

# ENVIRONMENTAL LAW SECTION UPDATE

RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

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The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from September 1 through December 31, 2011. For legislative developments since that date, the status of a particular bill can be accessed at [www.leginfo.ca.gov](http://www.leginfo.ca.gov) or through Capitol Track at <http://ct2k2.capitoltrack.com/report.asp?rptid=U36304>. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at <http://www.senate.ca.gov/~newsen/schedules/CALENDAR/jointCalendar2011.pdf>. Please note that all case law, legislative and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form. In addition, this issue also includes selected recent Federal case law of note from the U.S. Supreme Court, Ninth Circuit Court of Appeals and from selected Federal District Courts.

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

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at [cday-wilson@cox.com](mailto:cday-wilson@cox.com). I would like to thank Michael Haberkorn, Arielle Harris, David Levy, Whit Manley, Danielle K. Morone, Sal Salvador, Michael J. Steinbrecher, Stephen Velyvis and John Epperson for their contributions to this issue of the *Update*. – Cyndy Day-Wilson.

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# **CALIFORNIA** **SUMMARIES**

## **AIR QUALITY**

### **RECENT COURT RULINGS**

### **LEGISLATIVE DEVELOPMENTS**

**SB 739 (Lowenthal) Ports; Congestion Relief; Air Quality Mitigation.** This bill would require the Ports of Long Beach, Los Angeles, and Oakland, beginning January 1, 2012, to assess their infrastructure and air quality improvement needs, including, but not limited to, projects that improve the efficiency of the movement of cargo, reduce congestion impacts associated with the movement of cargo, and reduce pollution associated with the movement of that cargo. The bill would require each port to provide this assessment to specified committees of the Legislature by July 1, 2012, and to include in the assessment the total costs of the infrastructure and air quality improvements, possible funding options for these projects, and estimated timelines for implementation. *Status: Enrolled and presented to the Governor.*

**AB 135. State Air Resources Board: membership: small business owner (Hagman)**

This bill would require that as of January 1, 2012, at least one of the 11 State Air Resources Board members would be required to have been within the past five years a small business owner, as

defined in Government Code 14837. This provision would sunset on January 1, 2017, unless extended.

Based on the Assembly Floor Analysis prepared August 31, 2011, the Air Resources Board staff has indicated that five of its members are business owners, and three of these appear to meet the definition of "small business." *Status: Passed both houses and to Governor's desk.*

**AB 1314 (Wieckowski) Air resources: Alternative and Renewable Fuel and Vehicle Technology Program: investment plan.**

Existing law establishes the Alternative and Renewable Fuel and Vehicle Technology Program, administered by the California Energy Commission (CEC), to provide grants, loans, and other financial assistance to develop and deploy innovative technologies that will transform fuel and vehicles to help California meet its climate change goals. The CEC is currently required annually to develop an investment plan to establish funding priorities and opportunities under the Program.

AB 1314 would: authorize costs incurred from the date a proposed award is noticed to be counted as non-state matching funds; allow the Energy Commission to delegate authority to the Executive Officer to approve grants, loans, agreements, or other awards of \$75,000 or less, as well as amendments that don't increase the award amount, don't change the scope, or modify the purpose of an agreement; extend the block grant program to include incentive

programs and public entity grantees, and allow the Commission to develop guidelines for block grant and incentive programs; and allow the Commission to advance funds to public entities, to recipients making advance payments to public entities, and to block grant program administrators.

*Status: Passed both houses, enrolled and to Governor's desk.*

### **REGULATORY UPDATES**

**National Ambient Air Quality National Ambient Air Quality Standards ("NAAQS").** The following discussion summarizes various regulatory actions that concern the federal NAAQS on a pollutant-by-pollutant basis.

#### Carbon Monoxide ("CO")

In August 2011, the USEPA issued a final rule concluding that the current primary standards for CO are sufficient to protect public health with an adequate margin of safety; therefore, those standards are being retained. The USEPA also concluded that no secondary standards for CO should be set at this time. For more information, please see 76 Fed.Reg. 54294.

#### Fine Particulate Matter ("PM<sub>2.5</sub>")

None.

#### Lead ("Pb")

In June 2011, the USEPA announced the availability of its responses to state and tribal designation recommendations for the 2008 Pb NAAQS. For more

information, please see 76 Fed.Reg. 36042.

Nitrogen Dioxide ("NO<sub>2</sub>")

In July 2011, the USEPA announced the availability of its responses to state and tribal designation recommendations for the 2010 primary NO<sub>2</sub> NAAQS. For more information, please see 76 Fed.Reg. 39798.

Oxides of Nitrogen ("NO<sub>x</sub>")

In August 2011, the USEPA issued a proposed rule to retain the current NO<sub>2</sub> secondary standards in order to protect against the direct effects on vegetation resulting from exposure to gaseous oxides of nitrogen in the ambient air. Additionally, with regard to protection from the deposition of oxides of nitrogen to sensitive aquatic and terrestrial ecosystems, the USEPA proposed to add a secondary standard that is identical to the NO<sub>2</sub> primary 1-hour standard. Finally, the USEPA announced its decision to undertake a field pilot program to gather and analyze data that would enhance the agency's understanding of the degree of protectiveness that a new multi-pollutant approach, defined in terms of an aquatic acidification index, would afford and to support development of an appropriate monitoring network for such a standard. For more information, please see 76 Fed.Reg. 46084.

Oxides of Sulfur ("SO<sub>x</sub>")

In August 2011, the USEPA issued a proposed rule to retain the current SO<sub>2</sub> secondary standards in

order to protect against the direct effects on vegetation resulting from exposure to gaseous oxides of sulfur in the ambient air. Additionally, with regard to protection from the deposition of oxides of sulfur to sensitive aquatic and terrestrial ecosystems, the USEPA proposed to add a secondary standard that is identical to the SO<sub>2</sub> primary 1-hour standard. Finally, the USEPA announced its decision to undertake a field pilot program to gather and analyze data that would enhance the agency's understanding of the degree of protectiveness that a new multi-pollutant approach, defined in terms of an aquatic acidification index, would afford and to support development of an appropriate monitoring network for such a standard. For more information, please see 76 Fed.Reg. 46084.

Ozone

None.

Particulate Matter ("PM<sub>10</sub>")

None.

Sulfur Dioxide ("SO<sub>2</sub>")

None.

**State Implementation Plan ("SIP") Revisions.** The following discussion summarizes various regulatory actions that concern the California SIP on a jurisdiction-by-jurisdiction basis.

California SIP

In May 2011, the USEPA finalized its approval of revisions to CARB's portion of the California SIP

pertaining to VOC emissions from consumer products. For more information, please see 76 Fed.Reg. 27613.

In May 2011, the USEPA proposed a limited approval and limited disapproval of a SIP revision pertaining to the "transport SIP" provisions of Clean Air Act Section 110(A)(2)(D)(i) for the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS. In August 2011, the USEPA finalized its limited approval and disapproval action. For more information, please see 76 Fed.Reg. 31263, 48002.

In June 2011, the USEPA finalized its approval of the California Regional Haze Plan, a revision to the California SIP. The final rule became effective on July 14, 2011. For more information, please see 76 Fed.Reg. 34608.

In June 2011, the USEPA also finalized its approval of the California SIP revision addressing the interstate transport provisions of Clean Air Act Section 110(a)(2)(D)(i)(I) for the 1997 8-hour ozone NAAQS and 1997 PM<sub>2.5</sub> NAAQS. For more information, please see 76 Fed.Reg. 34872.

In July 2011, the USEPA proposed to approve revisions to the California SIP concerning three regulations that reduce PM, NO<sub>x</sub>, SO<sub>2</sub>, and other pollutants from in-use, heavy-duty, diesel-fueled trucks and buses, and from ocean-going vessels operating within California's jurisdiction. For more information, please see 76 Fed.Reg. 40652.

Antelope Valley Air Quality Management District ("AVAQMD")

In June 2011, the USEPA took direct final action to approve revisions to this air district's portion of the California SIP pertaining to VOC source categories. For more information, please see 76 Fed.Reg. 38572, 38589.

Feather River Air Quality Management District ("FRAQMD")

In May 2011, the USEPA proposed a limited approval and limited disapproval of permitting rules for this air district's portion of the California SIP pertaining to the New Source Review permit program. For more information, please see 76 Fed.Reg. 28944.

In July 2011, the USEPA finalized its limited approval and limited disapproval of revisions to this air district's portion of the California SIP pertaining to New Source Review permit programs for new and modified major stationary sources of air pollution. For more information, please see 76 Fed.Reg. 44809.

Imperial County Air Pollution Control District ("ICAPCD")

In May 2011, the USEPA finalized its approval of revisions to this air district's portion of the California SIP pertaining to New Source Review permitting requirements and exemptions for various air pollution sources. For more information, please see 76 Fed.Reg. 26615.

In June 2011, the USEPA published a proposed rule to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from Motor Vehicle Assembly Coatings, Surface Coatings of Metal Parts and Products, Plastic Parts and Products and Pleasure Crafts, Aerospace Coating Operations, and Automotive Refinishing Operations. For more information, please see 76 Fed.Reg. 32113.

In July 2011, the USEPA took direct final action to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from architectural coating operations. For more information, please see 76 Fed.Reg. 39303, 39357.

Kern County Air Pollution Control District ("KCAPCD")

In July 2011, the USEPA took direct final action to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from architectural coating operations. For more information, please see 76 Fed.Reg. 39303, 39357.

Mendocino County Air Quality Management District ("MCAQMD")

In May 2011, the USEPA announced that it took direct final action to approve definitional revisions in this air district's Prevention of Significant Deterioration permit program. For more information, please see 76 Fed.Reg. 26192, 26224.

Mojave Desert Air Quality Management District ("MDAQMD")

In May 2011, the USEPA issued a direct final rule approving revisions to this air district's portion of the California SIP pertaining to VOC source categories. For more information, please see 76 Fed.Reg. 29153, 29182.

North Coast Unified Air Quality Management District ("NCUAQMD")

In August 2011, the USEPA finalized a limited Federal Implementation Plan for this air district. The FIP establishes Prevention of Significant Deterioration permitting requirements for NOx emission sources in this air district. For more information, please see 76 Fed.Reg. 48006.

Northern Sierra Air Quality Management District ("NSAQMD")

In July 2011, the USEPA announced that it took direct final action to approve revisions to this air district's portion of the California SIP concerning VOC emissions from gasoline dispensing facilities, polyester resin operations, and spray booth facilities. For more information, please see 76 Fed.Reg. 44493, 44535.

Northern Sonoma County Pollution Control District ("NSCAPCD")

In May 2011, the USEPA announced that it took direct final

action to approve definitional revisions in this air district's Prevention of Significant Deterioration permit program. For more information, please see 76 Fed.Reg. 26192, 26224.

Placer County Air Pollution Control District ("PCAPCD")

In May 2011, the USEPA proposed a limited approval and limited disapproval of permitting rules for this air district's portion of the California SIP pertaining to the New Source Review permit program. For more information, please see 76 Fed.Reg. 28944.

In May 2011, the USEPA issued a direct final rule approving revisions to this air district's portion of the California SIP pertaining to VOC emissions from surface coating of metal parts and products. For more information, please see 76 Fed.Reg. 30025, 30080.

In July 2011, the USEPA finalized its limited approval and limited disapproval of revisions to this air district's portion of the California SIP pertaining to New Source Review permit programs for new and modified major stationary sources of air pollution. For more information, please see 76 Fed.Reg. 44809.

Sacramento Metropolitan Air Quality Management District ("SMAQMD")

In May 2011, the USEPA issued a proposed rule finding that the State is no longer required to submit or implement Section 185 fee program revisions for the Sacramento Metro 1-hour ozone

nonattainment area to satisfy anti-backsliding requirements. The proposed rule is based on complete, quality-assured and certified ambient air quality monitoring data for 2007-2009, which shows attainment of the 1-hour ozone NAAQS. For more information, please see 76 Fed.Reg. 28696.

In May 2011, the USEPA proposed a limited approval and limited disapproval of permitting rules for this air district's portion of the California SIP pertaining to the New Source Review and Prevention of Significant Deterioration permit programs. For more information, please see 76 Fed.Reg. 28942.

In July 2011, the USEPA finalized its limited approval and limited disapproval of permitting rules for this air district's portion of the California SIP pertaining to New Source Review and Prevention of Significant Deterioration permit programs. For more information, please see 76 Fed.Reg. 43183.

In July 2011, the USEPA announced that it took direct final action to approve revisions to this air district's portion of the California SIP concerning VOC emissions from gasoline dispensing facilities, polyester resin operations, and spray booth facilities. For more information, please see 76 Fed.Reg. 44493, 44535.

Santa Barbara Air Pollution Control District ("SBAPCD")

In May 2011, the USEPA finalized its limited approval and limited disapproval of revisions to this air

district's portion of the California SIP pertaining to NOx emissions from boilers, steam generators, and process heaters with a rated heat input rate greater than 2 million BTU/hr and less than 5 million BTU/hr, and internal combustion engines with a rated brake horse power of 50 or greater. For more information, please see 76 Fed.Reg. 31242.

San Joaquin Valley Air Pollution Control District ("SJVAPCD")

In May 2011, the USEPA finalized its approval of revisions to this air district's portion of the California SIP pertaining to NOx and PM emissions primarily from indirect sources associated with new development projects, as well as NOx and PM emissions from certain transportation and transit projects. For more information, please see 76 Fed.Reg. 26609.

In June 2011, the USEPA published a proposed rule to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from Motor Vehicle Assembly Coatings, Surface Coatings of Metal Parts and Products, Plastic Parts and Products and Pleasure Crafts, Aerospace Coating Operations, and Automotive Refinishing Operations. For more information, please see 76 Fed.Reg. 32113.

In June 2011, the USEPA issued a rule proposing to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from brandy and wine aging operations. Subsequently, in August 2011, the USEPA finalized

its approval of this rule. For more information, please see 76 Fed.Reg. 33181, 47076.

In June 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from architectural coatings. For more information, please see 76 Fed.Reg. 35167.

In June 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to NOx and PM emissions from glass melting furnaces. In August 2011, the USEPA finalized its approval of this rule. For more information, please see 76 Fed.Reg. 37044, 53640.

In June 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to VOC and PM emissions from commercial charbroiling. For more information, please see 76 Fed.Reg. 38340.

In July 2011, the USEPA finalized its limited approval and limited disapproval of revisions to this air district's portion of the California SIP pertaining to VOC emissions from crude oil production operations and refineries. For more information, please see 76 Fed.Reg. 39777.

In July 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to VOC, NOx, and PM emissions from open burning. For more information, please see 76 Fed.Reg. 40660.

In July 2011, the USEPA proposed a limited approval and limited disapproval of revisions to this air district's portion of the California SIP pertaining to VOC emissions from the manufacture of polystyrene, polyethylene, and polypropylene products. For more information, please see 76 Fed.Reg. 41745.

In July 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to its Rule 3170, Federally Mandated Ozone Nonattainment Fee, and fee-equivalent program. For more information, please see 76 Fed.Reg. 45212.

In August 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP concerning VOC, NOx, and PM emissions from flares. For more information, please see 76 Fed.Reg. 52623.

South Coast Air Quality  
Management District  
("SCAQMD")

In May 2011, the USEPA proposed to approve revisions to this air district's portion of the California SIP pertaining to NOx and SOx emissions from facilities emitting four tons or more per year of NOx and SOx in the year 1990 or any subsequent year under the air district's Regional Clean Air Incentives Market ("RECLAIM") program. In August 2011, the USEPA finalized its approval of this rule. For more information, please see 76 Fed.Reg. 30896, 50128.

In July 2011, the USEPA proposed a limited approval and limited disapproval of revisions to this air district's portion of the California SIP pertaining to NOx emissions from boiler, steam generators and process heaters larger than 2 MMBTu/hr that are not subject to the air district's RECLAIM program. For more information, please see 76 Fed.Reg. 40303.

In July 2011, the USEPA proposed to approve in part and disapprove in part SIP revisions provided for in this air district's 2007 Air Quality Management Plan, as revised in 2011. For more information, please see 76 Fed.Reg. 41562.

In July 2011, the USEPA took direct final action to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from consumer paint thinner & multi-purpose solvents and metalworking fluids & direct-contact lubricants. For more information, please see 76 Fed.Reg. 41717, 41744.

In July 2011, the USEPA announced that it took direct final action to approve revisions to this air district's portion of the California SIP concerning VOC emissions from gasoline dispensing facilities, polyester resin operations, and spray booth facilities. For more information, please see 76 Fed.Reg. 44493, 44535.

In August 2011, the USEPA announced that it took direct final action to approve a revision to this air district's portion of the California SIP pertaining to VOC emissions from polymeric foam

manufacturing operations. For more information, please see 76 Fed.Reg. 47074, 47094.

In August 2011, the USEPA announced that it finalized its approval of revisions to this air district's portion of the California SIP concerning VOC emissions from architectural coatings. For more information, please see 76 Fed.Reg. 50891.

Ventura County Air Pollution Control District ("VCAPCD")

In May 2011, the USEPA issued a direct final rule approving revisions to this air district's portion of the California SIP pertaining to VOC emissions from surface coating of metal parts and products. For more information, please see 76 Fed.Reg. 30025, 30080.

In July 2011, the USEPA took direct final action to approve revisions to this air district's portion of the California SIP pertaining to VOC emissions from architectural coating operations. For more information, please see 76 Fed.Reg. 39303, 39357.

**National Emission Standards for Hazardous Air Pollutants ("NESHAPs").** In May 2011, the USEPA issued proposed NESHAPs for coal- and oil-fired electric utility steam generating units ("EGUs"), and proposed revised new source performance standards for fossil fuel-fired EGUs. For more information, please see 76 Fed.Reg. 24976.

In May 2011, the USEPA issued proposed amendments to the

NESHAPs for Secondary Lead Smelting to address the results of a residual risk and technology revision. For more information, please see 76 Fed.Reg. 29032.

In May 2011, the USEPA issued proposed NESHAPs for Hazardous Air Pollutants for Polyvinyl Chloride and Copolymers Production. For more information, please see 76 Fed.Reg. 29528.

In June 2011, the USEPA took direct final action to amend the NESHAPs for the plating and polishing area source category. For more information, please see 76 Fed.Reg. 35744, 35806.

In July 2011, the USEPA provided final notice of its partial withdrawal of the NESHAPs for Hazardous Air Pollutants from Petroleum Refineries. For more information, please see 76 Fed.Reg. 42052.

In August 2011, the USEPA issued a proposed rule addressing: (1) its review of the new source performance standards for VOC and SO<sub>2</sub> emissions from natural gas processing plants; (2) the residual risk and technology review conducted for oil and natural gas production and natural gas transmission and storage NESHAPs; (3) standards for emission sources within these two source categories that are not currently addressed, as well as amendments to improve aspects of these NESHAPs related to applicability and implementation; and, (4) new source performance standards and NESHAPs related to emissions during periods of startup, shutdown, and malfunction. For more

information, please see 76 Fed.Reg. 52738.

**Delayed Federal Rule Implementation.** In May 2011, the USEPA announced that the effective dates for the following two rules have been delayed pending completion of the judicial review or reconsideration proceedings, whichever is earlier: "National Emission Standards for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters" and "Standards of Performance for New Sources and Emission Guidelines for Existing Sources: Commercial and Industrial Solid Waste Incineration Units." For more information, please see 76 Fed.Reg. 28662.

**Tier II Marine Inboard/Sterndrive Spark Ignition Engine Emission Standards.** In May 2011, the USEPA, pursuant to Clean Air Act Section 209(e), granted California's request for authorization to enforce its emission standards and other requirements for its second tier of emission standards for new marine inboard/sterndrive spark ignition engines. For more information, please see 76 Fed.Reg. 24872.

**New Source Review ("NSR") Program.** In May 2011, the USEPA issued a final rule, effective July 18, 2011, repealing the "grandfather" provision for PM<sub>2.5</sub> under the Prevention of Significant Deterioration permit program. For more information, please see 76 Fed.Reg. 28646.

