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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, and regulatory developments from October 1 through December 31, 2017.

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

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 of the California Lawyers Association, 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 cdaywilson1@gmail.com. I would like to thank Danielle K. Morone, Michael Haberkorn, Sabrina Teller, Anna Leonenko, Stephanie L. Safdi, Michael Sands, Anthony D. Todero and Amy Hoyt for their contributions to this issue of the Update. If you are interested in getting involved in writing for the Update or the activities of the Environmental Law Section, please contact me (at the above email) or any other section member. – Cyndy Day-Wilson.

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Regulatory Updates

Unified Program Regulations. In November 2017, the California Environmental Protection Agency (CalEPA) provided notice of, and requested comments on, proposed amendments to the Unified Program regulations. The proposed amendments would impose new reporting and procedural requirements, as well as make organizational and clarifying changes. Cal. Reg. Notice Register 2017, Vol. No. 44-Z, p. 1676.

Draft FY 2018-2022 EPA Strategic Plan. In October 2017, the Environmental Protection Agency (EPA) provided a notice of availability of, and requested comments on, the "Draft FY 2018-2022 EPA Strategic Plan." The document is being revised as a requirement by the Government Performance and Results Act Modernization Act of 2010. 82 Fed. Reg. 46490.

Report on Review of Agency Actions. In November 2017, the EPA provided a notice of availability of its "Final Report on Review of Agency Actions that Potentially Burden the Safe, Efficient Development of Domestic Energy Resources Under Executive Order 13738." 82 Fed. Reg. 51160.

AIR QUALITY

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

Area Designations. In December 2017, the California Air Resources Board (CARB) provided notice of a public hearing to consider proposed amendments to the area designations for state ambient air quality standards. Cal. Reg. Notice Register 2017, Vol. No. 51-Z, p. 1949.

California Capital Access Loan Program. In November 2017, the California Pollution Control Financing Authority provided notice of proposed regulations concerning the administration of the California Capital Access Loan program, the Collateral Support Program and the CalCAP Heavy-

Duty Vehicle Air Quality Loan Program. This action would make emergency regulations for same permanent. Cal. Reg. Notice Register 2017, Vol. No. 47-Z, p. 1797.

Ambient Air Monitoring Reference and Equivalent Method. In October 2017, the EPA provided notice of the designation of one new reference method for measuring concentrations of carbon monoxide in ambient air. 82 Fed. Reg. 45842.

Formaldehyde Emission Standards. In October 2017, the EPA provided notice of a proposed rule to amend the formaldehyde emission standards for composite wood products final rule. The amendment would update multiple voluntary consensus standards that have been changed since the 2013 proposed rulemaking, and would amend an existing regulatory provision. 82 Fed. Reg. 49302.

In December 2017, the EPA provided a notice of withdrawal of the direct final rule due to the receipt of adverse comments. The EPA will proceed with a final rule based on the proposed rule after considering all public comments. 82 Fed. Reg. 57874.

Glider Vehicles, Engines and Kits. In November 2017, the EPA provided notice of a proposed rule to repeal the emission standards and other requirements for heavy-duty glider vehicles, glider engines, and glider kits. The proposed action is based on a Clean Air Act interpretation that the EPA lacks authority to regulate glider vehicles. 82 Fed. Reg. 53442.

National Ambient Air Quality Standards (NAAQS). In October 2017, the EPA provided notice of a 30-day extension to the comment period for 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 Oxides, External Review Draft." 82 Fed. Reg. 48507.

In October 2017, the EPA also provided notice of a proposed rule providing a determination that a deficiency disapproval for the San Joaquin Valley nonattainment area for the 1997 fine particulate matter NAAQS has been corrected. The proposed determination is based on the EPA's approval of certain revisions to the California State Implementation Plan (SIP). 82 Fed. Reg. 48944. In December 2017, the EPA provided notice of a final rule regarding same which will stop the accrual of sanctions triggered by the disapproval. 82 Fed. Reg. 58747.

In November 2017, the EPA provided notice of a final rule establishing initial air quality designations for the 2015 primary and secondary NAAQS for ozone. Specifically, the following counties were designated attainment/unclassifiable: Del Norte, Humboldt, Lake, Lassen, Modoc and Siskiyou. 82 Fed. Reg. 54239.

In November 2017, the EPA also provided a notice of adequacy that the motor vehicle emissions budgets for the Reasonable Further Progress milestone year 2017 from the "2008 Eight-Hour Ozone Attainment Plan for San Diego County" is adequate for transportation conformity purposes for the 2008 ozone NAAQS. The previously-approved budgets are no longer applicable. 82 Fed. Reg. 54339.

In December 2017, the EPA provided a notice of availability of a final document titled, "Integrated Science Assessment for Sulfur Oxides-Health Criteria." The document provides information that serves as the scientific foundation for the EPA's review of the current primary NAAQS for sulfur oxide. 82 Fed. Reg. 58600.

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

1. Provided notice of a final rule regarding the residual risk and technology review conducted for the Manufacturing of Nutritional Yeast source category. In addition, the EPA is finalizing amendments including, but not limited to, revisions to the form of the volatile organic compounds standards for fermenters, removal of the option to monitor brew ethanol, and inclusion of ongoing relative accuracy test audits. 82 Fed. Reg. 48156.
2. Provided a notice of withdrawal of a direct final rule for the NESHAP for Wool Fiberglass Manufacturing; Flame Attenuation Lines. The direct final rule is being withdrawn in response to adverse comments. 82 Fed. Reg. 49132.
3. Provided notice of a final rule concerning the residual risk and technology review for the Publicly Owned Treatment Works source category under NESHAP. The final action makes revisions, edits and corrections to provide clarity for sources determining applicability and ensuring compliance. 82 Fed. Reg. 49513.

In November 2017, the EPA provided notice of an extended comment period for the proposed rule titled, "National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry Residual Risk and Technology Review." The comment period was extended by 15 days in response to a request for additional time. 82 Fed. Reg. 51380. That same month, the EPA also provided notice of, and requested comments on, data availability in support of the proposed rule. 82 Fed. Reg. 55339.

In December 2017, the EPA provided notice of a final rule completing the final residual risk and technology reviews conducted for the Wool Fiberglass Manufacturing category under NESHAP. The action readopts certain existing emission limits and revises certain emission standards. 82 Fed. Reg. 60873.

New Unit Set Asides. In December 2017, the EPA provided a notice of data availability of preliminary lists of units eligible for second-round allocations of emission allowances for the 2017 control periods from the new unit set-asides established under the Cross-State Air Pollution Rule. 82 Fed. Reg. 59603.

Oil and Natural Gas Sector: Emission Standards. In November 2017, the EPA provided a notice of data availability in support of a proposed rule titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources: Stay of Certain Requirements." Additional information is being provided in response to topics raised by stakeholders. 82 Fed. Reg. 51788.

In November 2017, the EPA also provided a notice of data availability in support of a proposed rule titled, "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified

Sources: Three Month Stay of Certain Requirements." Additional information is being provided in response to topics raised by stakeholders. 82 Fed. Reg. 51794.

Protection of Stratospheric Ozone. In December 2017, the EPA provided notice of a direct final rule to modify the use conditions required for three flammable refrigerants in new household refrigerators and freezers under the Significant New Alternatives Policy program. 82 Fed. Reg. 58122. The EPA also provided notice of a proposed rule regarding same. 82 Fed. Reg. 58154. The EPA withdrew the direct final rule due to the receipt of adverse comments. 82 Fed. Reg. 60890.

In December 2017, the EPA also provided notice of a final rule concerning proposed rulemaking titled "Protection of Stratospheric Ozone: Refrigerant Management Regulations for Small Cans of Motor Vehicle Refrigerant." Specifically, the EPA is finalizing its proposal to correct an editing oversight and is making clarifications. 82 Fed. Reg. 61180.

Renewable Fuel Standard. In October 2017, the EPA provided notice of, and requested comments on, supplemental information concerning the 2018 standards and 2019 biomass-based diesel volume under the Renewable Fuel Standard Program. The supplemental information presents data on production, imports and cost of renewable fuel and options to establish the final volume requirements. 82 Fed. Reg. 46174.

In December 2017, the EPA:

1. Provided notice of a final rule establishing the annual percentage standards and volume requirements for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel that apply to gasoline and diesel transportation fuel produced or imported in the year 2018. 82 Fed. Reg. 58486.
2. Provided a notice of availability of "Periodic Reviews for the Renewable Fuel Standard Program." The document includes the EPA's interpretation of the statutory requirement to conduct periodic reviews and prior actions taken by the EPA to fulfill its obligations to conduct such reviews. 82 Fed. Reg. 58364.
3. Provided notice of an opportunity to comment on an analysis of the lifecycle greenhouse gas emissions associated with certain biofuels that are produced from grain sorghum soil extracted at dry mill ethanol plants at any point downstream from sorghum grinding. 82 Fed. Reg. 61205.

State Implementation Plans. In October 2017, the EPA:

1. Provided notice of a proposed rule to approve California's Reasonably Available Control Measures/Reasonably Available Control Technology (RACT) and Reasonable Further Progress demonstrations for the 2006 24-hour fine particulate matter NAAQS in the Los Angeles-South Coast nonattainment area, and to determine that the State has corrected a related deficiency pending the EPA's final approval. 82 Fed. Reg. 46951. The EPA also provided notice of an interim final rule to defer sanctions based on the proposed approval. 82 Fed. Reg. 46917.

2. Provided notice of a final rule to approve and conditionally approve revisions to the Antelope Valley Air Quality Management District (AQMD) portion of the California SIP. The revisions concern demonstrations regarding RACT requirements for the 1997 8-hour ozone and the 2008 8-hour ozone NAAQS in the Antelope Valley ozone nonattainment area. 82 Fed. Reg. 46923.
3. Provided notice of a final rule approving a portion of an SIP submission regarding ambient ozone monitoring in the Bakersfield Metropolitan Statistical Area for the 1997 ozone and 2008 ozone NAAQS. 82 Fed. Reg. 47145.

