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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 June 1 through September 30, 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 Danielle K. Morone, Michael Haberkorn, Sabrina Teller, Stephanie L. Safdi, Michael Sands, and Anthony D. Todero for their contributions to this issue of the Update. – Cyndy Day-Wilson.

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STATE OF CALIFORNIA SUMMARIES

AGENCY ADMINISTRATION

Recent Court Rulings
No summaries or updates this quarter.

Legislative Developments
No summaries or updates this quarter.

Regulatory Updates

Quorum Definition. In August 2017, the Air Resources Board provided notice of proposed amendments to the definition of quorum in California Code of Regulations, title 17, section 60003. The proposed amendments would clarify that only voting members count toward the quorum. Cal. Reg. Notice Register 2017, Vol. No. 34-Z, p. 1275.

Unified Program State Surcharge. In June 2017, the Environmental Protection Agency provided notice of adjustments to the Unified Program state surcharge. The adjustments include a new assessment for refineries and increases in the existing Oversight state surcharge and Underground Storage Tank Program surcharge. Cal. Reg. Notice Register 2017, Vol. No. 22-Z, p. 848.

Regulatory Agenda. In August 2017, the Environmental Protection Agency (EPA) provided a notice of availability of its semiannual regulatory agenda published online for spring 2017. The document includes changes in regulations and review of regulations with small business impacts under section 610 of the Regulatory Flexibility Act. 82 Fed. Reg. 40347.

Smart Sectors Program. In September 2017, the EPA provided notice of the Smart Sectors program in the Office of Policy. The program will re-examine how the EPA engages with industry in order to reduce unnecessary regulatory burden, create certainty and predictability, and improve the ability to conduct long-term regulatory planning. 82 Fed. Reg. 44783.

AIR QUALITY

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Aftermarket Catalytic Converters. In August 2017, the Air Resources Board provided notice of a September 28, 2017 public hearing to consider proposed amendments to "California Evaluation Procedures for New Aftermarket Catalytic Converters." The amendments include

more stringent standards than are now in place. Cal. Reg. Notice Register 2017, Vol. No. 32-Z, p. 1209.

Portable Engines. In September 2017, the Air Resources Board provided notice of a public hearing to consider amendments to the "Airborne Toxic Control Measure for Diesel Particulate Matter from Portable Engines Rated at 50 Horsepower or Greater" and the "Portable Engine and Equipment Registration" program. Cal. Reg. Notice Register 2017, Vol. No. 39-Z, p. 1454.

Air Pollution Control Cost Manual. In July 2017, the EPA provided a notice of availability of, and requested comments on, two updated chapters of the EPA Air Pollution Control Cost Manual. The two chapters cover control measures for volatile organic compound (VOC) emissions. 82 Fed. Reg. 33903.

Ambient Air Monitoring Reference and Equivalent Method. In June 2017, the EPA provided notice of one new reference method for measuring concentrations of carbon monoxide (CO) and one new equivalent method for measuring concentrations of nitrogen dioxide (NO_2) in ambient air. 82 Fed. Reg. 27816.

In September 2017, the EPA provided notice of three new reference methods for measuring concentrations of particulate matter ($PM_{2.5}$, PM_{10}, and $PM_{10-2.5}$) in the ambient air. 82 Fed. Reg. 44612.

Applicability Determinations, Alternative Monitoring Decisions, Regulatory Interpretations. In August 2017, the EPA provided a notice of availability of Applicability Determinations, Alternative Monitoring Decisions, and Regulatory Interpretations that the EPA has made under the New Source Performance Standards (NSPS), the National Emissions Standards for Hazardous Air Pollutants (NESHAP), and/or the Stratospheric Ozone Protection Program. 82 Fed. Reg. 36394.

Cross-State Air Pollution Rule (CSAPR) Allowances. In June 2017, the EPA provided a notice of data availability on emission allowance allocations to certain units under the CSAPR. The data includes preliminary calculations for the first round of allocations of allowances from the CSAPR new unit set-asides for the 2017 control periods. 82 Fed. Reg. 28243.

Formaldehyde Emission Standards for Composite Wood Products. In July 2017, the EPA provided notice of a direct final rule withdrawing the extended compliance dates and California Air Resources Board Third Party Certifier transitional period originally published in the Toxics Substance Control Act Title VI formaldehyde emission standards for composite wood products. The withdrawal is based on the receipt of adverse comments on same. 82 Fed. Reg. 31267.

In July 2017, the EPA also provided notice of a direct final rule to amend the final rule concerning formaldehyde emissions standards for composite wood products. The amendment will allow compliant composite wood products and finished goods that contain same to be labeled as Toxic Substances Control Act Title VI compliant. 82 Fed. Reg. 31922. The EPA provided notice of a proposed rule concerning same. 82 Fed. Reg. 31932.

In September 2017, the EPA provided notice of a final rule extending certain compliance dates for the formaldehyde emission standards for composite wood products. The extended dates will allow flexibility for regulated entities, reduce compliance burdens and help prevent disruption to supply chains. 82 Fed. Reg. 44533.

n-Propyl Bromide. In June 2017, the EPA provided notice of an extended comment period, to October 1, 2017, on a draft rationale for granting petitions to add n-propyl bromide to the list of hazardous air pollutants under the Clean Air Act. 82 Fed. Reg. 26091.

National Ambient Air Quality Standards (NAAQS). In June 2017, the EPA:

1. Provided notice of a final rule approving State Implementation Plan (SIP) revisions to provide attainment of the 1997 8-hour ozone NAAQS in the Coachella Valley nonattainment area. Specifically, the EPA is approving the reasonably available control measures, transportation control strategies and measures, rate of progress and reasonable further progress demonstrations, attainment demonstrations and vehicle miles traveled offset demonstrations. 82 Fed. Reg. 26854.
2. Provided notice of an extended deadline, to October 1, 2018, for promulgating initial area designations for the 2015 ozone NAAQS. 82 Fed. Reg. 29246.
3. Provided a notice of adequacy for the motor vehicle emission budgets for ozone for the years 2018, 2021, 2024, 2027, 2030 and 2031 in the San Joaquin Valley "2016 Plan for the 2008 8-Hour Ozone Standards." These budgets must be used for future transportation conformity determinations. 82 Fed. Reg. 29547.

In July 2017, the EPA provided notice of a proposed rule to retain the current standards for the primary NAAQS for NO_2. The proposed rule follows the EPA's review of the air quality criteria addressing human health effects of oxides of nitrogen and the primary NAAQS for NO_2. 82 Fed. Reg. 34792.

In August 2017, the EPA provided a notice of withdrawal of an extended deadline for promulgating initial area designations for the 2015 ozone NAAQS. As a result, the 2-year deadline for promulgating designations provided in the Clean Air Act applies. 82 Fed. Reg. 37318.

In September 2017, the EPA provided a notice of availability, and requested comments on, responses to certain state designation recommendations for the 2010 sulfur dioxide primary NAAQS. The responses include EPA's intended designation for the affected areas. 82 Fed. Reg. 41903.

In September 2017, the EPA also provided a notice of availability, and requested comments on, two draft documents titled, "Risk and Exposure Assessment for the Review of the Primary National Ambient Air Quality Standard for Sulfur Oxides, External Review Draft" and "Policy Assessment for the Review of the Primary National Ambient Air Quality Standard for Sulfur Dioxides, External Review Draft." The documents were drafted as part of the review of the primary NAAQS for Sulfur Dioxide. 82 Fed. Reg. 43756.

National Emissions Standards for Hazardous Air Pollutants (NESHAP). In June 2017, the EPA provided notice of a direct final rule to amend the NESHAP from the Portland Cement Manufacturing Industry. The rule provides an alternative for sources that would otherwise be required to use a hydrogen chloride continuous emissions monitoring system to demonstrate compliance with the HCI emissions limit. 82 Fed. Reg. 28562. In August 2017, the EPA requested comments, and provided notice of a final rule regarding same. 82 Fed. Reg. 39551, 39671.

In July 2017, the EPA provided notice of a final rule to amend the NESHAP for flame attenuation lines in the wool fiberglass manufacturing industry. Specifically, the emission limits compliance date has been extended to allow the EPA to review corrected source emissions data. 82 Fed. Reg. 34858. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 34910.
In August 2017, the EPA:

1. Provided notice of a proposed rule to amend the NESHAP for Off-Site Waste and Recovery Operations. The proposed amendment would address an issue related to monitoring pressure relief devices on containers. 82 Fed. Reg. 36713.
2. Provided notice of, and requested comments on, a proposed rule concerning the NESHAP for Manufacture of Amino/Phenolic Resins. Specifically, the EPA is reconsidering the final rule in response to petitions for reconsideration on issues related to the maximum achievable control technology standards for continuous process vents at existing affected sources. 82 Fed. Reg. 40103.
3. Provided notice of a proposed rule concerning the NESHAP for Wool Fiberglass Manufacturing source category. The amendments include, but are not limited to: (i) re-adoption of existing emission limits for formaldehyde, (ii) establishing emission limits for methanol, and (iii) establishing work practice standards for phenol emissions from bonded rotary spin lines at wool fiberglass manufacturing facilities. 82 Fed. Reg. 40970.

In September 2017, the EPA provided notice of a final rule concerning amendments to the NESHAP for Phosphoric Acid Manufacturing and Phosphate Fertilizer Production source categories. The amendments are in response to petitions for reconsideration and include revisions to certain compliance dates and monitoring requirements for low-energy absorbers. 82 Fed. Reg. 45193.

Oil and Gas Sector: Emission Standards for Certain Sources. In June 2017, the EPA provided a notice of reconsideration and partial stay of a final rule titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources." Specifically, the reconsideration concerns well site pneumatic pump standards and the requirements for certification by a professional engineer. The rule requirements will by stayed for three months pending reconsideration. 82 Fed. Reg. 25730. Later that month, the EPA provided notice of a proposed rule to stay this action for two years to allow it time to propose, take public comment, and issue a final action on the issues concerning the specific requirements in which reconsideration has been granted. 82 Fed. Reg. 27641, 27645.

Outer Continental Shelf (OCS) Air Regulations. In September 2017, the EPA provided notice of a final rule updating the OCS Air Regulations. The updates would regulate emissions from

OCS sources in accordance with the requirements onshore, specifically the Santa Barbara and Ventura County Air Pollution Control Districts (APCDs). 82 Fed. Reg. 43491.

Procedure 2. In August 2017, the EPA provided notice of a final rule revising Procedure 2 quality assurance/quality control procedures for particulate matter continuous emission monitoring systems. The revisions establish consistent requirements for ensuring and assessing the quality of particulate matter data measured that meet certain initial acceptance requirements. 82 Fed. Reg. 37822.