**Outer Continental Shelf ("OCS") Regulations.** In May



2011, the USEPA finalized its update of the OCS regulations for the onshore area corresponding to the Santa Barbara County Air Pollution Control District. For more information, please see 76 Fed.Reg. 29156.

**Catalytic Reduction Technology.** In June 2011, the USEPA requested comment on draft guidance and related interpretations concerning the application of certain emission certification regulations to on-highway, heavy-duty diesel engines that are using selective catalytic reduction systems to meet federal emission standards. For more information, please see 76 Fed.Reg. 32886.

**Gasoline Vapor Recovery Systems.** In June 2011, the California Air Resources Board ("CARB") proposed to amend the list of equipment defects that substantially impair the effectiveness of gasoline vapor recovery systems used in motor vehicle refueling operations. For more information, please see Cal. Reg. Notice Register 2011, Vol. 22-Z, p. 923. This rulemaking effort subsequently was withdrawn. For more information, please see Cal. Reg. Notice Register 2011, Vol. 23-Z, p. 951.

**Gasoline Mis-Fueling.** In July 2011, the USEPA issued a final rule to mitigate the mis-fueling of vehicles, engines and equipment utilizing gasoline containing greater than 10 volume percent ethanol and up to 15 volume percent ethanol. For more information, please see 76 Fed.Reg. 44406.

**Aircraft NOx Standards.** In July 2011, the USEPA issued proposed NOx emission standards, compliance flexibilities, and other regulatory requirements (e.g., reporting requirements; measurement procedures) for aircraft turbofan or turbojet engines with rated thrusts greater than 26.7 kilonewtons. These standards are similar to those developed by the United Nation's International Civil Aviation Organization. For more information, please see 76 Fed.Reg. 45012.

## ATTORNEYS FEES

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

### REGULATORY UPDATES

## CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

### RECENT COURT RULINGS

**First District Court of Appeal finds the revised EIR for the City of Oakland's "Oak to Ninth" project did not impermissibly defer mitigation measures addressing seismic impacts.** *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4<sup>th</sup> 884

The City of Oakland (City) certified an environmental impact report (EIR) for the "Oak to Ninth

Project," a mixed-use project to develop 64 acres along the Oakland Estuary and the Embarcadero. The Oakland Heritage Alliance (Alliance) sued. The trial court granted the petition. The City revised the EIR to address the trial court's ruling. The revised EIR contained additional details regarding how the project would address earthquake hazards, and included updated mitigation measures concerning seismic impacts. The City and developer filed a motion to discharge the trial court's writ. The trial court granted the motion over the Alliance's objections. The Alliance appealed.

The Alliance argued the City's updated mitigation measures were inadequate. The Court of Appeal disagreed.

First, the Alliance argued the City used an improper significance threshold that considered only seismic risks to people. The Alliance claimed this threshold failed to consider structural damage. The Court, applying the "substantial evidence" standard of review, ruled the City's threshold tracked CEQA Guidelines Appendix G, and encompassed consideration of the potential for impacts to buildings. The formulation of the threshold was, moreover, a policy question for the City.

Second, the Alliance argued the mitigation measures adopted by the City merely required compliance with applicable codes; for this reason, the Alliance claimed, the City lacked substantial evidence that these impacts would, in fact, be

mitigated. Again, the Court applied the “substantial evidence” standard of review and disagreed. The revised EIR contained an extensive discussion of applicable Building Code and other regulations requiring soils and geotechnical investigations, leading to site-specific design of foundations and structural systems. The EIR also summarized a geotechnical investigation of the site prepared by an engineering firm; the report made recommendations about foundation designs and techniques that would have to be used. Site specific analysis and engineering would be performed for individual buildings. The Court ruled this discussion constituted substantial evidence that seismic and liquefaction impacts would be mitigated. Although the Alliance argued the City should have adopted alternative mitigation measures proposed by the Alliance, the Court was unwilling to substitute its judgment for that of the City regarding how to mitigate the project’s seismic impacts.

Third, the Alliance argued the City’s mitigation measures improperly deferred analysis. The Court disagreed. The revised EIR summarized State and local code requirements, listed the investigations, reports and certifications that would have to be provided in connection with development of a building, and described different approaches that could be used to address seismic impacts. The geotechnical investigation included a physical investigation of conditions at the site, and determined the methods outlined in the codes were feasible and would be effective. Under

such circumstances, the City could defer identifying precisely how mitigation would be achieved in the final design for a particular building.

**Sixth District Court of Appeal rules City of Santa Clara’s approval of a “term sheet” for a proposed football stadium did not constitute “approval” of a “project,” and thus did not need to be preceded with CEQA review.** *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4<sup>th</sup> 1150

A stadium was proposed to be constructed on a parcel that was leased by the redevelopment agency to Cedar Fair, L.P., which used the site as a parking area for an adjacent amusement park. The City approved a term sheet for the stadium. Cedar Fair sued, arguing that action triggered CEQA. The City demurred. The trial court dismissed the lawsuit. Cedar Fair appealed.

The case focused on application of the Supreme Court’s holding in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4<sup>th</sup> 116 to the term sheet approved by Santa Clara. Cedar Fair argued the term sheet failed the *Save Tara* test. Cedar Fair emphasized the high level of detail in the term sheet, the large amount of money already invested by the redevelopment agency in the process of reaching an eventual final agreement, and the fact that the term sheet was put to a public vote by the city council. Thus, Cedar Fair argued, approval of the term sheet showed that the city had effectively committed itself to the stadium project. According to

Cedar Fair, subsequent public statements by city officials and staff confirmed this commitment.

The Court disagreed. Under *Save Tara*, the critical question is “whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered.” The Court found that, although the term sheet was very detailed, the only binding commitment it contained was to require the parties to continue negotiating in good faith. The city retained sole discretion to make decisions under the CEQA, including a decision not to proceed with the project. Further, the term sheet created no legal obligations unless the parties reached agreement based on information produced by the CEQA review process. The term sheet recognized that a “no-project” option was still available. The Court therefore concluded the term sheet stopped short of the agreement at issue in *Save Tara*, where West Hollywood contractually bound itself to sell land for private development conditioned on CEQA compliance.

While persons speaking on behalf of the city may have indicated that the city regarded the term sheet as a binding agreement that committed it to the proposed project, as alleged by Cedar Fair, the Court concluded the language of the term sheet could not be reasonably construed as creating any contractual commitment by the city to conditionally approve or undertake any aspect of the stadium project, regardless of what

city officials may allegedly have said.

**Fourth District rejects attack on addendum to 1994 EIR, holding that petitioner's last-second document-dump did not suffice to exhaust the petitioner's administrative remedies; Court also holds City followed proper procedures in preparing water supply assessment, and information on greenhouse gas emissions was not "new" within the meaning of Public Resources Code section 21166.** *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515

In 1994, the City of San Diego certified an EIR and approved a mixed-use project in the Otay Mesa area. In 2008, Pardee Homes applied to the City for approval of planned development in one of the project's last undeveloped areas. The City prepared a Water Supply Assessment ("WSA") and an addendum to the 1994 EIR. At the hearing before the City Council, petitioner "CREED" submitted a short letter stating the City had to circulate the WSA. CREED also stated the City had to address the project's greenhouse gas ("GHG") emissions, and submitted a DVD containing 4,000 pages of general documents and data on climate change and GHG emissions. The Council approved the project. CREED sued. The trial court denied the petition. CREED appealed.

First, CREED argued the City erred by failing to follow the procedures outlined in Water Code

section 10910 in approving the WSA. The addendum referenced the WSA, and the City Council certified the addendum. The Council did not, however, otherwise approve the WSA. The Court held that the Council's approach sufficed. Nor was there a requirement to request the WSA from a separate water purveyor, since in this case the water purveyor and the lead agency were the same entity. Nothing in the record suggested a different procedure was necessary in order to assure opportunities for public input.

Second, CREED argued the City was experiencing a drought, and the drought constituted "significant new information" requiring a supplement to the 1994 EIR. The Court held CREED failed to exhaust its remedies on this issue because its letters to the City did not contain information on drought conditions, or even use the term "drought." CREED argued the DVD submitted to the Council contained information on drought conditions. The Court disagreed, stating: "The City cannot be expected to pore through thousands of documents to find something that arguably supports CREED's belief the project should not go forward. Additionally, CREED did not appear at either CEQA hearing to elaborate on its position. It appears from CREED's haphazard approach that its sole intent was to preserve an appeal." No one ever stated that the existence of a drought required the preparation of a supplemental EIR. CREED also erred by ignoring the WSA's analysis of water supplies during drought years; this analysis concluded the

City had adequate supplies to serve the project.

Third, CREED argued information regarding GHG emissions and climate change constituted significant new information requiring preparation of a supplement to the 1994 EIR. CREED cited documents included in the DVD it submitted to the Council. The Court held CREED's last-second document dump did not suffice to exhaust its remedies. The Court also held that, in any event, information on GHG and climate change was not "new" because in 1994, at the time the City certified the EIR, the issue was already a matter of public knowledge and therefore could have been raised at that time, concluding: "CREED adduced no competent evidence of new information of severe impact, and thus it did not meet its burden of showing the City's reliance on an addendum to the 1994 FEIR is unsupported by substantial evidence."

**Third District rejects multi-prong attack on EIR for Clover Valley project; Court finds CEQA did not require city to disclose confidential information regarding location and nature of sites containing cultural resources.** *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200

In 1991, property owners submitted an application to develop just under 1,000 homes in an undeveloped valley on the outskirts of the City of Rocklin. In 1997, the City certified an EIR, the site was annexed, and the City approved a development

agreement, General Plan amendments and a rezone. In 2000, the owners applied to subdivide the property. The project evolved. The number of units shrank from 974, to 933, to 753, to 710, and ultimately to 558. The amount of open space increased. Along the way, another EIR was prepared, and then recirculated. In 2007, the City certified the EIR and approved the 558-unit project. A coalition led by the Clover Valley Foundation sued, alleging the City had violated CEQA and the Planning and Zoning Law. The trial court denied the petitions. Petitioners appealed, raising eight distinct arguments.

First, Petitioners argued the EIR did not contain an adequate analysis of eight cultural resource sites on the property that were threatened by the project. The EIR stated the site contained 34 sites containing cultural resources relating to Native American habitation of the valley. To mitigate impacts to these resources, the EIR required data recovery at the sites that would be disturbed; sites to be preserved would be monitored and permanently fenced in order to protect them from vandalism. Comments on the EIR asked the City to disclose the location and character of the resources that could not be preserved. The City responded by providing a chart listing the resources by number, and indicating the sorts of cultural resources each site contained. The EIR did not, however, state their location, size, or significance. That information was included in a separate, confidential, historic property management plan prepared under Federal law, and in

a report prepared by a cultural resource expert called a “Determination of Eligibility,” or “DOE.” The State Historic Preservation Officer (“SHPO”) asked for a copy of the management plan and DOE. The City provided SHPO with the DOE, but not the management plan, noting that SHPO would receive the plan later on as part of the consultation process required in order to obtain Federal permits under section 106 of the National Historic Preservation Act. SHPO and other commenters criticized the City’s refusal to divulge the location and character of the sites. SHPO also submitted comments stating the City’s mitigation measures were inadequate because they deferred too much to the Federal permitting process. The City again declined, stating it was required under State and Federal law to maintain the confidentiality of information regarding the location of archaeological sites or sacred lands. Petitioners argued more was required. In particular, Petitioners argued the City should have released to the public redacted versions of the DOE and management plan.

As the Court observed, “[t]his case presents a paradoxical twist on the issue of good faith effort at full disclosure, as CEQA and the Public Records Act actually *restrict* the amount of information regarding cultural resources that can be disclosed in an EIR.” The Court held the City made a good-faith effort at disclosure, as required by CEQA, within the confines of its obligation to preserve the confidentiality of information regarding cultural sites

in order to protect them from vandalism.

Petitioners argued the City violated CEQA by including much of this information in “additional responses” prepared after it circulated the EIR. This approach, according to Petitioners, deprived the public of a meaningful opportunity to comment. The Court disagreed, concluding this information merely expanded upon information that had appeared in the Draft EIR. For this reason, the duty to recirculate the Draft EIR did not arise.

Second, Petitioners argued the EIR did not analyze the growth-inducing impacts of an off-site sewer line that would be constructed to serve the project, along with other nearby residences. The EIR explained that the pipeline would remove an obstacle to future growth. CEQA required no further analysis because the purpose of the pipeline was to serve the project, and the City’s General Plan and its EIR had already analyzed the impacts of growth in the area.

Third, Petitioners argued the EIR failed to disclose the loss of all oak trees that would be affected by the project. The EIR concluded that even with implementation of mitigation measures pursuant to general plan policy, the impacts to oak trees from roadway construction would remain significant and unavoidable. The EIR also found other impacts to the oak trees would be mitigated to a less than significant level with implementation of development agreement conditions and compliance with the city’s oak tree

preservation ordinance. The Court upheld the City's approach.

Fourth, Petitioners argued the City adopted inadequate mitigation measures to address impacts to the California black rail, a "fully protected" bird species. The measure required the developer to conduct bird surveys 30 days prior to ground-disturbing activities. If a listed species, such as the black rail, was identified, the developer had to pursue appropriate permits and implement any measures required by the permits. No permit is available to "take" a fully protected species, such as the black rail. That did not mean the mitigation measure was unenforceable, however. Moreover, the requirement to obtain necessary permits from other agencies did not constitute deferral of mitigation because the measures identified the performance standards that would have to be met to acquire those permits.

Fifth, Petitioners argued the project was inconsistent with the City's General Plan because it allowed construction of a proposed roadway on land designated as open space within a 50-foot buffer area next to a creek. The City acted within its discretion because forcing the road outside the buffer would have required more grading and increased damage to open space.

Sixth, Petitioners argued the EIR did not provide an adequate analysis of aesthetic impacts, or discuss potential mitigation measures to reduce those impacts. The EIR concluded the project would not have a significant

impact on views from the Town of Loomis, located immediately east of the site. Loomis disagreed. As the EIR explained, however, views in the area already consisted of residential development, so although views would change, substantial evidence supported the City's conclusion that the impact would not be significant. Another visual impact – identified as significant and unavoidable – consisted of impacts on views of the site from an adjacent roadway. Comments proposed mitigation measures to reduce this visual impact, including reducing building sizes and heights. The EIR stated landscaping and specific design features would be implemented later on. That was enough.

Seventh, Petitioners argued the EIR should have analyzed impacts at two intersections located in Loomis, and analyzed traffic impacts during school travel times. The Final EIR addressed Loomis's concerns regarding the two intersections by identifying changes in daily traffic volumes at the intersections and concluding traffic volumes would be too small to perform a level-of-service intersection analysis for them. The EIR also stated the traffic analysis focused on the p.m. peak hour because that was when traffic volumes were at their highest. The Court upheld the EIR.

Finally, the Court held the EIR's water supply analysis met the requirements set forth in *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412. Water for the project would be provided by the Placer County Water Agency

("PCWA"), which had a "first-come, first-served" policy for new customers. PCWA's policy ultimately meant that the project could lose out on water supplies if there were any project construction delays. The Court observed, however, that PCWA certified to the City in writing that it had enough water to meet the project's needs, as well as all other contemplated development for the next 20 years. Thus, PCWA's verification went beyond a mere "likelihood of actually proving available"; rather, it was virtually certain water would be available, which was more than CEQA required the EIR to show. Because of this certainty, the EIR was not required to discuss a possible replacement source; in any event, the EIR included such discussion.

**Second District upholds city's analysis of mitigation measures to address greenhouse gas emissions, rejects attack on EIR for hospital expansion project.**

*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042

A local, non-profit hospital submitted an application for a Master Plan to expand its existing campus. The City prepared and circulated an EIR. Ultimately, the City certified the EIR and approved the Master Plan and an accompanying development agreement. Santa Clarita Organization for Planning and the Environment ("SCOPE") sued. The trial court denied the petition. SCOPE appealed.

The EIR concluded that traffic generated by the project would

result in significant and unavoidable greenhouse gas (“GHG”) emissions. SCOPE submitted a letter to the City attaching a list of more than 50 recommended measures compiled by the California Attorney General to address GHG emissions and climate change. The hospital argued SCOPE’s letter was insufficient to exhaust SCOPE’s administrative remedies as to this issue. While expressing skepticism at whether a single letter was enough, the Court concluded SCOPE had exhausted its remedies under the lenient standard developed by the courts.

Turning to the merits, in approving the project, the EIR quantified direct and indirect GHG emissions. The EIR found that exhaust emissions from vehicles travelling to and from the campus would contribute to cumulative GHG emissions. The City adopted findings concluding that this impact was significant and unavoidable. The findings stated the impact had been reduced to the extent feasible. The City responded to SCOPE’s letter by noting that the Master Plan incorporated several of the measures recommended by the Attorney General. In particular, the EIR identified mitigation measures to improve the flow of traffic and to add two bus stops. In addition, the City required the hospital to comply with new sustainable policy standards and the City’s transportation demand management program.

SCOPE attacked the City’s findings, stating the City had not considered each of the mitigation measures in the Attorney General’s

compilation. The Court rejected this argument. The Court concluded it would be unreasonable to require the City to explore each of the 50 general suggestions attached to SCOPE’s comment letter. Having incorporating several of the recommended measures, the City was not required to do more. Moreover, in submitting the Attorney General’s letter, SCOPE did not call out particular measures for the City’s consideration. Under such circumstances, the City’s general response to GHG emissions sufficed.

Finally, SCOPE argued the City violated its own development code by engaging in a weighing of the project’s perceived benefits against its adverse impacts on neighboring residents. Looking to the plain language of the code, the Court found the ordinance in question did not limit the factors that the City could consider in adopting the required finding that the project would not detrimentally affect the health and welfare of neighboring residents.

**Fifth District holds that SB 50 does not excuse an EIR from analyzing or identifying mitigation for school-related impacts, such as traffic, that will occur off of school grounds.** *Chawanakee Unified School Dist. v. County of Madera* (2011) 196 Cal.App.4<sup>th</sup> 1016

Madera County certified an EIR and approved a development project. A local school district sued, arguing the county did not address the project’s impacts on schools. The trial court denied the petition. The school district

appealed. The Court of Appeal reversed, concluding the EIR did not address impacts associated with traffic near and on the way to existing schools, and with the construction of additional facilities at existing schools. The Court published the portion of its opinion discussing the interrelationship between Senate Bill 50 (“SB 50”) and CEQA.

In the 1980s, CEQA case law established that impacts of development projects leading to increased school enrollment must be mitigated. In 1986, the California legislature enacted a statutory scheme allowing school districts to impose fees on new developments to fund the construction of school facilities needed in order to serve that development. The legislation stated that these fees were the sole mitigation measure local agencies could impose on a development project to address school impacts. In *Mira Development Corp. v. City of San Diego* (1988) 205 Cal.App.3d 1201, and cases following *Mira*, the courts held that this limitation on fees and mitigation applied only to adjudicative decisions of local governments, such as the approval of tentative subdivision maps and the issuance of building permits.

In 1998, the Legislature passed SB 50. SB 50 overturned *Mira* and its progeny by: (1) imposing a cap on the amount of fees or other requirements that can be imposed on new developments to fund construction of school facilities; (2) removing from local agencies the authority to refuse to approve adjudicatory *and* legislative approvals on the basis of

inadequate school facilities or a developer's unwillingness to pay more than the specified fees; (3) limiting mitigation measures that can be required under CEQA to payment of school facilities fees; and (4) declaring that the payment of such fees constituted full and complete mitigation for school impacts under CEQA.