In November 2017, the EPA:

1. Provided notice of, and requested comments on, a proposed rule to approve a revision to the Northern Sierra AQMD portion of the California SIP. The revision concerns emissions of particulate matter from wood burning devices. 82 Fed. Reg. 51178.
2. Provided notice of a proposed rule to approve revisions to the Mojave Desert AQMD portion of the California SIP. The revisions concern emissions of VOCs from marine and pleasure craft coating operations. 82 Fed. Reg. 54307.
3. Provided notice of a proposed rule to approve and conditionally approve revisions to the Mojave Desert AQMD portion of the California SIP. The revisions concern the demonstration regarding the RACT requirements for the 1997 8-hour ozone and 2008 8-hour ozone NAAQS portion of the Western Mojave Desert ozone nonattainment area. 82 Fed. Reg. 54309.

In December 2017, the EPA:

1. Provided notice of a final rule to approve a revision to the Sacramento Metropolitan AQMD portion of the California SIP. The revision concerns volatile organic compound emission from organic chemical manufacturing operations. 82 Fed. Reg. 57123.
2. Provided notice of a final rule to approve a revision to the Sacramento Metropolitan AQMD portion of the California SIP. The revision concerns emissions of volatile organic compounds from landfill gas flaring at the Kiefer Landfill. 82 Fed. Reg. 57130.
3. Provided notice of a final rule finding that California failed to submit a timely revision to the SIP for implementation of the 2008 ozone NAAQS for Kern County (Eastern Kern), Mariposa County and Nevada County (Western part). California has 24 months to submit an approved revision before sanctions and other action is taken. 82 Fed. Reg. 58118.
4. Provided notice of a final rule to approve revisions to the Placer County APCD and Ventura County APCD portions of the California SIP. The revisions concern emissions of oxides of nitrogen (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. 60119.

5. Provided notice of a proposed rule to approve revisions to the San Diego County APCD portion of the California SIP. The revisions concern volatile organic compound emissions from polyester resin operations. 82 Fed. Reg. 60348.
6. Provided notice of a final rule to approve a revision to the California SIP concerning emissions of volatile organic compounds, NO_X and particulate matter from the idling of diesel-powered trucks. 82 Fed. Reg. 61178.
7. Provided notice of a proposed rule to approve revisions to the Northern Sierra AQMD portion of the California SIP. The revisions concern emissions of particulate matter from wood burning devices. 82 Fed. Reg. 61203.

ATTORNEY'S FEES

Recent Court Rulings
No Summaries or updates this quarter.

Regulatory Updates
No Summaries or updates this quarter.

CEQA

Recent Court Rulings

Trial court did not abuse its discretion in imposing issue sanction for misuse of the discovery process when a party repeatedly failed to comply with discovery orders in CEQA dispute. *Creed-21 v. City of Wildomar*, 226 Cal. Rptr. 3d 532 (2017).

Creed-21, represented by Briggs Law Corporation, filed a complaint alleging Walmart and the City of Wildomar ("defendants") violated the California Environmental Quality Act ("CEQA") by failing to prepare an adequate environmental impact report for a Walmart retail complex in the city. The defendants disputed Creed-21's standing to bring suit, alleging Creed-21 was a shell corporation used by Briggs Law to obtain attorney's fees. In discovery, the defendants repeatedly sought: 1) to depose Creed-21's person most qualified and 2) the production of documents related to the standing issue. Creed-21 maintained that discovery was inappropriate in administrative mandamus proceedings and refused to comply. The trial court issued multiple orders to compel discovery and issued monetary sanctions against Creed-21. The trial court denied Creed-21's *ex parte* application to further postpone the disputed deposition. The Court of Appeals denied Creed-21's petition for writ of mandate. The defendants filed a motion for issue and monetary sanctions for Creed-21's violation of discovery orders. The trial court granted the issue sanction, effectively terminating the proceedings, and Creed-21 appealed.

California Code of Civil Procedure section 2025.450 authorizes a trial court to impose an issue sanction under section 2023.030 related to the misuse of the discovery process when a party

fails to obey a discovery order. Discovery sanctions are incremental in nature and are designed to curb misuse; a trial court may order a terminating sanction for discovery misuse considering all the circumstances, such as 1) whether or not the conduct was willful, 2) any detriment to the propounding party, and 3) the number of prior attempts to obtain discovery through formal and informal means. An issue sanction is reviewed under the abuse of discretion standard.

The Court of Appeals affirmed the trial court, holding that the issue sanction was not arbitrary or capricious. Creed-21 repeatedly failed to cooperate with the defendants to resolve the standing issue, disobeying two court orders to produce the person most qualified and refusing to allow the deposition to go forward even after monetary sanctions were imposed. Creed-21 refused to submit to discovery even after its legal challenge thereto was rejected by the trial court. In light of the fact that lesser sanctions had failed to propel the case forward, the trial court acted within its discretion in imposing the issue sanction to terminate proceedings.

First District finds environmental review under the Department of Pesticide Regulation's certified regulatory program must follow CEQA's substantive requirements. *Pesticide Action Network North America v. California Dept. of Pesticide Regulation* (2017) 16 Cal.App.5th 224.

The Department of Pesticide Regulation regulates the distribution, sale, and use of pesticides in California. The Department registers all pesticides after reviewing their efficacy and potential effects on human and environmental health. Pesticides that later indicate a potentially adverse effect may be subject to departmental reevaluation or cancelled registration.

Since 2006, national honey bee populations have been sharply declining. The phenomenon was linked to stressors such as "systemic" pesticides. In 2009, the Department began reevaluating the effects of "dinotefuran"—one of four chemicals that comprises the systemic "neonicotinoid" pesticide. By late 2013, the Department had not received conclusive evidence regarding the chemical's toxicity to bees, but reevaluation was ongoing. In January 2014, the Department released a public report proposing a decision to amend the labels of two dinotefuran-containing pesticides manufactured by real parties in interest Mitsui Chemicals Agro, Inc. and Valent U.S.A Corporation. The labels expanded use on fruit and vegetable crops and in increased quantities. The Department's reports concluded the pesticides did not pose direct or indirect significant adverse environmental impacts, and thus, did not propose or consider any alternatives or mitigation measures. Plaintiff Pesticide Action Network North America ("PANNA") submitted comments regarding the proposed labels' failure to warn about potential risks to honey bees. In June 2014, the Department issued its notice of final decision to approve the amendments, finding that it lacked sufficient scientific data to support additional mitigation measures beyond the labels' current restrictions.

PANNA filed a petition for writ of mandate alleging the Department violated CEQA by approving the label amendments without sufficient environmental review. The Alameda Superior Court denied the petition, which PANNA subsequently appealed. On appeal, the First District evaluated: (1) whether the Department's final report satisfied CEQA's substantive documentation requirements; and, (2) whether the Department's review process approving the label amendments complied with CEQA's substantive procedural requirements.

The Department's pesticide review process constitutes a certified regulatory program under Public Resources Code section 21080.5. The provision exempts such programs from certain CEQA requirements, and permits use of environmental documents that serve as "functional equivalents" in lieu of traditional CEQA documents. Here, the Department argued its program enjoyed section 21080.5 exemptions because its final report functioned as a negative declaration and its label review process complied with CEQA's procedural requirements. On review, the First District found the Department went too far in asserting that its entire regulatory scheme was exempt from CEQA's substantive requirements. Section 21080.5 serves as a "limited" exemption and does not relieve an agency program from fulfilling the substantive standards and broad policy goals set forth in CEQA. As such, the Department's program must still thoroughly evaluate specific environmental effects before approving an activity.

The court deemed the Department's final document insufficient because it failed to consider reasonable alternatives and cumulative impacts, and was not recirculated after modification. Public agencies must contemplate meaningful alternatives to any proposed action, even if significant impacts will be avoided through mitigation measures. Here, the Department's report did not satisfy CEQA's substantive requirements because it failed to consider feasible alternatives, despite finding no significant impacts. The Department's regulations mirror CEQA's "fair argument standard," which requires documented review when an activity may significantly affect the environment. Even if the Department meaningfully derived its "no significant impacts" finding, it failed to produce evidence, such as a checklist, showing the possible effects it examined before reaching its final decision. The court further found the Department abused its discretion by failing to analyze the potential cumulative impacts of its decision. CEQA requires assessing a project's incremental effects, particularly in consideration of past, present, and future projects. The analysis is integral because it elucidates how the agency decided to approve the plan. Here, the Department's record lacked any analysis regarding the cumulative impacts of the pesticides' new registered uses. The Department's single, conclusory sentence regarding such impacts lacked facts and failed to explain how the Department reached its conclusion. Finally, the court held that the Department should have recirculated its report prior to approval. Recirculation is required where new significant information is added to an environmental review document after public notice and comment, but before certification. Newly added information is "significant" if it alters a document so substantially that it deprives the public of meaningful opportunity to comment on an adverse environmental effect. Here, the Department's pending reevaluation of the two pesticides was so inadequate that public comment was effectively meaningless. Because the Department failed to explain its "no significant impacts" determination, or analyze feasible alternatives and cumulative impacts, recirculation was required to allow for meaningful public comment.

First District finds Department of Parks and Recreation violated CEQA by failing to identify a preferred project among five contemplated alternatives in a Draft EIR. *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277.