Protection of Stratospheric Ozone. In July 2017, the EPA provided a determination of acceptability expanding the list of acceptable substitutes under the EPA's Significant New Alternatives Policy program for use in the refrigeration and air conditioning sector and the cleaning solvents sector. 82 Fed. Reg. 33809.

Renewable Fuel Standard Program. In July 2017, the EPA provided notice of a proposed rule concerning the annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in 2018. The EPA also proposes the applicable volume of biomass-based diesel for 2019. 82 Fed. Reg. 34206.

Risk Management Program Amendments. In June 2017, the EPA provided notice of a 20-month delay for the effective date of the Risk Management Program Amendments under the Clean Air Act. The additional time will allow the EPA to consider petitions concerning same and take further regulatory action as needed. 82 Fed. Reg. 27133.

State Implementation Plans (SIP). In June 2017, the EPA:

1. Provided notice of a proposed rule to approve revisions to the South Coast Air Quality Management District (AQMD) portion of the California SIP. The revisions concern emissions of oxides of nitrogen (NO_X) from facilities that emit four or more tons per year of NOx or oxides of sulfur (SO_X). 82 Fed. Reg. 25996.
2. Provided notice of a final rule approving revisions to the Imperial County APCD portion of the California SIP. The revisions concern emissions of VOCs and particulate matter from large confined animal facilities. 82 Fed. Reg. 26594.
3. Provided notice of, and requested comments on, a proposed conditional approval of one rule concerning the Imperial County APCD portion of the California SIP. The rule updates and revises the APCD's New Source Review permitting program for new and modified sources of air pollution. 82 Fed. Reg. 26883. The EPA provided notice of a final rule concerning same. 82 Fed. Reg. 27125.
4. Provided notice of a proposed rule to approve revisions to the South Coast AQMD portion of the California SIP. The revisions concern the demonstration of Reasonably Available Control Technology requirements for the 2008 8-hour ozone NAAQS in the South Coast Air Basin and Coachella Valley ozone nonattainment areas. 82 Fed. Reg. 27451.

5. Provided notice of a proposed rule to approve revisions to the Placer County APCD portion of the California SIP. The revisions concern the demonstration regarding Reasonably Available Control Technology requirements for the 1997 and 2008 8-hour ozone standard. 82 Fed. Reg. 27456.
6. Provided notice of a direct final rule to approve revisions to the Mojave Desert AQMD, Northern Sierra AQMD, and San Diego County APCD portions of the California SIP. The revisions concern aerospace assembly, rework and component manufacturing operations; emissions statements and recordkeeping; and definitions. 82 Fed. Reg. 28240. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 28292.
7. Provided notice of a direct final rule to approve revisions to the Great Basin Unified APCD and the Town of Mammoth Lakes portion of the California SIP. The revisions concern emissions of particulate matter from wood burning devices and road dust in the Town of Mammoth Lakes. 82 Fed. Reg. 29762. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 29809.

In July 2017, the EPA:

1. Provided notice of a final rule for approval, limited approval and limited disapproval on four permitting rules of the Mendocino County AQMD portion of the California SIP. The amended rules govern the issuance of permits for stationary sources. 82 Fed. Reg. 30770.
2. Provided notice of, and requested comments on, a proposed rule to approve a portion of the California SIP for ambient ozone monitoring in the Bakersfield Metropolitan Statistical Area for the 1997 ozone and 2008 ozone NAAQS. 82 Fed. Reg. 30812.
3. Provided notice of a final rule to approve revisions to the Antelope Valley AQMD portion of the California SIP. The revisions concern emissions of VOCs and NO_X from passenger vehicles. 82 Fed. Reg. 31457.
4. Provided notice of a proposed rule to approve revisions to the Sacramento Metropolitan AQMD portion of the California SIP. The revisions concern emissions of VOC from organic chemical manufacturing operations. 82 Fed. Reg. 33030.
5. Provided notice of, and requested comments on, a proposed rule to approve revisions to the Sacramento Metropolitan AQMD portion of the California SIP. The revisions propose to approve portions of two operating permits that limit VOC emissions from Kiefer Landfill under the Clean Air Act as a result of gas flaring at the facility. 82 Fed. Reg. 33030.
6. Provided notice of a proposed rule to approve and conditionally approve revisions to the Antelope Valley AQMD portion of the California SIP. The revisions concern the demonstration regarding Reasonably Available Control Technology requirements for the 1997 8-hour ozone and the 2008 8-hour ozone NAAQS. 82 Fed. Reg. 35149.

In August 2017, the EPA:

1. Provided notice of, and requested comments on, a proposed rule to approve California SIP revisions concerning establishment of a Photochemical Assessment Monitoring System network in six ozone nonattainment areas. 82 Fed. Reg. 35922.
2. Provided notice of a final rule to approve revisions to the San Joaquin Valley Unified APCD portion of the California SIP. The revisions concern emissions of NO_X, CO, SO_X, and PM_{10} from boilers, steam generators and process heaters. 82 Fed. Reg. 37817.
3. Provided notice of a final rule to approve revisions to the Placer County APCD portion of the California SIP. The revisions concern the demonstration regarding Reasonably Available Control Technology requirements for the 1997 and 2008 8-hour NAAQS and negative declarations for the polyester resin source category for the 2008 8-hour ozone standards. 82 Fed. Reg. 38604.

In September 2017, the EPA:

1. Provided notice of a final rule to make revisions to the Imperial County APCD portion of the California SIP. The revision includes a conditional approval of one rule to update and revise the Imperial County APCD's New Source Review permitting program for new and modified sources of air pollution. 82 Fed. Reg. 41895.
2. Provided notice of a proposed rule to approve revisions to the Placer County APCD and Ventura County APCD portions of the California SIP. The revisions concern emissions of NO_X from incinerators in the Placer County APCD and previously unregulated types of fuel burning equipment in the Ventura County APCD. 82 Fed. Reg. 42765.
3. Provided notice of a final rule to approve revisions to the South Coast AQMD portion of the California SIP. The revisions concern emissions of NO_X and SO_X from facilities that emit four or more tons per year of NO_X or SO_X, which are regulated by South Coast AQMD's Regional Clean Air Incentives Market program. 82 Fed. Reg. 43177.
4. Provided notice of a proposed rule for the Bay Area AQMD portion of the California SIP. The proposed revision is a conditional approval of one rule consisting of updates to provisions governing the issuance and banking of Emission Reduction Credits for use in the review and permitting of major sources and major modifications. 82 Fed. Reg. 43202.
5. Provided notice of a final rule to approve revisions to the South Coast AQMD portion of the California SIP. The revisions concern the demonstration regarding Reasonably Available Control Technology requirements for the 2008 8-hour ozone NAAQS in the South Coast Air Basin and Coachella Valley ozone nonattainment areas. 82 Fed. Reg. 43850.
6. Provided notice of a final rule finding that the state of California failed to submit SIP requirements for the 2008 8-hour ozone NAAQS for the Sacramento Metro nonattainment area. The submittal must occur within 18 months to avoid sanctions. 82 Fed. Reg. 44736.
7. Provided notice of a final rule to approve an SIP revision concerning the establishment of a Photochemical Assessment Monitoring System network in six ozone nonattainment areas. 82 Fed. Reg. 45191.

8. Provided notice of a proposed rule to approve revisions to the California SIP. The revision concerns emissions of VOCs, NO_X and particulate matter from idling diesel-powered trucks. 82 Fed. Reg. 45548.

ATTORNEY FEES

Recent Court Rulings
No Summaries or updates this quarter.

Regulatory Updates
No Summaries or updates this quarter.

CEQA

Recent Court Rulings

California Supreme Court holds that state agency compliance with CEQA is not preempted by the federal Interstate Commerce Commission Termination Act. *Friends of the Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677.

The North Coast Railroad Authority (NCRA) is a state agency created in 1989 for the purpose of resuming railroad freight service along a previously-abandoned route through Napa and Humboldt Counties. The northern portion of the line runs along the Eel River, while the southern portion at issue in the case runs along the Russian River. In 2000, the Legislature authorized funding for NCRA's program, with the express condition of CEQA compliance. NCRA subsequently contracted with a private company to run the railroad. As part of the lease agreement between the two entities, the company agreed that CEQA compliance by NCRA was a precondition to resumed operation. Accordingly, in 2007, NCRA issued a notice of preparation, and in June 2011, it certified a Final EIR. In July 2011, petitioners sued, challenging the adequacy of the EIR on a number of grounds. Concurrently, the company commenced limited freight service along the Russian River. In 2013, NCRA took the unusual step of rescinding its certification of the Final EIR, asserting in explanation as follows: that the Interstate Commerce Commission Termination Act (ICCTA) preempted California environmental laws; that the re-initiation of rail service was not a "project" under CEQA; and that the EIR was not legally required. Although NCRA successfully removed the case to federal court, the case was subsequently sent back to state court for a resolution of both the state CEQA claims and NCRA's federal preemption defense. The court of appeal ruled for NCRA, finding that the ICCTA was broadly preemptive of CEQA. The Supreme Court granted review.

The Court began by recognizing that ICCTA does preempt state environmental laws, including CEQA, that interfere with private railroad operations authorized by the federal government. ICCTA includes an express preemption clause giving the federal Surface Transportation Board (STB) jurisdiction over railroad transportation (including operation,

construction, acquisition, and abandonment). ICCTA's purpose was both unifying (to create national standards) and deregulatory (to minimize state and federal barriers). Although ICCTA is a form of economic regulation, state environmental laws are also economic in nature when they facially, or as applied, dictate where or how a railroad can operate in light of environmental concerns. Such state laws act impermissibly as "environmental preclearance statutes." These legal principles, however, did not extend to the actions of NCRA in this case. Just as a private railroad company may make operational decisions based on internal policies and procedures, and may even modify its operations voluntarily in order to reduce environmental risks and effects, so too may a state, in determining whether to create a new railroad line, subject itself to its own internal requirements aimed at environmental concerns. In the latter context, though, a state operates through laws and regulations, as opposed to purely private policies. When a state acts in such a manner, its laws and regulations are a form of self-governance, and are not regulatory in character. CEQA is an example of such an internal guideline that governs the process by which a state, through its subdivisions, may develop and approve projects that affect the environment. Viewed in this context, CEQA is part of state self-governance, and is not a regulation of private activity.

Although the market participant doctrine does not directly apply, being mainly applicable in Commerce Clause jurisprudence, the doctrine supports by analogy the view that that California was not acting in a regulatory capacity in this case. CEQA is analogous to private company bylaws and guidance to which corporations voluntarily subject themselves. By imposing CEQA requirements on the NCRA, the state was not "regulating" any private entity, but rather was simply requiring that NCRA, as one of its subdivisions, conduct environmental review prior to making a policy decision to recommence the operation of an abandoned rail line. If Congress had intended to preempt the ability of states to govern themselves in such a fashion, any such intention should have been clear and unequivocal. The Court found no such intent in the ICCTA.

