# California Lawyers Association

# *ENVIRONMENTAL LAW SECTION UPDATE*

**RECENT JUDICIAL AND REGULATORY DEVELOPMENTS**

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**The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the California Lawyers Association and reports on recent California case law of note, as well as significant federal case law and state and federal regulatory developments.**

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

**Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section of the California Lawyers Association. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cdaywilson@daywilsonlaw.com. I would like to thank Ryan DuBose, Anna Leonenko, Danielle K. Morone, Michael Haberkorn, and Sabrina Teller for their contributions to this issue of the Update. If you are interested in getting involved in writing for the Update or the activities of the Environmental Law Section, please contact me (at the above email) or any other section member. – Cyndy Day-Wilson.**

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**State Regulatory Updates**
No summaries or updates this quarter.

**Federal Regulatory Updates**

**Civil Monetary Penalty Inflation Adjustment Rule.** In February 2019, the U.S. Environmental Protection Agency (EPA) provided notice of a final rule adjusting the level of the statutory civil monetary penalty amounts under the EPA statutes. 84 Fed. Reg. 2056.
In April 2019, the U.S. Fish and Wildlife Service provided notice of a final rule adjusting the level of the statutory civil monetary penalties that may be assessed for violations of Service-administered statutes and their implementing regulations. 84 Fed. Reg. 15525.
**National Compliance Initiatives.** In February 2019, the EPA provided notice of a public comment period on the National Compliance Initiatives for fiscal years 2020-2023. The Initiatives focus on the most serious environmental violations. 84 Fed. Reg. 2848.

## AIR QUALITY

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**

**Cargo Tank Vapor Recovery Program (CTVRP).** In March 2019, the Air Resources Board (ARB) provided notice of proposed amendments to the CTVRP to address a variety of issues related to the CTVRP fee. The amendments would establish language that would allow ARB to evaluate CTVRP costs and subsequently revise the certification fee, as necessary, to recover costs going forward. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 391.
**Certified Regulatory Program.** In March 2019, the ARB provided notice of a public hearing to consider approving proposed amendments to the Certified Regulatory Program. The proposed amendments are intended to address changes in the California Environmental Quality Act statute and guidelines since the regulatory program was last updated. Cal. Reg. Notice Register 2019, Vol. No. 9-Z, p. 330.

**Red Sticker Program.** In March 2019, the ARB provided notice of a public hearing to consider proposed amendments to the red sticker program for off-highway recreational vehicles (OHRV) in order to reduce exhaust and evaporative emissions from OHRV. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 377.

**Zero-Emission Airport Shuttle Regulation.** In January 2019, the ARB provided notice of a public hearing to consider the proposed zero-emission airport shuttle regulation. The proposed regulation would require public and private airport shuttle fleets to transition from internal combustion vehicles to zero-emission vehicles. Cal. Reg. Notice Register 2019, Vol. No. 1-Z, p. 24.

**Zero-Emission Powertrain Certification Regulation.** In January 2019, the ARB provided notice of a public hearing to consider proposed alternative certification requirements and test procedures for heavy-duty electric and fuel-cell vehicles and proposed standards and test procedures for zero-emission powertrains. Cal. Reg. Notice Register 2019, Vol. No. 1-Z, p. 2.

## Federal Regulatory Updates

**Ambient Air Equivalent Method.** In March 2019, the EPA provided notice of a new equivalent method designation for measuring concentrations of ozone in ambient air. 84 Fed. Reg. 11973.

**Clean Air Act Stationary Source Program.** In March 2019, the EPA provided a notice of availability of applicability determinations, alternative monitoring decisions, and regulatory interpretations that EPA has made with regard to the New Source Performance Standards, National Emission Standards for Hazardous Air Pollutants (NESHAP), the Emission Guidelines and Federal Plan Requirements for existing sources, and/or the Stratospheric Ozone Protection Program. 84 Fed. Reg. 9783.

**Cross-State Air Pollution Rule.** In February 2019, the EPA provided a notice of availability of data on emission allowance allocations to certain units under the Cross-State Air Pollution Rule trading programs. 84 Fed. Reg. 3442.