In 1984, the Department of Parks and Recreation acquired 777 acres of land in the Lake Tahoe Basin—608 acres of the property were designated as Washoe Meadows State Park and the remainder contained an existing golf course. Studies conducted in the early 2000s indicated that the layout of the golf course was contributing to sediment runoff to Lake Tahoe, which contributes to deterioration of habitat and water quality in the lake. In 2010, the Department circulated a draft

EIR to address the concerns about the golf course. The draft EIR analyzed five alternatives in equal detail, with the stated purpose of "improv[ing] geomorphic processes, ecological functions, and habitat values of the Upper Truckee River within the study area, helping to reduce the river's discharge of nutrients and sediment that diminish Lake Tahoe's clarity while providing access to public recreation opportunities …." The draft EIR did not identify a preferred alternative among the five it considered. In the final EIR, the Department identified the preferred alternative as a refined version of the original alternative 2, which provided for river restoration and reconfiguration of the golf course. In 2012, the Department certified the EIR and approved the preferred alternative.

Petitioner sought a writ of mandate to set aside approval of the project, citing several CEQA violations. The trial court granted the petition and invalidated the EIR for failing to sufficiently describe the project or identify a "preferred" alternative from the five project options it analyzed. On appeal, the First District evaluated whether the substantial evidence supported the Department's determination.

Framing the issue as a question of law, the court found that the draft EIR did not "provide the public with an accurate, stable and finite description of the project," because it did not identify a preferred alternative. The court found that by describing a range of possible projects, the Department had presented the public with "a moving target," which required the public to comment on all of the alternatives rather than just one project. The court determined that this presented an undue burden on the public. The court compared the draft EIR to the circumstances in *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, where the court found an EIR insufficient because the project description described a much smaller project than was analyzed in other sections of the EIR. The court in *Washoe Meadows* found that rather than providing inconsistent descriptions as in *County of Inyo*, the draft EIR here had not described a project at all. Thus, the court directed the Department to set aside the project approvals.

On remand, Fourth District finds SANDAG's Regional Transportation Plan EIR failed to sufficiently analyze impacts of greenhouse gas emissions and other impacts. *Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 17 Cal.App.5th 413.

SANDAG certified a programmatic EIR for its 2050 Regional Transportation Plan/Sustainable Communities Strategy in 2011. Petitioners challenged that EIR, alleging multiple deficiencies under CEQA, including the EIR's analysis of greenhouse gas (GHG) impacts, mitigation measures, alternatives, and impacts to air quality and agricultural land. The Court of Appeal held that the EIR failed to comply with CEQA in all identified respects. The Supreme Court granted review on the sole issue of whether SANDAG was required to use the GHG emission reduction goals in Governor Schwarzenegger's Executive Order S-3-05 as a threshold of significance. Finding for SANDAG on that issue, the Court left all other issues to be resolved on remand.

On remand, the Fourth Appellate District invalidated the 2011 Program EIR. The court found multiple flaws in the EIR's GHG and air quality mitigation, alternatives analysis, baseline information on toxic air contaminants, correlation of air quality effects to health effects, and impacts on agricultural lands.

First, the Court of Appeal ruled that the case was not moot, even though the 2011 EIR had been superseded by a new EIR certified in 2015, because the 2011 version had never been decertified and thus in theory could still be relied upon. The court also found that the petitioners did not forfeit arguments from their original cross-appeal by not seeking a ruling on them. And, even if failing to raise the arguments was a basis for forfeiture, the rule is not automatic, and the court has discretion to resolve important legal issues, including compliance with CEQA.

Second, the court reiterated the Supreme Court's holding that SANDAG's choice of GHG thresholds of significance was adequate for this EIR, but may not be sufficient going forward. Turning to SANDAG's consideration of GHG mitigation measures, the court found that SANDAG's analysis was not supported by substantial evidence, because the adopted measures were either ineffective at reducing emissions or infeasible and thus "illusory."

Third, also under the substantial evidence standard of review, the court determined that the EIR failed to describe a reasonable range of alternatives that would plan for the region's transportation needs, while lessening the plan's impacts to climate change. The EIR was deficient because none of the alternatives would have reduced regional vehicles miles traveled (VMT). This deficiency was particularly inexplicable given that SANDAG's Climate Action Strategy expressly calls for VMT reduction. The court noted that the measures, policies, and strategies in the Climate Action Strategy could have formed an acceptable basis for identifying project alternatives in this EIR.

Fourth, the EIR's description of the environmental baseline, description of adverse health impacts, and analysis of mitigation measures for air quality improperly deferred analysis from the programmatic EIR to later environmental review, and were not based on substantial evidence. Despite acknowledging potential impacts from particulate matter and toxic air contaminants on sensitive receptors (children, the elderly, and certain communities), the EIR did not provide a "reasoned estimate" of pollutant levels or the location and population of sensitive receptors. The EIR's discussion of the project's adverse health impacts was impermissibly generalized. The court explained that a programmatic EIR improperly defers mitigation measures when it does not formulate them or fails to specify the performance criteria to be met in the later environmental review. Because this issue was at least partially moot given the court's conclusions regarding defects in the EIR's air quality analysis, the court simply concurred with the petitioners' contention that all but one of EIR's mitigation measures had been improperly deferred.

The court made two rulings regarding impacts to agricultural land. The court held that SANDAG impermissibly relied on a methodology with "known data gaps" to describe the agricultural baseline, as the database did not contain records of agricultural parcels of less than 10 acres nor was there any record of agricultural land that was taken out of production in the last twenty years. This resulted in unreliable estimates of both the baseline and impacts. However, under de novo review, the court found that the petitioners had failed to exhaust their remedies as to impacts on small farms and the EIR's assumption that land converted to rural residential zoning would remain farmland. While the petitioners' comment letter generally discussed impacts to agriculture, it was not sufficiently specific so as to "fairly apprise" SANDAG of their concerns.

Justice Benke made a detailed dissent. Under Benke's view, the superseded 2011 EIR is "most likely moot" and in any event, that determination should have been left to the trial court on remand. This conclusion is strengthened, when, as here, the remaining issues concern factual contentions. As a court of review, their record was insufficient to resolve those issues.

Fifth Appellate District finds county used appropriate baseline for oil refinery modification project, but erred in relying on federal preemption to avoid analyzing and mitigating impacts under CEQA. *Association of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708.

In 2014, Kern County approved a rail expansion and oil refinery modification project. The project involved modifications proposed by Alon USA to an existing petroleum refinery northwest of the City of Bakersfield. The refinery had undergone several ownership changes since 1932, with Alon USA purchasing it from Flying J and its subsidiary during the latter's 2008 bankruptcy proceedings. Alon USA sought to expand existing rail, transfer and storage facilities, including the construction of a double rail loop connected to the BNSF railway. The expanded train facilities would allow the transport of crude oil from the Bakken formation in North Dakota to the refinery for processing. The Association of Irritated Residents, Center for Biological Diversity, and Sierra Club filed suit after the county certified an EIR and approved the project. The trial court denied the petitioners' allegations that the county: (1) used an improper baseline to measure existing conditions; (2) incorrectly used cap-and-trade program participation to measure greenhouse gas emission impacts; and (3) and failed to adequately disclose significant environmental effects or mitigation measures from off-site rail activity. On appeal, the Fifth District evaluated whether substantial evidence supported the County's treatment of project baselines and greenhouse gas emissions, and whether federal law preempted CEQA review of impact analysis and mitigation.

First, the court rejected the plaintiffs' assertion regarding the county's use of year 2007 as the baseline for air pollution emissions instead of using year 2013—the year that the county published the notice of preparation. The court found no error in the county's use of data from year 2007 because substantial evidence supported this deviation from the "normal" baseline. The court concluded that it was reasonable to include an operating refinery in the baseline because: (a) existing permits and entitlements allow for the processing of up to 70,000 barrels per day; (b) Flying J's bankruptcy filing in 2008 only temporarily halted processing of hydrocarbons; (c) refinery operations have been subject to prior CEQA review; and (d) the processing of crude oil could begin again without the currently proposed project. Towards that end, substantial evidence supported the county's decision to use 2007 as a baseline because it was the last full year of refinery operations, and not a hypothetical, maximum authorized amount. Second, the court found the county did not violate CEQA when it used cap-and-trade allowances and offset credits to estimate the project's GHG emissions. Under CEQA Guidelines section 15064.4, subdivision (b)(3), the state's cap-and-trade program constitutes a regulation with which the project must comply. The section authorizes a lead agency to determine whether a project's GHG emissions will have a less-than-significant effect on the environment based on compliance with the program, even if surrendering (versus not surrendering) allowances would not reduce the number of emissions emitted. Compliance with the program could be part of the substantial evidence supporting a finding of less-than-significant impacts from GHG emissions, even though surrender of

allowances would not result in the project emitting fewer GHG molecules than if the allowance had not been surrendered.

In the final published section, the court dealt with federal preemption and off-site rail impacts. Claiming that the Interstate Commerce Commission Termination Act of 1995 (ICCTA) preempted CEQA review, the county had excluded analysis of some of the impacts from off-site main line rail operations that will deliver crude oil to the refinery. The court disagreed. Interpreting the California Supreme Court's direction in *Friends of Eel River v. North Coast Railroad Authority* (2017) 3 Cal.5th 677, 722, the court concluded that the development of information pursuant to CEQA is not categorically preempted but may be preempted on an as-applied basis. Then, as an alternative to that broad legal conclusion, the court considered whether categorical preemption applied to the specific circumstances in this case. It concluded that no categorical preemption applied because analysis of indirect environmental effects "would impose no permitting or preclearance by a state or local agency upon the delivery of crude oil to the project site by a rail carrier," and "would not control or influence matters directly regulated under federal law." The court also concluded that there was no as-applied preemption because the environmental analysis of off-site rail activities "would not prevent, burden, or interfere with BNSF Railway's operation." Finally, the court directed the county on remand to use the tests stated in this opinion to determine whether particular mitigation measures may be preempted by the ICCTA.

On remand, Second District finds lower court may partially decertify Newhall Ranch EIR and leave project approvals in place. *Center for Biological Diversity v. California Department of Fish and Wildlife* (2017) 17 Cal.App.5th 1245.