The Court's remedy, however, was cognizant of the narrowness of its holding. The Court concluded that, because the company that contracted with NCRA is currently operating the line, the state judiciary could not enjoin that private entity's operations even if, on remand, the lower state courts found problems with NCRA's CEQA documentation. An injunction under CEQA against the company would act as a regulation, by having the state dictate the actions to private railroad operator. Such action would go beyond the state controlling its own operations.

California Supreme Court upholds GHG analysis in SANDAG's Regional Transportation Plan EIR. *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497.

In 2011, the San Diego Association of Governments (SANDAG) issued its Regional Transportation Plan (RTP) as a 40-year blueprint for regional transportation planning. The RTP was accompanied by an EIR that used three thresholds of significance to assess GHG impacts. Compared to existing (2010) conditions, the EIR found GHG impacts to be "not significant" in 2020, but significant in both 2035 and 2050. The EIR also analyzed GHG emissions against statutory goals for the years 2020 and 2035, but did not compare emissions against the long-term (2050) goal set forth in EO S-3-5 (80 percent below 1990 levels by 2050). In response to comments that were critical of the GHG analysis, SANDAG maintained that it had no obligation to analyze projected GHG emissions against the Executive Order.

Several groups filed lawsuits challenging the EIR and the Attorney General later joined the petitioners. The superior court found the EIR inadequate and issued a writ of mandate. The Court of Appeal affirmed, holding that, among other flaws, the EIR violated CEQA by failing to measure GHG impacts against the Executive Order.

The Supreme Court granted review on the following question: "Must the environmental impact report for a regional transportation plan include an analysis of the plan's consistency with the greenhouse gas emission reduction goals reflected in Executive Order No. S-3-05 to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)?"

Addressing this question, the Supreme Court held that the EIR was not required to include an express analysis of GHG impacts compared to the Executive Order's goals. The court was careful, however, to limit its holding to the facts before it, explaining that it was holding "only that SANDAG, in analyzing greenhouse gas impacts at the time of the EIR, did not abuse its discretion by declining to adopt the Executive Order as a measure of significance or to discuss the Executive Order more than it did." The court noted that this level of analysis would not "necessarily be sufficient going forward."

Finding that an express consistency analysis was not required, the court disagreed that the EIR obscured the statutory framework or statewide goals, although it conceded that SANDAG could have presented the information in "clearer or more graphic" ways. Because the EIR presented anticipated GHG emissions in 2050 and discussed the long-term goals in the Executive Order, the court found that the information was "not difficult" for the public to obtain to conduct a consistency analysis. The court stressed that the inclusion of this information in responses to comments instead of the EIR itself was "not an infirmity" because it would be expected that members of the public "interested in the contents of an EIR will not neglect this section."

The court acknowledged the parties' understanding that an executive order does not carry the "force of a legal mandate" when preparing a CEQA document but did not discuss this issue further. Nor did the Court prescribe this specific outcome for other agencies but instead repeatedly asserted the "narrowness" of its ruling and that planning agencies must ensure their analysis keeps up with "evolving scientific knowledge and state regulatory schemes." In reversing the Court of Appeal's judgement, the court ruled only that the 2011 analysis of GHGs emissions did not render the EIR inadequate. The court declined to express an opinion on other deficiencies identified by the trial court and Court of Appeal.

In a comprehensive dissent that included a detailed discussion of the legislative framework, Justice Cuéllar maintained that SANDAG's EIR lacked "good faith reasoned analysis" because it obscured important GHG information. Justice Cuéllar pointed to the "relative clarity of statewide statutory goals" as reasoning why SANDAG did not have the discretion to downplay the GHG consequences of its RTP. Further, he expressed concern that the majority's ruling could allow other regional planning agencies to "shirk their responsibilities."

First District holds air district board's tie vote on permit is effectively a decision not to revoke it, which is reviewable for prejudicial abuse of discretion. *Grist Creek Aggregates, LLC v. The Superior Court of Mendocino County* (2017) 12 Cal.App.5th 979.

In November 2015, the Mendocino County Air Quality Management District issued an authority to construct permit to Grist Creek Aggregates to build a facility to heat and blend rubber. Friends of Outlet Creek, the petitioner in related suits challenging the construction and operation of an asphalt facility in Mendocino County, appealed the permit decision to the district's five-member Hearing Board. After recusal of one of the board's members, the remaining four members were locked in a tie vote. Because it was unable to reach a decision, the board determined not to hold any further hearings on the appeal. Thus, the permit remained in place.

Friends of Outlet Creek filed suit, alleging that the air district and the board violated CEQA in not conducting environmental review for the permit, and violated the district's own regulations. The board demurred on the ground that because the tie vote was tantamount to no action, there was no agency decision for the court to review. Grist Creek Aggregates also demurred, arguing that the petitioner could not sue directly under CEQA and had failed to exhaust its administrative remedies. The trial court sustained the board's demurrer with leave to amend and overruled Grist Creek's demurrer, on the basis that the tie vote was not a board "decision," and therefore, there was nothing for the court to review. In the interim, the board added a fifth member. The trial court noted this, but failed to order that the new board re-hear the permit appeal. Grist Creek filed a petition for writ of mandate with the First Appellate District, seeking to require the trial court to vacate all of its demurrer rulings.

The court of appeal granted Grist Creek's petition. The court first noted that the trial court's decision was internally inconsistent. The board was under no obligation to hold another hearing on the appeal, and in fact indicated it would not do so. Coupled with the trial court's conclusion that the tie vote meant that the petitioner did not have a cause of action, it was unclear how the trial court envisioned that the petitioner's writ petition could be cured by amendment.

As the purpose and meaning of a tie vote, the court explained there are two criteria for the Board to reach a decision: a quorum of voting members and a majority decision by those voting members. The board had a quorum (four voting members out of five), but it failed to reach a majority decision. The court explained that it does not follow from this result that there is nothing for a trial court to review, since the gravamen of the petition was a challenge to the district's underlying approval of the permit and the board's failure to revoke it.

In reaching this decision, the court emphasized that the meaning of tie votes in administrative proceedings must be viewed in context. The trial court erroneously oversimplified precedent in its finding that a tie vote of an administrative action agency always results in no action. The court of appeal's deeper analysis of the relevant case law demonstrated that a tie vote can mean that the petitioner is entitled to a different remedy—a return to status quo ante, a new hearing, or setting aside the agency decision—not that the agency has not acted.

Viewing the tie vote in proper context, the court of appeal concluded that the board's action here was the equivalent of allowing the permit to stand, which is effectively a decision not to revoke it. That decision was ripe for judicial review under the prejudicial abuse of discretion standard of Code of Civil Procedure section 1094.5.

First District finds the potential for protests against health clinic does not constitute substantial evidence of impacts under "unusual circumstances" exception to categorical exemptions. *Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449 (Sept. 18, 2017, A145992).

The City of South San Francisco approved a conditional use permit for the conversion of an existing office building to a medical clinic to be used by Planned Parenthood, finding the project was categorically exempt from CEQA under the Class 1 (existing facilities), Class 3 (conversion of small structures) and Class 32 (infill) exemptions. The City made no explicit determinations about the application of the potential exceptions to categorical exemptions (CEQA Guidelines, §15300.2), including the "unusual-circumstances" exception. An unincorporated association, Respect Life South San Francisco, and other petitioners sued. The trial court denied the petition. Respect Life appealed.

Respect Life argued that the permit was not exempt from CEQA because the unusual-circumstances exception applied to the project, theorizing that protests against Planned Parenthood's services would ensue, causing environmental impacts including traffic, parking, and public health and safety concerns. After noting that it was Respect Life's burden to establish that the exception applied, the court explained that different standards of review govern an agency's determination of the applicability of the exception and a court's review of that determination, citing the California Supreme Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 ("*Berkeley Hillside*"). For the standard governing the City, the *Berkeley Hillside* court explained that a party seeking to establish that the unusual-circumstances exception applies to a project must show two elements: (1) "that the project has some feature that distinguishes it from others in the exempt class, such as size or location" and (2) that there is "a reasonable possibility of a significant effect due to that unusual circumstance." (*Id.* at p. 1115.) Thus, there must be both unusual circumstances and a potentially significant effect.

For the standard governing the court's review of the city's determination, the court explained that, under *Berkeley Hillside*, when an agency *explicitly* determines whether the unusual-circumstance exception applies, a court reviews that determination under the abuse of discretion standard in Public Resources Code section 21168.5. (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1114.) The agency's determination of whether there are "unusual circumstances" is a factual inquiry and thus reviewed under section 21168.5's substantial evidence prong. But the agency's finding as to whether such unusual circumstances give rise to a reasonable possibility of a significant environmental effect is reviewed under the fair argument standard. (*Ibid*.)

But the court announced that where an agency only makes an *implied* determination that the unusual-circumstance exception is inapplicable, the court's review is constrained and ultimately less deferential. Without an explicit agency determination, the court concluded, it cannot say with certainty whether the agency found that there were no unusual circumstances, or whether the agency found there were, but that the record did not contain substantial evidence supporting a fair argument of a reasonable possibility of a significant environmental effect. To affirm an implied determination that the unusual-circumstances exception is inapplicable, the court assumed that the agency found the project involved unusual circumstances then concluded that the record contained no substantial evidence to support either a finding that any unusual circumstances

exist, or a fair argument that any purported unusual circumstances identified by the petitioner will have a significant effect on the environment.

Applying these assumptions, the court concluded that Respect Life failed to identify any substantial evidence of a potential significant environmental effect to support a fair argument. There was evidence that protests were likely, but no evidence that the number of protestors would be large, particularly disruptive, or that any resulting increase in traffic, sidewalk use, noise or business disruptions would be consequential.

The decision adds two important points to the already substantial body of case law interpreting and applying the "unusual-circumstances" exception. First, the case reinforces the general principle in CEQA discouraging impact conclusions founded on mere speculation. "We decline to hold, as Respect Life would apparently have us do, that the possibility of 'foreseeable First Amendment activity' establishes the applicability of the unusual-circumstances exception because the activity might lead to unsubstantiated and ill-defined indirect or secondary environmental effects." The second, perhaps more notable takeaway for agencies applying categorical exemptions is to make explicit determinations regarding the applicability of the exceptions in CEQA Guidelines section 15300.2, especially the unusual-circumstances exception. Failure to do so could result in the court's application of the less-deferential "fair argument" standard of review to the project's administrative record.

First District upholds Water Board's CEQA-equivalent environmental analysis for surface water flow maintenance policy. *Living Rivers Council v. State Water Resources Control Board* (2017) ___ Cal.App.5th ____ (Sept. 28, 2017, A148400).

