to comply and leave California.

Second, allowances convey a benefit—the privilege to pollute—whereas taxes are valueless to the taxpayer. Covered entities may use, bank, or sell allowances, each of which returns value. Because the purchase of allowances is voluntary and the purchaser receives a thing of value, the court held the auctions were not a tax.

The First District Court of Appeal reversed the trial court's dismissal and held that air quality districts can be sued directly under the California Environmental Quality Act (CEQA). *Friends of Outlet Creek v. Mendocino County (2017)* A148508

In 2002, the County granted a land use permit for asphalt production at a site of an aggregate operation after conducting an environmental review under CEQA and issuing a mitigated negative declaration. In 2009, the County updated its General Plan and changed the land use designation of the site to industrial. The County prepared and environmental impact report (EIR) under CEQA. In 2010, consistent with the updated General Plan, the County approved zoning changes to allow industrial uses at the site. The site was used for aggregate processing, concrete, and hot mix asphalt plant. Over the years, there had been little asphalt production at the site and a lot of the equipment has been removed. When Girst Creek acquired the site, it continued the operation with only aggregate and concrete production. In 2015, Girst Creek proposed to resume asphalt production at the site. In 2015, the County issued a resolution stating that the proposed use was not a "new or changed" industrial use under the zoning ordinance. Girst Creek applied to the Mendocino County Air Quality Management District (District) for an Authority to Construct. The District determined that a new EIR was not required and approved the Authority to Construct. Friends of Outlet Creek (Friends), an environmental group filed an administrative appeal to the District's hearing board. The District's determination that further CEQA review was not required was based on the County's 2009 EIR and approval of an updated General Plan, the County's rezoning of the site to industrial, and the 2002 MND with the issuance of land use permit for asphalt production at the site. The hearing board denied the appeal.

Friends sued the District challenging the issuance of the Authority to Construct. The first cause of action alleged that the District failed to comply with CEQA by acting without a new environmental impact analysis, and the second cause of action alleged the District did not follow its own regulations. The trial court dismissed the suit and held that Friends can only sue the District in an administrative mandamus proceeding under the Health and Safety Code section 40864, which cannot be used to make CEQA claims. Friends argued that air quality districts can be sued directly under CEQA.

The Court of Appeal reversed the trial court's judgement finding that there is established precedent allowing CEQA claims against air quality districts. The Court of Appeals held that Friends can sue the District directly under CEQA and its petition was not deficient for failure to invoke the Health and Safety Code section 40864. The court further noted that even under CEQA, the lawsuit against the District must proceed as an administrative mandamus proceeding under controlling procedural

law. The court also explained that Friends' relief in this lawsuit is limited to the action taken by the District, which was the issuance of an Authority to Construct. Lastly, the court concluded that Friends cannot challenge the County's actions, and any challenge to the County's land use decisions and adequacy of the County's EIR must proceed against the County and not the District.

Federal Regulatory Updates

Agency Administration

Consolidated Rules of Practice. In January 2017, the U.S. Environmental Protection Agency (EPA) provided notice of a final rule revising its Consolidated Rules of Practice, which governs the administrative assessment of civil penalties and various other administrative adjudicatory hearings. The revisions would simplify and streamline the process, as well as make clerical corrections. 82 Fed. Reg. 2230.

Evaluation of Existing Regulations. In April 2017, the EPA requested input on regulations that may be appropriate for repeal, replacement, or modification. The request is in response to Executive Order 13777, "Enforcing the Regulatory Reform Agenda." 82 Fed. Reg. 17793.

Federal Assistance Nondiscrimination. In January 2017, the EPA provided a notice of withdrawal of its proposed rule concerning nondiscrimination in programs or activities receiving federal assistance from the EPA. 82 Fed. Reg. 2294.

Rules of Practice and Procedure. In April 2017, the California Public Utilities Commission (CPUC) provided notice of proposed amendments to its Rules of Practice and Procedure. The amendments would: (i) implement Senate Bill 215 statutory amendments; (ii) reflect changes in the CPUC's administration; and (iii) streamline and provide greater clarity for certain procedures. Cal. Reg. Notice Register, Vol. No. 20-Z, p. 770.