This was the second appeal of the EIR for the Newhall Ranch development project. It follows the Supreme Court's decision in *Center for Biological Diversity v. California Department of Fish & Wildlife* (2015) 62 Cal.4th 204, where the Court determined that the EIR's analysis of GHG emissions improperly relied on a "business-as-usual" model and that mitigation adopted for the stickleback fish (catch and relocate) was itself a prohibited taking under the California Fish and Game Code. Subsequently, the Second District affirmed in part and reversed in part its original decision. The appellate court remanded the matter to the trial court, with instructions to issue an order consistent with the Supreme Court's opinion, but otherwise granting the trial court discretion to resolve all outstanding matters under Public Resources Code section 21168.9.

After additional briefing and a hearing, the trial court issued a limited writ. The writ decertified those sections of the EIR concerning GHG emissions and mitigation measures for the stickleback; enjoined all project activity, including construction; and suspended two of the six project approvals. This appeal followed, alleging the trial court erred in partially decertifying the EIR and leaving project approvals in place during decertification.

The Second District upheld the lower court's judgment and order on remand held that (1) a trial court has the authority to partially decertify an EIR under CEQA following a trial, hearing, or remand; (2) a trial court has the power to leave an agency's project approvals in place after partially decertifying an EIR; and (3) the trial court acted within its discretion in declining to set aside all project approvals after court suspended project activity pending correction of partially-decertified EIR. The court upheld the trial court's judgment mandating the partial decertification

of the Final EIR for the Newhall Ranch project and the suspension of only two out of six project approvals. In the unpublished portion of the opinion, the court found that the writ was not a separate appealable post-judgment order or injunction, and therefore the court had jurisdiction to hear the appeal under Code of Civil Procedure section 904.1.

The court reviewed the lower court's interpretation of section 21168.9 de novo. The court determined that the trial court did not abuse its discretion in partially decertifying the EIR, as section 21168.9 expressly permits decertification of an EIR "in whole or in part." The court also held that after partial decertification, it is permissible to leave in place project approvals that do not relate to the affected section of the EIR. This is consistent with the statute's implicit mandate that project activities that do not violate CEQA must be permitted to go forward.

The court further found that the trial court did not abuse its discretion in issuing the limited writ. The lower court adequately supported its findings and demonstrated that project activities were severable, that severance would not prejudice compliance with CEQA, and that the remaining activities complied with CEQA. The court noted that prejudice with CEQA compliance is particularly unlikely here, given the court's injunction against further construction. Finally, the court rejected petitioners' contention that the writ, issued under CEQA, does not provide an adequate remedy for California Fish and Game Code violations. While acknowledging that section 21168.9 is part of CEQA, the streambed alteration agreement that remains in place, already prohibits the taking of sticklebacks. Furthermore, the injunction barring project construction provides a suitable remedy for this violation.

Second District finds City of West Hollywood adequately analyzed and sufficiently responded to comments regarding a project's preservation alternative. *Los Angeles Conservancy v. City of West Hollywood* (2017) 18 Cal.App.5th 1031.

In 2014, the city certified an EIR for a mixed–use development in the Melrose Triangle section of West Hollywood. The project was the product of city incentives to redevelop the area in order to create a unified site design with open space, pedestrian access, and an iconic "gateway" building to welcome visitors and promote economic development. The EIR concluded that a significant and unavoidable impact would result from the demolition of a building eligible for listing as a California historic resource. One alternative would have preserved the building in its entirety, by reducing and redesigning the project. This preservation alternative was ultimately rejected as infeasible because it was inconsistent with project objectives, and would eliminate or disrupt the project's critical design elements. After circulating the draft EIR, the project's architects developed a site design which incorporated the building's façade and mandated this design as a condition of approval. A subsequent fire destroyed 25 percent of the building, but left the façade intact. The final EIR and conditions were approved in 2014. Petitioners immediately filed suit.

In the court below, the petitioner argued that the EIR's analysis of the preservation alternative was inadequate, the city did not respond adequately to public comments, and that the city's finding that the alternative was infeasible was not supported by substantial evidence. The respondents prevailed on all claims and the petitioner appealed.

The Second District upheld the trial court's denial of a petition for writ of mandate, finding that the EIR's treatment of alternatives was sufficient and that the city adequately responded to comments. The court afforded substantial deference to the city's determination that the petitioner's preferred alternative was infeasible based on its inability to meet the city's policy goals and vision for the site's redevelopment. The court reiterated the *Laurel Heights* standard that an analysis of alternatives does not require perfection, only that the EIR provide sufficient information to support a reasonable range of alternatives. Furthermore, the EIR's statement that preservation of the building would preclude construction of other parts of the project was self-explanatory and did not require additional analysis. The EIR's use of estimates to calculate how the preservation alternative would reduce the project's footprint did not create ambiguities that would confuse the public. Such imprecision is simply inherent in the use of estimates.

The court also found that the city's responses to the three comments cited by the petitioner were made in good faith and demonstrated reasoned analysis. The court reiterated that a response is not insufficient when it cross-references relevant sections of the draft EIR, and that the level of detail required in a response can vary. Here, the West Hollywood Preservation Alliance and the President of the Art Deco Society of Los Angeles opined in comments that the building could be preserved while achieving the project's objectives. The city adequately responded to these comments by referencing, and expanding upon, the EIR's analysis of the preservation alternative, where this option was considered. The last comment was of a general nature, so the city's brief, general response was appropriate.

Finally, the court found sufficient evidence to support the city's finding that the preservation alternative was infeasible. An alternative is infeasible when it cannot meet project objectives or when policy considerations render it impractical or undesirable. An agency's determination of infeasibility is presumed correct and entitled to deference, if supported by substantial evidence in the record. The court found that the city's conclusion that the alternative was infeasible was supported by substantial evidence in the record. Development plans, photographs, and testimony from senior planning staff supported the city's conclusion that retaining the building and reducing the project would not fulfill the project objectives of creating a unified site design, promoting pedestrian uses, and encouraging regional economic development. That another conclusion could have been reached did not render the city's decision flawed.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Greenhouse Gas Emissions Standards. In December 2017, CARB provided notice of a public hearing to consider proposed California greenhouse gas emissions (GHG) standards for medium- and heavy-duty engines and vehicles and proposed amendments to the tractor-trailer GHG regulation. Cal. Reg. Notice Register 2017, Vol. No. 51-Z, p. 1938.

Carbon Pollution Emission Guidelines. In October 2017, the EPA provided notice of a proposed rule to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units. 82 Fed. Reg. 48035. In November 2017, the EPA provided notice of a public hearing and extended comment period for same. 82 Fed. Reg. 51787.

Electric Utility Generating Units. In December 2017, the EPA provided an advance notice of proposed rulemaking concerning emission guidelines to limit greenhouse gas emissions from existing electric utility generating units and is soliciting certain information. 82 Fed. Reg. 61507.

COASTAL RESOURCES

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

The Ninth Circuit has ruled that under the Endangered Species Act, (ESA), a subjective good faith standard controls when determining whether a criminal defendant acted in self-defense in killing three grizzly bears. *United States v. Wallen* (9th Cir. 2017) 874 F.3d 620.

A defendant was convicted after a bench trial of killing three grizzly bears in violation of the ESA. The magistrate judge rejected the defendant's claim that he killed the bears in self-defense, concluding that defendant's belief that it was necessary to kill the bears in self-defense was objectively unreasonable.

On appeal, the defendant challenged the conviction on two grounds: (1) that he was entitled to a jury trial; and (2) the court erred in applying an objective standard to determining whether the defendant acted in self-defense.

The Ninth Circuit held that taking the three bears in violation of the ESA was a presumptively petty crime, and as such, the defendant did not have a right to a trial by jury. The Court then discussed the self-defense language of the ESA, which stated that killing an endangered or threatened species was not an illegal taking if the defendant acted had a "good faith belief" that he was "acting to protecting himself . . ., a member of his . . . family, or any other individual, from bodily harm from any endangered or threatened species." 16 U.S.C. section 1540(b)(3). The Court held that a subjective standard, and not an objective standard, applied to determining whether the defendant acted in a "good faith belief." Because the district court applied an objective standard, the Ninth Circuit overturned the conviction.

Regulatory Updates

Cascades Frog. In October 2017, the California Fish and Game Commission provided a notice of findings concerning the petition to list the Cascades frog as a threatened or endangered species. Based on the available information it was found the listing likely could occur and, as a result, the species is a candidate species. The California Department of Fish and Wildlife's written report indicating whether the petitioned action is warranted is due within one year. Cal. Reg. Notice Register 2017, Vol. No. 43-Z, p. 1633.

Mitigation Policies. In November 2017, the U.S. Fish and Wildlife Service (USFWS) provided notice of, and requested comments on, the mitigation planning goals of the existing Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy. The policies will be revised, as necessary, based on the comments received. 82 Fed. Reg. 51382.

Black-Backed Woodpecker. In October 2017, the USFWS provided notice of a 12-month finding on a petition to list the Oregon-Cascades/California and Black Hills populations of the black-backed woodpecker. Based on the best available scientific and commercial information, the USFWS found that listing the species is not warranted at this time. 82 Fed. Reg. 46618.

Candidate Conservation Agreements with Assurances. In November 2017, the USFWS provided notice of, and requested comments on, its intent to review and potentially revise the regulations concerning enhancement-of-survival permits issued associated with Candidate Conservation Agreements with assurances. 82 Fed. Reg. 55550. The USFWS also provided notice of its intent to review and potentially revise the Candidate Conservation Agreements with Assurances policy. 82 Fed. Reg. 55625.

Hidden Lake Bluecurls. In November 2017, the USFWS provided notice of a re-opened comment period for the proposed rule to remove the plant Hidden Lake bluecurls from the list of endangered and threatened plants on the basis of recovery. This action will allow publication of a legal notice and provide an opportunity for further comments. 82 Fed. Reg. 50606.