In 2004, in response to new water legislation, the State Water Resources Control Board (Board) developed a draft "Policy for Maintaining Instream Flows in Northern California Coastal Streams" (Policy) establishing principles to be followed in administering water rights and making decisions about surface water diversions. The principles emphasized the need to maintain instream flows to protect fish and fish habitat. The Board also published a "Substitute Environmental Document" (SED) intended to fulfill the Board's obligations under the California Environmental Quality Act. The SED's programmatic-level review considered and made conservative conclusions regarding the potential indirect effects of restricting water diversions to maintain sufficient flows to maintain habitat. One such significant indirect effect was the possibility that people would increase groundwater extraction and use instead of surface water diversions under the Policy. The SED's supporting technical analysis noted that increased groundwater pumping in some areas could result in reduced stream flows, where there was a hydrological connection between them. The Board's consultant also prepared maps delineating subterranean streams over which the Board had jurisdiction in the Policy area, which indicated where the Board would have permitting authority over groundwater pumping. Neither the SED nor the Policy incorporated or required the use of the stream delineations, however.

After the Board certified the SED in 2010, Petitioner Living Rivers Council sued under CEQA. The trial court denied most of the claims, but found the SED had been deficient in two respects: (1) it failed to disclose the subterranean stream delineations as a potential mitigation measure for the increased use of groundwater pumping; and (2) it failed to disclose the fact there

would likely be no review under CEQA of the increased groundwater pumping in certain counties due to the Board's lack of permitting authority over groundwater that did not flow in a subterranean stream.

In response to the ruling the Board vacated the Policy and prepared additional CEQA documentation. It revised the original SED's analysis of the effects of increased groundwater extraction and use, cumulative impacts, and responses to comments, and included a supplemental technical analysis of the potential impacts of groundwater pumping in response to the Policy. The Revised SED (RSED) considered the subterranean stream delineations as a mitigation measure but concluded they were infeasible for several reasons based on uncertainty about future behavior, the limited extent of the mapping, and the Board's existing authority to regulate unacceptable impacts associated with groundwater pumping to prohibit the unreasonable use of water, among others. The supplemental technical study for the RSED further noted a variety of reasons why there was an imperfect correlation between reduced surface water diversions under the Policy, increased groundwater pumping, and indirect effects on surface water flows due to groundwater pumping. The Board adopted the RSED and adopted a statement of overriding considerations stating that while the Policy could have potentially significant effects if people responded by increasing groundwater pumping, the outcome was speculative and unlikely to cause significant reduction in surface flows.

The petitioner filed a new petition for writ of mandate under CEQA, alleging the Board's decisions and the RSED's analysis with respect to the effects of increased groundwater pumping still did not comply with CEQA. The trial court denied the petition and the petitioner appealed.

On appeal, the petitioner contended the RSED provided conflicting information about whether Policy-induced increases in groundwater use would cause significant impacts, by concluding that the indirect effects of the Policy potentially causing additional groundwater pumping were significant on the one hand, but also asserting that these significant impacts were uncertain or unlikely. The court of appeal distinguished the circumstances at hand from other cases in which EIRs had provided conflicting information in violation of CEQA, finding that the revised analysis in the RSED had provided sufficiently clear information for a reader to understand that while such diversions could potentially reduce stream flows, a significant net reduction in flows was unlikely given the available information. The uncertainty identified by the Board resulted from the situation analyzed by the RSED, not from omissions or inconsistencies in the RSED itself.

The court of appeal also rejected the petitioner's contention that the RSED inadequately described the subterranean stream delineations as a potential mitigation measure, finding that the description and reasons provided in the RSED for the Board's decision to forego the use of the delineations as mitigation were adequately supported, even though reasonable minds might differ regarding the wisdom of that decision.

Lastly, the court of appeal considered and disagreed with the petitioner's allegation that the Board's reasons for rejecting the subterranean stream delineations as infeasible mitigation were legally invalid. The petitioner argued that the Board relied on legally irrelevant factors in determining the delineations were infeasible: (1) the uncertainty that surface water users would switch to groundwater pumping because of the Policy; and (2) the unlikelihood that any switch to

groundwater would deplete surface water flows. The petitioner contended that while these factors were relevant to a determination of whether an indirect impact was reasonably foreseeable and therefore required to be analyzed, they were not permitted to factor into a determination of feasibility. The court saw "nothing wrong with an agency considering the likelihood or severity of an indirect effect when determining whether a proposed mitigation measure will be successful in ameliorating that effect." (Slip. Op., p. 15.) The court acknowledged the CEQA cases stating that "feasibility" encompasses "desirability" and desirability is based on a reasonable balancing of relevant economic, environmental, social, and technical factors, concluding that the "likelihood and severity of an indirect significant effect may render a potential mitigating measure either desirable or undesirable when balanced against its cost and the difficulty of its implementation." (*Ibid.*) The court found that the Board could reasonably conclude that formal adoption of the subterranean stream delineations as mitigation was too costly in light of their limited effectiveness and therefore infeasible.

First District finds environmental review under certified regulatory program inadequate. In *Pesticide Action Network North America v. California Department of Pesticide Regulation* (2017) ___ Cal.App.4th ___ (Sept. 19, 2017, A145632).

The Department of Pesticide Regulation registers all pesticides in California, after evaluating their efficiency and potential for impacts to human health and the environment. The Department has a continuing obligation to reevaluate pesticides, and may cancel a prior registration. Since 2006, there has been a documented widespread collapse of honeybee colonies in the United States. One suspected factor is exposure to pesticides such as dinotefuran, the active ingredient in pesticides sold by the real parties. For this reason, in 2009, the Department initiated the still-ongoing process of reevaluating dinotefuran's registration. Simultaneously, in 2014, the Department issued public reports for a proposal to amend labels for pesticides containing dinotefuron. The amended labels would allow the pesticides to be used on fruit trees and in increased quantities. The reports concluded that the use of each pesticide in a manner consistent with the new labels would have no direct or indirect significant adverse environmental impacts, and therefore the Department did not consider alternatives or mitigation measures. The Department issued a final approval of the label amendments in June 2014. Pesticide Action Network (PAN) filed a petition for writ of mandate in Alameda Superior Court. After the trial court ruled for the Department, PAN appealed.

The Department's pesticide program is a certified regulatory program under Public Resources Code section 21080.5. This exemption permits a state agency to rely on abbreviated environmental review documents, which are the functional equivalent of CEQA documents, subject to some, but not all, of CEQA's procedural requirements. Here, the Department issued a document intended to be the functional equivalent of a negative declaration. The standard of review applied by the court of appeal is prejudicial abuse of discretion, which is established if the agency did not proceed in a manner required by law, or if the determination is not supported by substantial evidence.

First, the court rejected the Department's assertion that because it operates a certified regulatory program, its functionally-equivalent environmental review documents are otherwise exempt from CEQA's substantive requirements. The court found that section 21080.5 is a

"limited" exemption, and environmental review must otherwise comply with CEQA's policy goals, substantive requirements, content requirements stated in section 21080.5, and any other CEQA provisions, as well as the Department's own regulations.

Second, the court found that the Department's report was inadequate under CEQA because it failed to analyze alternatives and cumulative impacts, and did not describe the environmental baseline. With respect to alternatives, contrary to the Department's assertion, a functionally-equivalent document prepared under a certified regulatory program must consider alternatives, as required by both CEQA and the Department's own regulations. The Department argued that it did not need to consider alternatives because it concluded there would be no significant environmental impacts. The court explained that the standard for a certified regulatory program for determining whether an adverse impact may occur is the same as the "fair argument" standard under CEQA. Furthermore, the content requirements for environmental review under a certified regulatory program require that a state agency provide proof–either a checklist or other report–that there will not be adverse effects. The court found that the Department did not produce or consider such evidence.

The court also held that the substantive requirements and broad policy goals of CEQA require assessment of baseline conditions. The Department argued that it had acknowledged and assessed baseline conditions, but the court disagreed. The Department's baseline discussion was based on one statement that "the uses are already present on the labels of a number of currently registered neonicotinoid containing products." The court found that this general statement was not sufficient.

The court found that the Department also abused its discretion when it failed to consider cumulative impacts. In its report, the Department simply stated that the cumulative analysis would be put off until the reevaluation was complete. The court found that this one-sentence discussion lacked facts and failed to provide even a brief explanation about how the Department reached its conclusion.

Finally, the court found that the Department is required to recirculate its analysis. Recirculation is required when significant new information is added to an environmental review document, after notice and public comment has occurred, but before the document is certified. The court explained that, in light of the Department's pending reevaluation, its initial public reports on the amended labeling were so "inadequate and conclusory" that public comment on them was "effectively meaningless."

Fourth District finds failure to exhaust administrative remedies bars challenge to community college land purchase agreement and determines CEQA not required prior to agreement approval. *Bridges v. Mt. San Jacinto Community College District* (2017) 14 Cal.App.5th 104.

In 2014, the Mt. San Jacinto Community College District entered into a purchase agreement to buy an 80-acre plot of land from in Riverside County Regional Park & Open-Space District in order to build new campus facilities near the Interstate 15 corridor in southwest Riverside County. The agreement conditioned the opening of escrow on both parties' compliance with CEQA, and held that the parties were not bound by the agreement unless and until the CEQA

process was complete and there was no more possibility of any legal challenges. The college district's board considered and approved the agreement at a public meeting, the agenda for which listed a motion to approve the purchase agreement as an open agenda item and invited the public to comment. There were no public comments on the item. Three months later, the college approved a resolution to place a bond measure on the ballot to pay for several new improvements to the college, including a "new campus along the I-15 corridor to serve additional students." The bond measure did not commit the college to any particular project and qualified that some of them may be delayed or not completed due to cost and funding issues. Immediately upon voter approval of the bond measure, two residents near the potential new campus site sued the college and the regional park districts, seeking orders directing the college to set aside the purchase agreement and to adopt local CEQA implementing guidelines. The trial court dismissed the suit, finding the first cause of action unnecessary because CEQA requires an EIR before the purchase is final, but not before executing the agreement, and because the purchase agreement expressly required an EIR to initiate escrow for the purchase. The trial court also found the college exempt from adopting local implementing procedures because it used the same guidelines that Riverside County and the California Community College Chancellor's Office have adopted. The regional park district argued the case should be dismissed because of the petitioners' failure to exhaust administrative remedies by objecting to the purchase agreement first, but the trial court declined to address the exhaustion issue in light of its rulings on the applicability of CEQA. Petitioners appealed.