**National Ambient Air Quality Standards (NAAQS).** In February 2019, the EPA:

1. Provided notice of a public hearing and reopened comment period for a proposed rule relating to certain attainment dates for the 2008 Ozone NAAQS. The proposed rule specifically relates to Mariposa and San Diego Counties. 84 Fed. Reg. 2858.

2. Provided notice of a proposed rule to determine that the Pechanga Band of Luiseno Mission Indians of the Pechanga Reservation nonattainment area failed to attain the 2008 NAAQS by the applicable requirement date. Because of this, the Pechanga nonattainment area will be reclassified to "serious." 84 Fed. Reg. 4029.

In March 2019, the EPA provided notice of a final action following review of the air quality criteria addressing human health effects and the primary NAAQS for sulfur oxides ($SO_X$). The current standard will remain without revision. 84 Fed. Reg. 9866.

**National Emission Standards for Hazardous Air Pollutants (NESHAP).** In February 2019, the EPA:

1. Provided notice of a proposed rule amending the NESHAP for the Hydrochloric Acid Production source category. The proposed amendments address the startup, shutdown, and malfunction provisions of the rule and revise reporting elements. 84 Fed. Reg. 1570.

2. Provided notice of a proposed revision to its response to the U.S. Supreme Court decision in *Michigan v. EPA*. The EPA proposes to find that it is not "appropriate or necessary" to regulate hazardous air pollutant emissions from coal- and oil-fired electric utility steam generating units (EGUs). In addition, the EPA is requesting comments on whether it has the authority or obligation to delist EGUs and rescind the NESHAP for Coal- and Oil-Fired EGUs. 84 Fed. Reg. 2670.

3. Provided notice of an action for the Friction Materials Manufacturing Facilities source category regulated under NESHAP. The action finalized the residual risk and technology review, addressed periods of startup, shutdown and malfunction, and finalized the proposed determination that risks from the category are acceptable. 84 Fed. Reg. 2742.

4. Provided notice of a final rule concerning the Leather Finishing Operations NESHAP. The action would: (i) finalize the residual risk and technology review, (ii) address startup, shutdown and malfunction, (iii) address electronic reporting, and (iv) clarify rule provisions. The amendments are expected to improve compliance and implementation of the rule. 84 Fed. Reg. 3308.

5. Provided notice of a final rule concerning the Wet-Formed Fiberglass Mat Production NESHAP. The action would: (i) finalize the residual risk and technology review, (ii) address startup, shutdown and malfunction, (iii) address electronic reporting and, (iv) clarify rule provisions. 84 Fed. Reg. 6676.

In March 2019, the EPA:

1. Provided notice of a final rule concerning the Surface Coating of Wood Building Products NESHAP. The action would: (i) finalize the residual risk and technology review, (ii) address startup, shutdown and malfunction, (iii) finalize a determination that the risks are acceptable and the current NESHAP provides an ample margin of safety to protect public health; (iv) include provisions on electronic reporting and an alternative compliance equation under the current standards, and (iv) make technical and editorial changes. 84 Fed. Reg. 6676.
2. Provided notice of a public hearing and extended comment period for the Hydrochloric Acid Production NESHAP referenced in the February summary above. 84 Fed. Reg. 8069.
3. Provided notice of a final rule concerning the NESHAP for Surface Coating of Large Appliances; the Printing, Coating and Dyeing of Fabrics and Other Textiles; and the Surface Coating of large Appliances. The action would: (i) finalize the residual risk and technology review; (ii) address emissions during startup, shutdown and malfunction; (iii) address certain electronic reporting; and (iv) EPA Method 18 and updates to several measurement methods in addition to other items. 84 Fed. Reg. 9590.

In April 2019, the EPA provided notice of a proposed rule for the Stationary Combustion Turbines NESHAP. The proposed rule would address the results of the residual risk and technology review conducted by the EPA which found that the risks from this source category due to emissions of air toxins are acceptable and provide an ample margin of safety to protect human health. 84 Fed. Reg. 15046.

**Standards of Performance.** In February 2019, the EPA provided notice of a reopened comment period for the proposed rule titled "Standards of Performance for New Residential Wood Heaters, New Residential Hydronic Heaters and Forced-Air Furnaces." 84 Fed. Reg. 2484.