Mojave Shouldband Snail. In December 2017, the USFWS provided notice of a 12-month finding on a petition to list the Mojave shoulderband snail. The USFWS found that listing the species as threatened or endangered is not warranted. 82 Fed. Reg. 57562.

San Fernando Valley Spineflower. In November 2017, the USFWS provided notice of a Candidate Conservation Agreement for the San Fernando Valley Spineflower to implement conservation measures for the species. As a result, the comment period for the proposed rule to list the species as threatened was reopened for an additional 30 days. 82 Fed. Reg. 52262.

Southwestern Willow Flycatcher. In December 2017, the USFWS provided notice of a 12-month finding concerning the southwestern willow flycatcher. Following evaluation of the species, the USFWS found that it is a valid subspecies, continues to meet the definition of an endangered species and removing it from the List of Endangered and Threatened Wildlife is not warranted. 82 Fed. Reg. 61725.

ENERGY

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

FEES/TAXES

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

FISHING RIGHTS

Recent Court Rulings

The Ninth Circuit has held that the judge who adjudicated the Suquamish Indian Tribe's treaty fishing rights in 1975 did not intend to extend them to certain contested waters because

there was no evidence before him that the tribe traditionally fished in those locations. *Upper Skagit Indian Tribe v. Suquamish Indian Tribe*, 871 F.3d 844 (9th Cir. 2017).

The Stevens Treaties secured for the tribes of Western Washington, including the Suquamish Indian Tribe, fishing rights in those "usual and accustomed ground and stations" (referred to as "U&A") where members of the tribes customarily fished at and before treaty times. In 1974, Judge George Boldt determined the usual and accustomed fishing rights for several tribes in the first decision in the ongoing *United States v. Washington* case. A year later, the Suquamish intervened by filing a Request for Determination of the tribe's treaty fishing rights. In support of the tribe's Request, the Suquamish filed a map identifying its claimed U&A determinations, divided into four areas from the southern Puget Sound to the Canadian border. Judge Boldt ruled over the State's objection that the Suquamish had made a prima facie showing of U&A in Areas One and Two of the map but did not address Area 3, which was not contested by any party at the time. Judge Boldt then issued a written order holding that the Suquamish's usual and accustomed fishing grounds include, in relevant part, "the marine waters of Puget Sound from the northern tip of Vashon Island to the Fraser River." In 2014, the Upper Skagit Indian Tribe initiated the instant proceeding, requesting a determination that the Suquamish Indian Tribe's U&A determined by Judge Boldt did not include three bays on the eastern side of the Puget Sound (the "Contested Waters") located in Area 3 of the claim map. The district court granted summary judgment to the Upper Skagit Indian Tribe, and the Suquamish appealed.

The question presented on appeal was whether Judge Boldt intended to include the Contested Waters in the Suquamish's U&A determination.

The Ninth Circuit held that Judge Boldt did not so intend and affirmed the district court's grant of summary judgment. The court reasoned that under circuit precedent's framework for interpreting Judge Boldt's U&A findings, the Upper Skagit Indian Tribe had the burden to show that there was no evidence before Judge Boldt that the Suquamish customarily fished or traveled through the Contested Waters. Examining the record before Judge Boldt, the Ninth Circuit agreed that there was none. The anthropological evidence in the record identified Suquamish fisheries on the Western side of the Puget Sound, far from the Contested Waters. That evidence also described regular Suquamish travel through the San Juan Islands and to the Fraser River but placed that travel path west of Whidbey Island, whereas the Contested Waters lay to the east. The court further reasoned that Judge Boldt's failure to name the Contested Waters, while not dispositive, contributed to the conclusion that Judge Boldt did not intend to include them in the Suquamish's U&A determination. The court rejected the Suquamish's attempt to broaden the scope of relevant record evidence. Among other things, it held that the law of the case foreclosed the Suquamish's argument that the lack of objection to Area 3 on the 1975 claim map was probative evidence, pointing out the court had previously determined that Judge Boldt did not intend to recognize Suquamish U&A in parts of Area 4, which was also uncontested.

FOREST RESOURCES

Recent Court Rulings

The Ninth Circuit Court of Appeals held that a special purpose permit granted by the U.S. Fish & Wildlife Service (USFWS), as well as a biological opinion issued by the National Marine Fisheries Service (NMFS) were arbitrary and capricious. *Turtle Island Restoration Network v. U.S. Department of Commerce* (9th Cir. 2017) 878 F.3d 725.

The NMFS issued a biological opinion determining that shallow-set fishing would not jeopardize certain sea turtle populations. Subsequent to this opinion, the NMFS implemented a rule approving previously prohibited shallow-set fisheries. Then, the USFWS found that there was a compelling justification to grant a special purpose permit to the NMFS and allow the shallow-set fishery to incidentally take a certain number of migratory seabirds because the fishery would benefit the nation.

The Turtle Island Restoration Network (TIRN) challenged the conclusion in the biological opinion as well as the decision to issue the permit, contending that the USFWS and the NMFS acted arbitrarily and capriciously. The District Court granted summary judgment affirming the decision to issue the permit and upholding the biological opinion. TIRN appealed to the Ninth Circuit to address the issue of whether the NMFS or the USFWS acted arbitrarily and capriciously when issuing the biological opinion and the special use permit.

The court concluded that the NMFS did act arbitrarily and capriciously in a portion of the biological opinion that concluded the turtles would not be affected by the shallow-set fishery because it overlooked climate based models depicting the turtle population decline. Similarly, the court concluded the USFWS acted arbitrarily and capriciously because a special use permit should only be issued when there is a compelling justification that is related to migratory seabirds, as opposed to a justification related to the nation as a whole.

Regulatory Updates

Cumulative Impacts Assessment Checklist, Technical Rule Addendum No. 2 and Appendix. In December 2017, the California Board of Forestry and Fire Protection provided notice of proposed amendments to the Cumulative Impacts Assessment Checklist, Technical Rule Addendum No. 2 and Appendix. Specifically, the amendments would revise the rules to follow CEQA's substantive requirements concerning fire hazard impacts and GHG emissions, as well as update the existing guidance to provide clarity between requirements and guidance. Cal. Reg. Notice Register 2017, Vol. No. 52-Z, p. 1980.

Licensing, Certification and Discipline of Certified Rangeland Managers. In December 2017, the California Board of Forestry and Fire Protection responded to a petition for administrative rulemaking and to amend the program for licensing, certification and discipline of certified rangeland managers. The Board accepted the petition, in part, and has scheduled a December 8,

2017 hearing for consideration of the petition. Cal. Reg. Notice Register 2017, Vol. No. 48-Z, p. 1846.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Regulatory Updates

Paint or Varnish Strippers Containing Methylene Chloride. In November 2017, the California Department of Toxic Substances Control (DTSC) provided notice of proposed amendments to add paint or varnish strippers containing methylene chloride as a Priority Product on the Priority Products list under the Safer Consumer Products regulations. Cal. Reg. Notice Register 2017, Vol. No. 46-Z, p. 1769.

Post-Closure Rule. In October 2017, the DTSC provided notice of proposed regulations to impose post-closure plan requirements pursuant to Senate Bill 1325. The proposed rule would provide flexibility for DTSC to use enforceable documents to authorize hazardous waste post-closure activities at hazardous waste facilities subject to post-closure care. A public workshop and public hearing will be held concerning same. Cal. Reg. Notice Register 2017, Vol. No. 41-Z, p. 1545.

2017 North American Industry Classification System (NAICS) Codes. In November 2017, the EPA provided a notice of withdrawal of a direct final rule to update the list of NAICS codes subject to reporting under the Toxic Release Inventory. Due to an adverse comment, the EPA will proceed with a final rule based on the proposed rule after considering all comments. 82 Fed. Reg. 52674. In December 2017, the EPA addressed the adverse comment received. 82 Fed. Reg. 60906.

Draft Guidance for Pesticide Registrants. In October 2017, the EPA provided notice of an extended comment period for the document titled "Pesticide Registration Notice 2017-XX: Notifications, Non-Notifications and Minor Formulation Amendments." The comment period has been extended for an additional 60 days ending December 5, 2017. 82 Fed. Reg. 46491.

Hazardous Waste Compliance Docket. In December 2017, the EPA provided notice of an update to the Federal Agency Hazardous Waste Compliance Docket. Specifically, the update includes 21 additional facilities, 10 deletions and 7 corrections since the previous update. 82 Fed. Reg. 57976.

Hazardous Waste Export and Import. In December 2017, the EPA provided notice of a final rule amending existing regulations regarding the export and import of hazardous wastes from and into the United States. The rule applies to confidentiality determinations specifically and is being made to apply a consistent approach in documentation. 82 Fed. Reg. 60894.

Mercury. In October 2017, the EPA provided notice of, and requested comments on, a proposed rule of reporting requirements to provide information to assist in the preparation of an "inventory of mercury supply, use and trade in the United States," where mercury is defined as elemental mercury and a mercury compound. 82 Fed. Reg. 49564. In December 2017, the EPA extended the deadline for comments on same. 82 Fed. Reg. 60168.

National Priorities List. In December 2017, the EPA provided a notice of, and requested comments on, its intent to partially delete the surface soil portion of the Pacific Coast Pipe Lines Superfund Site from the National Priorities List which is an appendix to the National Oil and Hazardous Substances Pollution Contingency Plan. 82 Fed. Reg. 60943.

Toxic Substance Control Act (TSCA). In November 2017, the EPA provided notice of two meetings to discuss implementation activities under the amended TSCA. The meeting topics include implementing changes to the New Chemicals Review program and possible approaches for identifying potential candidate chemical substances for the EPA's prioritization process under TSCA. 82 Fed. Reg. 51415.

In November 2017, the EPA provided notice of a final determination that revisions to the current size standards are warranted for small manufacturers and processors. The determination was made after consideration of public comments regarding same. 82 Fed. Reg. 56824.