Air Quality

California State Nonroad Engine Pollution Control Standards. In January 2017, the EPA:

1. Provided a notice of decision granting the California Air Resources Board's (CARB) request for an authorization of amendments to its Commercial Harbor Craft regulations. The amendments would: (i) subject diesel-fueled engines on certain vessels to the in-use engine emission requirements of the original regulations; (ii) allow certain certified off-road engines to be used as auxiliary or propulsion engines; and (iii) clarify requirements and address certain issues. 82 Fed. Reg. 6500.
2. Provided a notice of decision granting CARB's request for authorization of amendments concerning its Airborne Toxic Control Measure for In-Use Diesel-Fueled Transport Refrigeration Units (TRU) and TRU Generator Sets and Facilities where TRUs Operate. 82 Fed. Reg. 6525.

3. Provided a notice of decision granting CARB's request for authorization of amendments to its Off-Highway Recreation Vehicle (OHRV) regulation. The amendments establish new evaporative emission standards and test procedures for 2018 and subsequent model year OHRVs. 82 Fed. Reg. 6540.

Commercial and Industrial Solid Waste Incineration Units. In January 2017, the EPA provided notice of a proposed rule for a federal plan concerning existing commercial and industrial incineration units. The federal plan applies to states that do not have an approved state plan to implement emission guidelines in place by the effective date of the federal plan. 82 Fed. Reg. 3554.

Cross-State Air Pollution Rule Allowances. In February 2017, the EPA provided notice of emission allowance allocations to certain units under the new unit set-aside provisions of the Cross-State Air Pollution Rule Federal Implementation Plans (FIP), and posted spreadsheets showing same. 82 Fed. Reg. 10712.

Equivalent Method. In May 2017, the EPA provided a notice of designation of a new equivalent method for monitoring ambient air quality for measuring concentrations of nitrogen dioxide (NO_2). 82 Fed. Reg. 21995.

Federal Implementation Plan. In March 2017, the EPA provided notice of a final rule concerning a limited FIP to apply to the North Coast Unified Air Quality Management District (AQMD) of California. The FIP will implement provisions to regulate fine particulate matter ($PM_{2.5}$) under the Clean Air Act's (CAA) Prevention of Significant Deterioration (PSD) program. This action is a result of two previously issued findings of failure to submit a State Implementation Plan (SIP) addressing these issues. 92 Fed. Reg. 14608.

Formaldehyde Emission Standards. In May 2017, the EPA provided notice of a direct final rule to extend the compliance dates and transitional period for the December 12, 2016 final rule relating to formaldehyde emission standards for composite wood products. 82 Fed. Reg. 23735. The EPA provided notice of a proposed rule concerning same. 82 Fed. Reg. 23769.

Guideline on Air Quality Models. In January 2017, the EPA provided notice of a final rule concerning revisions to the "Guideline on Air Quality Models." The revisions would enhance the AERMOD dispersion modeling system and incorporate approaches to address ozone and fine particulate matter. 82 Fed. Reg. 5182.

Motor Vehicle Pollution Control Standards. In January 2017, the EPA provided a notice of decision granting CARB's request for a waiver of CAA preemption for its On-Highway Heavy-Duty Vehicle In-Use Compliance program. The EPA also confirmed that CARB's amendments to its 2007 and Subsequent Model Year On-Highway Heavy-Duty Engines and Vehicle regulation and Truck Idling requirements are within the scope of previous waivers issued by the EPA. 82 Fed. Reg. 4867.

National Ambient Air Quality Standards (NAAQS). In January 2017, the EPA provided a notice of availability, and requested comments on, preliminary interstate ozone transport modeling

data and associated methods concerning the 2015 ozone NAAQS. The information will assist states in developing SIPs to address CAA requirements. 82 Fed. Reg. 1733.
In February 2017, the EPA provided a notice of availability of "Review of the Primary National Ambient Air Quality Standards for Sulfur Oxides: Risk and Exposure Assessment Planning Document." The plan includes considerations and the proposed approach for conducting quantitative analyses of sulfur dioxide (SO_2) exposures and health risks. 82 Fed. Reg. 11356.
In March 2017, the EPA:

1. Provided notice of a final rule to approve a SIP revision applicable to the Owens Valley coarse particulate matter (PM_{10}) nonattainment area. The revision was triggered by a 2007 finding that the Owens Valley PM_{10} nonattainment area had failed to meet its deadline to attain the PM_{10} NAAQS. 82 Fed. Reg. 13390.
2. Provided a notice of determination that the Imperial County moderate nonattainment area has attained the 2006 24-hour $PM_{2.5}$ NAAQS. As a result, certain requirements of the Imperial County Air Pollution Control District (APCD) shall be suspended. The area remains nonattainment for the 2012 annual $PM_{2.5}$ NAAQS. 82 Fed. Reg. 13392 and 13413.