**State Implementation Plans (SIPs).** In February 2019, the EPA:

1. Provided notice of a final rule to approve three SIP revisions for the 2008 8-hour ozone NAAQS in San Joaquin Valley ozone attainment areas. The approval includes portions of the "2016 Ozone Plan for the 2008 8-Hour Ozone Standard," portions of the "Revised Proposed 2016 Strategy for the State Implementation Plan," and an air district rule concerning the emission statement requirement for the ozone nonattainment areas. 84 Fed. Reg. 3302.

2. Provided notice of a final rule approving portions of an SIP revision requirement for the 2006 24-hour $PM_{2.5}$ NAAQS in the Los Angeles South Coast air basin Serious $PM_{2.5}$ nonattainment area. The EPA also provided notice of the approval of the 2017 and 2019 motor vehicle emissions budgets for transportation conformity purposes and inter-pollutant trading rations for use in transportation conformity analyses. 84 Fed. Reg. 3305.

In March 2019, the EPA:

1. Provided notice of a final rule revising certain regulations concerning implementation of the $NO_X$ SIP Call. The revisions would give states greater flexibility concerning the form of the nitrogen oxides ($NO_X$) emissions monitoring requirements that must be included in SIPs and would remove obsolete provisions. 84 Fed. Reg. 8422.
2. Provided notice of a proposed rule to approve a revision to the Antelope Valley Air Quality Management District (AQMD) portion of the California SIP. The revision concerns emissions of volatile organic compound (VOCs) from solvent cleaning operations. 84 Fed. Reg. 10748.
3. Provided notice of a proposed rule to approve a revision to the Imperial County Air Pollution Control District portion of the California SIP. The revision concerns the New Source Review permitting program for new and modified sources of air pollution. 84 Fed. Reg. 10753.
4. Provided notice of a final action to approve portions of two California SIP revisions to meet the requirements for the 2008 8-hour ozone NAAQS in the San Joaquin Valley ozone nonattainment area. The approvals include a portion of the "2016 Ozone Plan for the 2008 8-Hour Ozone Standard" and a portion of the "2018 Updates to the California SIP." 84 Fed. Reg. 11198.

5. Provided notice of a final rule to approve most elements of SIP revisions submitted to address requirements for the 2012 annual $PM_{2.5}$ NAAQS in the Plumas County Moderate $PM_{2.5}$ nonattainment area. 84 Fed. Reg. 11208.

In April 2019, the EPA provided notice of a proposed rule to approve revision to the South Coast AQMD portion of the California SIP. The revision concerns emissions of $NO_X$ from on-road heavy-duty vehicles. 84 Fed. Reg. 17365.

# ATTORNEY'S FEES

**Recent Court Rulings**
No Summaries or updates this quarter.

**Regulatory Updates**
No Summaries or updates this quarter.

# CEQA

**Recent Court Rulings**

**The First District Court of Appeal found St. Helena properly limited scope of its review to design issues as required under city ordinance, and the city's limited discretion did not trigger CEQA review.** *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2019) 31 Cal.App.5th 80.

The First District Court of Appeal affirmed a judgment denying a petition for writ of mandate seeking to overturn the City of St. Helena's approval of an 8-unit multifamily residential project, finding the city's approval authority was limited to design review under the zoning ordinance. Because the city lacked any discretion to address the project's environmental effects, the city properly determined no CEQA review was required, despite also relying on the Class 32 categorical exemption.

Between 2015 and 2016, the City amended its general plan and zoning ordinance to eliminate the requirement to obtain a conditional use permit for multifamily projects in High Density Residential (HDR) districts. Consequently, multifamily residential projects were a permitted use in HDR districts, with only design review approval required. Real Party applied for design review approval for the project and a demolition permit to demolish an existing single family home on the site, which was located within an HDR district.

City planning staff concluded: (1) the project was exempt from CEQA under the Class 32 infill exemption (CEQA Guidelines, § 15332); and (2) the project met the design review criteria. At the planning commission hearing several neighbors and community members opposed the project, alleging that the site was contaminated, had inadequate drainage, lacked sufficient open space, and would result in cumulatively considerable impacts. Project opponents also contended

that the project design was inconsistent with the design of the neighboring historical homes. The city attorney advised the members of the planning commission that, under the city's zoning ordinance, the commission was required to approve the project if it met the city's design review criteria. The city attorney added that while he was confident the Class 32 infill exemption applied, CEQA also did not apply because the approval was non-discretionary. The commission approved the project and adopted findings that the project was exempt from CEQA and would not cause any significant environmental effects. Opponents appealed.