The court of appeal first considered the exhaustion defense reasserted by the regional park district on appeal. Appellants alleged the college did not give proper notice of the meeting at which the Board approved the agreement and therefore they were excused from objecting to the purchase agreement. The court noted that CEQA provides an exception to the exhaustion requirement where "there was no public hearing or other opportunity for members of the public to raise those objections orally or in writing prior to the approval of the project, or if the public agency failed to give the notice required by law." (Pub. Resources Code, § 21177, subd. (e).) But the court further explained that notice in this context can be constructive; it need not be actual. The relevant notice in these circumstances was the 72-hour publicly posted notice required by the Brown Act. (Gov. Code, § 54954.2, subd. (a).) The record contained the agenda for the college district board's meeting listing the purchase agreement as an action item and inviting the public to comment, but no proof that the agenda was properly posted under the Brown Act. The court noted it was the appellants' burden to demonstrate that the no-notice exception applied to them and they could only allege, but not prove, that the college did not properly notice the meeting. In the absence of any evidence that the college failed to meet the deadline under the Brown Act, the court followed the presumption required under Evidence Code section 664 that an "official duty has been regularly performed." Applying that presumption, the court concluded that the appellants could not show CEQA's exhaustion exception for lack of notice applied to them and therefore they were barred from raising their objection in a CEQA suit.

The court further considered the merits of the appellants' CEQA claims, despite the exhaustion bar. Appellants argued it was not enough for the college to commit to completing an EIR before escrow on the land purchase opened; they argued an EIR was required before approval of the purchase agreement. The court disagreed, relying in these circumstances on the criteria described by the California Supreme Court in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128 and the exception in CEQA Guidelines section 15004, subdivision (b), allowing

agencies to designate a "preferred site" for a land acquisition agreement and conditional future use dependent on CEQA compliance. The court found nothing in the purchase agreement or other record documents that committed the college to any type of construction plan or definite course of development and no funds had been committed to the project; the college retained its full discretion to consider alternatives under CEQA.

The court also rejected the appellants' contention that the college violated CEQA by failing to adopt local implementing guidelines as required by Public Resources Code section 21082. Noting that school districts are exempt from this requirement if they utilize the guidelines of another public agency whose boundaries are coterminous with or entirely encompass the school district (CEQA Guidelines, § 15022, subd. (b)), the court found the college's "utilization," not formal adoption, of the same guidelines adopted by Riverside County and the state Chancellor's Office (the CEQA Guidelines), was all that was required under these circumstances.

Sixth District holds that general plan consistency is not a CEQA issue and therefore mandate procedures for CEQA violations are inapplicable. *The Highway 68 Coalition v. County of Monterey* (2017) 14 Cal.App.5th 883.

Monterey County certified an EIR for an 11-acre shopping center project in 2012. Highway 68 Coalition, a community organization, sued under the California Environmental Quality Act, alleging that the EIR was deficient in several respects, including its analysis of water supply impacts, traffic, and general plan consistency, among other issues. The trial court initially denied the petition, but remanded the matter to the county to clarify whether the project was consistent with specific general plan policies requiring that the project have a "long term, sustainable water supply." In originally approving the project, the Board of Supervisors had found that the project had an "adequate long-term water supply." On remand, the county made more specific findings affirming the quality and quantity of the project's long-term water supply and its consistency with the general plan policies at issue. The trial court then entered judgment in favor of the county and denied Highway 68 Coalition's petition. As relevant to the published portion of the court of appeal's opinion, the petitioner contended on appeal that the trial court erred in issuing the interlocutory remand in a CEQA case and that the EIR's analysis of the project's consistency with the County's general plan was inadequate.

The petitioner argued that the trial court erred in issuing an interlocutory remand to allow the county to make clearer findings as required by its general plan, because CEQA does not authorize interlocutory remands where an agency has abused its discretion under CEQA. Rather, the petitioner argued, the only allowable remedy is a writ of mandate compelling compliance with CEQA. The County responded that interlocutory remand was within the trial court's inherent powers and CEQA did not bar this remedy in this case because the trial court found the county had complied with CEQA with respect to water resources and CEQA does not require an analysis of the project's consistency with the general plan. The real party in interest emphasized that the county general plan, not CEQA, required the specific finding regarding a "long term sustainable water supply."

The court of appeal held that "the issue of whether a proposed project is consistent with a county's general plan is not a CEQA issue, and therefore the mandate procedures provided for

CEQA violations at [Public Resources Code] section 21168.9 do not apply." The court noted that CEQA Guidelines section 15125, subdivision (d) requires discussion of any inconsistencies between applicable plans and a proposed project, but no analysis is required if the project is consistent with those plans. Since an agency's decisions regarding planning consistency are reviewed by ordinary mandamus, the court held that the trial court did not err in ordering an interlocutory remand under these circumstances, relying on the California Supreme Court's decision in *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499 as authority for the interlocutory remand procedure.

Regarding the EIR's analysis of general plan consistency, the petitioner argued that the EIR did not analyze the project's consistency with the county general plan and that the county's finding that the project had a long-term sustainable water supply was not supported by substantial evidence. The court noted that, as discussed in the portion of the decision on the propriety of the interlocutory remand, CEQA does not require an analysis of general plan consistency. The court further addressed the standard of review for an agency's decision of consistency with its own general plan, affirming that the court's role is extremely deferential. An agency's findings that a project is consistent may only be overturned if it is based on evidence from which no reasonable person could have reached the same conclusion. Here, the court determined that the petitioner had not met its burden to show why, based on all of the evidence in the record, the county's determination with respect to the long-term water supply was unreasonable.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Model Year 2022-2025 Light Duty Vehicles. In August 2017, the EPA requested comments on its reconsideration of the final determination of mid-term evaluation of greenhouse gas standards for model year 2022-2025 light-duty vehicles. The EPA is reconsidering whether the standards are appropriate under the Clean Air Act. 82 Fed. Reg. 39551. The EPA provided notice of a public hearing regarding same. 82 Fed. Reg. 39976.

Sugar Beets for Use in Biofuel Production. In July 2017, the EPA provided notice of, and requested comments on, its analysis of the upstream greenhouse gas emissions attributable to the production of sugar beets for use as a biofuel feedstock. Based on the analysis, the EPA anticipates that biofuels produced from sugar beets could qualify as renewable fuel or advanced biofuel under certain circumstances. 82 Fed. Reg. 34656.

COASTAL RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Foothill Yellow-Legged Frog. In July 2017, the Fish and Game Commission provided a notice of findings concerning the petition to list the foothill yellow-legged frog as a threatened species. After review of the relevant information, the Commission concluded there is a substantial possibility the requested listing could occur. Within one year, the Department of Fish and Wildlife shall submit a written report indicating whether the petitioned action is warranted. Cal. Reg. Notice Register 2017, Vol. No. 27-Z, p. 986.

Northern Spotted Owl. In July 2017, the Fish and Game Commission provided a notice of findings that the petition to list the northern spotted owl as a threatened species under the California Endangered Species Act is warranted. The determination was based on review of the best available information. Cal. Reg. Notice Register 2017, Vol. No. 27-Z, p. 987.

San Fernando Valley Spineflower. In July 2017, the EPA provided notice of a 6-month extension on the final determination to list the San Fernando Valley spineflower as a threatened species. In the addition, the EPA re-opened the comment period on the proposed rule to list the species for an additional 30 days. 82 Fed. Reg. 33035.

ENERGY

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Appliance Efficiency Regulations. In June 2017, the Energy Commission provided notice of a public hearing to consider modifications to existing appliance efficiency regulations. The modification would delay compliance dates for certain residential air filters and allow certification of certain permanent magnet synchronous motors. Cal. Reg. Notice Register 2017, Vol. No. 24-Z, p. 889.

In September 2017, the Energy Commission provided notice of proposed modifications to existing appliance efficiency regulations for computers. Specifically, the new regulations would create a new allowance for certain graphic processing units, modify definitions, and allow manufacturer reporting in alignment with federal regulations. Cal. Reg. Notice Register 2017, Vol. No. 38-Z, 1415.

Data Collection. In August 2017, the Energy Commission provided notice of proposed amendments to regulations concerning the rules of practice and procedure for energy data collection, types of data to be filed, and the confidential treatment of certain types of energy data. Cal. Reg. Notice Register 2017, Vol. No. 31-Z, p. 1166.

FEES/TAXES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Cumulative Impacts. In June 2017, the Board of Forestry and Fire Protection provided notice of a proposed action and public hearing concerning the assessment of cumulative impacts. Specifically, the proposed action would align the cumulative impact analysis within the Forest Practice Rules and the current CEQA guidelines, as well as identify a guidance document of general application for the preparation of cumulative impact analyses. Cal. Reg. Notice Register 2017, Vol. No. 26-Z, p. 937.

Oak Woodland Management Exemption. In August 2017, the Board of Forestry and Fire Protection provided notice of proposed action to create the Oak Woodland Management

Exemption, 2017. This action is a result of AB 1958 and would allow certain exemptions to landowners engaged in timber operations. Cal. Reg. Notice Register 2017, Vol. No. 32-Z, p. 1216.

Working Forest Management Plan. In June 2017, the Office of Administrative Law provided a notice of disapproval of a Board of Forestry and Fire Protection action to adopt amendments to regulations concerning implementation of certain assembly bills and the creation of the Working Forest Management Plan. The disapproval is based on the failure to comply with the clarity standard of the Administrative Procedures Act. The Board has 120 days to submit revisions. Cal. Reg. Notice Register 2017, Vol. 24-Z, p. 898.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Covered Electronic Waste. In August 2017, the Department of Resources and Recycling and Recovery provided notice of proposed amendments to the implementation and administration of the Covered Electronic Waste program. The amendments would provide clarity in order to achieve the intent of the Electronic Waste Recycling Act. Cal. Reg. Notice Register 2017, Vol. No. 32-Z, p. 1221.

Pipeline Testing. In September 2017, the Department of Conservation provided notice of proposed amendments concerning pipeline testing regulations. Specifically, the amendments address gaps in requirements for active pipelines in sensitive areas that are more than 10 years old and existing requirements for pipeline management plans. Cal. Reg. Notice Register 2017, Vol. No. 38-Z, p. 1408.

Hazardous Substance Release Sites. In August 2017, the Department of Toxic Substances Control provided notice of proposed regulations to set a cleanup performance standard, and adopt the listed toxicity criteria for all human health risk assessments calculating health-based screening levels and risk-based remediation goals at hazardous substance release cleanup sites. Cal. Reg. Notice Register 2017, Vol. No. 31-Z, p. 1175.

Hazardous Waste Facilities. In September 2017, the Department of Toxic Substances Control provided notice of proposed regulations relating to hazardous waste facility permits. The amendments address five of the seven required criteria including: (i) permit criteria for compliance history; (ii) data for community involvement profile; (iii) financial responsibility amendments; (iv) training for facility personnel amendments; and (v) a health risk assessment for hazardous waste facility operations. Cal. Reg. Notice Register 2017, Vol. No. 38-Z, p. 1420.