In April 2017, the EPA provided a notice of availability of the final document titled, "Policy Assessment for the Review of the Primary National Ambient Air Quality Standards for Oxides of Nitrogen (NO_2 PA)." 82 Fed. Reg. 17948.
In May 2017, the EPA provided notice of final determinations of attainment by the attainment date for areas currently classified as "Moderate" for the 2006 24-hour $PM_{2.5}$ NAAQS. Specifically, Chico, Imperial County, Sacramento and the San Francisco Bay Area have a determination of attainment. 82 Fed. Reg. 21711.

National Emission Standards for Hazardous Air Pollutants (NESHAP). In January 2017, the EPA:

1. Provided notice of a public hearing, and extended comment period, for the NESHAP for the manufacturing of nutritional yeast source category. 82 Fed. Reg. 4232.
2. Provided notice of a final rule revising certain portions of the NESHAP for radon emissions from operating mill tailings. The revisions are in response to what represents available control technology or management practices for this area source category. 82 Fed. Reg. 5142.
3. Provided notice of a final rule concerning the NESHAP for Ferroalloys Production. Specifically, the rule makes amendments regarding monitoring for proper baghouse operation and maintains opacity limit compliance requirements. In addition, the EPA provides notice of a denial of a reconsideration request of the polycyclic aromatic hydrocarbons emission limits for both ferromanganese and silicomanganese production furnaces. 82 Fed. Reg. 5401.

In February 2017, the EPA provided notice of an extended comment period for the proposed rule "National Emission Standards for Hazardous Air Pollutants (NESHAP): Publicly Owned Treatment Works." 82 Fed. Reg. 11334.
In April 2017, the EPA provided notice of a final rule amending the electronic reporting requirements for the NESHAP: Coal- and Oil-Fired Electric Utility Steam Generating Units to

allow for temporary submission of certain reports to correct inadvertent errors. 82 Fed. Reg. 16736.

n-Propyl Bromid (nPB). In January 2017, the EPA provided notice of, and requested comments on, a draft notice of the rationale for granting petitions to add nPB to the list of hazardous air pollutants. The EPA has determined that there is adequate evidence to support a determination that emissions and ambient concentrations of nPB may be anticipated to cause adverse health effects. 82 Fed. Reg. 2354. In March 2017, the EPA provided notice of a 90-day extension to the comment period for same. 82 Fed. Reg. 12589.

Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources. In February 2017, the EPA provided notice of a withdrawal of a direct final rule titled "Revisions to Procedure 2—Quality Assurance Requirements for Particulate Matter Continuous Emission Monitoring Systems at Stationary Sources" due to receipt of an adverse comment. 82 Fed. Reg. 10711.

Protection of Visibility. In January 2017, the EPA provided notice of a final rule concerning revisions to state plan requirements regarding protection of visibility in mandatory Class I federal areas. The revision will continue environmental progress while addressing administrative aspects of the program. 82 Fed. Reg. 3078.

Oil and Gas New Source Performance Standards for Certain Sources. In April 2017, the EPA announced its review of the 2016 Oil and Gas New Source Performance Standards; if necessary, the EPA will initiate proceedings to suspend, revise or rescind it. 82 Fed. Reg. 16331.