At the city council hearing, the city attorney similarly advised the members of the council that the project was exempt from CEQA under the Class 32 infill exemption, and that their review was limited to the project design. The council voted 3-2 to deny the appeal and uphold the planning commission's approval. The council adopted a resolution containing detailed findings to support the design review approval. The council also found that the Class 32 infill exemption applied, but, even if some level of CEQA review was required, the city was limited to reviewing design-related issues and not the use-related environmental impacts the project opponents had raised.

The McCorkle Eastside Neighborhood Group and St. Helena Residents for an Equitable General Plan (Petitioners) filed a petition for writ of mandate challenging the city council's approval as a violation of CEQA and local zoning laws. The trial court denied the petition. The Petitioners appealed. The primary issue on appeal was whether the city abused its discretion by approving the project without requiring an EIR. The appellants argued that the Class 32 infill exemption requires the city council to determine that the project would not result in any significant environmental effects relating to traffic, noise, air quality, and water quality. According to the appellants, the city council could not have done so because it reviewed only the project design.

The court disagreed and held that, irrespective of reliance on the Class 32 exemption, the city council correctly determined that the scope of its discretion was limited to design review and, therefore, no environmental review was required. Under the city's design review ordinance, the city council could not disapprove the project for non-design related reasons. The court found that substantial evidence supported the city council's findings that the project met the design review criteria and would not result in design-related impacts.

With regard to the Appellants' design-related concerns, the court rejected the notion that review was required for those concerns alone, at least for the project at issue. Quoting from the First District's decision in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, the court stated, "[W]e do not believe that our Legislature in enacting CEQA . . . intended to require an EIR where the sole environmental impact is aesthetic merit of a building in a highly developed area." Furthermore, the court added, "[w]hile local laws do not preempt CEQA, 'aesthetic issues like the one raised here are ordinarily the province of local design review, not CEQA.' 'Where a project must undergo design review under local law, that process itself can be found to mitigate purely aesthetic impacts to insignificance . . . .'" (*Id.* at p. 594.)

While the court recognized that St. Helena is not as urban as Berkeley (the location of the *Bowman* project), it nonetheless found that "the principles of that case apply to the design review in this case, which cannot be used to impose environmental conditions." The court next rejected the appellants' argument that the mere fact the city had some discretionary authority in the design

review process made the project subject to CEQA. According to the court, the rule that a project will be deemed discretionary for purposes of CEQA if it requires both discretionary and ministerial approvals "applies only when the discretionary component of the project gives the agency the authority to mitigate environmental impacts."

Finally, the court found that it was unnecessary for the city to rely on the Class 32 infill exemption because the city lacked any discretion to address the project's non-design related environmental effects. The court also found it unnecessary to address the appellants' argument that the Class 32 exemption did not apply based on the "unusual circumstances" exception. According to the court, "[b]ecause CEQA was limited in scope to design review whether or not the Class 32 exemption applied, any exception to the exemption was irrelevant." (*Id*. at p. 95.)
Because CEQA was limited in scope to design review whether or not the Class 32 exemption applied, any exception to the exemption was irrelevant.

**The Fourth District Court of Appeal upheld San Diego's determination that an amended lease for an amusement park in Mission Beach was categorically exempt from CEQA.** *San Diegans for Open Government v. City of San Diego* (2018) 31 Cal.App.5th 349.

In 1925, a developer built an amusement park on the San Diego oceanfront, now commonly known as Belmont Park. Upon the developer's death, the amusement park was granted to the city for the enjoyment of the people and the city later dedicated the park and surrounding land, collectively referred to as Mission Beach Park, to be used solely for park and recreational purposes.

In 1987, the city entered into a lease agreement with the park operator and approved a development plan to revitalize the park. The 1987 lease authorized the operator to demolish and renovate certain facilities, and to construct several new buildings for restaurants, shops, and other commercial uses. The lease was for a 50-year term and included a right of first refusal to enter into a new agreement in the future.