INSURANCE COVERAGE

Recent Court Rulings

The Fourth District Court of Appeal has held that when allocation of indemnity among insurers turns exclusively on legal issues, damages are certain and pretrial interest is available. *State of California v. The Continental Insurance Company* (2017) Cal. App. 4th No. 064518

The State of California sued to recover from its insurance companies the costs of cleanup at Stringfellow hazardous waste site. Continental Insurance Company (Continental) is the only remaining insurer and the issue is the award of mandatory prejudgment interest. Continental paid its policy limit of $12 million and went to trial to determine the issue of prejudgment interest. The trial court ruled that the State was entitle to mandatory prejudgment interest starting on September 11, 1998, the date of the Rule 54(b) judgment and totaling $13,914,082.

The court of appeal affirmed the trial court's judgement awarding mandatory prejudgment interest dating back to September 11, 1998. This court found that the policies were written in excess of a retention and therefore the trial court properly ruled that vertical exhaustion applies. This court also ruled that judicial estoppel does not apply because the trial court rejected the State's position that horizontal exhaustion applies.

The trial court ruled that the State was ordered to pay in 1998 when Rule 54(b) judgment found the State liable for 100% of the costs. The court of appeal affirmed, concluding that Rule 54(b) judgement triggered and exhausted Continental's policies. The trial court correctly awarded prejudgment interest dating back to September 11, 1998. This court further stated that the test for determining claims as to uncertainty of damages is: "when the allocation of indemnity among insurers turns on factual issues, damages are uncertain and pretrial interest is unavailable; when it turns exclusively on legal issues, damages are certain and pretrial interest is available." In applying this test, this court found that Continental's uncertainty claims were disputes of purely legal questions, that the trial court had resolved, and therefore prejudgment interest was available. Lastly, this court rejected Continental's offset claim because there was not showing that the State had been made whole.

Regulatory Updates
No summaries or updates this quarter.

LAND USE

Recent Court Rulings

Regulatory Updates

Fixing America's Surface Transportation (FAST)-41 Best Practices. In October 2017, the EPA provided a notice of availability of, and requested comments on, "Recommended Best Practices for Environmental Reviews and Authorizations for Infrastructure Projects." Specifically, the EPA would like comments on whether any of the best practices are generally applicable on a delegation or authorization-wide basis to permitting under FAST-41. 82 Fed. Reg. 50418.

MINING

Recent Court Rulings
The Ninth Circuit affirmed the District Court's ruling rejecting various challenges to the Secretary of Interior's decision to withdraw over a million acres of land in the Grand Canyon from new uranium mining claims. *National Mining Association v. Zinke* (2017) 9th Cir. No. 14-17351

Since the Grand Canyon National Park was discovered to contain large quantities of uranium in 1947, there have been mining operations and production in the region. A spike in uranium prices led to a uranium mining surge in the 1980s and additional mines were opened. Most uranium production stopped when prices dropped in 1990s. In 2007 prices spiked again leading to a renewed interest in uranium mining in the region. In 2012, in response to concerns about the impact of uranium extraction the Secretary of Interior issued a Record of Decision (ROD) withdrawing over one million acres of federal land from new uranium mining claims for up to twenty years. Mining companies and local governments opposing the withdrawal (Plaintiffs) filed a lawsuit

challenging the Secretary's decision. In a consolidated action Plaintiffs asserted the following claims: (1) that FLPMA contains an unconstitutional legislative veto provision that is not severable and therefore invalidates the provision granting Secretary authority to make withdrawals; (2) that Secretary's withdrawal was arbitrary and capricious; (3) that Secretary failed to comply with NEPA in approving the withdrawal; (4) that the withdrawal violated the Establishment Clause; (5) that the U.S. Forest Service's consent to withdrawal was arbitrary and capricious. The district court rejected each of the challenges to withdrawal. Plaintiffs appealed. The court of appeals affirmed the judgement of the district court on all claims.

District court held that the unconstitutional legislative veto provision is severable from the large-tract withdrawal authority delegated to the Secretary. The court further held that invalidating the veto provision does not affect the Secretary's withdrawal authority. District court found no indication that Congress would have preferred no statute at all if the legislative veto was severed.

District court concluded that the Secretary did not exceed its statutory authority under FLPMA and NEPA. The record showed that the Secretary conducted a detailed analysis, considered expert opinions and public comments, recognized the limitations of the available scientific data, and concluded that a cautious approach was necessary. The record also showed that the Secretary consulted with local governments and the final EIS and ROD considered the approved county plans and found no conflicts. The Secretary's decision was not arbitrary and capricious and did not violate FLPMA or NEPA.

The district court applied the Lemon test and determined that the Establishment Clause argument fails under that test. The district court rejected the claim that the Forest Service's consent to withdrawal violated the National Forest Management Act, explaining that Forest Service does not have the authority to open or close public lands to mining claims.

The Ninth Circuit affirmed the district court's rejection of challenges to operate a uranium mine in the withdrawal area because the company had valid existing rights. *Havasupai Tribe v. Provencio* (2017) 9th Cir. No. 15-15754

In 2012, the Secretary of Interior issued a decision to withdraw from new mining claims over a million acres of federal lands around the Grand Canyon National Park for up to twenty years. The withdrawal decision was subject to "valid existing rights." In 1988, the Forest Service approved the operation of a uranium mine, known as Canyon Mine, on land within the withdrawal area. The area also contained Red Butte, a site of religious significance to the Tribe. During the initial approval process, the Forest Service prepared an EIS and addressed the impact on the tribal significance of Red Butte under the National Historic Preservation Act (NHPA). The mine operator placed the mine on standby status in 1992. Energy Fuels, the new owner of Canyon Mine, requested to resume its mining operations. In April 2012, the Forest Service issued a Mineral Report and concluded that Energy Fuels had "valid existing rights that were established prior to the mineral withdrawal." The Forest Service reviewed its 1988 decision, the EIS and the approved plan of operations (PO) for any changes that might require additional review. Forest Service concluded that no modification was required to resume operations under the approved PO, no further NEPA analysis was necessary, and there was no new "undertaking" under NHPA. Forest

Service began its NHPA consultation with the Tribe.

In 2013, the Tribe sued the Forest Service asserting the following claims: (1) the Forest Service's determination that Energy Fuels had valid existing rights was a major federal action requiring an EIS under NEPA; (2) the Forest Service's determination was an "undertaking" under NHPA and required a full section 106 consultation; (3) the Forest Service violated NHPA by not updating section 106 analysis to consider the impact on Red Butte; (4) the Forest Service improperly determined that Canyon Mine could be operated at a profit. Both parties cross-moved for summary judgement. Forest Service claims that the court has no jurisdiction because the determination of valid existing rights was not a final agency action.

The district court held that the Forest Service's determination that Energy Fuels had valid existing rights was a final agency action and that the Tribe lacked prudential standing to assert the fourth claim. As to the merits, the district court held that (1) the Mineral Report was not a major federal action requiring an EIS under NEPA; (2) the Mineral Report was not an "undertaking" under NHPA requiring a full section 106 consultation; (3) the Forest Service's decision to consider the impact on Red Butte under 36 CFR 800.13(b)(3) was reasonable and the Forest Service complied with that regulation. The Tribe appealed. Forest Service claims that the Mineral Report was not legally required and was the agency's opinion. The court of appeal, reviewing this issue de novo, held that the Mineral Report was a final agency action and the court has jurisdiction. The remaining issues on appeal are: whether the Mineral Report was a "major federal action" under NEPA, whether the Mineral Report was an "undertaking" under NHPA, and whether the Tribe had prudential standing under the Federal Land Policy and Management Act (FLPMA) and the Mining Act.

The court of appeal agreed with the district court and held that the original approval of operations was a major federal action and that action was complete when the plan was approved in 1988. Resuming operations did not require any additional government action, therefore the original EIS complied with NEPA. The court of appeal, citing NHPA regulation section 800.13(b)(1) and (3), explained that a full section 106 consultation is required if the agency has not yet approved the undertaking or if construction has not yet commenced. If the agency already approved an undertaking or if the undertaking has commenced the agency can do a simplified process to determine ways to resolve any adverse effects. This court concluded that Forest Service was not required to do a new 106 consultation and that the Forest Service made a good faith effort to comply with the applicable simplified process. The court of appeal also affirmed that the Tribe lacked prudential standing, concluding that the Tribe's interests were not within the zone of interests protected by FLPMA and the Mining Act.

Regulatory Updates
No summaries or updates this quarter.

PLANNING AND ZONING

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

PROPERTY RIGHTS/FEDERAL TORT CLAIMS

Recent Court Rulings

The U.S. Court of Appeals for the First Circuit held the "discretionary function" exception to the Federal Tort Claims Act barred a property owner's claim. *Evans v. United States*, 876 F.3d 375 (1st Cir. 2017)

In 2008, the Massachusetts Department of Conservation and Recreation entered into a cooperative agreement with the USDA Animal and Plant Health Inspection Service ("APHIS") to eradicate the Asian Longhorned Beetle ("ALB") via host-tree removal. In February 2009, contractors entered onto the plaintiff's property and cut down 25 trees. The plaintiff sued under the Federal Tort Claims Act (the "FTCA"), alleging APHIS cut down the trees without permission. A magistrate judge entered summary judgment in favor of the government, and the plaintiff appealed.

The FTCA provides a limited waiver of sovereign immunity allowing civil actions against the United States for injury caused by the negligent acts of government employees acting within the scope of their office. The "discretionary function" exception to the FTCA bars liability for claims based on discretionary functions of a government employee. If the challenged conduct involves the exercise of discretion in the furtherance of public policy, the exception forecloses claims under the FTCA.