State Implementation Plan. In March 2017, the EPA:

1. Provided notice of a proposed rule to approve revisions to the Western Mojave Desert portion of the California SIP. The revisions would approve the initial six-year 15 percent rate of progress demonstration to address requirements for the 1997 8-hour ozone NAAQS. 82 Fed. Reg. 13086.
2. Provided notice of a final rule to approve revisions to the Ventura County APCD portion of the California SIP. The revisions would incorporate a PSD rule to establish a PSD permit program for pre-construction review of certain new and modified major stationary sources in attainment and unclassifiable areas. 82 Fed. Reg. 13243.
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 volatile organic compounds (VOCs) and oxides of nitrogen (NO_X) from passenger vehicles. 82 Fed. Reg. 13280.
4. Provided notice of a final rule to approve revisions to the Yolo-Solano AQMD portion of the California SIP. The revision concerns emissions of VOCs and PM from confined animal facilities. 82 Fed. Reg. 13398.
5. Provided notice of a direct final rule approving revisions to the California SIP concerning state regulations establishing standards and other requirements relating to the control of emissions from new on-road and new in-use off-road vehicles and engines. 82 Fed. Reg. 14446. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 14498.

6. Provided notice of a proposed rule approving revisions to the San Joaquin Valley Unified APCD portion of the California SIP. The revision concerns emissions of NO_X and particulate matter from boilers, steam generators, and process heaters. 82 Fed. Reg. 14496.

In April 2017, the EPA provided notice of a direct final rule to approve a revision to the Butte County AQMD portion of the California SIP. The revision concerns procedures to create emission reduction credits from the reduction of VOCs, NO_X, oxides of sulfur, particulate matter, and carbon monoxide emissions due to the permanent curtailment of burning rice straw. 82 Fed. Reg. 17380. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 17405.
In May 2017, the EPA provided notice of a proposed rule to approve revisions to the Eastern Kern APCD and Imperial County APCD portions of the California SIP. The revisions concern certain provisions in the SIP related to affirmative defenses applicable to excess emissions during startup, shutdown, and malfunction events. 82 Fed. Reg. 20295.

Withdrawal of Proposed Rules. In April 2017, the EPA provided a notice of withdrawal of proposed rules for: (i) a federal plan to implement the GHG emission guidelines for existing fossil fuel-fired electric generating units, (ii) model trading rules for implementation of the emission guidelines, (iii) amendments to the CAA framework regulations, and (iv) design details of the Clean Energy Incentive Program. 82 Fed. Reg. 16144.

Climate Change

Agricultural Animal Facilities. In April 2017, the California Air Resources Board (CARB) acknowledged its receipt of a petition concerning greenhouse gas emissions from large agricultural animal facilities. Based on the available information, the petition was denied with respect to the suggested amendment of the Cap-and-Trade Regulation and granted with respect to the continued implementation of the Short-Lived Climate Pollutant Strategy. Cal. Reg. Notice Register 2017, Vol. No. 15-Z, p. 550.

Carbon Pollution Emission Guidelines. In January 2017, the EPA provided notice of a final action denying petitions for reconsideration and administrative stay of the Emission Guidelines for Greenhouse Gas Emissions and Compliance Times for Electric Utility Generating Units. The EPA deferred action on certain petitions that raised biomass and waste-to-energy. 82 Fed. Reg. 4864.

Model Year 2022-2025 Light Duty Vehicles. In March 2017, the EPA and the Department of Transportation's (DOT) National Highway Traffic Safety Administration (NHTSA) provided a notice of intent to reconsider the final determination of the mid-term evaluation of greenhouse gas standards for model year 2022-2025 light-duty vehicles. The reconsideration will be in coordination with the DOT NHTSA's process regarding corporate average fuel economy standards. 82 Fed. Reg. 14671.

Stationary Sources: Electric Generating Units. In April 2017, the EPA announced its review of the Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Stationary Sources: Electric Generating Units; if necessary, the EPA will initiate proceedings to suspend, revise or rescind it. 82 Fed. Reg. 16330.

U.S. Greenhouse Gas Emissions and Sinks: 1990-2015. In February 2017, the EPA provided a notice of availability, and requested comments on, the draft inventory of U.S. greenhouse gas emissions and sinks: 1990-2015. 82 Fed. Reg. 10767.

Endangered Species

Cascades Frog. In March 2017, the California Fish and Game Commission (Commission) acknowledged its receipt of a petition to list the Cascades frog as a threatened or endangered species under the California Endangered Species Act. The petition was transmitted to the California Department of Fish and Wildlife (CDFW) for review. An evaluation and recommendation concerning same was expected at the Commission's June 21-22, 2017 meeting. Cal. Reg. Notice Register 2017, Vol. N. 13-Z, p. 479.