Before SB 50 was passed, Government Code section 65996, subdivision (a), provided that certain statutory provisions, such as development fees, were "the exclusive methods of mitigating environmental effects related to the adequacy of school facilities when considering the approval or the establishment of conditions for the approval of a development project . . . ." SB 50 amended this section to provide that specified statutory provisions "shall be the exclusive methods of considering and mitigating impacts on school facilities that occur or might occur as a result of any legislative or adjudicative act" involving the approval of development projects. The amendment resulted in four textual changes, two of which were especially significant. First, the inclusion of the word "considering" meant "to view attentively, examine carefully, and study." Therefore, section 65996(a) excludes the need for an EIR to examine and study impacts on school facilities in a description and analysis section of the EIR. Second, the substitution of "on" for "related to" narrowed the statute and limited the types of impacts that are excused from consideration and mitigation to those impacts that occur on school grounds, school buildings, and school facilities. Therefore, under

section 65996, impacts on traffic related to school attendance were not impacts on school facilities, and were not excused from mitigation requirements. Similarly, an EIR should consider and mitigate indirect impacts to the non-school physical environment caused by the construction of school facilities, such as impacts on air quality and noise levels.

**First District holds that, in order to commence CEQA's statute of limitations, "Notice of Determination" must be posted, and remain posted, for entire duration of 30-day period.** *Latinos Unidos de Napa v. City of Napa* (2011) 196 Cal.App.4<sup>th</sup> 1154

On June 16, 2009, the Napa City Council approved resolutions adopting amendments to the housing and land use elements of its general plan, and considered an ordinance with related amendments to the zoning code. On June 17, 2009, at 9:05 a.m., the City filed a "Notice of Determination" ("NOD") with the Napa County Clerk stating that an environmental impact report ("EIR") was not required because the City had completed a general plan program EIR in 1998, and no new significant environmental effects would result from the amendments. According to a declaration, the county clerk posted the NOD at 10:00 a.m., and the NOD remained posted until at least 10:00 a.m. on July 17, 2009. Counsel for affordable housing advocates Latinos Unidos de Napa visited the Napa County Clerk's office on July 17, 2009, and took a photograph of the bulletin board at 11:29 a.m. The photograph showed the NOD was not posted at

that time. On September 17, 2009, Latinos Unidos filed a petition against the City asserting that an EIR was required. The City moved to dismiss the CEQA challenge on the grounds that it was barred by the 30-day statute of limitations established under Public Resources Code section 21167, subdivision (e). The trial court granted the motion. Latinos Unidos voluntarily dismissed its non-CEQA claims and appealed.

Code of Civil Procedure section 12 states: "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded." Under *Ley v. Dominguez* (1931) 212 Cal. 587, section 12 governs the calculation of all statutorily prescribed time periods unless there is clear legislative intent that a different method of calculation must be used. In this case, the Court concluded that the 30th day of posting was July 17, 2009. The County Clerk had erred by posting the NOD for only a fraction of the last day. Because the NOD was not properly filed and posted pursuant to Public Resources Code section 21152, subdivision (c), the longer 180-day statute of limitations found in Public Resources Code section 21167, subdivision (a) applied, instead of the 30-day statute of limitations found in subdivisions (b) or (e). Under the 180-day statute of limitations, the petition was timely, and the trial court erred in dismissing the petition.

The City argued that, under *Committee for Green Foothills v. Santa Clara County Bd. of*

*Supervisors* (2010) 48 Cal.4th 32, filing an NOD is enough, regardless of whether the County Clerk posts the NOD. The court disagreed, concluding the 30-day statute of limitations cannot be triggered unless a notice is both filed and posted.

The City argued that posting for part of the 30th day sufficed. The Court disagreed, stating the notice had to be posted for the entire 30<sup>th</sup> day. Posting for only part of that day did not substantially comply with the requirement.

**Fourth District upholds negative declaration for mixed use project, holding that CEQA did not require City to analyze odor impacts from adjacent sewer plant on future residents of project.** *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604

In 2007, Makar Properties applied to the City to amend the City's general plan and zoning code to allow a mixed-use development on a nine-acre site. The site was next door to a sewage treatment plant operated by the South Orange County Wastewater Authority ("SOCWA"). City staff prepared and circulated a proposed mitigated negative declaration ("MND"). SOCWA submitted comments stating that future residents of the Makar project would be subject to noise and odors from the plant. SOCWA proposed as mitigation that the City require Makar to pay \$5 million to install covers on the tanks at the SOCWA plant. The City adopted the MND and approved the amendment and

rezone. The City required a buffer zone, visual screening, air conditioning, and notice to future owners of the proximity of the plant. The City did not require Makar to pay \$5 million to SOCWA. SOCWA sued. The trial court denied the petition. SOCWA appealed.

SOCWA argued the record before the City contained substantial evidence supporting a "fair argument" that approving the Makar rezone would subject future residents to odors from the sewer plant. The Court responded: "SOCWA's objection to the adoption of the MND for the rezoning essentially turns CEQA upside down. Instead of using the act to defend the existing environment from adverse changes caused by a proposed project, SOCWA wants to use the act to defend the proposed project (the future residences) from a purportedly adverse existing environment (smells from the sewage treatment plant)." In effect, SOCWA sought to use CEQA to insulate itself from potential future nuisance claims, and to make Makar "foot the bill." Citing *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, the Court held the purpose of CEQA is to analyze a project's effect on the environment, not the other way around. "The Legislature did not enact CEQA to protect people from the environment. Other statutes, ordinances, and regulations fulfill that function. [Citations omitted.] . . . This is the framework established by the Legislature to protect people from odors such as the ones SOCWA's sewage plant might produce. CEQA serves

another purpose." The Court concluded an EIR was not required to analyze the issue.

SOCWA argued the amendments approved by the Council resulted in an internally inconsistent General Plan. The new mixed-use land-use designation did not make the general plan internally inconsistent. The zoning ordinance was not inconsistent with the general plan, and any such inconsistency would not render the general plan itself inconsistent.

**Fourth District rules that new information on potential presence of listed toad on or near project site did not require recirculation of EIR.** *Silverado Modjeska Recreation and Parks Dist. v. County of Orange* (2011) 197 Cal.App.4th 282

In 2002, a developer submitted an application for "Silverado Canyon Ranch." The project consisted of 12 home sites on 68.7 acres of privately held land within the boundaries of the Cleveland National Forest. The County circulated a draft EIR. Commenters questioned the EIR's conclusions regarding biological resources potentially present on the site. The debate focused in part on whether the arroyo southwestern toad, an endangered species, was present. In 2003, the County certified the EIR and approved the project. Lawsuits followed. In 2004, the trial court granted the writ on two grounds: water quality, and mitigation measures to address impacts to coastal sage scrub. The trial court denied claims related to the toad. No one appealed. The developer gathered



additional data on water quality. The County prepared and circulated a draft Supplemental EIR with an updated water quality analysis. During the circulation period, a zoologist found arroyo toad larvae in a creek roughly 330 feet from the project site. Other toads were detected further downstream. The County retained its own biologist, who conducted surveys, but found no toads on the property. A U.S. Fish and Wildlife Service (“USFWS”) biologist submitted a letter stating there was a high probability that toads were present. The zoologist and USFWS biologist both noted the toad can be present on a site, undetected, for a number of years before emerging. The County’s biologist concluded the toad was not present. The County declined to recirculate the draft SEIR, certified the document and approved the project. The trial court discharged the writ issued in 2004. No one appealed. Petitioner “Rural Canyons,” joined by the Silverado Modjeska Recreation and Parks District, filed a new CEQA petition challenging the County’s certification of the SEIR and approval of the project. The trial court denied the petition. Rural Canyons and the District appealed.

First, Rural Canyon challenged the County’s efforts to address water quality impacts in response to the 2003 lawsuit. The Court held that res judicata barred this claim because it was based on the same issue adjudicated by the trial court when it granted the County’s motion to discharge the writ. Rural Canyons argued res judicata did not apply because the District had not been a party to the

earlier lawsuit. The Court rejected this argument because Rural Canyons and the District had a “common interest” – enforcing CEQA – and therefore were in privity to one another.

Second, Rural Canyon argued the County violated CEQA by failing to recirculate the SEIR to address the potential presence of the toad. The Court did not address whether res judicata barred this claim. Rather, the Court focused on whether the record contained “significant new information” triggering the need for additional environmental review. The 2003 EIR concluded the project would not have a significant impact on the arroyo toad because, although detected in the vicinity, the toad had not been found on the project site and the site did not contain suitable habitat. Although the zoologist and USFWS stated that arroyo toads can remain buried in the soil for extended periods of time and are difficult to observe year-to-year, that was not new information, but an existing condition based on the habits of the toad. The zoologist’s observation – that toad larvae was present 330 feet from the site – was investigated by the County’s biologist, who stood by the conclusion that the toad was not located on the site. All these issues had been analyzed in the 2003 EIR. The further information – from the County’s biologist, the zoologist, and the USFWS biologist – merely expanded upon that analysis. Substantial evidence supported the County’s decision not to recirculate the SEIR.

Third, the Court considered the District’s appeal of the trial

court’s determination to grant the developer’s motion for attorneys’ fees. In 2003, the District and the developer entered into a written agreement in which the developer agreed to dedicate land to the County as permanent open space. The agreement provided, among other things: “The sole obligation of the District under this Agreement is not to appeal and/or litigate [developer’s] plans for development of the Project Site ... as currently proposed.” The agreement also included a provision in which the District agreed to indemnify the developer for damages, including fees, connected with the breach of the agreement. After the trial court denied the petition for writ of mandate in the 2007 action, the developer moved for attorneys’ fees under Code of Civil Procedure section 1033.5 subdivision (a)(10)(A), which provides that attorneys’ fees are allowable as costs when authorized by contract. The trial court granted the motion. The Court of Appeal found that although not directly stated, the trial court implicitly determined that the District had breached the agreement by bringing the 2007 CEQA action against the developer and that the District was obligated to pay the developer’s attorneys’ fees and costs under the indemnity provision. The Court held that the trial court should not have addressed whether the District breached the agreement in the context of the developer’s motion for attorney’s fees in a CEQA case. The Court also rejected the developer’s argument that the District breached the agreement. The agreement provided for notice and an opportunity to cure any breach. The developer did not

provide notice of the breach, and therefore could not invoke the indemnity clause.

Justice Cynthia Aaron wrote a concurring and dissenting opinion. Citing CEQA Guidelines section 15065, subdivision (a)(1), which requires a mandatory finding of significance where a project will have “a potential impact” on endangered species, Justice Aaron concluded that the siting of toads next to the site required the County to recirculate the SEIR. According to Justice Aaron, because the site was within the dispersal range of these toads, the project had the potential to result in direct or indirect impacts on toads and their habitat.

**Fourth District upholds negative declaration’s analysis of greenhouse gas emissions for proposal to redevelop Target store; Court also requires remand to address potential presence of contaminated soils.**

*Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327

In 2008, Target proposed demolishing an existing Target store and other facilities on a 9.9-acre site in order to replace them with a new, larger Target store. In 2009, the City of Chula Vista completed an initial study recommending various mitigation measures to address air quality, geology and soils, hazards and hazardous materials, hydrology and water quality, and traffic/transportation. The day before the final city council hearing, Citizens for Responsible Equitable Environmental

Development (“CREED”) submitted a comment letter, along with a CD-ROM containing thousands of pages of materials. The city council adopted a mitigated negative declaration (“MND”) and approved the project. CREED sued. The trial court denied the petition. CREED appealed.

CREED argued the record contained a “fair argument” that the project may result in significant impacts due to the presence of contaminated soil left behind by a former gas station. The record indicated that pollutants leaking from underground storage tanks contaminated soil beneath the site before reaching groundwater. Measures set forth in an adopted corrective action plan had to be completed before the City would issue building permits for the new project. Because the plan was not part of the record of proceedings, however, there was no way to know whether the plan would address contaminated soils that would be disturbed during grading. The Court remanded the matter to the trial court to determine whether the corrective action plan addressed contaminated soil. If it did not, then the City needed to prepare an EIR to address this issue.

CREED argued the MND failed to address impacts on nearby sensitive receptors: four schools and preschools located within 500 feet of the site. The Court disagreed. The City performed a screening-level health risk assessment based on guidance issued by the South Coast Air Quality Management District, and concluded the project would not

cause hazards. Similarly, an air quality assessment showed non-attainment air pollutant emissions would be below thresholds adopted by the District. Because the record did not contain a fair argument on these issues, an EIR was not required.

Finally, CREED challenged the City’s analysis of the project’s contribution to greenhouse gas emissions (“GHG”). One of the significance thresholds relied upon by the City to assess this impact was whether the project would “conflict with or obstruct the goals or strategies” set forth in AB 32. The Court noted that, at the time the City prepared the MND, no general guidance existed on the appropriate significance threshold to use for this issue. Citing CEQA Guidelines, section 15064.4, which became effective March 18, 2010, the Court noted that lead agencies have discretion to decide what threshold of significance for GHG emissions to apply to a project. The City acted within its discretion in evaluating whether the project would interfere with efforts to comply with AB 32. The air quality assessment used a target of 20% below “business as usual emissions” to be consistent with AB 32’s goals. Arguably, under AB 32, that target should have been 25%. The difference did not matter, however, because the assessment estimated the project would reduce GHG emissions by 29% as compared to business as usual through the use of energy savings measures.

**California Supreme Court issues decision addressing (1) standing of corporations to bring challenges under California**

**Environmental Quality Act (“CEQA”), and (2) applicability of “fair argument” standard of review for negative declarations as applied to city-wide ban on use of plastic bags.** *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155

In 2008, the City Manager of the City of Manhattan Beach proposed that the City consider adopting an ordinance banning the use of plastic bags at retail outlets in the City. The City prepared an initial study and proposed negative declaration. The coalition – an association of plastic bag manufacturers – submitted comments stating the ordinance, if adopted, would increase reliance on paper bags. The coalition submitted studies showing that the “life-cycle” impacts from the manufacture, transport and disposal of paper bags are in some respects greater than those of plastic bags. City staff researched the issue, and concluded the evidence of the relative merits of paper versus plastic was equivocal. The City Council adopted the negative declaration and approved the ordinance. The City’s findings explained that the City wanted to discourage the use of plastic because it accumulated in the Pacific Ocean, did not bio-degrade, and harmed marine life. The coalition sued. The trial court granted the writ. In a split opinion, the Court of Appeal affirmed. The Supreme Court granted a petition for review, and reversed. The Supreme Court ruled for the coalition on the standing issue and against the coalition on the merits.

On the question of standing, the Court’s ruling was fairly broad. The Court considered a lower court’s opinion in *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, which subjected corporations to heightened scrutiny when they assert public interest standing. “As a general rule, a party must be ‘beneficially interested’ to seek a writ of mandate. ... The requirement that a petitioner be ‘beneficially interested’ has been generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.” That said, courts have afforded more generalized “public interest standing” in cases where the petitioner asserts a public right and the object of the mandamus is to procure the enforcement of a public duty. In such a case, the petitioner need not possess a special interest in the result, since it is “sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.” The Court of Appeal in *Waste Management* held, however, that a corporation could not assert public interest standing because the entire purpose of such standing is to give citizens an opportunity to ensure the enforcement of public rights and duties, and “corporations are not generally regarded as ‘citizens.’” The Court of Appeal reasoned that because corporations are typically motivated by corporate interests rather than the interests of citizenship, when a corporation claims public interest standing it

must “demonstrate it should be accorded the attributes of a citizen litigant.”

The California Supreme Court rejected this heightened showing required for corporations. The state court, following the trend in the United States Supreme Court, seemed to place corporations and natural persons on equal footing: “we [reject] the *Waste Management* rule holding corporations to a higher standard in qualifying for public interest standing. Absent compelling policy reasons to the contrary, it would seem that corporate entities should be as free as natural persons to litigate in the public interest.”

On the merits, the Supreme Court ruled for the City. The issue before the Court was the legal threshold under CEQA when a project or ordinance necessitates preparing an environmental impact report (“EIR”). The “life cycle” studies submitted by the coalition seemed to suggest that the manufacture, distribution, use, recycling, and disposal of paper bags may entail more negative environmental consequences than do the same aspects of the plastic bag “life cycle.” Nevertheless, the Court held the relevant inquiry was not the impacts of paper or plastic bags on a global scale, but on “the actual scale of the environmental impacts that might follow from increased paper bag use in Manhattan Beach.” On a local scale, “it is plain the city acted within its discretion when it determined that its ban on plastic bags would have no significant effect on the environment.” The Court explained its conclusions were influenced by the small size

of the city (40,000), and added the caveat that “the analysis would be different for a ban on plastic bags by a larger governmental body, which might precipitate a significant increase in paper bag consumption.” The Court emphasized that under CEQA, the analysis should focus on the local environment. While the Court stressed that the focus and depth of the analysis must be on local impacts, CEQA does require a consideration of impacts outside the boundaries of the project area, if such impacts will occur, but “[t]his does not mean, however, that an agency is required to conduct an exhaustive analysis of all conceivable impacts a project may have in areas outside its geographical boundaries. [T]hat the effects will be felt outside of the project area . . . is one of the factors that determines the amount of detail required in any discussion. Less detail, for example, would be required where those effects are more indirect than effects felt within the project area, or where it [would] be difficult to predict them with any accuracy.” Here, because the City was not expecting a huge increase in the use of paper bags, “the city could evaluate the broader environmental impacts of the ordinance at a reasonably high level of generality.”

**Sixth District Court of Appeal rules petitioner may be entitled to award of attorneys’ fees despite personal stake in litigation.** *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312

The Unitarian Universalist Fellowship of San Luis Obispo

County proposed to build an 11,000 square-foot facility in the Edna Valley area of San Luis Obispo County. The Planning Commission granted the church a conditional use permit for the project. A neighbor who owned adjacent property, along with a non-profit association, appealed the decision to the Board of Supervisors. The board denied the appeal. The neighbor and the association sued under CEQA. The church notified the parties it was abandoning the project. The board rescinded the use permit. The neighbor and association filed a motion for an award of attorneys’ fees. They sought \$35,045.50: \$19,239.50 for the administrative appeal to the board, \$8,042 for “litigation,” and \$7,674.50 for the fee motion. The trial court rejected the claim for fees for work performed at the administrative level. The trial court also denied a fee award to the neighbor due to his personal stake in the case in light of his plans to develop his property as a bed-and-breakfast. The petitioners appealed.

The Court held that, under Code of Civil Procedure section 1021.5, petitioners could recover fees for work performed during the administrative proceedings, noting that the petitioners had to exhaust their remedies as a precondition to filing suit. The Court directed the trial court to consider the extent of the parties’ participation in the administrative proceedings in determining the amount of fee award.

The Court also reversed the trial court’s decision to deny the neighbor his motion for fees. While the case was pending on

appeal, the California Supreme Court decided *Conservatorship of Whitley* (2010) 50 Cal.4th 1206 (*Whitley*), which disapproved a line of cases on which the trial court relied in denying the neighbor’s fee request. *Whitley* held a litigant’s personal, non-pecuniary interests in the litigation may not be used as a basis to disqualify the litigant from obtaining fees under Code of Civil Procedure section 1021.5. Instead, the court must focus on the financial burdens and incentives involved in bringing the lawsuit. Based on *Whitley*, the court directed the trial court to reconsider the neighbor’s fee request without regard to his non-pecuniary interest in the litigation.

**Fourth District reverses judgment and directs trial court to dismiss lawsuit as moot where, during the appeal, developers abandoned a project.** *Coalition for a Sustainable Future in Yucaipa v. City of Yucaipa* (2011) – Cal.App.4<sup>th</sup> – [2011 Cal.App.LEXIS 1117]

The City of Yucaipa certified an environmental impact report (“EIR”) and approved a shopping center anchored by a proposed Target. The trial court denied the petition. The coalition appealed. While the appeal was pending, Target and the developer abandoned the project. The City rescinded the approval resolutions. Target and the City moved to dismiss the appeal as moot.

Following *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, the Court reasoned that dismissal of the appeal was improper because the normal effect of

dismissal is in effect an affirmation of the judgment. Such an implied affirmation was improper because the Court had not reached the merits, so in that sense the issue raised in the appeal had not been finally adjudicated, and never would be due to the mootness of the underlying dispute. The Court ruled that reversal of the judgment, with specific instructions to the trial court to dismiss the underlying action as moot, was the appropriate vehicle to dispose of the matter. The sole purpose of reversal was to return jurisdiction to the trial court, so that the trial court could dismiss the lawsuit as moot.