The First Circuit Court of Appeals affirmed. The conduct of federal employees is discretionary unless a federal law prescribes a course of action to follow. Federal authority was silent about any requirement to obtain permission from a property owner as a condition of tree removal. Accordingly, the decision to remove a host tree without permission was discretionary. Although APHIS made good-faith efforts to obtain permission, that was a courtesy, not federal policy, based on the policy decision to allow APHIS employees more latitude to improve the odds of abating the infestation. Because removing the trees without permission was discretionary in furtherance of the policy goal of stemming the ALB infestation, the Court affirmed.

PROPOSTITION 65

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates

List of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity. For the California Office of Environmental Health Hazard Assessment's (OEHHA) current list of chemicals known to the state to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2017, Vol. No. 52-Z, p. 2016.

Notice of Listing. In October 2017, the OEHHA provided a notice to list, effective October 27, 2017, *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. 43-Z, p. 1635.

In November 2017, the OEHHA provided a notice to list, effective November 10, 2017, *perfluorooctanoic acid* and *perfluorooctane sulfonate* as known to the state to cause reproductive toxicity. The chemical is being listed under the authoritative bodies listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 45-Z, p. 1714.

In December 2017, the OEHHA provided a notice to list, effective December 15, 2017, *chlorpyrifos* and *n-hexane* as known to the state to cause reproductive toxicity. The chemical is being listed under the State's qualified expert listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 50-Z, p. 1897.

In December 2017, the OEHHA also provided notice to list *vinylidene chloride* to the list of chemicals known to the state to cause cancer. The chemical is being listed under the labor code listing mechanism. Cal. Reg. Notice Register 2017, Vol. No. 52-Z, p. 2015.

No Significant Risk Level. In December 2017, the OEHHA provided notice of, and requested comments on, a no significant risk level of 0.95 micrograms per day for *cromodichloroacetic acid.* Cal. Reg. Notice Register 2017, Vol. No. 52-Z, p. 2006.

In December 2017, the OEHHA also provided notice of, and requested comments on, a no significant risk level of 0.70 micrograms per day for *bromochloroacetic acid*. Cal. Reg. Notice Register 2017, Vol. No. 52-Z, p. 2010.

Reference Exposure Levels. In December 2017, the OEHHA provided a notice of availability of, and requested comments on, two documents summarizing the toxicity and derivation of Reference Exposure Levels (RELs) for Hexamethylene Diisocyanate (HDI) and Toluene. RELs are airborne concentrations of a chemical that are not anticipated to result in adverse non-cancer health effects for specified exposure durations in the general population. Cal. Reg. Notice Register 2017, Vol. No. 48-Z, p. 1844.

Safe Use Determination. In October 2017, the OEHHA provided notice of, and requested comments on, an acceptance of a request for a safe use determination for *chlorothalonil* in certain foods resulting from pesticidal use of the chemical. Cal. Reg. Notice Register 2017, Vol. No. 43-Z, p. 1636.

In December 2017, the OEHHA provided notice of issuance of safe use determinations for *diisononyl phthalate* in Interface GlasBac® and GlasBac®RE modular carpet tiles. The request was made by Interface, Inc. and only covers the specified products. Cal. Reg. Notice Register 2017, Vol. No. 50-Z, p. 1918.

RESOURCE CONSERVATION

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

SOLID WASTE

Recent Court Rulings
No summaries or updates this quarter.

Regulatory Updates
No summaries or updates this quarter.

WATER RESOURCES AND RIGHTS

Recent Court Rulings

The Sixth Appellate District has held that the failure to exhaust administrative remedies under the Porter-Cologne Water Quality Control Act bars mandamus relief from an agency's alleged failure to file waste discharge reports. *Monterey Coastkeeper v. Monterey County Water Resources Agency* (2017) 18 Cal. App. 5th.

Monterey County Water Resources Agency ("MCWRA") is an agency charged with controlling flood and storm waters in the County of Monterey. MCWRA allegedly operates two wastewater conveyance facilities, which collect contaminated agricultural wastewater from adjacent farmland and discharge it into county waterbodies. In 2010, Monterey Coastkeeper filed a petition for writ of mandate alleging that MCWRA failed to submit a report of wastewater discharge to the Regional Water Quality Control Board as required by section 13260 of the Porter-Cologne Act and that it violated its public trust obligation by discharging agricultural pollutants

into the conveyance facilities. The trial court granted Monterey Coastkeeper's petition as to its Porter-Cologne Act claim and denied it on the merits of the public trust claim.

On appeal, the questions were: (1) whether Monterey Coastkeeper was required to exhaust administrative remedies before the regional and state water boards prior to seeking judicial relief, and (2) whether Monterey Coastkeeper's public trust claim was ripe for adjudication.

The court of appeal reversed the grant of the petition for writ of mandate on Monterey Coastkeeper's Porter-Cologne Act claim and affirmed the denial of the writ on its public trust claim. The court held that adequate administrative remedies exist under the Porter-Cologne Act for Monterey Coastkeeper's claim that MCWRA violated its reporting obligations. The Porter-Cologne Act provides that a regional water board has the authority to require a waste discharge report and to hold a discharger civilly liable for failure to report. It also provides that a regional board may be requested to act and that, if it fails to do so, administrative relief can be sought via petition for review with the state board, followed by judicial review in superior court. Because the Act charges the regional board with regulating MCWRA's discharges and reporting, the court rejected Monterey Coastkeeper's argument that the Act's administrative remedy was inapplicable because its grievance was against MCWRA rather than the board. The court held that Monterey Coastkeeper's failure to initiate the administrative review process barred it from obtaining extraordinary relief in the form of a writ of mandate. The court further held that Monterey Coastkeeper's failure to develop an administrative record meant that an actual set of facts had not been developed on which the court could decide the public trust act claim and that the claim was therefore not ripe for adjudication.

The Ninth Circuit has held that the Navajo Nation's asserted injury to unquantified rights to Colorado River water was too speculative to confer standing for its NEPA claims challenging the Secretary's guidelines for declaring water shortages and surpluses but that the APA's waiver of sovereign immunity applied to its breach of trust claim challenging the Secretary's failure to determine the Nation's water rights. *Navajo Nation v. U.S. Department of Interior*, 876 F.3d 1144 (9th Cir. 2017).

The 1922 Colorado River Compact and its progeny erected a legal regime known as "The Law of the River" governing the allocation of Colorado River water. A 1964 Supreme Court decree dictates each state's portion of river water but charges the U.S. Secretary of Interior with determining whether there is a surplus or shortage in any given year. After years of taking an ad hoc approach, the Secretary adopted Surplus and Shortage Guidelines, which pegged the determination to the year-end water level in Lake Mead. The Navajo Nation, whose reservation lies in the drainage basin of the Colorado River, had repeatedly asserted its rights to water in the Lower Colorado, but those rights have never been adjudicated or quantified. The Navajo Nation sued the Department of Interior, claiming that the Secretary's failure to consider and protect its unquantified water rights in creating the Guidelines violated the National Environmental Policy Act ("NEPA") and that the United States breached its trust obligations to the Nation by failing to determine and protect its water rights. The district court dismissed the Nation's complaint without leave to amend, holding that it lacked standing to assert its NEPA claims and that its breach of trust claim was barred by sovereign immunity.

The principal questions on appeal were: (1) whether the Nation had alleged a sufficient injury to rights or interests protected by NEPA to confer standing and (2) whether the waiver of the United States' sovereign immunity under § 702 of the Administrative Procedure Act ("APA") applied to the Nation's challenge to the agency's failure to act, as opposed to final agency action.

The Ninth Circuit affirmed the district court's dismissal of the Nation's NEPA claims for lack of standing but reversed the dismissal the breach of trust claim. As to the NEPA claims, the court reasoned that both the Nation's unquantified *Winters* rights in water in the Colorado River's Lower Basin and generalized interests in an adequate supply of that water were sufficiently concrete to give rise to standing under NEPA. But the Court reasoned that the Nation had failed to allege that the Guidelines posed a reasonably probable threat to those rights or interests because the 1964 Decree and not the Guidelines established the actual allotment of water, and the Nation had not alleged that the Guidelines would cause more frequent declarations of shortages or otherwise diminish the quantity of water available to it. The court also deemed as overly speculative the Nation's allegations that the Guidelines would nevertheless impair its interests as a practical matter by increasing third-party reliance on Colorado River water and making it more difficult for the Nation to establish its rights or satisfy its needs in the future. As to the Nation's breach of trust claim, the court reconciled a seeming intra-circuit conflict over whether § 704 of the APA's limitation of judicial review to "final agency action" applied to § 702's waiver provision. The Court reasoned that § 702's first sentence, which grants judicial review to persons suffering legal wrong because of agency action, creates an APA cause of action, which is subject to § 704's final agency action limitation. Section § 702's second sentence, by contrast, grants a broad waiver of sovereign immunity for all non-monetary claims, which is not constrained by § 704. In other words, § 704's requirement that agency action must be final or otherwise reviewable by statute is an element of an APA claim rather than a limit on the APA's waiver of sovereign immunity. The Court thus held that the Nation's breach of trust claim, which sought non-monetary relief against the United States, fell within the scope of § 702's waiver notwithstanding that it was based on the Secretary's failure to act.

The Ninth Circuit has held that navigable waters in a preserve set aside under the Alaska National Interest Lands Conservation Act ("ANILCA") qualify as public lands by virtue of the United States' reserved water rights and are thus subject to the federal government's hovercraft ban. *Sturgeon v. Frost*, 872 F.3d 927 (9th Cir. 2017).

The Yukon-Charley Rivers National Preserve conservation system unit ("Yukon-Charley") was set aside for preservation purposes under ANILCA and includes State, Native Corporation, and privately-owned inholdings. It also encompasses a stretch of the Nation River, a navigable waterway that John Sturgeon sought to travel by hovercraft to reach moose hunting grounds upstream. Alaska permits hovercraft use but federal Park Service regulations prohibit it on waters subject to the United States' jurisdiction within the boundaries of the National Park system. ANILCA authorizes the Park Service to regulate "public land" within conservation units but not lands held by Alaska, Native Corporations, or private parties. After Park Service rangers barred Sturgeon from piloting his hovercraft on the Nation River, Sturgeon filed suit for declaratory and injunctive relief, claiming that the Nation River belongs to Alaska and that the Park Service lacked authority to regulate it. The district court entered summary judgment for the Service and the Ninth

Circuit affirmed in pertinent part, but its decision was vacated by the Supreme Court and remanded.