2017 North American Industry Classification System (NAICS) Codes. In August 2017, the EPA provided notice of a final rule updating the list of NAICS codes subject to reporting under the Toxic Release Inventory. The EPA is also modifying the list of exceptions and limitations associated with the codes. 82 Fed. Reg. 39038. The EPA provided notice of a proposed rule regarding same. 82 Fed. Reg. 39101.

Chemical Risk Evaluations. In July 2017, the EPA provided notice of a final 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. This rule identifies the steps of a risk evaluation process including: scope, hazard assessment, exposure assessment, risk characterization and risk determination. 82 Fed. Reg. 33726.

In July 2017, the EPA also provided notice of a final rule to establish the process and criteria that will be used to identify chemical substance prioritization. The rule provides the process for initiation, public comments, screening and finalizing designations of priority. 82 Fed. Reg. 33753. In July 2017, the EPA further provided a notice of availability of a document titled "Guidance to Assist Interested Persons in Developing and Submitting Draft Risk Evaluations Under the Toxic Substances Control Act." 82 Fed. Reg. 33765.

Hazardous Waste Compliance Docket Update. In June 2017, the EPA provided notice of an update to the Hazardous Waste Compliance Docket. The docket contains reported information on facilities that manage hazardous waste or from which a reportable quantity of hazardous substances has been released. This update includes facilities not previously listed, facilities reported to the EPA since the last update, revisions to the previous docket list and facilities that are to be deleted. 82 Fed. Reg. 26092.

Hazardous Waste Exports. In August 2017, the EPA provided notice of a December 31, 2017 filing compliance date for export shipments of hazardous waste and certain other materials. On or after this date, exporters are required to file information electronically in the Automated Export System. 82 Fed. Reg. 41015.

Hazardous Waste Management System. In July 2017, the EPA provided notice of a proposed rule to delist the sludge generated from the electroplating process from the lists of hazardous wastes after using the Delisting Risk Assessment Software for the evaluation. This action is a result of a petition submitted by Samsung Austin Semiconductor. 82 Fed. Reg. 32519.

Integrated Risk Information System (IRIS) Assessments. In September 2017, the EPA provided a notice of availability of, and requested comments on, draft IRIS assessment plans for nitrate/nitrite, chloroform and ethylbenzene. The documents provide the identified scoping needs and initial problem formulation activities. 82 Fed. Reg. 43539.

Pesticide Registration Notice. In September 2017, the EPA provided a notice of availability of, and requested comments on, "Pesticide Registration Notice 2017-XX: Notifications, Non-notifications, and Minor Formulation Amendments." This document provides updated guidance in line with current regulatory statutes. 82 Fed. Reg. 42094.

Scopes of Risk Evaluations. In July 2017, the EPA provided a notice of availability of the scope documents for risk evaluations to be conducted for the first ten chemical substances. Each scope includes the hazards, exposures, conditions of use, and the potentially exposed subpopulation to be considered in the risk evaluations. 82 Fed. Reg. 31592.

Standards and Practices Under CERCLA. In June 2017, the EPA provided notice of a direct final rule to amend the Standards and Practices for All Appropriate Inquiries Rule to update an existing reference. The rule would amend reference to ASTM International's E2247-16 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process for Forestland or Rural Property," and allow for its use to satisfy the statutory requirements for conducting inquiries under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). 82 Fed. Reg. 28009. The EPA provided notice of a proposed rule concerning same. 82 Fed. Reg. 28040. In September 2017, the direct final rule was withdrawn due to adverse comment and an effective date of March 14, 2018 was provided. 82 Fed. Reg. 43309 and 43310.

Toxic Substance Control Act (TSCA) Inventory Notification Requirements. In August 2017, the EPA provided notice of a final rule establishing an electronic notification of chemical substances on the TSCA Inventory to distinguish active from inactive substances. This action is a result of a requirement in the 2016 amendments to the TSCA. 82 Fed. Reg. 37520.

Uranium and Thorium Mill Tailings. In August 2017, the EPA provided notice of a proposed rule reopening the comment period for the proposed rule "Health and Environmental Protection Standards for Uranium and Thorium Mill Tailings." 82 Fed. Reg. 35924.

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

California Building Standards. In September 2017, the California Building Standards Commission proposed to adopt, approve, codify, and publish changes to the building standards related to exterior elevated elements. Cal. Reg. Notice Register 2017, Vol. No. 36-Z, pp. 1363.

The Commission provided notice of same on behalf of the Division of the State Architect and the Department of Housing and Community Development. Cal. Reg. Notice Register 2017, Vol. No. 36-Z, pp. 1358 and 1368.

PROPOSTITION 65

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Arsenic in Rice. In July 2017, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of proposed regulations to provide guidance by establishing default natural background levels for arsenic in rice. The proposed naturally occurring concentrations for inorganic arsenic in rice are 80 parts per billion (ppb) for white rice and 170 ppb for brown rice. Cal. Reg. Notice Register 2017, Vol. 29-Z, p. 1083.

Candy Containing Chili and Tamarind. In June 2017, OEHHA provided notice of an agenda for a July 6, 2017 public hearing on a petition concerning the lead level in candy containing chili and tamarind. Cal. Reg. Notice Register 2017, Vol. No. 25-Z, p. 926.

Chemical Testing. In June 2017, OEHHA provided notice of proposed amendments to update regulations to incorporate 2016 amendments to the federal Toxic Substance Control Act. The amendments concern chemicals that are required by state or federal law to be tested for potential to cause cancer or reproductive toxicity, but have not been adequately tested. Cal. Reg. Notice Register 2017, Vol. No. 26-Z, p. 944.

Chlorpyrifos. In September 2017, OEHHA provided notice of a Development and Reproductive Toxicant Identification Committee meeting to consider possible listing of *chlorpyrifos* as a chemical to be shown to cause reproductive toxicity. Related hazard identification materials were made available for same. Cal. Reg. Notice Register 2017, Vol. No. 35-Z, p. 1324.

Clear and Reasonable Warnings. In July 2017, OEHHA provided notice of, and requested comments on, proposed rulemaking concerning clear and reasonable warnings tailored for exposures to listed chemicals that can occur at hotels and other transient lodging. Cal. Reg. Notice Register 2017, Vol. No. 29-Z, p. 1080.

In July 2017, OEHHA also provided notice of proposed amendments to Article 6, Clear and Reasonable Warnings. The amendments provide further clarification of, and corrections to, certain sections in order to benefit the regulated community in advance of the August 30, 2018 operative date of the new Article 6 regulations. Cal. Reg. Notice Register 2017, Vol. No. 29-Z, p. 1086.

Coumarin. In July 2017, OEHHA provided a notice of availability of, and requested comments on, "Evidence on the Carcinogenicity of Coumarin." Coumarin will be considered for possible listing by the Carcinogen Identification Committee at its November 2, 2017 meeting. Cal. Reg. Notice Register 2017, Vol. No. 33-Z, p. 1249.

n-Hexane. In September 2017, OEHHA provided notice of a Development and Reproductive Toxicant Identification Committee meeting to consider possible listing of *n-Hexane* as a chemical to be shown to cause reproductive toxicity. Related hazard identification materials were made available for same. Cal. Reg. Notice Register 2017, Vol. No. 35-Z, p. 1324.

List of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. For OEHHA's most current list of chemicals known to the state to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2017, Vol. No. 27-Z, p. 998.

No Significant Risk Level. In September 2017, OEHHA provided notice of, and requested comments, the proposed adoption of a Proposition 65 No Significant Risk level of 0.88 micrograms per day for *vinylidene chloride*. Cal. Reg. Notice Register 2017, Vol. No. 38-Z, p. 1427.

Notice of Intent to List. In June 2017, OEHHA provided notice of its intent to list *N,N-dimethylformamide, 2-mercaptobenzothiazole* and *tetrabromobisphenol A* as known to the state to cause cancer under the Labor Code listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 26-Z, p. 951.

In September 2017, the OEHHA provided notice of its intent to list *vinylidene chloride* as known to the state to cause cancer under the Labor Code listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 38-Z, p. 1431.

Notice of Listing. In July 2017, OEHHA provided a notice of listing *glyphosate* as a chemical known to the state to cause cancer under the Labor Code listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 27-Z, p. 997.

In July 2017, OEHHA also provide notice of listing *pentabromodiphenyl ether mixture [DE-71 (technical grade)]* to the list of chemicals known to the state to cause cancer under the authoritative bodies listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 27-Z, p. 997.

Public Health Goals. In August 2017, OEHHA provided a notice of availability of the draft technical support document for the update of certain public health goals. Specifically, a public health goal of 13 ppb is proposed for *cis-1,2-dichloroethylene* and 50 ppb for *trans-1,2-dichloroethylene* in drinking water. Cal. Reg. Notice Register 2017, Vol. No. 31-Z, p. 1181.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Rattlesnakes. In August 2017, the Fish and Game Commission provided notice of proposed regulations relating to commercial use and possession of native rattlesnakes for biomedical and therapeutic purposes. The proposed regulations are in response to a 2015 petition for same. Cal. Reg. Notice Register 2017, Vol. No. 31-Z, p. 1151.

Sea Cucumber. In August 2017, the Fish and Game Commission provided notice of proposed regulations relating to the commercial take of sea cucumber. Specifically, the regulations would implement a seasonal closure prohibiting take of warty sea cucumber during spawning season and prohibit certain possessions during this same time. Cal. Reg. Notice Register 2017, Vol. No. 31-Z, p. 1157.

Sea Urchin. In September 2017, the Fish and Game Commission provided notice of proposed amendments to regulations concerning the taking of sea urchin for commercial purposes, and commercial fishing applications, permits, tags and fees. The amendments would, among other things, decrease the capacity goal to 150 permittees and modify the priority of new permits. Cal. Reg. Notice Register 2017, Vol. No. 36-Z, p. 1351.

Peregrine Falcon. In September 2017, the Fish and Wildlife Service provided notice of revised take limits for passage peregrine falcons beginning in fall 2017. The revisions were based on a review of recent data at the request of the Atlantic, Mississippi and Central Flyway Councils. 82 Fed. Reg. 42700.

Sea Otter. In August 2017, the EPA provided a notice of availability of the final revised stock assessment report for the southern sea otter in California. The revisions include incorporation of public comments. 82 Fed. Reg. 40793.

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

Surface Water Augmentation. In July 2017, the State Water Resources Control Board provided notice of the proposed "Surface Water Augmentation Using Recycled Water" regulations. The regulations would govern the planned placement of recycled water into a surface water reservoir that is used as a source of domestic drinking water supply. Cal. Reg. Notice Register 2017, Vol. No. 29-Z, p. 1074.