**First District upholds County's adoption of mitigated negative declaration for proposed distribution facility, despite modest imperfections in notice to responsible agencies.**

*Schenck v. County of Sonoma* (2011) – Cal.App.4<sup>th</sup> – [2011 Cal.App.LEXIS 1120]

In 2006, developers applied to Sonoma County for design review approval to construct a warehouse and beverage distribution facility on a vacant 1.25-acre parcel. A traffic study was performed; the study recommended improvements to five nearby intersections. The planning department prepared and circulated an initial study and proposed mitigated negative declaration (“MND”). At a hearing before the County’s design review committee, neighbors complained about traffic, light, aesthetics, noise, and biological resources. The developers modified the project. A revised MND was prepared. The

committee approved the modified design. Neighbors appealed the decision to the planning commission. The commission denied the appeal. The neighbors appealed to the Board of Supervisors, claiming an environmental impact report (“EIR”) was required. The developers’ traffic consultant prepared an updated traffic analysis, using traffic counts from another distribution facility that this project would replace. The counts were lower than the consultant had previously estimated. A third MND was prepared incorporating the updated traffic analysis. At the board hearing, neighbors submitted evidence of traffic and other impacts. At a continued hearing, the traffic consultant responded to this new evidence, concluding no significant traffic impacts would result. The developers submitted additional information on biological resources, noise, and greenhouse gas (“GHG”) emissions. Fourth and fifth revised MNDs were circulated. The board denied the appeal. The neighbors sued. In December 2009, the trial court granted the petition, finding that the County had not provided adequate notice to the Bay Area Air Quality Management District (“District”). The court denied the balance of the petition. The trial court retained jurisdiction. In January 2010, the County sent the District a notice of its intent to adopt the MND. The District sent back a letter stating the MND was consistent with District guidance. The District also stated it supported the identified air quality mitigation measures. The County filed a “certificate of compliance” with the trial court’s ruling. The

trial court entered judgment denying the petition. The neighbors appealed.

CEQA required the County to consult with the District before the County prepared the Initial Study, and to send the District notice of its intent to adopt the MND. The record showed the County had consulted informally with the District at the outset of the process. The record also showed, however, that the County had sent the proposed revised MND to the State Clearinghouse, but that the Clearinghouse had not forwarded the MND to the District, and the County did not separately provide notice directly to the District. In this respect, the County violated CEQA.

The Court found, however, that the error was not prejudicial. The County had consulted with the District at the outset. The County expressly followed District guidance in preparing the initial study. As the project evolved, trip generation rates declined, such that they were well below District-recommended thresholds. The lack of notice to the District did not result in truncated or incomplete environmental review. The District ultimately confirmed that the project’s traffic would be below applicable thresholds. For these reasons, “[t]he failure to provide notice to the [District] was not prejudicial.”

The neighbors argued the trial court erred in fashioning the writ directing the County to consult with the District. According to the neighbors, such interlocutory relief was inappropriate. The Court of

Appeal disagreed. It found the trial court had fashioned a remedy that focused on the specific violation at issue: the failure to provide notice to the District. Moreover, the neighbors waived the issue by failing to object to the County or the trial court.

The neighbors argued the County did not provide adequate notice to the Regional Water Quality Control Board or to Caltrans. The County had sent these agencies copies of the proposed MND. The neighbors argued the County was also required to provide the agencies with notice of hearings on the project. The Court held, however, that the County had substantially complied with the notice requirements of CEQA Guidelines sections 15072 and 15073. Moreover, the analyses of traffic and water quality issues in the final, fifth MND – the version adopted by the County – was substantially identical to earlier versions that were sent to the agencies.

## LEGISLATIVE DEVELOPMENTS

### **SB 226 (Simitian) Environmental Quality (CEQA).**

The bill proposes a variety of amendments to the government approval process for several specific types of projects that offer environmental benefits. In particular, the bill would: (1) exempt from the requirements of CEQA the installation of a solar energy system, including associated equipment, on the roof of an existing building or an existing parking lot meeting specified conditions (projects requiring certain environmental

permits, such as species take permits, streambed alteration agreements, waste discharge requirements, or permits under section 401 or 404 of the federal Clean Water Act are not eligible)

(2) streamline the process for changing a zoning ordinance to expedite the approval of sustainable community developments

(3) streamline the inter-agency scoping process under CEQA

(4) clarify that a project's greenhouse gas emissions are not, in and of themselves, a sufficient reason exclude the project from a categorical exemption

(5) limit the application of the CEQA process in cases where an infill development is proposed in an area where an Environmental Impact Report was previously prepared in support of a planning level decision (a project specific EIR will not be required provided that there are no project or site specific impacts that were not covered in the existing EIR and substantial new information does not contradict the findings in the existing EIR).

(6) direct the Office of Planning and Research to prepare guidelines for the Natural Resources Agency that would establish statewide standards for infill projects, as defined by statute

(7) permit the California Energy Commission to consider an amendment to the permits of a limited number of solar thermal powerplants to substitute approved technologies with photovoltaic technology.

*Status: The bill has been passed by both houses and presented to the Governor.*

## REGULATORY UPDATES

### CLIMATE CHANGE

## RECENT COURT RULINGS

## LEGISLATIVE DEVELOPMENTS

## REGULATORY UPDATES

### **Confidentiality Determinations.**

In May 2011, the USEPA issued its final rule regarding the confidentiality determinations for certain data elements required to be reported under the Mandatory Greenhouse Gas Reporting Rule. This rule also finalized amendments to the special rules governing certain information obtained under the Clean Air Act, which authorizes the USEPA to release or withhold as confidential reported data according to the final determinations without taking further procedural steps. For more information, please see 76 Fed.Reg. 30782.

**Mandatory Reporting Rule.** In June 2011, the USEPA proposed to amend certain provisions relating to best available monitoring methods for Petroleum and Natural Gas Systems. For more information, please see 76 Fed.Reg. 37300.

In August 2011, the USEPA also proposed to amend specific provisions of the rule in order to correct certain technical and editorial errors, and to clarify or propose amendments to certain provisions that have been the subject of questions from reporting entities. For more information, please see 76 Fed.Reg. 47392.

In August 2011, the USEPA issued a final rule that defers the reporting deadline for data elements that are used by direct emitter reporters as inputs to emission equations under the rule. The deadline for reporting some of these elements has been deferred to March 31, 2013, while the deadline for reporting other elements has been deferred to March 31, 2015. For more information, please see 76 Fed.Reg. 53057.

**PSD and Title V Permitting Programs.** In July 2011, the USEPA issued its final rule deferring, for a period of three years, the application of the PSD and Title V permitting requirements to biogenic CO<sub>2</sub> emissions from bioenergy and other biogenic stationary sources. For more information, please see 76 Fed.Reg. 43490.

**2017-2025 Model Year Light-Duty Vehicle GHG Emissions And CAFE Standards.** In light of President Obama's May 21, 2010 Presidential Memorandum, the USEPA and National Highway Traffic Safety Administration issued a notice of intent to develop a joint proposal to reduce fuel consumption by and GHG emissions of light-duty vehicles for model years 2017-2025. The agencies anticipate issuing a proposed rule by September 28, 2011, and a final rule by July 31, 2012. For more information, please see 76 Fed.Reg. 48758.

## COASTAL RESOURCES

### RECENT COURT RULINGS

**The First District Court of Appeal held that the Coastal Commission has jurisdiction to determine the Coastal Development Permit appeal.** *County Citizens for a Better Eureka v. California Coastal Commission (2011)*, \_\_ Cal.App.4<sup>th</sup> \_\_.

A developer planned an extensive marina project on a 43-acre site near Humboldt Bay in the City of Eureka (City). The City, having issued nuisance abatement orders concerning the site, finally issued a coastal development permit (CDP) for Phase 1. The CDP has been appealed to the Coastal Commission (Commission). Plaintiff, Citizens For A Better Eureka (CBE) is challenging the Commission's appellate jurisdiction over the CDP.

At issue is Public Resources Code section 30005, subdivision (b), which states no provision of the California Coastal Act of 1976 (§ 30000 et seq.; Coastal Act) "is a limitation . . . . (b) On the power of any city . . . to declare, prohibit, and abate nuisances.

The Court held that because a CDP is required, the Commission has jurisdiction to determine the CDP appeal.

## LEGISLATIVE DEVELOPMENTS

### REGULATORY UPDATES

## ENDANGERED SPECIES

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

**SB 16 (Rubio) Renewable energy: Department of Fish and Game: expedited permitting.** The California Endangered Species Act (CESA) authorizes the Department of Fish and Game ("DFG") to authorize the take of threatened, endangered, or candidate species by permit if certain requirements are met. Existing law requires DFG to collect, and requires the owner or developer of certain solar thermal powerplants or photovoltaic powerplants to pay, a one-time permit application fee of \$75,000. This bill requires DFG to take prescribed procedural steps regarding applications for certain eligible renewable energy projects, including determining whether the application is complete or incomplete, notifying the applicant of its determination, and approving or rejecting an incidental take permit application for an eligible project within specified timeframes. The bill also requires DFG to provide an accounting to the Legislature on incidental take permit applications for eligible renewable energy projects, and to report to the Legislature on the extent to which it arranges for entities other than itself to provide all or part of the environmental review of eligible renewable energy projects. *Status: Enrolled-9/9/2011*



**AB 13 (Pérez) Energy: renewable resources: endangered species: environmental impact reports.**

Expands categories of projects eligible for participation in Desert Renewable Energy Conservation Plan to include wind and geothermal powerplants. Establishes fees to cover CDFG expense of reviewing CESA incidental take permit applications for such projects. Establishes \$7 million grant fund to be administered by the California Energy Commission, to assist counties in revising and establishing general plan, land use policies, and natural communities conservation plans that will facilitate the development of eligible renewable energy resources. Bill will only become effective if SB 16 is signed into law before January 1, 2012. *Status: approved by the Governor August 29, 2011.*

## REGULATORY UPDATES

**Mapping Delineations.** In May 2011, the USFWS and National Marine Fisheries Service issued a proposed rule to maintain the publication of maps of proposed and final critical habitat designations, but also make optional the inclusion of any textual description of the boundaries of the designation. For more information, please see 76 Fed.Reg. 28405.

**5-Year Reviews.** In May 2011, the USFWS announced that it was initiating 5-year reviews for 53 listed species located in California, Nevada, and Oregon's Klamath

Basin. The USFWS also announced its completion of 5-year reviews for 32 listed species located in California and Nevada. For more information, please see 76 Fed.Reg. 30377.

**Mountain Plover.** In May 2011, the USFWS announced its decision to withdraw the proposed listing of the mountain plover as a threatened species on the basis that the species is not endangered or threatened throughout all or a significant portion of its range. For more information, please see 76 Fed.Reg. 27756.

**American Pika.** In May 2011, the California Fish and Game Commission ("CFGC") announced that a 43-page letter from the Center for Biological Diversity, dated March 31, 2011, amounted to a substantive amendment of the petition to list the American pika as a threatened species. For more information, please see Cal. Reg. Notice Register 2011, Vol. 21-Z, p. 892.

**Lane Mountain Milk-Vetch.** In May 2011, the USFWS published its final revised critical habitat rule for the Lane Mountain milk-vetch. Effective June 20, 2011, the rule designates approximately 14,069 acres of land located in the Mojave Desert in San Bernardino County as critical habitat. For more information, please see 76 Fed.Reg. 29108.

**Riverside Fairy Shrimp.** In June 2011, the USFWS issued its proposed revised critical habitat rule for the Riverside fairy shrimp. The proposed rule would designate approximately 2,984 acres of land located in Ventura, Orange,

Riverside and San Diego counties. For more information, please see 76 Fed.Reg. 31686.

***Monardella linoides ssp. viminea.*** In June 2011, the USFWS proposed to recognize the recent change to the taxonomy of the currently endangered plant taxon, *Monardella linoides ssp. viminea*, in which the subspecies was split into two distinct full species: *Monardella viminea* (willow monardella) and *Monardella stoneana* (Jennifer's monardella). The USFWS also proposed to retain willow monardella's listing as endangered, and designate critical habitat (approximately 348 acres) in San Diego County. No similar actions were proposed for Jennifer's monardella, which the USFWS believes does not meet the listing criteria. For more information, please see 76 Fed.Reg. 33880.

**California Tiger Salamander.** In June 2011, the USFWS reopened the comment period on its August 18, 2009 proposed designation of critical habitat for the Sonoma County distinct population segment of the California tiger salamander. The USFWS also announced revisions to the proposed critical habitat unit; specifically, an additional 4,945 acres were added to the unit in the general area of Roblar Road. As such, the USFWS proposed to designate a total of 55,800 acres as critical habitat. In August 2011, the USFWS finalized its critical habitat rule, designating approximately 47,383 acres of land. For more information, please see 76 Fed.Reg. 36068, 54346.



**Northern Spotted Owl.** In July 2011, the USFWS announced the availability of the Revised Recovery Plan for the northern spotted owl. For more information, please see 76 Fed.Reg. 38575.

**Whitebark Pine.** In July 2011, the USFWS announced its 12-month finding on a petition to list whitebark pine as threatened or endangered and to designate critical habitat. After reviewing all available scientific and commercial information, the USFWS found that listing whitebark pine as threatened or endangered is warranted, but presently precluded by higher priority actions. The whitebark pine has been added to the candidate species list. For more information, please see 76 Fed.Reg. 42631.

**Southwestern Willow Flycatcher.** In August 2011, the USFWS issued a proposed rule to revise the critical habitat designation for the southwestern willow flycatcher. Under the proposed rule, a total of 2,090 stream miles are proposed for critical habitat in a combination of federal, state, tribal and private lands. Potentially impacted California counties include Imperial, Inyo, Kern, Los Angeles, Mono, Orange, Riverside, Santa Barbara, San Bernardino, San Diego, and Ventura. For more information, please see 76 Fed.Reg. 50542.

**Valley Elderberry Longhorn Beetle.** In August 2011, the USFWS announced its 90-day finding on a petition to de-list the valley elderberry longhorn beetle. The USFWS found that the petition presented substantial

scientific or commercial information indicating that de-listing may be warranted; therefore, the USFWS initiated a status review and will issue a 12-month finding in the future. For more information, please see 76 Fed.Reg. 51929.

**Coachella Valley Milk-Vetch.** In August 2011, the USFWS issued a proposed rule to revise the critical habitat designation for the Coachella Valley milk-vetch. Under the proposed rule, a total of approximately 25,704 acres would be designated as critical habitat in Riverside County, California. For more information, please see 76 Fed.Reg. 53224.

**Desert Tortoise.** In August 2011, the USFWS announced the availability of a revised recovery plan for the Mojave population of the desert tortoise. This species is found in the Mojave and Sonoran deserts in southern California. For more information, please see 76 Fed.Reg. 53482.



## RECENT COURT RULINGS

**The Fourth District Court of Appeal affirms CPUC's decision approving certain revenue allocations and rate design settlement agreements.** *Ames v. Public Utilities Commission (Southern California Edison Co.) (2011)*, Cal.App.4th.

Petitioner, Ames, asserts the California Public Utilities

Commission (commission or CPUC) erred by approving certain revenue allocation and rate design settlement agreements submitted by real party in interest Southern California Edison Company (SCE). According to Ames, the effect of the approved agreements is to unreasonably "flatten" electricity rates for large power customers by reducing the rate differential between peak and non-peak hours. Moreover, Ames claims the decisions do not include any "analysis or justification as to how or why these rates flattened, as required by the statutory mandates." Ames also contends commissioner Peevey should have been disqualified from participation in the pertinent proceedings.

The Court of Appeal rejected each of Ames's assertions of error and therefore affirmed the CPUC's decision.

**The California Supreme Court upholds Court of Appeal's Decision Regarding Best Technology Available.** *Voices of the Wetlands v. State Water Resources Control Bd. (2011)*, Cal.4th.

Plaintiff, Voices of the Wetlands, an environmental organization, filed an administrative mandamus action in the Monterey County Superior Court to challenge the issuance, by the California Regional Water Quality Control Board, Central Coast Region (Regional Water Board), of a federally required permit authorizing the Moss Landing Powerplant (MLPP) to draw cooling water from the adjacent

Moss Landing Harbor and Elkhorn Slough. The case, now more than a decade old, presents issues concerning the technological and environmental standards, and the procedures for administrative and judicial review, that apply when a thermal power plant, while pursuing the issuance or renewal of a cooling water intake permit from a regional water board, also seeks necessary approval from another state agency, the State Energy Resources Conservation and Development Commission (Energy Commission), of a plan to add additional generating units to the plant, with related modifications to the cooling intake system.

More specifically, the California Supreme Court affirms the judgment of the Court of Appeal and reaches the following conclusions:

First, the superior court had jurisdiction to entertain the administrative mandamus petition here under review. The Supreme Court thus rejects the contention of defendants and the real party in interest that, because the substantive issues plaintiff seeks to raise on review of the Regional Water Board's decision to renew the plant's cooling water intake permit were also involved in the Energy Commission's approval of the plant expansion, statutes applicable to the latter process placed exclusive review jurisdiction in this court.

Second, the trial court did not err when, after concluding that the original record before the Regional Water Board did not support the board's finding on a single issue crucial to issuance of the cooling

water intake permit, the court deferred a final judgment, ordered an interlocutory remand to the board for further "comprehensive" examination of that issue, then denied mandamus after determining that the additional evidence and analysis considered by the board on remand supported the board's reaffirmed finding.

Third, recent United States Supreme Court authority confirms that, when applying federal Clean Water Act (CWA) standards for the issuance of this permit, the Regional Water Board properly utilized cost-benefit analysis, and in particular a "wholly disproportionate" cost-benefit standard, to conclude that the MLPP's existing cooling water intake design, as upgraded to accommodate the plant expansion, "reflect[ed] the *best technology available* for minimizing adverse environmental impact." (CWA, § 316(b); 33 U.S.C. § 1326(b) (hereafter CWA section 316(b)), italics added.)

## LEGISLATIVE DEVELOPMENTS

**SB 216 (Yee) Public utilities: intrastate natural gas pipeline safety.** Currently, the Public Utilities Commission (PUC) has regulatory authority over public utilities, including gas corporations, and the Public Utilities Act authorizes the PUC to ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements, or services to be furnished, imposed, observed, and followed by specified public utilities, including gas corporations. This bill would designate the PUC as the state

authority responsible for regulating and enforcing intrastate gas pipeline transportation and pipeline facilities pursuant to federal law, including the development, submission, and administration of a state pipeline safety program certification for natural gas pipelines. Under the bill the PUC would be mandated to require the installation of automatic shut-off or remote controlled sectionalized block valves on certain intrastate transmission lines, that are located in a high consequence area or that traverse an active seismic earthquake fault, unless it determined that doing so would be preempted under federal law. The bill would require owners/operators of a commission-regulated gas pipeline facility, that is an intrastate transmission line, to provide the PUC with a valve location plan, along with any recommendations for valve locations, and would authorize the PUC to make modifications to the valve location plan. *Status: passed both houses and presented to the Governor.*

**SB 585 (Kehoe) Energy: solar energy systems: funding.** SB 585 would increase funding for the California Solar Initiative by \$200 million, to a total of \$3,550,800,000, by expanding the cap that the three investor-owned utilities can collect from customers. The extra funding will also first come from interest on charges collected from customers. *Status: signed by the Governor and chaptered.*

**AB 56 (Hill) Gas corporations: rate recovery and expenditure: intrastate pipeline safety.**

Amends the Public Utilities Code to require the installation of certain safety equipment on certain gas transmission lines (e.g., automatic shutoff or remote controlled sectionalized block valves ). This bill also amends the Public Utilities Code to prohibit a gas corporation from recovering any fine or penalty in any rate approved by the commission. *Status: passed both houses and presented to the Governor.*

**AB 1055 (Hill) Public Utilities Commission: solicitation of contributions from regulated persons or corporations.**

This bill prohibits a commissioner or employee of the Public Utilities Commission from knowingly soliciting charitable, political, or other contributions from any person or corporation subject to regulation by the commission, or from any person that is representing, or regularly represents, persons or corporations regulated by the commission. This bill additionally requires the Commission to annually report related information to the Legislature. *Status: Passed both houses, enrolled and to Governor's desk.*

**SB 771 (Kehoe) California Alternative Energy and Advanced Transportation Financing Authority.** This bill would expand the definition of "renewable energy" in the Public Resources Code to include energy generation based on thermal energy systems such as natural gas turbines; landfill gas turbines; engines, and microturbines; digester gas bill was passed on September 8. . *Status: Passed*

*both houses, enrolled and to Governor's desk.*

**AB 631 (Ma) An Act to amend Section 216 of the Public Utilities Code, relating to public utilities.**

AB 631 provides that the ownership, control, operation, or management of a facility that supplies electricity to the public only for use to charge light duty plug-in electric vehicles, as defined, does not make the corporation or person a public utility.