On remand, the question was whether the Nation River qualifies as "public land" for the purposes of ANILCA such that the Park Service is authorized to regulate it.

The Ninth Circuit held that, under Circuit precedent, navigable waters in conservation units set aside under ANILCA qualify as public lands under the statute on account of the United States' implied reservation of water rights. Alaska holds title to submerged lands underlying navigable waters within the state's boundaries, including the Nation River. However, the United States holds an interest in certain such waters under the reserved water rights doctrine. Under that doctrine, when the United States reserves land for a federal purpose, it impliedly reserves unappropriated appurtenant water to the extent necessary to accomplish the purpose of the reservation. In *Alaska v. Babbitt* (*Katie John I*), 72 F.3d 698 (9th Cir. 1995), the Ninth Circuit held that ANILCA's definition of public land includes those navigable waters in which United States has an interest by virtue of its reservation of water rights. The court reasoned that it was bound by that holding to deem the Nation River public land subject to Park Service regulation under ANILCA. It also reasoned that the Service's hovercraft regulations are consistent with Congressional intent expressed in ANILCA to maintain the integrity of the Yukon-Charley basin. A concurring opinion disagreed with the reasoning in *Katie John I* and would situate the United States' regulatory authority over navigable waters in ANILCA conservation units under the Constitution's Commerce Clause rather than the reserved water rights doctrine.

Regulatory Updates

Conservation and Prevention of Waste and Unreasonable Use. In November 2017, the SWRCB provided notice of proposed regulations to establish a chapter on Conservation and Prevention of Waste and Unreasonable Use including an article on Water Conservation. The proposed regulations would replace existing emergency regulations that are set to expire. Cal. Reg. Notice Register 2017, Vol. No. 45-Z, p. 1696.

Underground Storage Tanks (UST). In November 2017, the SWRCB provided notice of proposed revisions to the UST regulations that would modify them to be at least as stringent as the federal UST regulations. The amendments are administrative and technical in nature and would impose new requirements. Cal. Reg. Notice Register 2017, Vol. No. 46-Z, p. 1776.

Water Infrastructure Finance and Innovation Act. In November 2017, the EPA provided notice of an information session being held on January 17, 2018 to provide prospective borrowers with a better understanding of the Water Infrastructure Finance and Innovation Act program requirements and application process. 82 Fed. Reg. 52722.

Waters of the United States. In November 2017, the EPA provided notice of a proposed rule to add an applicability date to the "Clean Water Rule: 'Definition of Waters of the United States.'" The date would be two years from the date of final action on the proposal. 82 Fed. Reg. 55542.

WATER QUALITY

Recent Court Rulings

The Ninth Circuit Court of Appeals has reaffirmed that Justice Kennedy's "significant nexus" standard is controlling when determining whether a water body is a "water of the United States" for purposes of the Clean Water Act. *U.S. v. Robertson* (9th Cir. 2017) 875 F.3d 1281.
After a jury trial, Joseph Robertson was found guilty of discharging dredge and fill material into nearby wetlands without a permit in violation of the Clean Water Act. Robertson moved for acquittal and the District Court denied the motion. Robertson appealed to the Ninth Circuit arguing that the District Court lacked subject matter jurisdiction because the government failed to prove the wetlands were "waters of the United States" and that the term "waters of the United States" was unconstitutionally vague.

On appeal, the Ninth Circuit addressed whether Justice Kennedy's significant nexus standard, from *Rapanos v. U.S.* (2006) 547 U.S. 715, is controlling when determining whether a water body is a "water of the United States" for purposes of the Clean Water Act. The Ninth Circuit also considered whether the statute is unconstitutionally vague.

The court held that jurisdiction under the Clean Water Act was appropriately determined using the significant nexus standard to conclude that the subject waters were, in fact, "waters of the U.S.". The court also concluded that the term "waters of the United States" is not unconstitutionally vague and Robertson had sufficient notice that the wetlands were subject to the Clean Water Act.

Regulatory Updates

Point-of-Use and Point-of-Entry Treatment. In October 2017, the State Water Resources Control Board (SWRCB) provided notice of proposed regulations governing the use of point-of-use treatment and point-of-entry stream by public water systems in lieu of centralized treatment. This action would make emergency regulations concerning same permanent. Cal. Reg. Notice Register 2017, Vol. No. 41-Z, p. 1550.

Perchlorate. In October 2017, the EPA provided a notice of extended comment period for the notice "Request for Public Comments to be sent to EPA on Peer Review Materials to Inform the Safe Drinking Water Act Decision Making on Perchlorate." In addition, the EPA also extended the comment period for the "Draft Report: Proposed Approaches to Inform the Derivation of a Maximum Contaminant Level Goal for Perchlorate in Drinking Water." 82 Fed. Reg. 47507.

In November 2017, the EPA announced a public peer review meeting and final list of expert peer review panelists to review the scientific materials in the report titled "Draft Report: Proposed Approaches to Inform the Derivation of a Maximum Contaminant Level Goal for Perchlorate in Drinking Water." 82 Fed. Reg. 56235.

Water Quality Criteria. In December 2017, the EPA provided notice of a proposed rule to amend federal regulations to withdraw certain human health water quality criteria and certain freshwater acute and chronic aquatic life water quality criteria applicable to certain waters of California due to state-adopted, and EPA approved, criteria for these parameters. 82 Fed. Reg. 58156.

Other Federal Summaries of Interest

NEPA

Recent Court Rulings

The Ninth Circuit Court of Appeals held that a case involving the National Environmental Policy Act (NEPA) is not moot solely because development on the project at issue has been completed. *Wild Wilderness v. Oregon State Snowmobile Association* (9th Cir. 2017) 871 F.3d 719.

In 2009, the U.S. Forest Service issued a Scoping Notice stating that the Forest Service would complete an Environmental Impact Statement (EIS) to develop a snow park. In 2012, the Forest Service issued public notices to withdraw its Draft EIS, and instead issued a Notice and Finding of No Significant Impact (FONSI) and an Environmental Assessment. Wild Wilderness challenged the Forest Service's decision to issue this FONSI and the District Court granted summary judgment in favor of the Forest Service. Wild Wilderness then appealed to the Ninth Circuit.

On appeal, the issues before the court were: (1) whether the case was moot because the snow park had been fully developed, (2) if the Forest Service violated the National Forest Management Act (NFMA) by acting inconsistently with the government forest plan, and (3) if the Forest Service violated NEPA.

Specific to the NEPA claim, the court held that a NEPA claim is not moot solely because construction of the project has been completed. The court also determined that the Forest Service acted consistently with the applicable forest plan and therefore did not violate the NFMA. Finally, the court ruled that the Forest Service did not violate NEPA because the Forest Service's FONSI explained why the effects were insignificant and did not require an EIS, and NEPA does not require an agency to publish a separate explanation detailing why the agency changed its mind and decided to pursue a FONSI as opposed to an EIS.

The Court of Appeals for the Federal Circuit held that a claim against the U.S. Forest Service was not ripe for review because the claimant did not comply with the Forest Service's request for information. *Freeman v. U.S.* (Fed. Cir. 2017) 875 F.3d 623.

The Plaintiff filed an operation plan with the U.S. Forest Service, attempting to obtain several mining claims on public land. The Forest Service requested more information from the Plaintiff before the Service would process Plaintiff's plan. The Plaintiff did not provide this information,

and instead sued the Forest Service for a regulatory taking of Plaintiff's mining claims. The U.S. Court of Federal Claims granted the Forest Service's motion to dismiss because the claim was not ripe and Plaintiff appealed to the Court of Appeals for the Federal Circuit.

On appeal, the Court of Appeals addressed whether the claim against the Forest Service was ripe for review.

The court concluded the claim was not ripe because: (1) the Forest Service had not issued a final decision, and (2) the Plaintiff's attempt to secure a final decision from the Forest Service was not futile because there was no evidence the Forest Service would have denied review of the Plaintiff's plan after the Plaintiff included the requested information.

The Ninth Circuit has held that the United States Environmental Protection Agency (EPA) has a duty to promulgate rules establishing revised standards for dust-lead hazard and lead-based paint. *In re A Community Voice* (9th Cir. 2017) 878 F.3d 779.

In October 2009, the EPA granted environmental groups' rulemaking petition that requested adoption of rules regarding standards for dust-lead hazard and lead-based paint. Thereafter, the EPA engaged in some preliminary studies and surveys, but as of August, 2016, the EPA had not promulgated any rules. Environmental groups brought a writ of mandamus to compel the EPA to adopt rules.

The issues presented were whether: (1) the EPA had a duty under the Toxic Substances Control Act (TCSA), Residential Lead-Based Paint Hazard Reduction Act (Paint Hazard Act) and Administrative Procedures Act (APA) to issue standards within a reasonable time; and (2) if so, whether the EPA had unreasonably delayed in issuing rules.

The Ninth Circuit held that under the TCSA and Paint Hazard Act, the EPA had a duty to establish, amend as necessary and enforce standards for dust-lead hazard and lead-based paint. Because there was an obvious need for amended standards on the scientific record presented, the Court held that the EPA had a duty to issue revised standards. In addition, the Court concluded that the EPA also had a duty under the APA to take final action on the 2009 rulemaking petition. Finally, the Court concluded that the EPA had unreasonably delayed in acting on the 2009 petition. The Court ordered the EPA to issue draft rules within 90 days of the Court's December 2017 decision, and thereafter, to adopt final rules within 6 months.