Waters of the United States. In August 2017, the EPA provided notice of public meeting dates regarding recommendations to revise the definition of "Waters of the United States" under the Clean Water Act. Several of the meetings will be tailored to specific sectors. 82 Fed. Reg. 40742.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Alternative Test Procedures for Measuring Contaminants. In July 2017, the EPA provided notice of a final rule approving 17 alternative test methods to measure levels of contaminants in drinking water and determining compliance with the national primary drinking water regulations. 82 Fed. Reg. 34861.

Aquatic Ambient Water Quality Criteria for Aluminum in Freshwater. In July 2017, the EPA provided a notice of availability of, and requested comments on, "Draft Updated Aquatic Life Ambient Water Quality Criteria for Aluminum in Freshwater." The document includes the EPA's updated recommended aluminum criteria to reflect the latest science and to provide users the flexibility to develop site-specific criteria based on site-specific water chemistry. 82 Fed. Reg. 35198. In September 2017, the EPA provided notice of a 30-day extension to the comment period for same. 82 Fed. Reg. 44784.

Clean Water Act Section 303(d). In September 2017, the EPA provided notice of a reopened comment period for the "Clean Water Act Section 303(d): Availability of List Decisions." 82 Fed. Reg. 42808.

Coal Combustion Residuals Permit Programs. In August 2017, the EPA provided a notice of availability of "Coal Combustion Residuals State Permit Program Guidance Document; Interim Final." The document describes how the EPA intends to review State programs in compliance with the Water Infrastructure Improvements for the Nation Act. 82 Fed. Reg. 38685.

Dental Category. In June 2017, the EPA provided notice of a final rule concerning technology-based pretreatment standards under the Clean Water Act to reduce discharges of mercury from dental offices into municipal sewage owned treatment works. In addition, the rule includes a provision to reduce and streamline the oversight and reporting requirements. 82 Fed. Reg. 27154.

Perchlorate in Drinking Water. In September 2017, the EPA provided a notice of request for public comment on a draft report titled "Draft Report: Proposed Approaches to Inform the Derivation of a Maximum Contaminant Level Goal for Perchlorate in Drinking Water." 82 Fed. Reg. 43354. The EPA also provided notice of a request for public comments to be sent directly to Versar, Inc. on an interim list of perchlorate in drinking water expert peer reviewers and draft peer review charge questions. 82 Fed. Reg. 43361.

Steam Electric Power Generating Point Source Category. In June 2017, the EPA provided notice of a proposed rule to postpone certain compliance dates in the effluent limitations guidelines and standards for the steam electric point source category under the Clean Water Act. Specifically, the compliance dates will be postponed for effluent limitations and pretreatment standards for certain waste streams. 82 Fed. Reg. 26017. In September 2017, the EPA provided notice of a final rule concerning same. 82 Fed. Reg. 43494.

Testing Procedures. In August 2017, the EPA provided notice of a final rule modifying the testing procedures for analysis and sampling under the Clean Water Act. The changes include: (i) new, revised and updated methods; (ii) methods reviewed under alternate test procedures; (iii) clarifications; and (iv) amendments to certain procedures. 82 Fed. Reg. 40836.

Federal Summaries

Supreme Court

The California Supreme Court's new clear statement rule: absent unambiguous evidence the purpose of a provision was to constrain the public's initiative power, the Court will not construe the provision to impose such limitations. *California Cannabis Coalition v. City of Upland*, 3 Cal.5th 924 (2017).

The California Cannabis Coalition proposed a voter initiative that would repeal an existing City of Upland ordinance banning medical marijuana dispensaries, adopt regulations for the operation of up to three dispensaries in the City, and require each dispensary to pay the City an annual licensing fee of $75,000. The petition included a request voters consider the initiative at a special election. The city council adopted a resolution submitting the initiative to the voters at the next general election. The Coalition sued for a writ of mandate, alleging the City violated California Election Code section 9214 by failing to submit the initiative at a special election.

California Election Code section 9214 requires a city to (1) adopt an initiative without alteration, (2) immediately order a special election, or (3) order an agency report, and once the report is presented, adopt the initiative or order a special election. Article 13C, section 2(b) of the California Constitution ("Proposition 218") prohibits a local government from imposing any general tax unless that tax is submitted to the electorate and approved by a majority vote. The trial court denied the writ, determining the $75,000 fee was a tax that had to be approved at a general election. The Coalition appealed, and the Court of Appeal reversed, determining Proposition 218 applied to taxes levied by local governments, not voter initiatives.

The California Supreme Court affirmed. The Court found Proposition 218 applied to actions by a "local government," which meant governing bodies, not voters. The Court found the purpose of Proposition 218 was to protect taxpayers from the imposition of taxes by local governments, not to constrain the voters' initiative rights. Under California judicial authority, courts preserve and liberally construe the public's initiative power, resolve doubts about its scope in its favor whenever possible, and narrowly construe statutory provisions that would limit that power. Against that backdrop, the Court invoked a new clear statement rule. Without an unambiguous indication a provision's purpose was to constrain the initiative power, the Court will not construe it to impose such limitations. Accordingly, the City erred by not ordering a special election.

United States Court of Appeals

Recent Court Rulings

The Ninth Circuit Court of Appeals has affirmed a district court's denial of a preliminary injunction in an action challenging the North Fork Mill Creek A to Z Project. *Alliance for the Wild Rockies v. Pena* (9th Cir. August 1, 2017) 865 F.3d 1211.

In the case, Alliance appealed the district court's denial of a preliminary injunction. Alliance alleged that the U.S. Forest Service violated the National Forest Management Act (NFMA) and the National Environmental Policy Act (NEPA) when it approved the A to Z Project, a forest restoration project encompassing 12,802 acres within the Colville National Forest in Washington. The district court concluded that Alliance did not satisfy any of the four required factors for the issuance of a preliminary injunction.

The Ninth Circuit affirmed, holding that the Alliance had not shown either serious questions or a likelihood of success on the merits of its NFMA or NEPA claims, which were: based on the Forest Service's use of "habitat as a proxy" approach for assessing the viability of the pine marten; based on the Forest Service's use of the "proxy-as-proxy" approach for assessing the viability of the fisher; based on the Forest Service's snow-intercept cover analysis; and based on the Forest Service's open road density analysis. The panel also held that Alliance had not shown either serious questions or a likelihood of success on the merits of Alliance's NEPA claim based on the Forest Service's sediment analysis.

The Ninth Circuit Court of Appeals has affirmed a district court ruling holding that the U.S. Forest Service did not violate the National Forest Management Act (NFMA) or the National Environmental Policy Act (NEPA) when it approved a parking lot in a National Forest. *Wilderness v. Allen* (9th Cir. September 8, 2017) 2017 U.S. App. Lexis 17386.

In the case, the National Forest Service in 2012 approved the building of Kapka Sno-Park, a parking lot primarily designed to facilitate motorized recreationalists in the Deschutes National Forest in central Oregon, and the Service issued an Environmental Assessment for the project.

Wild Wilderness, a group representing non-motorized users, challenged approval of the project on the grounds that the Forest Service had violated both the NFMA and the NEPA. The district court granted summary judgment in favor of the Forest Service, and plaintiff appealed.

The Ninth Circuit affirmed, holding that the Forest Service did not violate the NFMA or the NEPA. As to the NFMA claims, the court held that the applicable Forest Plan merely outlines steps that generally will be taken in the event of user conflicts, and that the Plan outlines an aspiration, not an obligation and, therefore, "there is no law to apply in second-guessing the agency." The court also held that the Service did not violate the NEPA. In this regard, plaintiffs raised multiple claims, including a challenge to the fact that the Forest Service first issued a Draft EIS, but then reversed course and issued a Finding of No Significant Impact and final Environmental Assessment in its place. The court found that the Service followed the applicable regulations and procedures, and, as such, did not violate NEPA.

The Second Circuit Court of Appeals has held that the Orange County District Attorney and Water District were not in privity and that, as a consequence, settlements between the District Attorney and oil companies did not have a res judicata effect in subsequent litigation filed by the Water District. *Orange County Water District v. Texaco Refining and Marketing Inc. (In re Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 859 F.3d 178 (2d Cir. 2017).

In 1999, the Orange County District Attorney ("District Attorney") sued BP and Shell, alleging that underground storage tanks at the companies' gas stations had released the gasoline additive MTBE, resulting in contamination of adjacent soil and groundwater. The parties reached settlements in 2002 and 2005, and the Orange County Superior Court entered consent judgments settling all claims against BP and Shell. In 2003, the Orange County Water District ("Water District") filed separate litigation against a number of oil companies, including BP and Shell, seeking to recover funds that it expended to investigate and remediate MTBE contamination allegedly caused by the companies. The district court granted summary judgment in favor of BP and Shell on the ground that the Water District's claims were barred by the prior consent judgments under the doctrine of res judicata.

On appeal, the question was whether the consent judgments from lawsuits by the District Attorney had res judicata effect under California law in subsequent litigation by the Water District against the same defendants.

The court of appeal reversed, holding that res judicata did not apply because the District Attorney and Water District were not in privity. For the parties to have been in privity, California law requires that the District Attorney had adequately represented the Water District in the prior suits. Adequate representation, in turns, requires, that the interests of the parties were aligned and that either the District Attorney understood itself to be acting in a representative capacity or the court took care to protect the interests of the Water District. The court held that these requirements were not met. Although the District Attorney and Water Districts had overlapping interests in protecting Orange County's groundwater, their interests diverged in that the former was pursuing nuisance actions on the public's behalf while the latter was seeking to recover damages it suffered in investigating and remediating the contaminated groundwater. Furthermore, it was clear that the

Water District's interests were not adequately represented because the District Attorney had successfully opposed the Water District's attempts to intervene in the prior lawsuits, neither settlement reimbursed the Water District's remediation costs or provided it other compensation, the MTBE plumes allegedly continued to migrate toward the Water District's production wells, and the trial court in the prior suits had not taken special care to protect the Water District's interests.

The Fourth District Court of Appeal has held that under California's Hazardous Substances Account Act, a plaintiff needed to show that pollutants were released from a defendant's site and that those pollutants caused at least some of the plaintiff's response costs, and has further held that, under the Orange County Water District Act, some but not all of the response costs, which could include investigatory costs, must have been reasonable. *Orange County Water District v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal. App. 5th 252.