Flat-Tailed Horned Lizard. In February 2017, the Commission provided notice of findings in response to a petition requesting the flat-tailed horned lizard be added to the list of threatened or endangered species under the California Endangered Species Act. The Commission found that listing the species as threatened is not warranted at this time. The Commission adopted the findings at its February 8, 2017 meeting. Cal. Reg. Notice Register 2017, Vol. No. 8-Z, p. 250.

Foothill Yellow-Legged Frog. In January 2017, the Commission acknowledged its receipt of a petition to list the foothill yellow-legged frog as threatened under the California Endangered Species Act. CDFW's evaluation and recommendation relating to the petition was expected to be received by the Commission in April 2017. Cal. Reg. Notice Register 2017, Vol. No. 3-Z, p. 46.

Lassics Lupine. In February 2017, the Commission provided notice of acceptance of a petition to list the Lassics lupine as an endangered species under the California Endangered Species Act. Within one year, CDFW will submit a written report indicating whether the petitioned action is warranted. Cal. Reg. Notice Register 2017, Vol. No. 8-Z, p. 258.

Desert Tortoise. In April 2017, the U.S. Fish and Wildlife Service (USFWS) provided a notice of findings on a petition to list the Mojave Population of the Desert Tortoise as endangered under the federal Endangered Species Act. Based on a review of the petition and sources cited, the USFWS found the petitioned action is not warranted at this time. 82 Fed. Reg. 18410.

Hidden Lake Bluecurls. In January 2017, the USFWS provided notice of a proposed rule to remove the Hidden Lake Bluecurls from the Federal List of Endangered and Threatened Plants. The determination is based on a review of the best available information which provides that the threat has been reduced or eliminated. The USFWS is requesting comments on the proposed rule and draft post-delisting monitoring plan concerning same. 82 Fed. Reg. 1296.

Marbled Murrelet. In April 2017, the USFWS provided notice of a 5-year status review for the Marbled murrelet. The review will based on the best scientific and commercial data available, and submission of any new information on the species is requested. 82 Fed. Reg. 18665.

Oregon Silverspot Butterfly. In April 2017, the USFWS provided notice of a 5-year status review for the Oregon silverspot butterfly. The review will based on the best scientific and commercial data available, and submission of any new information on the species is requested. 82 Fed. Reg. 18665.

Hazardous Materials/Wastes

Chemical Risk Evaluation. In January 2017, the EPA provided notice of, and requested comments on, a proposed rule to establish a process for conducting risk evaluations to determine whether a chemical substance presents an unreasonable risk of injury to health or the environment. The EPA proposes that the process be used for the first ten chemical substances to be evaluated. 82 Fed. Reg. 7562. In January 2017, the EPA also provided notice of a February 14, 2017 public hearing concerning same. 82 Fed. Reg. 6545. In March 2017, the EPA provided notice of a reopened comment period concerning the request for information to assist establishment of the scope of risk evaluations under development for ten chemical substances designated for risk evaluation. 82 Fed. Reg. 12589.

Chemical Substances Manufactured or Processed at the Nanoscale. In January 2017, the EPA provided notice of a final rule establishing reporting and recordkeeping requirements for certain chemical substances manufactured or processed at the nanoscale. Specifically, a one-time electronic report of certain information will be required. 82 Fed. Reg. 3641. In May 2017, the EPA provided notice of a delay in the effective date to August 14, 2017 for same. 82 Fed. Reg. 22088. In May 2017, the EPA also provided notice of, and requested comments on, a draft guidance document titled, "Guidance of EPA's Section 8(a) Information Gathering Rule on Nanomaterials in Commerce." The guidance document is in response to questions received on the final rule. 82 Fed. Reg. 22452.

Chlorinated Phosphate Ester Cluster. In April 2017, the EPA acknowledged receipt of, and provided a notice of denial for, a petition requesting that testing be conducted by manufacturers and processors of chlorinated phosphate esters. 82 Fed. Reg. 17601.

Hazardous Ranking System (HRS). In January 2017, the EPA provided notice of a final rule concerning the addition of a subsurface intrusion (SsI) component to the HRS. The SsI component expands the options for those performing work to evaluate threats to public health from releases of hazardous substances, pollutants, or contaminants. 82 Fed. Reg. 2760.