In addition to exempting providers of energy for plug-in electric vehicles, AB 631 also contains exemptions from the definition of a public utility for those who own or operate facilities providing or engaged in cogeneration power, landfill gas, geothermal, solar thermal, or retail of natural gas for use as a motor vehicle fuel. The bill further provides exemptions for exempt wholesale generators, and electric plants used for direct transactions. *Status: Passed both houses, enrolled and to Governor's desk.*

**SB 618, Wolk. Local government: solar-use easement.**

The bill is intended to provide an incentive to solar developers seeking to build on compromised agricultural lands subject to Williamson Act contracts. The bill would create a very detailed procedure that would permit parties to a Williamson Act contract, after approval by the Department of Conservation, in consultation with the Department of Food and Agriculture, to mutually agree to rescind the contract in order to simultaneously enter into a solar-use easement that would require that the land be used

for solar photovoltaic facilities for a term of no less than 20 years (with some exceptions). Among its many demands, the bill would require the that restrictions, conditions, or covenants of a solar easement include a requirement for the landowner to post a performance bond or other securities to fund the restoration of the land that is subject to the easement to the conditions that existed before the approval or acceptance of the easement by the time the easement terminates. The bill would additionally create public and private enforcement rights to enjoin conditions that violate the solar easement.

*Status: The bill has been passed by both houses and presented to the Governor.*

**REGULATORY UPDATES**



**RECENT COURT RULINGS**

**LEGISLATIVE DEVELOPMENTS**

**REGULATORY UPDATES**

## FOREST RESOURCES

### RECENT COURT RULINGS

**The Third District Court of Appeal has ruled that the trial court erred in certifying as a class action an action brought by a city, landowners, and business owners against the California Department of Fish and Game (CDFG) relating to the Department's intention poisoning of Lake Davis in Plumas County.** *Department of Fish and Game et al. v. Superior Court* (August 2, 2011) 197 Cal.App.4<sup>th</sup> 1323.

In the case, plaintiffs brought action against CDFG alleging public nuisance, negligence, inverse condemnation, and multiple other claims associated with the Department's 2007 poisoning of Lake Davis as part of its effort to eradicate an invasive species of fish, the northern pike, from the lake and its tributaries in order to preserve tourism in the area and to prevent migration of the fish to other bodies of water. Petitioners allege CDFG's efforts created a decline in tourism that adversely affected business income, property values, and tax receipts for the period leading up to and following the eradication effort. In certifying the proceedings as a class action, the trial court concluded that common issues predominate and, therefore, the action should move forward as a class action pursuant to Code of Civil Procedure section 382.

The Court of Appeal framed the primary issue before it as whether

the legal and factual issues that must be resolved in the dispute are predominantly common to all class members or must be determined on an individual basis.

In order to obtain class certification, a proponent must demonstrate the existence of both an ascertainable class and a well-defined community of interest among the proposed class members. The community of interest requirement embodies three factors: (1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class. The predominance factor requires a showing that questions of law or fact common to the class predominate over the questions affecting the individual members. The ultimate question in every case of this type is whether the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants. A class action can be maintained even if each class member must at some point individually show his or her eligibility for recovery or the amount of his or her damages, so long as each class member would not be required to litigate substantial and numerous factually unique questions to determine his or her individual right to recover. Individual issues do not render class certification inappropriate so long as such issues may effectively be managed.

Based on the evidence before it, and as explained in detail in the opinion, the Court of Appeal ruled that the impact of the 2007 poisoning in this case may be different relative to each of the individual petitioners depending on the particular characteristics and location of each individual parcel. In light of the claims asserted by plaintiffs, these differences are more than just a matter of damages, but go to the fundamental issues of liability. On that basis, the Court ruled that the trial court's order certifying the matter as a class action was an abuse of discretion, and it issued a writ of mandamus directing the trial court to vacate its certification order and to enter a new order denying class certification.

### LEGISLATIVE DEVELOPMENTS

### REGULATORY UPDATES

## HAZARDOUS WASTES/ HAZARDOUS MATERIALS

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

**AB 255 (Wieckowski) Hazardous waste: latex paint: collection facility.**

Existing law generally allows recyclable latex paint to be accepted at any location if specified requirements are met concerning the management of that paint. A violation of the requirements concerning hazardous waste is a crime. This bill allows a permanent household hazardous waste collection facility

to accept recyclable latex paint from any generator, notwithstanding specified provisions and regulations, if that facility complies with certain requirements. Because a violation of these requirements would be a crime, the bill imposes a state-mandated local program. This bill contains other related provisions and other existing laws. *Status: Approved by the Governor and chaptered, 9/6/2011.*

**AB 358 (Smythe) Hazardous substances; underground storage tanks; releases; reports.** This bill makes several changes to the regulation of underground storage tanks. Tank owners and operators will be required to report additional information in the event of an unauthorized release. Further, each regional water quality control board and local agency will be required to submit a report for all unauthorized releases using the board's Internet-accessible database and the board will annually post and update on its Internet Web site regarding unauthorized releases. Other provisions of this bill affect the filing deadlines and claim limitations for claims to the Underground Storage Cleanup Fund and the authority of certain agencies to close tanks where an unauthorized release has occurred. This bill is immediately effective as an urgency statute. *Status: enrolled and presented to the Governor.*

**AB 341 (Chesbro) Commercial Waste Recycling Mandate.** This bill expands local diversion efforts (recycling requirements) from the residential to the commercial sector by requiring the

participation of multi-family dwellings of five or more units and commercial and public entities that generate more than 4 cubic yards of total commercial solid waste per week. In addition, this bill directs CalRecycle to increase statewide diversion (source reduction, recycling, or composting) to 75% by 2020. *Status: passed both houses, enrolled and presented to the Governor.*

**AB 1319 (Butler) Toxin-Free Infants and Toddlers Act: bisphenol A.** The bill would, except as specified, prohibit, on and after July 1, 2013, the manufacture, sale, or distribution in commerce of any bottle or cup that contains bisphenol A, at a detectable level above 0.1 parts per billion (ppb), if the bottle or cup is designed or intended to be filled with any liquid, food, or beverage intended primarily for consumption by children 3 years of age or younger. This prohibition would not apply to a product subject to a regulatory response by the department, on the date that a prescribed notice is posted regarding the department's adoption of the regulatory response. The bill would also require manufacturers to use the least toxic alternative when replacing bisphenol A in containers in accordance with this bill. *Status: Passed both houses, enrolled and to Governor's desk.*

**SB 646 (Pavley) Toxics; enforcement; lead jewelry.** Existing law prohibits the manufacture, shipping, selling or sale of jewelry, children's jewelry or jewelry used for body piercing unless the jewelry is made entirely of specified materials, and

specifically restricting the amount of lead in such jewelry. The author of this bill contends that existing law contain two loopholes which allows business to bypass much of the statutory enforcement provisions and avoid financial penalties through either continuing to file multiple notices of elections of responses or by adding its name to a growing list of signatories to a consent judgment. This bill prevents companies from continuing to correct specific violations they were cited for and yet continuing to violate in the future. It also closes the loophole by which offending companies avoid the restrictions by signing agreements similar to the original consent judgment. *Summary of status – September 7, 2011. Enrolled and presented to the Governor.*

## REGULATORY UPDATES

**National Priorities List (“NPL”).** The Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) requires that the National Oil and Hazardous Substances Pollution Contingency Plan include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants. The NPL constitutes this list. In March 2011, USEPA issued a proposed rule to add 15 sites to the General Superfund section of the NPL. One of these sites -- the New Idria Mercury Mine -- is located in Idria, California. For more information, see 76 Fed.Reg. 13113.



## INSURANCE COVERAGE

### RECENT COURT RULINGS

**The Second District Court of Appeal held that defendant insurance company did not owe plaintiff insured a defense because neither the pleadings nor the extrinsic evidence in the underlying action revealed a possibility the claim being asserted against insured might be covered by the defendant's policy.** *Ulta Salon, cosmetics & Fragrance, Inc. v. Travelers Property Casualty Co. of America (2011)*, \_\_\_Cal.App.4th \_\_\_.

On or about October 8, 2007, Plaintiff, Ulta, received notice of lawsuit. Ulta notified Defendant, Travelers, of the suit, provided Travelers with a copy of the complaint, and requested that Travelers defend and indemnify Ulta pursuant to the terms of the policy. On October 17, 2007, Travelers denied coverage of the lawsuit. On January 7, 2009, Travelers reiterated its denial, in response to a December 2, 2008 request by Ulta that Travelers withdraw its letter denying coverage. On March 16, 2010, after hearing the matter, the trial court sustained Travelers' demurrer to the first amended complaint without leave to amend.

The issue is whether an *Insured is owed a duty only when there is a potential for coverage under an insurance policy.*

The Court of Appeal held that insurance company had no duty to defend insured based on unpled claims that might implicate the insurance policy.

## LAND USE

### RECENT COURT RULINGS

**In *Gutierrez v. County of San Bernardino*, 198 Cal. App. 4th 831 (Cal. Ct. App. 2011), the Fourth District Court of Appeal held that an unimproved portion of a public roadway is not a public improvement for purposes of an inverse condemnation claim. The court departed from the general rule of strict liability in inverse condemnation cases and determined that in the context of flood control, liability only exists where the government acts unreasonably in making public improvements.**

In December 2003, storm water runoff from a nearby mountain range flooded Greenwood Avenue and damaged the plaintiffs' properties. In response to the flooding, the County placed flood control rails along the paved portion of Greenwood Avenue to protect property owners from further damage. However, in October 2004, excessive rainfall again caused storm water to flood Greenwood Avenue, and some of the flood water escaped the rails and again caused damage to the plaintiffs' property.

The plaintiffs filed suit against the County asserting a claim of inverse condemnation. The plaintiffs argued that the flood control rails constitute a public improvement purposely designed to function as a storm channel and that the County is strictly liable for any proximate damages resulting

from the improvements. The County contended the public improvements did not cause the damage and that the flood control rails caused no more damage than what would have occurred in their absence. Moreover, the County argued that a reasonableness standard applies and that the County's actions were reasonable. The trial court determined that the County's installation of the flood control rails did constitute a public improvement that resulted in damages to the plaintiffs' properties. However, the trial court held that a reasonableness standard did apply and found that the County's actions were reasonable. Therefore, the trial court held that the County is not liable. The plaintiffs appealed.

The Court of Appeal affirmed the trial court's decision. The court noted that the paved portion of Greenwood Avenue is a public improvement and that the installation of flood control rails constitutes a further public improvement because it is a deliberate attempt to channel surface water. It further noted that while strict liability is the general rule for inverse condemnation claims, in the context of flood control public policy counsels against it. The court reasoned that the application of strict liability in this context renders the County the insurer of the protected lands and discourages necessary public improvements that affect surface water drainage. Therefore, the court concluded that the County's actions were reasonable and that it is not liable for the damages.

*In Villa Los Alamos Homeowners Ass'n v. State Farm General*

*Insurance Co.*, 198 Cal. App. 4th 522 (Cal. Ct. App. 2011), **the Fourth District Court of Appeal held that a pollution exclusion in a first-party property insurance policy—comparable to a standard pollution exclusion clause in a comprehensive general liability policy—is intended to exclude coverage for injuries attributed to activities commonly understood as environmental pollution. The court also concluded that disturbing asbestos while scraping acoustical “popcorn” ceilings in a residential building, thereby releasing asbestos fibers into the air, common areas, individual residential units, and spaces outside of the building, constitutes environmental pollution.**

The Villa Los Alamos Homeowners Association maintains a 94-unit condominium complex. State Farm insures the Association under a comprehensive “open peril” policy providing coverage for first-party property losses and third-party business liability claims. Under this policy, State Farm agrees to cover all of the insured’s losses not specifically excluded by its terms—which included pollution exclusion for losses due to the presence, release, discharge, or dispersal of pollutants. In 2006, the Association hired a contractor to scrape “acoustical (popcorn) ceilings and stairways” in one of its buildings. The contractor disturbed asbestos in the ceilings, releasing asbestos fibers into the air, common areas, individual units, and areas outside of the building. The Bay Area Air Quality Management District

required the Association to perform a comprehensive abatement to remedy the contamination. State Farm denied coverage of the Association’s resulting claim under both the policy’s first-party property and business-liability provisions.

The Association sued State Farm alleging breach of contract and breach of the covenant of good faith and fair dealing. The Superior Court of Sonoma County granted State Farm’s motion for summary judgment on the Association’s first-party claims, and affirmed the parties’ stipulation to dismiss its third-party claims with prejudice. The trial court held that whether the pollution exclusion precluded coverage depended upon the type of pollutant and whether its release constitutes environmental pollution. It took judicial notice of the fact that asbestos is a pollutant, and held that the airborne release of asbestos involved here constitutes pollution. On the latter determination, the trial court held that the scope of degradation, and not the manner of pollution, is the relevant inquiry. The Association appealed.

The Court of Appeal addressed the Association’s argument that under the authority of *MacKinnon v. Truck Insurance Exchange*, 73 P.3d 1205 (Cal. 2003), a pollution exclusion did not apply to a single, negligent localized asbestos release. In *MacKinnon*, an insurer argued for a narrow interpretation of the standard pollution exclusion clause in its comprehensive general liability policy with the insured. The California Supreme Court held that a reasonable policyholder would understand the

policy to exclude injuries arising from any event “commonly thought of” as pollution. Thus, the court held that despite analytical differences between first-party property and third-party liability policies, the principle of *MacKinnon* is equally applicable to the comparable exclusion involved here. It concluded that a reasonable insured would read this exclusion as applicable to environmental pollution, and that the release of asbestos by the Association’s contractor constitutes environmental pollution within the meaning of the exclusionary clause.

In *City of Palmdale v. Palmdale Water Dist.*, 2011 Cal. App. LEXIS 1118 (Cal. Ct. App. 2011), **the Second District Court of Appeal held that the Palmdale Water District’s (the District) new water rate structure does not comply with Proposition 218’s mandates because the rate structure failed to satisfy the proportionality requirement set forth in Cal. Const., art. XII D, § 6, because it placed a disproportionate share of the District’s costs on irrigation users.**

The District is the water service provider for approximately 145,000 users in the Palmdale area. Single-family residential (SFR) users account for 72 percent of the District’s total water usage. The remaining water usage is from the following users: commercial/industrial (10 percent); multifamily residential (MFR) (9 percent); irrigation (5 percent); and, miscellaneous (4 percent). In 2008, in an attempt to balance its budget, the District adopted a new

water rate structure. The water rate structure imposes a fixed monthly service charge based on the size of the customer's meter and a per unit commodity charge for the commodity charge of water used, with that amount depending upon the customer's compliance with its allocated water budget. The customer pays a higher commodity charge per unit of water above its allotment, but the incremental rate increase depends on its class. For example, all customers pay tier 1 rates (\$0.64/unit) at 0 to 100 percent of their water budget allocation; however, SFR/MFR pay tier 5 rates (\$5.03/unit) when they use above 175% of their budget, but irrigation users pay tier 5 rates when they use above 130% of their budget.

In 2009, the City of Palmdale (an irrigation user) filed a complaint with the Los Angeles County Superior Court seeking to invalidate the water rate structure. The City claimed that the water rate structure does not comply with the requirements of Proposition 218 because it places a disproportionate share of the District's costs on irrigation users, and Proposition 218 does not allow this type of price discrimination. The trial court, in its tentative ruling, indicated that it was inclined to invalidate the rate structure. However, after hearing oral arguments, it ruled the water rate structure is valid. The City appealed.

The Court of Appeal addressed whether the District's water rate structure complies with Proposition 218's mandates, specifically whether each user

bears a proportional share of the costs associated with providing water service to their respective parcel. The court found that the water rate structure does not comply with Proposition 218. It held that the water rate structure places a disproportionate share of the District's costs on irrigation users, without any showing from the District that there is a corresponding disparity in the cost of providing water to irrigation users as compared to other users. The court noted that SFR/MFR users could waste or inefficiently use water without paying the same proportional costs as irrigation users because of the significant disparity in tiered rates for water use in excess of the customer's allotted water budget. Thus, the court held that the District did not comply with Proposition 218's proportionality requirement in developing and adopting the water rate structure and therefore the water rate structure is not valid.

## **LEGISLATIVE DEVELOPMENTS**

**SB 110 (Rubio) Real Property Disclosures; Mining.** Existing law limits the liability of a transferor of property for failing to make certain disclosures regarding the condition of the property if the error or condition was not within the personal knowledge of the transferor or listing agent or the failure to make disclosures is based on reliance on the report or opinion of an expert. This bill further conditions the limit on liability by requiring the transferor to disclose whether residential real property is located within one mile of a mining operation. *Status: passed both houses and signed by the Governor.*

## **SB 292 (Padilla) California Environmental Quality Act: administrative and judicial review procedures: City of Los Angeles: stadium.**

This bill would establish specified streamlined administrative and judicial review procedures for the administrative and judicial review of the Environmental Impact Review and approvals granted for a project related to the development of a specified stadium in the City of Los Angeles. The bill would require the lead agency and applicant to implement specified measures, as a condition of approval of the project, to minimize traffic congestion and air quality impacts. This bill was originally introduced as an amendment to the Education Code pertaining to postsecondary education and was gutted and amended on September 2, 2011 to become the CEQA measure. *Status: Passed both houses, enrolled and to Governor's desk.*

**AB 900 (Buchanan) Jobs and Economic Improvement Through Environmental Leadership Act of 2011.** This bill would establish specified streamlined judicial review procedures for the judicial review of the Environmental Impact Report and approvals granted for a "leadership" project related to the development of a residential, retail, commercial, sports, cultural, entertainment, or recreational use project, or clean renewable energy or clean energy manufacturing project. The act would authorize the Governor to certify a leadership project for streamlining pursuant to the act if certain conditions are met. One of the conditions is that the project will



result in a minimum investment of \$100,000,000 in California upon completion of construction. The bill would repeal the act as of January 1, 2015. *Status: Passed both houses, enrolled and to Governor's desk.*

**SB 267 (Rubio) Water supply planning: renewable energy plants.**

Under existing law, cities or counties that determine a project is subject to CEQA must identify any public water system that may supply water for the project. The relevant public water system must prepare a water supply assessment for the project. If no public water system is identified, then the city or county must prepare the water supply assessment. SB 267 amends Section 10912 of the Water Code to alter the definition of a "project" to exclude proposed photovoltaic or wind energy generation facilities so long as they demand 75 acre-feet of water per year or less.