In the mid-1980's, the Orange County Water District ("District") became aware that volatile organic compounds ("VOC's") released from industrial sites were contaminating groundwater in Orange County's North Basin. Although the contamination primarily affected the North Basin's shallow aquifer, by the late 1990's, it had reached the principal aquifer, leading to the decommissioning of drinking wells. Beginning in 1999, the District refined a series of proposals for the North Basin Groundwater Protection Project ("Project"), the goal of which was to contain the VOC plume by treating contamination in the shallower aquifer. Following a brief public comment period, the District adopted a mitigated negative declaration under the California Environmental Quality Act ("CEQA"). The District subsequently changed the Project to address treatment of additional contaminants in the shallow aquifer and sought public comment on a subsequent environmental impact report ("SEIR") for the revised Project. The District filed suit against a number of owners and operators of industrial sites in the North Basin area, asserting claims for damages under the Carpenter-Presley-Tanner Hazardous Substance Account Act ("HSAA"), the Orange County Water District Act ("OCWD Act"), and for declaratory relief, as well as common law claims. The District proceeded to trial against five defendants, including Northrop Grumman Systems Corp. ("Northrop"). By the time of trial, the District had expended $3.7 million on the Project, and its total cost estimate had increased from $20 million to $200 million. Following a bench trial on the statutory claims, the court determined that the District should not recover from any defendant under the HSAA or OCWD Act. The court also entered a declaration that defendants were not responsible for past or future costs and determined that its findings on the statutory claims would apply in a jury trial to defeat the common law claims.

On appeal, the principal questions were: (1) whether the District, as a voluntary actor, had standing to assert a claim under the HSAA, (2) whether the trial court misinterpreted the causation standards and other elements of the HSAA and OCWD Act, and (3) whether the court erred by trying the District's equitable statutory claims before its legal claims and applying findings on the former to defeat the latter.

The court of appeal affirmed on the HSAA and common law claims but reversed as to Northrop only on the District's OCWD Act claim and declaration of no liability. The HSAA provides for a private right of action for a person who has incurred response costs to "seek contribution or indemnity" from anyone liable under the HSAA. The court held that the district had standing to

sue under this provision because the word "indemnity" includes volunteers like the District and not just plaintiffs who are liable for response costs. The court construed the HSAA's causation requirement to require a causal connection between a release or threatened release at a *site* (regardless of its source) and *some* of the District's response costs. Although the trial court erred in requiring the District to show a causal connection between releases by *each defendant* and *all* of the District's response costs, this error was only prejudicial as to Northrop because only VOC releases from its site had actually contaminated the shallow aquifer. But because the District did not qualify as a "State" within the meaning of the HSAA, it had to show that its response costs were necessary and consistent with the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). Although the District had demonstrated necessity, which requires only a showing of a threat to human health or the environment, it had not shown NCP consistency because, among other things, the District's adoption of the mitigated negative declaration and SEIR did not meet the NCP's public participation requirements and the Project was not a cost-effective response to the contamination. The OCWD Act, by contrast, required the District to prove only that a defendant was a substantial factor in bringing about actual or threatened water contamination and that the Project was necessary and at least some of the incurred costs were reasonable. The court held that Northrop alone had made this showing, and it rejected Northrop's argument that the District's past Project costs were not recoverable because they were merely "investigatory." Finally, the court held that under California's "equity first" rule, defendants were entitled to a bench trial on their equitable claims first and that the findings on those claims were binding on the District's legal claims.

The Fourth District Court of Appeal has held that California's Hazardous Substances Account Act required a plaintiff to prove a causal connection between the plaintiff's response costs and the release of a contaminant from the defendant's site but not necessarily by the defendant itself. *Orange County Water District v. MAG Aerospace Industries, Inc.* (2017) 12 Cal. App. 5th 229.

In 2004, the Orange County Water District ("District") filed suit against defendant MAG Aerospace Industries, Inc. ("MAG") and several other owners and operators of industrial sites in Orange County's North Basin area, seeking to recover costs the District incurred responding to release of hazardous wastes, including VOC's, into groundwater. The District alleged injury in the form of investigation and remediation costs to address actual and threatened contamination, and alleged causes of action against all defendants, including MAG, under the HSAA, OCWD Act, and under various common law theories. Following the District's presentation of evidence at bench trial, the trial court entered judgment in favor of MAG, and the District appealed. The District's claims against five other defendants were the subject of a separate opinion in *Orange County Water District v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal. App. 5th 252.

The principal questions in this appeal were whether the trial court committed prejudicial error by misinterpreting the HSAA's causation standard and whether it erred by granting declaratory judgment in favor of MAG in the absence of a request by MAG.

The court of appeal ruled in MAG's favor on all claims. The HSAA's causation element is the same as that under the federal Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). As the court explained in the companion opinion in *Alcoa*, causation

under CERCLA, and therefore under the HSAA, departs from traditional tort theories of causation in that it does not require a plaintiff to show that a defendant caused a release or response costs but rather that there was a release from the defendant's site or facility. Further, the classes of potentially liable persons are identified under a separate HSAA prong, and include persons who might not be liable under traditional tort theories, e.g. current owners and operators of a contaminated facility. The court of appeal held that although the trial court erred by applying tort theories of causation rather than the correct HSAA standard, the error was harmless because the trial court found that no releases from MAG's site, regardless of source, had caused groundwater contamination or response costs incurred by the District, and the District had not challenged those factual findings. The court of appeal also rejected the District's argument that declaratory judgment could not be entered against MAG because MAG did not request such a declaration. Rather, California law provides that when a plaintiff requests declaratory relief but does not show entitlement to it, the appropriate practice is to enter an express, unfavorable declaration.

The Fourth District Court of Appeal has held that a water district's appropriative rights in groundwater were insufficient to support a trespass claim based on contamination of that water but sufficient to support a claim for private nuisance. *Orange County Water District v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal. App. 5th 343.

VOC's and perchlorate were detected in groundwater drawn from a drinking water well in Orange County's South Basin area. In 2006, the Orange County Water District ("District") began investigating the contamination and developed plans for a water treatment system. In 2008, after the District had incurred $1.5 million in costs but had not yet begun construction, the District filed suit against various current and former owners and operators of sites in the South Basin area that the District alleged were responsible for groundwater contamination. The District asserted statutory claims for damages under the HSAA, OCWD Act, and for declaratory relief, as well as common law claims for negligence, nuisance, and trespass. The trial court entered judgment on the pleadings in favor of a number of defendants, and judgment in favor of the remaining defendants following a bench trial.

On appeal, the principal questions were: (1) whether the HSAA's nonretroactivity provision bars suit against a defendant whose ownership of the contaminated site at issue ceased prior to 1982, (2) whether recoverable costs under the OCWD Act include "investigatory" costs, (3) whether the theory of "continuous accrual" applies to the District's negligence claim to save it from the statute of limitations, (4) whether a trespass claim could lie for contamination of water in which the District has potential appropriative rights, and (5) whether appropriative water rights can support a claim for private nuisance.

The court of appeal affirmed in part and reversed in part. The court held that the HSAA's retroactivity provision requires a showing both that alleged wrongful acts occurred before January 1, 1982 and that the acts did not violate any existing state or federal laws at the time they occurred. Because the defendant that raised this defense had not offered evidence on the latter element, its motion for summary adjudication should have been denied. The court also reaffirmed its holding in *Orange County Water District v. Alcoa Global Fasteners, Inc.* (2017) 12 Cal. App. 5th 252, that recoverable costs under the OCWD Act—reasonable costs incurred in cleaning up, containing, abating, or remediating contamination—include investigatory costs. As to negligence, the court

held that the theory of "continuous accrual" saves a claim from the three-year statute of limitations if it is based on a series of actionable wrongs, at least one of which occurred within the limitations period. Only one defendant met its burden to show that each allegedly negligent act was time-barred. As to trespass and nuisance, the court reasoned that both claims required the District to show some form of property interest. The District did not own the land overlying the South Basin, nor did its regulatory powers over South Basin groundwater confer a property interest. However, the District could hold an appropriative right in groundwater it recharged into the South Basin so long as it intended to reappropriate the water. Because the District was not given the opportunity to offer evidence of its intent to reappropriate below, the court assumed that it possessed appropriative rights for purposes of appeal. As a matter of first impression, it held that those rights nevertheless did not give rise to a trespass claim because they were not possessory in character. But they could support a claim for private nuisance, which requires a showing of injury to some property interest but not necessarily a possessory one.

The Fourth Circuit Court of Appeals dismisses landowner's claims that county's failure to extend sewer lines to landowner's property and county's enactment of a "merger" regulation resulted in an unconstitutional taking of property, a substantive due process violation and an equal protection violation. *Quinn v. The Board of County Comm. for Queen Anne County, et. al.,* No. 16-1890, slip op. (Fourth Cir. 2017).

Beginning in the 1950s, real estate investors began purchasing vacant land on and around South Kent Island, Queen Anne's County, Maryland. However, due to the inability to construct a viable septic system, construction of hundreds of lots was delayed until South Kent Island gained access to a main sewer line. Thereafter, Queen Anne's County (the "County") adopted a comprehensive zoning plan which included the extension of a sewer line to South Kent Island. (the "Sewer Plan") However, due to concerns related to overdevelopment of the island, the County determined that the sewer line would only be extended to fully or partially developed streets. Streets abutted by vacant lots were not included as part of the sewer line extension. Additionally, the County enacted a regulation governing the minimum lot size required for a building permit. Further, if contiguous lots under common ownership did not meet the minimum lot size requirements, they would merge into one, legally-conforming parcel (the "Merger Regulation").

In response to the Sewer Plan and Merger Regulation, a landowner on South Kent Island (the "Landowner") sued the County, alleging the Sewer Plan and Merger Regulation both resulted in an unconstitutional taking of property and that the Sewer Plan violated the Landowner's substantive due process and equal protection rights. The Landowner appealed from the federal district court's dismissal of all the Landowner's claims.

The Fourth Circuit upheld the district court's dismissal of the Landowner's claims. Regarding the Sewer Plan takings claim, the Fourth Circuit held that the Landowner could not prevail on such a claim because he did not have a property interest in obtaining the sewer service. Rather, the Landowner merely hoped for the extension of the sewer line, which does not equate to a protectable property interest. Similarly, the Fourth Circuit upheld the dismissal of the substantive due process claim because the Landowner did not possess an entitlement to receive sewer services. The Circuit Court also upheld the dismissal of the equal protection claim because the County's decision to extend the sewer services to streets with improved lots, versus those with only vacant

lots, was related to a legitimate governmental interest (i.e., preserving open areas). Regarding the Merger Regulation takings claim, the Circuit Court ruled the Landowner could not establish the elements under either the *Penn Central* or *Lucas* test. Regarding the *Lucas* test, the Circuit Court held that, even if the merged lots should be viewed in their individual (rather than merged) capacity, the Merger Regulation did not deprive the Landowner of all economically beneficial use of his land. Under the *Penn Central* Test, the Fourth Circuit held that the Merger Regulation did not deprive the Landowner of all economically-beneficial uses (i.e., the lack of sewer service, rather than the Merger Regulation, made the land undevelopable), the Merger Regulation did not interfere with the Landowner's reasonable investment-backed expectations (i.e., such expectations were highly speculative), and the nature of the Merger Regulation related to a classic governmental interest (i.e., preserving open areas). Accordingly, the Fourth Circuit upheld the district court's dismissal of the Landowner's claims.

Other Federal Cases of Interest