Methylene Chloride and N-Methylpyrrolidone. In January 2017, the EPA provided notice of a proposed rule concerning methylene Chloride and N-methylpyrrolidone (NMP). Specifically, the EPA proposes to: (i) prohibit the manufacture, processing and distribution for paint and coating removal; (ii) require downstream notifications; (iii) require recordkeeping; and (iv) provide certain exemptions for national security. 82 Fed. Reg. 7464.

Natural Gas Processing (NGP) Facilities. In January 2017, the EPA provided notice of a proposed rule to add NGP facilities to the scope of the industrial sectors covered by certain sections

of the reporting requirements of the Emergency Planning and Community Right-to-Know Act and the Pollution Prevention Act. This action would increase the information available to the public regarding chemical waste levels and require the facilities to provide significant release and waste management data of the chemicals to the public. 82 Fed. Reg. 1651. In March 2017, the EPA provided notice of an extended comment period for same. 82 Fed. Reg. 12924.

Prioritization of Chemicals for Risk Evaluation. In January 2017, the EPA provided notice of a proposed rule to establish a risk-based screening process and criteria that would be used to identify chemical substances as either High-Priority Substances for risk evaluation, or Low-Priority Substances for which risk evaluations are not warranted. 82 Fed. Reg. 4825.

Risk Management Program. In January 2017, the EPA provided notice of a final rule regarding amendments to its Risk Management Program regulations. The amendments would revise the accident prevention program requirements, among others, and seek to improve chemical process safety, accident response planning, and public awareness of chemical hazards at regulated sources. 82 Fed. Reg. 4594. In March 2017, the EPA provided notice of a 90-day delay to the effective date of the rule. 82 Fed. Reg. 13968. In April 2017, the EPA provided notice of a further delay to allow time to consider petitions for reconsideration of the final rule and take further regulatory action. 82 Fed. Reg. 16146.

Small Manufacturers and Processors. In May 2017, the EPA provided notice of a reopened comment period concerning revisions to the current size standards for small manufacturers and processors used in connection with reporting regulations under the Toxic Substance Control Act (TSCA). The comment period is being reopened to allow for consideration of feedback received from the Small Business Administration. 82 Fed. Reg. 21542.

Trichloroethylene (TCE). In January 2017, the EPA provided notice of a proposed rule concerning regulations of certain uses under the TSCA for trichloroethylene. The proposed rule would: (i) prohibit the manufacture, processing, and distribution in commerce of TCE for use in vapor degreasing; (ii) prohibit commercial use of TCE in vapor degreasing; (iii) require downstream notification of prohibitions throughout the supply chain; and (iv) require limited recordkeeping. 82 Fed. Reg. 7432. In February 2017, the EPA provided notice of an extended comment period for same. 82 Fed. Reg. 10732.

TSCA Inventory Notification Requirements. In January 2017, the EPA provided notice of a proposed rule to require retrospective electronic notification of chemical substances on the TSCA Inventory that were manufactured for non-exempt commercial purposes during the prior 10 years. The proposed rule is in response to recent requirements for the EPA to designate chemical substances on the TSCA Chemical Substance Inventory as active or inactive in U.S. commerce. 82 Fed. Reg. 4255.

Uniform National Discharge Standards for Vessels of the Armed Forces. In January 2017, the EPA and the Department of Defense provided notice of a final rule regarding the performance standards for 11 discharges incidental to the operation of a vessel of the Armed Forces. Implementation of the standards would reduce adverse environmental impacts and advance development of improved vessel pollution control devices and environmentally sound vessels of

the Armed Forces. 82 Fed. Reg. 3173. In February 2017, the EPA provided notice of a delay in the effective date of the standards due to a Presidential directive entitled "Regulatory Freeze Pending Review." 82 Fed. Reg. 9682.

Unique Identifier. In May 2017, the EPA requested comments on approaches for assigning and applying unique identifiers as required under the Toxic Substance Control Act whenever it approves a confidential business information claim for the specific chemical identity of a chemical substance. The EPA provided notice of a public meeting regarding same. 82 Fed. Reg. 21386.

Uranium and Thorium Mill Tailings. In January 2017, the EPA provided notice of a proposed rule concerning health and environmental protection standards for uranium and thorium mill tailings. The standards would be applicable to byproduct materials produced by uranium in-situ recovery (ISR). 82 Fed. Reg. 7400.

Water Resources