Section 10912 of the Water Code expires on January 1, 2017, unless a later enacted statute deletes or extends the sunset provision. In addition, Section 2 of SB 267, which becomes operative on January 1, 2017, defines project for purposes of Section 10912 of the Water Code as any of the following: a proposed residential development of more than 500 dwelling units, a proposed shopping center or business establishment employing more than 1,000 persons or having more than 500,000 square feet of floor space, a proposed commercial office building employing more than 1,000 persons or having more than 250,000 square feet of floor space, a proposed hotel or motel having more than 500 rooms, a

proposed industrial, manufacturing, or processing plant or industrial park planned to house more than 1,000 persons or occupying more than 40 acres of land, or having more than 650,000 square feet of floor area, or, a project that would demand an amount of water equivalent to, or greater than, the amount of water required by a 500 dwelling unit project. *Status: Passed both houses, enrolled and to Governor's desk.*

**REGULATORY UPDATES**

**Off-Highway Motor Vehicle Recreation Act.** In August 2011, the California Department of Parks and Recreation issued a proposed rule to amend Sections 4970.00 through 4970.26 of Title 14 of the California Code of Regulations, which pertain to the Off-Highway Motor Vehicle Recreation Grants and Cooperative Agreements Program. This program allows California to assist eligible agencies and organizations to develop, maintain, expand and manage high-quality off-highway motor vehicle recreation areas, roads, trails, and other facilities, while responsibly maintaining the wildlife, soils and habitat. For more information, please see Cal. Reg. Notice Register 2011, Vol. No. 31-Z, p. 1275.

**PROPOSITION 65**

**RECENT COURT RULINGS**

**The First District Court of Appeal held that Proposition 65 list not only can, but must be, updated by the method used by the OEHHA and set forth in subdivision (a) of section 25249.8.** *California Chamber of Commerce v. Brown (2011), \_\_Cal.App.4th\_\_.*

In November 1986, California voters approved Proposition 65, an initiative that enacted the Safe Drinking Water and Toxic Enforcement Act of 1986, now set forth in Health and Safety Code section 25249.5 et seq. (Proposition 65). A key provision of Proposition 65 is its mandate that the Governor publish a list of chemicals known to the state to cause cancer or reproductive toxicity. (§ 25249.8, subd. (a).) This list is to be revised and republished in light of additional knowledge at least once per year and is commonly referred to as the "Proposition 65 list."

This case concerns the methods by which the Proposition 65 can be updated, and specifically whether the Office of Environmental Health Hazard Assessment (OEHHA) can add chemicals to the list by use of a methodology set forth in subdivision (a) of section 25249.8. The California Chamber of Commerce (CalChamber) contends this listing method is no longer operable and applied only to the creation of the initial

Proposition 65 list. CalChamber asserts further changes to the list must be made using one of the three methods set forth in subdivision (b) of section 25249.8. The trial court concluded the language of section 25249.8 is unambiguous and the listing method set forth in subdivision (a) remains operable.

The Court of Appeal disagreed with the trial court's determination that the statutory language is, in all respects, unambiguous. However, the Court of Appeal agreed that the Proposition 65 list not only can, but must be, updated by the method used here by the OEHHA and set forth in subdivision (a) of section 25249.8. The trial court's judgment is therefore affirmed.

## LEGISLATIVE DEVELOPMENTS

### REGULATORY UPDATES

**List of Chemicals Known to Cause Cancer or Reproductive Toxicity.** OEHHA published the list of chemicals known to the State to cause cancer or reproductive toxicity on numerous occasions since the last issue of the *ELS Update*. For more information, see Cal. Reg. Notice Register 2011, Vol. 20-Z, p. 838; Vol. 30-Z, p. 1217.

**Hydrogen Cyanide and Cyanide Salts.** In May 2011, OEHHA requested information as to whether hydrogen cyanide and cyanide salts meet the criteria for listing as a reproductive toxicant under Proposition 65. For more information, please see Cal. Reg. Notice Register 2011, Vol. 19-Z, p. 793.

**Avermectin B1.** In May 2011, OEHHA proposed to establish a specific regulatory level having a maximum allowable dose level for Avermectin B1. For more information, please see Cal. Reg. Notice Register 2011, Vol. 20-Z, p. 834.

**Imazalil.** In May 2011, OEHHA announced that imazalil was added to the list of chemicals known to the State to cause cancer, effective May 20, 2011. For more information, please see Cal. Reg. Notice Register 2011, Vol. 20-Z, p. 837.

**Alpha-Methyl Styrene.** In May 2011, OEHHA provided notice of its intent to list alpha-methyl styrene as known to the State to cause reproductive toxicity. In July 2011, OEHHA announced that alpha-methyl styrene has been added to the list of chemicals known to cause reproductive toxicity, effective July 29, 2011. For more information, please see Cal. Reg. Notice Register 2011, Vol. 21-Z, p. 892; Vol. 30-Z, p. 1215.

**Titanium Dioxide.** In May 2011, OEHHA provided notice of its intent to list titanium dioxide (airborne, unbound particles of respirable size) as known to the State to cause cancer. For more information, please see Cal. Reg. Notice Register 2011, Vol. 21-Z, p. 893.

**Hand-to-Mount Transfer of Lead.** In June 2011, OEHHA announced the release of "Interpretive Guideline No. 2011-001: Guideline for Hand-to-Mouth Transfer of Lead through Exposure to Consumer Products." Within

the context of Proposition 65, the Interpretive Guideline provides general scientific guidance on how to estimate lead intake from the handling of consumer products. For more information, please see Cal. Reg. Notice Register 2011, Vol. 22-Z, p. 927.

**Fluoride and its Salts, and Tris(1,3-Dichloro-2-Propyl) Phosphate.** In July 2011, OEHHA announced the availability of the following two documents for public review and comment: "Evidence on the Carcinogenicity of Fluoride and Its Salts," and "Evidence on the Carcinogenicity of Tris(1,3-dichloro-2-propyl) phosphate." For more information, please see Cal. Reg. Notice Register 2011, Vol. 27-Z, p. 1075.

**Cancer Potency Calculations.** In July 2011, OEHHA proposed to amend Section 25703(a)(6) of Title 27 of the California Code of Regulations with respect to the calculation used to convert estimates of animal cancer potency to estimates of human cancer potency. The proposed modification would print Proposition 65's interspecies conversion calculations into uniformity with other OEHHA programs, such as the drinking water public health goal and air toxics programs. For more information, please see Cal. Reg. Notice Register 2011, Vol. 30-Z, p. 1210.

**Hazard Traits.** In July 2011, OEHHA issued proposed modifications to previously proposed regulations (i.e., Sections 69401 through 69406 of Title 22 of the California Code of Regulations). The proposed

modifications/regulations are related to the specification of hazard traits, as required by SB 509 (2008). For more information, please see Cal. Reg. Notice Register 2011, Vol. 30-Z, p. 1214.

**Sulfur Dioxide.** In July 2011, OEHHA announced that sulfur dioxide has been added to the list of chemicals known to cause reproductive toxicity, effective July 29, 2011. For more information, please see Cal. Reg. Notice Register 2011, Vol. 30-Z, p. 1216.

## RESOURCE CONSERVATION

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

**SB 108 (Rubio) Surface Mining.** This bill changes the definition of “idle” mines under the Surface Mining and Reclamation Act to mean that an operator of a surface mining operation has curtailed production at the surface mining operation, with the intent to resume the surface mining operation at a future date, for a period of one year or more by more than 90% of its maximum annual mineral production within any of the last 5 years during which an interim management plan has not been approved.

This bill would authorize the lead agency to renew an idle mine’s interim management plan for additional 5-year periods, if the lead agency finds that the surface mining operator has complied fully with the interim management plan.

This bill would authorize a mine operator who has failed to properly report mineral production or status in any year prior to January 1, 2012, to attach corrected annual reports to the 2012 annual report so long as the corrected report is submitted on or before July 1, 2013, among other things. The bill would authorize a mine to return to idle status after being considered abandoned prior to January 1, 2013, if an interim management plan is approved by July 1, 2013. *Status: enrolled and presented to Governor*

### REGULATORY UPDATES

**Migratory Bird Permits.** In May 2011, the USFWS published a final rule amending the regulations governing captive propagation of raptors in the United States. For more information, please see 76 Fed.Reg. 29665.

**Upland Game Hunting.** In May 2011, CFGC proposed to amend various regulations relating to upland game hunting. For more information, please see Cal. Reg. Notice Register 2011, Vol. 20-Z, p. 808.

**Waterfowl Hunting.** In May 2011, CFGC proposed to amend various regulations relating to waterfowl hunting. For more information, please see Cal. Reg. Notice Register 2011, Vol. 20-Z, p. 810.

**Sport Fishing.** In May 2011, CFGC proposed to amend various regulations relating to sport fishing. For more information, please see Cal. Reg. Notice Register 2011, Vol. 21-Z, p. 873.

**Inspection of Facilities for Restricted Species.** In May 2011, CFGC proposed to amend various regulations relating to the inspection of facilities for restricted species. However, in August 2011, CFGC provided notice that it will not proceed with either the proposed amendment of Sections 671.1 and 703, or the proposed addition of Section 671.8 to Title 14 of the California Code of Regulations. For more information, please see Cal. Reg. Notice Register 2011, Vol. 21-Z, p. 877; Vol. 33-Z, p. 1337.

**Commercial Herring Fishery.** In July 2011, CFGC proposed to amend various regulations relating to commercial herring fishery. For more information, please see Cal. Reg. Notice Register 2011, Vol. 29-Z, p. 1144.

**Water Conservation Act of 2009.** In July 2011, the California Department of Water Resources (“DWR”) issued a proposed rule to adopt regulations providing for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements of California Water Code Section 10608.48(1)(b). For more information, please see Cal. Reg. Notice Register 2011, Vol. 29-Z, p. 1168.

## SOLID WASTE

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

#### **SB 567 (DeSaulnier) Recycling: plastic containers and bags**

Under existing law (California Integrated Waste Management Act of 1989), the sale of a plastic bag that is labeled “compostable” or “marine biodegradable” is prohibited unless it meets certain standards set by ASTM. This bill would repeal those prohibitions on January 1, 2013, and would instead, as of January 1, 2013, prohibit the sale of a plastic product, as defined, labeled as “compostable,” “home compostable,” or “marine degradable” unless it meets those ASTM

standard specifications, the OK Compost HOME certification, as specified, or a standard adopted by the department, or unless the plastic product is labeled with a qualified claim for which the department has adopted an existing standard, and the plastic product meets that standard. The bill would prohibit the sale of a plastic product that is labeled as “biodegradable,” “degradable,” “decomposable,” or as otherwise specified. The bill would provide for the continuation of the labeling requirements imposed upon a manufacturer of a compostable plastic bag. The bill would provide for the imposition of a civil penalty for a violation of those prohibitions. *Summary of status: Enrolled and presented to the Governor.*

### REGULATORY UPDATES

**Resource Conservation and Recovery Act ("RCRA").** In July 2011, the USEPA proposed to revise certain exclusions from the definition of solid waste for hazardous secondary materials intended for reclamation that would otherwise be regulated under Subtitle C of RCRA. For more information, please see 76 Fed.Reg. 44094.

In August 2011, the USEPA issued a proposed rule to revise the RCRA regulations to conditionally exclude CO<sub>2</sub> streams that are hazardous from the definition of hazardous waste, provided these streams are captured, injected into Class VI Underground Injection Control wells for purposes of geologic sequestration, and meet other conditions. For more information, please see 76 Fed.Reg. 48073.

## WATER RESOURCES

### RECENT COURT RULINGS

### LEGISLATIVE DEVELOPMENTS

**AB 1152 (Chesbro) Groundwater.** This law would add to the list of entities (local agencies) that can assume responsibility for monitoring and reporting groundwater elevations if the agency adopts a groundwater management plan in accordance with the specified provisions of existing law by January 1, 2014. The law would also permit DWR

to authorize the local agency to conduct monitoring and reporting of groundwater elevations on an interim basis until the agency adopts a groundwater management plan. *Status: Approved by Governor September 7, 2011.*

#### **AB 1194 (Block) Drinking water.**

The Calderon-Sher Safe Drinking Water Act of 1996 requires the State Department of Public Health to, among other things, adopt regulations relating to primary and secondary drinking water standards for contaminants in drinking water. The act authorizes the department to enter into primacy delegation agreements with local health officers for enforcement of these provisions. The act defines various terms, including human consumption, which means the use of water for drinking, bathing or showering, hand washing, or oral hygiene. This bill would include cooking, including, but not limited to, preparing food and washing dishes, in the definition of human consumption. *Status: presented to the Governor.*

#### **SB 834 (Wolk) Integrated regional water management plans.**

The Integrated Regional Water Management Planning Act of 2002 authorizes a regional water management group, as defined, to prepare and adopt an integrated regional water management plan. The act requires an integrated regional water management plan to address specified water quality and water supply matters. This law would additionally require an integrated regional water management plan to identify the manner in which the plan furthers a specified state policy concerning



reducing reliance on the Sacramento-San Joaquin Delta for water supply and improving regional self-reliance for water, if the region depends on water from the Delta watershed. The bill would require integrated regional water management plans to incorporate that requirement when they are developed, updated, or amended in accordance with guidelines established by the Department of Water Resources. *Status: presented to the Governor.*

## REGULATORY UPDATES

**Industrial Process Water Exclusion.** In March 2011, the California Department of Water Resources (“DWR”) issued a notice of proposed rulemaking to add various regulations to Title 23, Division 2, of the California Code of Regulations. These regulations set forth criteria and methods for the exclusion of industrial process water from the calculation of gross water use for purposes of urban water management planning. For more information, see Cal. Reg. Notice Register 2011, Vol. No. 9-Z, p. 303.

## WATER QUALITY

### RECENT COURT RULINGS

**In an action to compel the Department of Public Health to prepare and submit to the Legislature a safe drinking water plan as required by Health and Safety Code section 116355, denial of a petition for a writ of mandate is reversed where trial court failed to**

**determine, as a threshold matter, whether petitioner met the requirements of CCP section 1085.** *Enloe v. Horton* (April 4, 2011), \_\_\_ Cal.App.4<sup>th</sup> \_\_\_.

Plaintiffs are Enloe an individual and an organization called the A.G.U.A. Coalition. Plaintiffs filed a verified petition for writ of mandate and writ of mandate in 2009. They allege that Health and Safety Code section 116355 (section 116355) requires that the California Department of Public Health and its director (the Department) submit to the Legislature a plan every five years and that no such plan has been completed since 1995. Their petition therefore, sought a writ of mandate commanding the Department to prepare and submit to the Legislature a plan and also to submit to the court a detailed proposal for the completion of the plan, including parameters and a timeline.

The Department filed an answer to the petition asserting several affirmative defenses. Among these was a claim that any mandate to prepare and submit a plan was suspended by the Legislature's decision to discontinue funding its preparation. The Department also filed an opposition to the petition, arguing that any statutory mandate was suspended because specific funding to prepare a plan had been eliminated in 1992 by Assembly Bill No. 3085 (AB No. 3085). In reaching this conclusion, the Department relied on Government Code section 11098, which provides that any legislatively mandated publication (like the plan) is suspended "when funding ... is discontinued in the Budget Act ...." On February 5, 2010, the

trial court heard oral argument. In denying the petition, the court stated, "[Plaintiffs] failed to carry their burden of proof to relief under Code of Civil Procedure § 1085, especially in light of the declarations filed by defendants. To obtain a writ, plaintiffs were required to show three elements (1) no plain, speedy, and adequate alternative remedy exists (Code Civ. Proc., § 1086); (2) a clear, present, ... ministerial duty on the part of the respondent; and (3) a correlative clear, present, and beneficial right in the petitioner to the performance of that duty.

The plaintiff appealed. The Court of Appeal held that to determine whether the Legislature has suspended the requirement to prepare and submit a plan, the Court of Appeal would review de novo the trial court's implicit statutory interpretations. The Court of Appeal concluded that the statutory mandate was not suspended. Consequently, the Department was not entitled to judgment on the ground that Government Code section 11098 suspended the statutory mandate to prepare a plan. The matter was remanded to enable the trial court to decide whether the requirements of Code of Civil Procedure section 1085 have been met.

### LEGISLATIVE DEVELOPMENTS

#### **AB 741 – (Huffman) Onsite wastewater disposal.**

Existing law prohibits the discharge of sewage or other waste or effluent of treated sewage or other waste that will result in any contamination. Under existing law, when the State Department of Public Health or a local public health officer finds a

contamination, they must order the contamination abated, and the property owner may request the governing board to construct plumbing to connect the property to the adjoining public sewer system, the cost of which would be a lien on the property. Under existing law, as an alternative to enforcement of the lien, the public agency may provide for payment of the costs either prior to the construction or in installments payable at a maximum of 6% interest over a 15-year period. Under this bill, the installment payment would be extended to 30 years and the interest rate ceiling increased to 12%. Additionally, this bill authorizes defined entities to use this provision to convert properties from onsite septic systems and connecting them to the sewer system and for replacing or repairing existing sewer laterals connecting pipes to a sewer system. *Summary of status: Approved by Governor & chaptered by Secretary of State.*

**SB 263 (Pavley) Wells: reports: public availability.** The bill would make reports on wells available to certain persons, and for specified purposes. Specifically, these reports would be available to professionals working on environmental clean-up studies, academics associated with post secondary education, and other professionals with a well contractor's license. Persons requesting these reports must state their purpose for the request, are prohibited from disclosing the location of the wells and the report, and must not use these reports for other commercial purposes. *Status: passed both houses and presented to the Governor.*

**SB 482 (Kehoe) Public beach contamination: standards: testing: closing.** This act shifts primary responsibility for devising water quality monitoring protocols, monitoring locations, and monitoring frequencies at public beaches from the state Department of Public Health to the State Water Quality Control Board, subject to regulations governing various standards drafted by the Department of Public Health. The act retains the actual testing with the local health officers of local jurisdictions. Intent seems to be to streamline and reduce redundancy with respect to other testing that the Water Board oversees. Provides five years of funding for implementation. *Status: passed both houses and presented to the Governor.*

## REGULATORY UPDATES

**Clean Water Act.** In May 2011, the USEPA and U.S. Army Corps of Engineers ("Corps") announced the availability of a draft guidance document for public review and comment that describes how the agencies will identify waters protected by the federal Clean Water Act and implement the U.S. Supreme Court's decisions on this topic. The agencies believe that, under this proposed guidance, the number of waters identified as protected by the Clean Water Act will increase, when compared to current practice. This guidance would apply to all Clean Water Act programs, including Section 303 water quality standards, Section 311 oil spill prevention and response, Section 401 water quality certifications, Section 402 NPDES permits, and Section 404

permits for discharges of dredged or fill material. For more information, please see 76 Fed.Reg. 24479.

**Safe Drinking Water Act.** In June 2011, the USEPA announced its approval of alternative testing methods for use in measuring the levels of contaminants in drinking water and determining compliance with the national primary drinking water regulations. For more information, please see 76 Fed.Reg. 37014.

**National Pollutant Discharge Elimination System ("NPDES").** In July 2011, the USEPA announced that Region 9 modified the 2008 NPDES general permit for stormwater discharges associated with construction activity in order to extend the expiration date of the permit to February 15, 2012. For more information, please see 76 Fed.Reg. 40355.

**Hexavalent Chromium.** In July 2011, OEHHA announced the publication of the final technical support document for the Public Health Goal for hexavalent chromium in drinking water, which is 0.02 parts per billion. For more information, please see Cal. Reg. Notice Register 2011, Vol. 30-Z, p. 1235.

## **FEDERAL** **SUMMARIES**

### **SUPREME COURT**

**Supreme Court finds Clean Air Act and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel power plants.** *American Electric Power Co., Inc. v. Connecticut*, No. 10-174 (United States Supreme Court, June 20, 2011)

In July 2004, two groups of plaintiffs (the first, eight States and New York City; the second, three nonprofit land trusts) filed separate complaints in the Southern District of New York against the same five major electric power companies (four private companies and the Tennessee Valley Authority). According to the complaints, which advanced federal common law nuisance claims (alleging climate change-related risks to public lands, infrastructure and health, as well as animal and plant species and habitats) and sought injunctive relief requiring each defendant to cap and reduce its emissions, these five companies are the largest emitters of carbon dioxide in the United States. The District Court dismissed both actions as presenting non-justiciable political questions, but the Second Circuit Court of Appeal reversed. After finding that the suits were not barred by the political question doctrine and that the plaintiffs had adequately alleged Article III standing, the Second Circuit held that all

plaintiffs had stated a claim under the federal common law of nuisance. Importantly, at the time of the Second Circuit's decision, the Environmental Protection Agency ("EPA") had initiated greenhouse gas regulation but had not yet promulgated any rule regulating greenhouse gases.

It is important to note that during the pendency of these actions, in *Massachusetts v. EPA*, 549 U.S. 497, the United States Supreme Court ruled that the federal Clean Air Act ("CAA") authorizes federal regulation of emissions of carbon dioxide and other greenhouse gases due to the fact that such gases qualify as "air pollutant[s]" within the meaning of the governing CAA provision. (*Id.* at 528-529.) In that case, the Supreme Court held that the EPA had misread the CAA when it denied a rulemaking petition seeking controls on greenhouse gas emissions from new motor vehicles. (*Id.* at 510-511.) In response to the decision in *Massachusetts*, EPA made what is referred to as an endangerment finding (i.e., that motor vehicle emissions cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare), which is the regulatory trigger under the CAA. EPA also subsequently: (1) issued a joint final rule regulating emissions from light-duty vehicles; (2) initiated a joint rulemaking covering medium- and heavy-duty vehicles; (3) began phasing in regulatory requirements applicable to new or modified "[m]ajor [greenhouse gas] emitting facilities"; (4) commenced a rulemaking to set limits on greenhouse gas emissions from

new, modified, and existing fossil-fuel fired power plants; and (5) settled another lawsuit by committing to issue proposed and final power plant rules by July 2011, and May 2012, respectively.

Back to the Supreme Court decision, the petitioner power companies first argued that the federal courts lack authority to adjudicate this case. Interestingly, the Court deadlocked on the question. Four justices believed at least some of the plaintiffs satisfied Article III standing requirements under *Massachusetts* and four others, adhering to a dissent in *Massachusetts* or regarding that decision as distinguishable, believed that none of the plaintiffs satisfied Article III standing. Justice Sotomayor took no part in the consideration or decision of the case, apparently because she was on the three-judge panel that heard this very case in her former role as a judge on the Second Circuit (although she was elevated to the Supreme Court before the Circuit Court ruled). Thus, the Second Circuit's exercise of jurisdiction was affirmed by the Supreme Court's equally divided vote on this threshold procedural question.

On the merits, the Supreme Court addressed one and remanded a second issue to the Second Circuit for further proceedings. While noting that *it* was not deciding that global warming is a problem, the Supreme Court ruled that *Congress* thinks it is, and has assigned the role of dealing with it first to the EPA, with the courts playing only a limited secondary role. Citing CAA statutory provisions concerning rulemaking and enforcement, as well as EPA's

progress with respect to its regulation of greenhouse gases in the wake of the decision in *Massachusetts*, the Supreme Court held that the CAA and the EPA action the Act authorizes displace any federal common-law right to seek abatement of carbon dioxide emissions from fossil-fuel fired power plants. The Court noted that the legislative displacement of federal common law theory upon which its decision rested does not require the same clear and manifest congressional purpose necessary to find federal preemption of state law, but rather, simply, that the statute “speak[s] directly to the question” at issue. Finding that its *Massachusetts* decision made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the CAA, and that the CAA plainly “speaks directly” to emissions of carbon dioxide from the defendants’ plants, the Court determined that the CAA provides the same relief the plaintiffs seek through their lawsuits and declined to permit both to proceed on a parallel track. The Court determined that EPA must act pursuant to its duties under the CAA first before plaintiffs can avail themselves of the courts, and when they do, the CAA’s enforcement provisions displace any federal common law claim for curtailment of greenhouse gas emissions.

Finally, the Court summarily addressed the plaintiffs’ alternative claims seeking relief under the nuisance law of each State where the defendants operate power plants on account of the fact that none of the parties briefed preemption or otherwise addressed

the availability of a claim under state nuisance law.

Accordingly, the Court reversed the judgment of the Second Circuit and remanded the case for further proceedings on the preemptive effect of the CAA on such state common law nuisance claims.

## NINTH CIRCUIT

### AIR QUALITY

**Ninth Circuit upholds Monterey Bay Unified Air Pollution Control District rules regulating diesel-powered agricultural engines challenged on federal and state preemption and due process grounds.** *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control District*, 644 F.3d 934 (9<sup>th</sup> Circuit, May27, 2011)

In 2007, the Monterey Bay Unified Air Pollution Control District (“District”) adopted and began enforcing rules regulating diesel-powered engines. The three District rules at issue here require the registration and payment of fees for certain diesel engines used in agricultural operations (Rules 220 and 310) and set emission standards for stationary diesel engines within the District (Rule 1010) (collectively, the “Rules”). Specifically, Rules 220 and 310 require owners or operators of diesel engines used for agricultural operations of 50 brake horsepower (“hbp”) or larger to register and pay application and registration fees. Rule 1010, a replacement rule for the California Air

Resources Board’s (“CARB”) airborne toxic control measure for diesel particulate matter, sets specific numerical emission standards for stationary diesel engines.

Plaintiff Jensen Family Farms (“Jensen”), a non-profit agricultural corporation with its principal place of business in Monterey, California, registered several diesel engines with the District and paid the required fees in February 2008, and then sued the District in November 2008, alleging that the Rules are preempted by the federal Clean Air Act (“CAA”) and violate California law and Jensen’s due process rights. After hearing argument on both Jensen’s motion for summary judgment and a permanent injunction and the District’s (and Intervenor CARB’s) motion for judgment on the pleadings, the district court (N. Cal.) entered a final judgment granting the District’s/CARB’s joint motion and denying Jensen’s.

On appeal, Jensen first argued that all of the Rules are preempted by the CAA. The Court thus began its analysis with an overview of the CAA, focusing on the Act’s regulatory dichotomy – federal government preemptively controls mobile, including nonroad, sources of air pollution via CAA section 209 while direct regulation of emissions from stationary sources is primarily left to the states. Next, the Court turned its attention to Rules 220 and 310 and quickly determined neither was preempted by the CAA, despite the fact that they apply to nonroad sources in the form of diesel engines used at agricultural operations. Relying on



*Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252-53 (2004), the Court pointed out that CAA section 209(e) only prohibits the adoption or enforcement of state standards or other requirements relating to the control of emissions from new nonroad sources and that Rules 220 and 310 do not involve any such emission control standard, but rather, simply require owners and operators of certain diesel engines to provide information to the District about their engines and to pay fees. Jensen acknowledged that these rules do not directly control emissions but argued that they are nonetheless preempted by CAA section 209(e) because they “relate to” emissions control, and the decision in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992) dictates the broad definition of “relating to” that would encompass Rules 220 and 310. The Court rejected this argument as well, distinguishing *Morales* (Airline Deregulation Act preemption case) and pointing out that under such an expansive interpretation of the term “relating to” every rule promulgated by the District relating to nonroad engines and vehicles would be preempted, and render inconsequential the analysis contained in *South Coast*.

The Court similarly held that the CAA did not preempt Rule 1010, despite the fact that contrary to Rules 220 and 310, Rule 1010 unquestionably sets emission standards. In so ruling, the Court focused on Rule 1010’s definition of the stationary compression ignition engines covered thereby and demonstrated that the stationary engines regulated by Rule 1010 were mutually exclusive

from the nonroad mobile engines preemptively regulated by the federal government.

The Court rejected Jensen’s final three arguments in short order. First, in response to Jensen’s claim that Rules 220 and 310 were preempted by California Code of Regulations titles 17, section 93116 and 13, section 2450 et seq (California’s voluntary Portable Equipment Registration Program), the Court found that the Rules were not issued pursuant to the former and that the later voluntary program did not preempt the rules as applied to Jensen because Jensen did not allege that it participated therein. Second, the Court rejected Jensen’s substantive due process challenge to the Rules noting Jensen’s admission that the Rules serve the legitimate governmental interest in minimizing air pollution from diesel engines and thus meet the rational basis test applicable to due process challenges that do not implicate a fundamental right or suspect classification. Finally, the Court concluded that Jensen waived the argument that the Rules violate the California Constitution’s tax limitation provision in Article 13A because Jensen did not raise this argument in its complaint and thus the argument was not considered by the district court.

## **FOREST RESOURCES**

**In a partially split, fragmented decision, the Ninth Circuit finds U.S. Forest Service’s 2004 Sierra Nevada Forest Plan Amendment largely complied with NEPA, and remanded for further district court analysis concerning**

**the Plan’s compliance with NFMA.** *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161 (9<sup>th</sup> Circuit, May 26, 2011)

This per curiam decision is one of several in this protracted, multiple party case addressing whether the U.S. Forest Service’s adoption of the 2004 Sierra Nevada Forest Plan Amendment (the “2004 Framework”) and approval of the related Basin Project, a 40,000-acre timber harvesting project approved thereunder, complied with the procedural requirements of the National Environmental Policy Act (“NEPA”) and the substantive restrictions of the National Forest Management Act (“NFMA”). The dispute grew out of the fact that the Bush-era 2004 Framework loosened prior restrictions on logging and grazing (advancing intensive management practices based in part on controversial fire ecology analyses) that were implemented by the Clinton-era 2001 Framework Plan.

Specifically, in 2005, Sierra Forest Legacy (and other national environmental groups, hereinafter collectively “Sierra Forest”) and the State of California filed separate actions challenging the 2004 Framework based on various NEPA and NFMA claims. After an interlocutory appeal of the district court’s denial of Sierra Forest’s motion for preliminary injunction (which was reversed and remanded for a renewed injunction determination), the district court resolved the parties’ cross-motions for summary judgment primarily in the Forest Service’s favor as it found that the 2004 Framework complied with

NFMA and all of NEPA's procedural requirements but for its alternatives analysis, which it ordered to be redone. The district court entered judgment, and Sierra Forest and California filed timely appeals. During the pendency of the appeal, Sierra Forest moved several times for an injunction pending appeal, finally convincing the Ninth Circuit to partially enjoin imminent logging.

On appeal, the appellants raised the following three NEPA and two NFMA claims: Sierra Forest and California argued that the Forest Service violated NEPA by failing to consider short-term impacts of the 2004 Framework and by failing to disclose and rebut expert opposition; Sierra Forest separately argued that the Forest Service violated NEPA when approving the Basin Project by failing to analyze cumulative impacts to sensitive species; Sierra Forest argued that the 2004 Framework violated NFMA by failing to maintain viable populations of old forest wildlife and that the Basin Project specifically violates NFMA by failing to comply with the 2004 Framework's management indicator species monitoring requirement. Finally, both Sierra Forest and California argued that the district court abused its discretion when considering the equitable factors governing entry of a permanent injunction to remedy the sole NEPA violation. In response, the Forest Service and numerous intervenors contested these assertions and raised several procedural bars to relief, including that the Court lacked jurisdiction to hear the appeal because the district court's challenged orders were not yet final and that the plaintiffs

lacked standing to challenge the 2004 Framework under NEPA.

The Court first addressed the jurisdictional and standing arguments. The Court found that the district court's challenged orders were practically final under *Collord v. U.S. Dep't of the Interior* 154 F.3d 933, 935 and that it thus had jurisdiction over the appeals. It did so, notwithstanding the fact that the Forest Service had not yet completed the supplemental NEPA alternatives analysis ordered by the district court, by pointing out that the district court's decision placed a judicial imprimatur on the vast majority of the challenged NEPA analysis and the Forest Service had already released a draft supplemental alternatives analysis that did not address plaintiffs' claims. Next, the Court determined that both Sierra Forest and California had standing to advance facial challenges to the 2004 Framework under NEPA, finding that both asserted requisite protected interests and harm to satisfy Article III injury in fact requirements.

With respect to the merits of the NEPA claims, the Court found that when promulgating the 2004 Framework the Forest Service adequately disclosed the short-term effects of intensified management on old forest species and that it was the prerogative of the Forest Service to determine that long-term effects, even those subject to uncertainty, remain desirable despite short-term harm. On the alleged failure to disclose and rebut expert opinion opposed to the 2004 Framework's intensified management, the Court found that

the environmental impact statement's over 120 pages raising and responding to public critiques satisfied NEPA, which does not require agencies to prioritize the concern of scientific experts or disclose their identities amongst public critiques. Addressing Sierra Forest's separate challenge to the approval of the Basin Project, the Court upheld the cumulative impact analysis in the Basin Plan's Environmental Assessment noting that it provided detailed cumulative analysis of soil, watershed, fish and wildlife effects and was supplemented by extensive discussions of cumulative impacts in the 2004 Framework's environmental impact statement. Finally, while the Court agreed that the Forest Service violated NEPA by failing to update the alternatives from the environmental analysis of the 2001 Framework to reflect new modeling techniques used in conjunction with the 2004 Framework, it rejected the district court's limited remedy therefore and remanded the matter for reconsideration of the equities of a substantive injunction without giving undue deference to government experts.

With respect to the merits of the NFMA claims, Judge Reinhardt authored a separate portion of the majority opinion\* which rejected the Forest Service's 2007 attempt to retroactively amend the 2004 Framework to eliminate the population monitoring requirements for management indicator species. The Court then determined that Sierra Forest's NFMA challenge to the 2004 Framework was not ripe for consideration until the district

court, on remand, first decided whether the Basin Project complied with the 2004 Framework without the 2007 amendment.

In sum, the Court's per curiam decision affirmed the district court judgment in part (re NEPA claims) and reversed, vacated and remanded the district court's NFMA decisions as well as remanded the decision whether or not to issue a permanent injunction to remedy the affirmed NEPA violation.

[\* NOTE: While a majority agreed to reverse the district court's decision on Sierra Forest's NFMA claim, it did so for different reasons. Thus, while Judge Reinhardt's holding controls the disposition of this case, it is not binding authority on NFMA because there is no common ground between the majority justices as to the reason for the reversal]

## **HAZARDOUS WASTE/MATERIALS**

### **Ninth Circuit Finds Railroad Companies Not Liable Under Nuisance Theory or California's Polanco Act for French Drain that Channeled Contamination from Adjacent Property.**

*Redevelopment Agency of the City of Stockton v. BNSF Railway Co.*, Nos. 09-16585, 09-16739, 09-17640 (9th Circuit, June 28, 2011) In 1968 the State of California entered into an agreement with several railroad companies, predecessors in interest to Appellants BNSF Railway

Company and Union Pacific Railroad Company (the "Railroads") to relocate existing railroad track to a State-owned parcel (the "Property"). Under the Agreement the Railroads planned and approved grading and drainage improvements to the Property made by the State, including the installation of a French drain underneath the new roadbed, which was intended to improve soil stability. After the State installed these improvements, the Railroads laid track on the Property and agreed to maintain the track, roadbed, and drainage, and the State agreed to convey to the Railroads all rights-of-way necessary for track operation. The Railroads began running trains over the track in 1970, but the State did not transfer the deed to the underlying land to the Railroads until 1983.

In 1988 the Railroads sold their property to Appellee the Redevelopment Agency of the City of Stockton ("Agency"). In 2004, petroleum contamination was found in the soil along the path of the French drain and in the groundwater; testing indicated the contamination was at least 20 years old and that the likely source was a nearby petroleum facility. It was undisputed that the French drain served as a preferential pathway through which the petroleum contamination migrated underground to the Property. The Agency incurred a total of approximately \$1.8 million to remediate the Property. In September 2005 the Agency sued the Railroads seeking cost recovery and an injunction requiring the Railroads to remediate any remaining

contamination. The Agency claimed that the Railroads were liable under the Polanco Redevelopment Act, Cal. Health & Safety Code § 33459 *et seq.* ("Polanco Act") and the law of nuisance. The United States District Court for the Eastern District of California held the Railroads were liable for contamination, the Ninth Circuit reversed.

It was undisputed that the soil and groundwater contamination constituted a nuisance, the issue centered on whether the Railroads were liable for it. The "critical question" for nuisance liability is "whether the defendant created or assisted in the creation of the nuisance." *County of Santa Clara v. Atl. Richfield Co.*, 137 Cal.App.4th 292, 306 (2006). The Ninth Circuit rejected the District Court's reasoning that the Railroads were liable because they were a but-for cause of the contamination, since the Court found no precedent suggesting that but-for causation suffices for nuisance liability and declined to adopt such an expansive interpretation. The Court concluded that the Railroads were not liable for creating a nuisance by virtue of their installation of the French drain, which was designed to move water, not contaminants.

The Court also declined to find the Railroads liable for nuisance as the possessors of the Property because there was no basis on which to conclude that the Railroads knew or should have known of the contamination. The contamination was not, in any way, visible from the surface of the land and was not discovered by any subsequent

owner or possessor of the Property until excavation began some 16 years after the Railroads sold it.

Under the Polanco Act, a local redevelopment agency can recover the costs it incurs for contamination remediation within a redevelopment project area from any “responsible party.” Ca. Health & Safety Code, § 33459.4(a). Under the Polanco Act liability is imposed on the “responsible party,” defined as any person described in either: (1) California Water Code Section 13304(a); or (2) California Health and Safety Code section 25323.5, which refers to provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”). The Agency alleged the Railroads were liable under both.

The Ninth Circuit rejected the District Court’s finding that the channeling and emission of petroleum through the French drain constituted a “discharge” under section 13304. Because the District Court had construed nuisance liability too broadly by, its section 13304 analysis reflected the same error. The Court held that but-for causation was not only insufficient for nuisance liability, but was also insufficient to impose liability for a discharge under section 13304. Since the Railroads did not cause or permit the discharge under section 13304, they were not liable under the Water Code provision of the Polanco Act.

The Polanco Act also imposes liability on “any person who at the time of disposal of any hazardous substance owned or operated any

facility at which such hazardous substances were disposed of,” as provided in CERCLA at 42 U.S.C. § 9607(a)(2). Cal. Health & Safety Code § 33459(h). The Ninth Circuit affirmed the District Court’s holding that the Railroads were neither “owners” nor “operators” under CERCLA. The Railroads were not “owners” because the petroleum releases that were the source of the contamination occurred during the 1970s, well before 1983 when the deeds were transferred to the Railroads. Further, the Railroads were not “equitable owners” of the land at the time of the contamination because the Agreement between the State and the Railroads did not adequately describe the extent of the property to be transferred to the Railroads. Even assuming the Railroads had an easement that interest was not sufficient to render them “owners” under CERCLA, based on established Ninth Circuit precedent. Finally, the Railroads were not “operators” under CERCLA because they did not “manage, direct, or conduct operations specifically related to [the] pollution, that is, operations having to do with the leakage or disposal of [the] hazardous waste.” *United States v. Bestfoods*, 524 U.S. 51, 66-67 (1998).

**The Ninth Circuit has ruled that the manufacturer of a machine used in the dry-cleaning process is not liable under CERCLA as an arranger for disposal absent a showing that the company had “the specific purpose” to dispose of hazardous substances.** (*Team Enterprises LLC v. Western Investment Real Estate Trust, No. 10-16916, 9<sup>th</sup> Cir., 7/26/11*).

In 1980, Team Enterprises began operating a dry-cleaning business in a shopping center using a machine designed and built by R.R. Street & Co. to filter and recycle wastewater containing perchlorethylene (PCE) for reuse. The machine returned distilled water to Team Enterprises' dry cleaning machines and deposited wastewater into a bucket which was subsequently poured into a sewer drain. The California Regional Water Quality Control Board determined that the PCE had leaked into the soil, and ordered Team Enterprises to clean up the property.

After addressing the contamination, Team Enterprises filed suit against several parties, including R.R. Street seeking cost recovery through the contribution provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Team Enterprises alleged that Street was liable as an arranger for disposal of hazardous waste under CERCLA. The trial court granted summary judgment to Street, finding that the dry cleaner failed to show that the manufacturer took “intentional steps to plan for and control disposal of PCE.” Team Enterprises appealed.

The Ninth Circuit affirmed. The Court was not convinced by Team's argument that intent could be inferred from Street's designing its machine in a way that made disposal inevitable. “Absent a showing that Street intended for its sale of the [machine] to result in the disposal of PCE, we must conclude that Street lacks the requisite intent for arranger

liability,” said the Court, citing *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 129 S. Ct. 1870, (2009).

Team Enterprises had argued that it had “no other choice than to dispose of the contaminated wastewater” by pouring it down the drain, the Ninth Circuit noted. “But the design of the [machine] does not indicate that Street intended the disposal of PCE,” the Court said. “At most, the design indicates that Street was indifferent to the possibility that Team would pour PCE down the drain. This is insufficient.” The Ninth Circuit also declined to infer intent from Street's failure to warn about the risk of contamination from improper disposal.

**Ninth Circuit affirms dismissal of a citizen suit against a Canadian company under CERCLA, holding that two individuals could not enforce the penalties clause of a contract the company had reached with the EPA.** (*Pakootas v. Teck Cominco Metals Ltd.*, No. 8-35951, 9<sup>th</sup> Cir., 6/1/11).

In 2006 the Ninth Circuit had ruled that Teck Cominco, a Canadian smelting company, could be held liable under CERCLA for contamination that had migrated down the Columbia River from British Columbia into Washington state. In other proceedings, EPA had issued a unilateral administrative order requiring Teck Cominco to conduct a remedial investigation and feasibility study and implement a cleanup. Teck Cominco refused to comply with the UAO, but the EPA took no action to enforce the

order. Individuals brought a citizen suit against the company to enforce EPA's order and the company moved to dismiss. The district court denied the motion but certified the order for interlocutory appeal. On appeal, the Circuit Court affirmed, holding that the suit was not an extraterritorial application of CERCLA. While the case was on appeal, the company settled with EPA, contractually agreeing to perform environmental remediation. Plaintiffs amended their complaint, dropping their request for injunctive relief but seeking civil penalties for non-compliance with the UAO. The district court dismissed the claims for lack of jurisdiction finding that the penalties were a challenge barred by CERCLA section 113(h) and plaintiffs appealed.

The key issue on appeal was whether the civil penalties could be considered a challenge to the cleanup. Section 113(h) is jurisdictional – it states that “no federal court shall have jurisdiction” over pre-enforcement challenges to a cleanup decision made by EPA. Plaintiffs argued that they were seeking only penalties for past violations of the order and were not challenging the cleanup agreement.

The Ninth Circuit observed that “penalties exacted before a cleanup is completed may interfere with the ability to perform a cleanup.” The Court noted that money going to pay penalties might not be available to be used for cleanup purposes. Some companies finding themselves in that situation might declare bankruptcy in order to avoid paying for both the cleanup and penalties. Reading the statute in such a way as to reduce

EPA's leverage to enforce its agreements would not be consistent with the intent of Congress. The Court determined that it lacked jurisdiction to hear the claims seeking civil penalties.

**Ninth Circuit holds that manufacturers of dry-cleaning equipment are not liable as “contributors” to disposal of hazardous waste under the Resource Conservation and Recovery Act.** (*Hinds Investments LP v. Angioli*, No. 10-15607, 9<sup>th</sup> Cir., 8/1/11).

Hinds Investments LP and the Hinds family trust owned two shopping centers that had dry cleaning stores as tenants. Groundwater at the sites was contaminated with perchloroethylene (PCE). Seeking declaratory relief and monetary damages to contend with the cost of environmental remediation, the shopping center owners sued manufacturers of dry cleaning equipment used at the dry cleaning stores. Plaintiffs alleged that, under the federal Resource Conservation and Recovery Act (RCRA), defendants were liable for contributing to waste disposal because the design of their machines generated waste and the manuals they distributed instructed users to dispose of contaminated wastewater in drains or open sewers. The district court granted defendants' motion to dismiss for failure to state a claim. Plaintiffs appealed.

The Ninth Circuit found that merely designing equipment that generates waste is insufficient for RCRA liability. In its analysis, the Court noted that RCRA Section

6972(a)(1)(B) permits citizen lawsuits against any person who “has contributed or who is contributing to the past or present handling, storage, treatment, transportation, or disposal of any solid or hazardous waste” that may present an imminent, substantial danger to health or the environment. The Court also observed that RCRA does not define what acts of contribution are sufficient to trigger liability, recognizing that the issue was one of first impression in the Ninth Circuit.

Rejecting plaintiffs' argument that it should give an expansive reading to the definition of “contribute,” the Court said the statutory prohibition on “contributing to” speaks in active terms about “handling, storage, treatment, transportation, or disposal” of hazardous waste. The Court indicated that congressional language was concerned with those who have a more active role and a more direct connection to the waste rather than with manufacturers who design machinery that might generate a waste by-product that could be disposed of improperly.

The Ninth Circuit said its conclusion was consistent with that of other courts assessing the scope of RCRA contributor liability. Courts that have not explicitly held that RCRA liability requires active involvement by defendants have nonetheless suggested that substantial affirmative action is required, permitting RCRA claims to survive only if they include some allegation of defendants' continuing control over waste disposal.

To state a claim based on RCRA liability for “contributing to” disposal of hazardous waste, a plaintiff must allege that a defendant had a measure of control over the waste at the time of its disposal or was otherwise actively involved in the waste disposal process. Mere design of equipment that generated waste, which was then improperly discarded by others, is not sufficient. The court affirmed the district court's dismissal.

### **NEPA**

**Ninth Circuit Finds FAA Failed to Take a “Hard Look” at Consequences of Adding Airport Runway.** *Barnes v. United States Department of Transportation*, No. 10-70718 (9th Circuit, August 25, 2011).

In 2005 the Port of Portland (“Port”) undertook the Airport Master Plan to forecast future aviation demand and to plan for new or expanded facilities to meet the demand of the Hillsboro Airport (“Airport”). The Master Plan concluded that, based on the Airport’s projected increase in annual service volume (“ASV”), a new runway for use exclusively by small general aviation (“GA”) aircraft was necessary to reduce the ASV, and thereby reduce delays and the associated negative impacts. The Port proposed to construct a new 3,600-foot-long and 60-foot-wide runway and associated taxiways, relocate a helipad, and make certain infrastructure improvements. The project would be partially funded by Federal Aviation Administration (“FAA”) grants.

As a result, the project needed FAA approval and was subject to the National Environmental Policy Act (“NEPA”). The FAA approved and published a Draft Environmental Assessment (“DEA”). In the DEA the Port considered the proposed project and seven alternative actions, including a “no action” alternative. After a public comment period and public hearing, the Port made minor revisions to the DEA and prepared a final EA. The Port selected either Alternative 2 or 3 (which differed from the project only as to the location of the helipad) and the FAA approved the EA and issued a Finding of No Significant Impact (“FONSI”). Thereafter, Petitioners filed suit against the FAA, and the Port intervened.

Petitioners first argued that adding a new runway would result in increased demand and that the EA was deficient for failing to consider the indirect effects of this increased demand. The Port and the FAA argued that Petitioners waived this argument for failure to raise it during the public comment period. The Court disagreed finding that not only did Petitioners' comments sufficiently raise the argument, but moreover, because the Port and FAA had independent knowledge of the issue EA's failure to address this argument, failure to discuss it in the EA was a flaw "so obvious" that Petitioners did not need to preserve the issue by raising it in their comments.

On the merits of Petitioners' first argument, the Court noted that no analysis was provided in the administrative record supporting

the agencies' argument that the new runway at the Airport was unlikely to attract more private aircraft. In the Court's view, it was very possible that a significant increase the Airport's capacity would result in an increase in the number of individuals, businesses, military, and medical services selecting the Airport to locate their GA aircraft. The FAA relied on the Ninth Circuit's prior opinions in *Seattle Community Council Fed'n v. F.A.A.*, 961 F.2d 829 (9th Cir. 1992), and *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 580 (9th Cir. 1998), for the argument that an EA need not account for growth inducing effects of a project designed to alleviate current congestion. The Court rejected the argument, finding neither of those cases controlled in this instance because they dealt with changes to flight patterns and flight arrival paths—not a major ground capacity expansion project. The FAA's decision not to prepare an EIS, was arbitrary and capricious because the FAA failed to take a "hard look" at the consequences of the new runway and failed to conduct a demand forecast based on three, rather than two, runways.

Petitioners' second argument was that the context and intensity of the project required an EIS. Determining whether an action significantly affects the quality of the human environment requires "considerations of both context and intensity." 40 C.F.R. § 1508.27. Context refers to the setting of the action taking place, the affected region, affected interests, and the locality. Intensity refers to the degree to which the agency action affects the

locale and interests identified in the context part of the inquiry. Where environmental effects of a proposed agency action are highly uncertain, an agency must generally prepare an EIS, and an EIS is mandated where uncertainty may be resolved by further collection of data or where additional data may prevent speculation on potential effects. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1240 (9th Cir. 2005). Petitioners argued that the project's greenhouse gas effects were highly uncertain, but the Court disagreed. The EA included estimates, by means of global percentages, of the estimated increase in greenhouse gas emissions associated with existing and future aviation activity at the Airport. The EA concluded that the Airport represents 0.03% of U.S. based greenhouse gases. The Court held that "[b]ecause this percentage does not translate into locally quantifiable environmental impacts given the global nature of climate change, the EA's discussion of the project[] in terms of percentages is adequate" and the "project's effects are not highly uncertain."

Third, Petitioners claimed the discussion of the cumulative effects in the EA was deficient because the agencies failed to consider the effects of two recent zoning changes approved by the City of Hillsboro, which impacted the Airport. However, the two zoning changes were invalidated by Oregon's Land Use Board of Appeals, and later, the Oregon Court of Appeals (through a suit initiated by Petitioner Barnes). Therefore, any failure to consider the zoning was harmless error.

Fourth, Petitioners argued that the FAA did not provide them with a public hearing as required by the Airport and Airway Improvement Act, 49 U.S.C. § 47106(c)(1)(A)(i). "Public hearing" is not defined in the statute and is only defined in FAA Order 5050.4B. The Court did not address whether FAA Order 5050.4B was entitled to deference because the record showed that the meeting had a designated hearing officer, the members of the public were invited to talk with project team members who were available to answer questions and get feedback, the members of the public were invited to visit the oral testimony area and provide feedback, and twice during the two-hour meeting the FAA made a presentation about the project and the EA. Petitioners nevertheless argued that the "open house" format of the public hearing was not permissible, relying on dictum from *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999). The Court swiftly rejected Petitioners' argument, finding the language in *Slater* to be unpersuasive and lacking any supporting authority. Petitioners were afforded an adequate "public hearing" under 49 U.S.C. § 47106 and FAA Order 5050.4B.

Finally, Petitioners' argued that the EA did not consider a reasonable range of alternatives and that the impacts of a new control tower were not adequately analyzed. The Court found both issues waived. Petitioners' comments about considering high-speed rail and other transportation alternatives were not alternatives to the project—which was aimed at reducing congestion and delay at



the Airport. As to the control tower, Petitioners made absolutely no mention of the control tower in their comments, and further, the Port had no plan, immediate or remote, to build a new control tower.

## **WATER QUALITY**

**Ninth Circuit finds County and Flood District liable under the Clean Water Act for discharges from separate storm-sewer systems and denies petition for rehearing.** *Natural Resources Defense Council, Inc. v. County of Los Angeles*, No. 10-56017 (9th Circuit, July 13, 2011)

*\*\*This July 13 opinion replaces the Ninth Circuit's prior opinion in this case issued on March 10, 2011, and published at 636 F.3d 1235, which has been withdrawn by the Court. In this reissued opinion, the Court denies the petition for rehearing or rehearing en banc by Defendants/ Appellees, the Los Angeles Flood Control District ("District") and the County of Los Angeles ("County").*

In March of 2008, the Natural Resources Defense Council and Santa Monica Baykeeper ("Plaintiffs") sued the District and the County ("Defendants") alleging the release of untreated water by the District's flood-control and storm-sewer infrastructure ("MS4"). Plaintiffs alleged that Defendants violated the Clean Water Act ("CWA") when they released high levels of pollutants, particularly heavy metals and fecal bacteria, identified by MS4 mass-emissions monitoring stations, into four Watershed Rivers: the Los Angeles

River, San Gabriel River, Santa Clara River, and Malibu Creek. Mass-emissions monitoring measures *all* constituents present in water, and the readings give a cumulative picture of the pollutant load in a water body. Stormwater runoff is surface water generated by precipitation events, which flows over streets, parking lots, commercial sites, and other developed parcels of land, and which collects various types of toxic contaminants. In the County, the municipal ms4s are highly interconnected because the District allows each municipality to connect its storm drains to the District's MS4.

The Court first addressed whether an exceedance at a mass-emission monitoring station is a violation of the Defendants' National Pollutant Discharge Elimination System permit (the "Permit"). The Court rejected Defendants' argument that they were subject to a less rigorous or unenforceable regulatory scheme for their stormwater discharges, finding Defendants' position to be in direct conflict with the legislative history of the CWA. The Court first pointed to the prior decision of the D.C. Circuit Court of Appeals rejecting the EPA's attempt to categorically exempt separate storm sewers, and finding the EPA Administrator to be without authority to exempt categories of point sources from the permit requirements of section 402 of the CWA (the section codifying the NPDES permitting program). *Natural Res. Def. Council v. Costle* (D.C. Cir. 1977) 568 F.2d 1369, 1371. The Court also pointed to the 1987 Water Quality Act amendments to the CWA, which expanded the

coverage of Section 402's permitting requirements and established a phased and tiered approach for NPDES permitting requiring the most significant sources of stormwater pollution to be addressed first. Among the list of five most significant sources are discharges from municipal separate storm sewer systems serving a population of 250,000 or more, and systems serving a population of between 100,000 and 249,999. 33 U.S.C. § 1342(p)(2)(C), (D). The Court also pointed to language in the CWA requiring permits for discharges from municipal separate storm sewers to include controls to reduce the discharge of pollutants to the maximum extent practicable. The Court likewise rejected Defendants' argument that the Permit's language indicates that mass-emissions monitoring is not intended to be enforced against municipal discharges and that the mass-emissions monitoring program neither measures nor was designed to measure any individual permittee's compliance with the NPDES permit. The Court found application of such an argument would "emasculate" the Permit and is unsupported by case law or the plain language of the Permit conditions, as well as the plain language of CWA § 505 authorizing citizens to enforce *all* permit conditions. Accordingly, the Court held that an exceedance detected through mass-emissions monitoring is a Permit violation, which gives rise to liability for contributing dischargers. *\*\*The Court's reissued opinion additionally analyzed and rejected Defendants argument that the Permit contained a "safe harbor" provision. Defendants argued that the iterative process in Part 2.3 of*

*the Permit forgives violations of the discharge prohibitions in Parts 2.1 and 2.2. The Court disagreed, finding Part 2.3 to lack textual support for the proposition that compliance with certain provisions will forgive non-compliance with the discharge prohibitions. Instead, the iterative process in Part 2.3 ensures that if water quality exceedances persist, a process is initiated whereby a responsible Permittee amends its Stormwater Quality Management Program.*

The Court next addressed whether, as a factual matter, it was beyond dispute that the Defendants discharged pollutants that caused or contributed to water-quality exceedances. On this issue, the Court found Plaintiffs satisfied their evidentiary burden as to discharges in the Los Angeles and San Gabriel Rivers, by providing evidence that the monitoring stations for those two rivers are located in the MS4, that stormwater known to contain standards-exceeding pollutants passed through these monitoring stations, and thereafter, such stormwater was discharged into the two rivers. The Court reversed the district court's grant of summary judgment in favor of the District and County on these claims. However, the Court found that Plaintiffs *did not* provide sufficient evidence establishing that stormwater discharged from the District MS4 caused or contributed to pollution exceedances located in the Santa Clara River and Malibu Creek. The Court additionally held that Plaintiffs did not delineate how stormwater from the MS4 caused or contributed to any exceedances in any of the four rivers. The Court affirmed the

district court's grant of summary judgment in favor of Defendants on these claims.

## DISTRICT COURTS

### HAZARDOUS WASTE/MATERIALS

**The US District Court for the Southern District of California held that a negligence claim based on repeated releases of petroleum that was filed 15 years after plaintiffs first learned of the contamination was not barred by California's three year statute of limitations for property damage.** *California v. Kinder Morgan Energy Partners LP, No. 07-cv-01883, (S.D. Cal., 6/24/11)*

In 1992, the California Regional Water Quality Control Board ordered the remediation of petroleum contamination at a terminal operated by Kinder Morgan in San Diego. This effectively put the city on notice that releases from the terminal had caused contamination of the city's adjacent opportunity. The state and city sued Kinder Morgan for negligence on 8/14/2007. Defendants moved for partial summary judgment on a negligence claim.

Kinder Morgan argued that the Negligence claim was barred by California's three-year statute of limitations for claims of damage to real property. San Diego did not challenge evidence that it was aware of the contamination as early as 1992 but argued that its negligence claim was based only

on petroleum releases that took place after the statutory cutoff period.

The court noted that the alleged petroleum releases constituted harm to the property itself and that for purposes of summary judgment, plaintiffs were not obliged to distinguish between damage to the property caused by releases occurring within three years before the lawsuit was filed and damage from earlier releases. In construing San Diego's negligence claim as based on releases occurring on or after 8/14/2004, the court denied summary judgment based on the statute of limitations.

**Strict compliance with the notice requirements of the Resource Conservation and Recovery Act (RCRA) is not required to establish subject matter jurisdiction.** *(Gregory Village Partners LP v. Chevron USA Inc., No. 11-1597, N.D. Cal., 8/2/11).*

Between 1950 and 1986, Chevron U.S.A. operated a gasoline service station on a leased parcel of land in Pleasant Hill, California known as the northern parcel. In 1986, Chevron bought the northern parcel and another lot, the southern parcel, which it combined into a single parcel. Between at least 1981 and 1986 a dry-cleaning business was allegedly operated on the southern parcel. Chevron eventually sold the parcel to MB Enterprises, which currently operates a Chevron station on the property. Gregory Village Partners LP owns the Gregory Village Shopping Center located downhill from the service station property.

Gregory Village asserted that chlorinated solvents were detected in groundwater and soil vapor in the neighborhood and that a sewer line maintained by the Central Contra Costa Sanitary District (CCCSD) was a source of the pollution. In April 2011, Gregory Village filed suit against Chevron, MB Enterprises, and CCCSD seeking to recover the cost of cleaning up groundwater contamination on their property. The complaint included allegations under RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

Chevron, MB Enterprises, and CCCSD moved to dismiss the RCRA allegation, challenging the sufficiency of notice. Denying the motions, the court found the notice sufficient. “While Gregory Village did not strictly comply with certain provisions set forth in the regulations implementing the RCRA notice requirements, which appear at 40 C.F.R. part 254, that failure does not deprive the court of subject matter jurisdiction,” the Court said. The Court noted that under 40 C.F.R. § 254.3, the notice “shall include sufficient information to permit the recipient to identify the specific permit, standard, regulation, condition, requirement, or order which has allegedly been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the date or dates of the violation, and the full name, address, and telephone number of the person giving notice.”

“The notices did not provide Gregory Village's address and

telephone number—just the address and telephone number of its counsel—and also did not provide precise ‘dates of the violation,’ or the exact ‘activity alleged to constitute a violation,’ ” the Court noted. Observing that there was no Circuit or Supreme Court authority on the issue of sufficiency of notice, the Court pointed out that defendants were relying on cases interpreting the Clean Water Act and what they claimed were almost identical notice requirements.

The court distinguished RCRA from the Clean Water Act, noting that Congress directed the Environmental Protection Agency to promulgate regulations relating to the notice requirements of the Clean Water Act. “Congress did not expressly direct the EPA to promulgate regulations relating to the notice requirements of 42 U.S.C. Sec. 6972(b)(2)(A). Instead, the EPA promulgated regulations pursuant to Sec. 6972 generally, in which it outlined ‘the procedures to be followed’ and prescribed ‘the information to be contained in the notices,’ ” the Court said.

As a result, while strict compliance with the CWA regulations is a prerequisite to suit, the district court found no indication by Congress that it intended that the applicable RCRA regulations apply with the same force. The Court found that the notice served by Gregory Village provided sufficient information regarding its intent to sue.

The Court however, granted Chevron's motion to dismiss the CERCLA count, finding the complaint contained insufficient

allegations to support a claim against Chevron as an owner/operator at the time of release.