Following the execution of the 1987 lease, the city voters passed Proposition G, which limited the development of Mission Beach Park to certain specified uses. It also included an exemption for projects that had obtained "vested rights" as of the effective date of the measure. In 1988, the city passed an ordinance providing that the 1987 lease and development plan for Belmont Park provided a vested right under Proposition G, and as a result, the use and redevelopment of the park could continue as planned.

In 2015, the city entered into an amended lease with the current operator, Symphony Asset Pool XVI, LLC. The amended lease required Symphony to pay rent, operate, and maintain the property, and also gave Symphony the opportunity to extend the lease beyond the original 50-year term. Under the terms of the agreement, if Symphony completed ongoing and planned improvements, made additional improvements, and paid the city a lump sum payment, the amended lease could be extended an additional 50 years. Prior to approving the amended lease, the city determined that it was categorically exempt from CEQA under the "existing facilities" exemption in CEQA Guidelines section 15301.

Shortly thereafter, a local group filed a lawsuit challenging the amended lease on three grounds: (1) that the amended lease violated Proposition G by authorizing new uses in excess of the vested rights conferred under the 1987 lease; (2) that the city improperly determined that the amended lease was categorically exempt from CEQA; and (3) that the approval of the amended lease violated the city charter, which at the time required certain agreements lasting more than five years to be adopted by ordinance after notice and a public hearing. The trial court ruled in favor of the city and the petitioner appealed.

The Court of Appeal first considered whether the amended lease violated Proposition G. The petitioner argued that it did because the scope of work allowed under the amended lease exceeded the vested rights determined by the city in 1988, and because the extension of the lease beyond the original 50-year term exceeded the vested rights obtained in 1988. The court rejected both arguments. First, the court found that the original lease included a long list of allowable uses and all of the uses allowed under the amended lease were encompassed within the broad language of the original agreement. Second, the court held that the extension beyond the original 50-year term did not violate Proposition G because the 1987 lease contemplated such an extension by including a right of first refusal to enter into a new agreement. Furthermore, neither Proposition G nor the city's 1988 ordinance finding a vested right contained any time limit on the rights vested.

Turning to the petitioner's CEQA claim, the court considered whether the city properly determined that the amended lease was categorically exempt from CEQA under Guidelines section 15301 (Class 1 exemption). Section 15301, known as the "existing facilities" exemption, covers the "operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." The petitioner argued that the amended lease did not fit within this exemption because it contemplated a wide range of improvements, including construction of a new restaurant and bar, food court venues, and a new arcade, all of which the petitioner asserted comprised more than a negligible expansion of the existing use. The court disagreed.

The court found that all of the construction activities cited by the petitioner had already been completed at the time the amended lease was executed, and thus were existing facilities. The court noted that while the amended lease did contemplate additional improvements to a pool facility in the future, the petitioner did not argue those activities were outside the scope of the exemption. At any rate, the court added, those activities involved only the refurbishment of existing facilities and not new construction, and therefore, they too fell squarely within the exemption.

The petitioner also argued that even if the amended lease did fit within the existing facilities exemption, the unusual circumstances exception in CEQA Guidelines section 15300.2 (c) applied and precluded the city from relying on the exemption. Under that section, a categorical exemption "shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances."

The petitioner alleged the existence of the voter-passed Proposition G constituted an unusual circumstance within the meaning of section 15300.2 because the voters had used the

initiative power to declare a distinct interest in minimizing the environmental impacts of development in Mission Beach. The petitioner also argued that there was a fair argument that the project could result in significant traffic and noise impacts. To support this claim, the petitioner cited a statement by a Symphony representative that the project would generate an additional $100 million in revenue over the term of the lease, which the petitioner argued could only occur with significantly more visitors and, therefore, significantly more traffic and noise. The court rejected these arguments, finding that the types of impacts alleged were speculative, and in any event, the petitioner failed to establish that the alleged traffic and noise impacts would be due to the alleged unusual circumstance (i.e., the existence of Proposition G).

The final issue in the case was whether the approval of the amended lease violated a provision in the city's charter requiring that certain agreements lasting more than five years could only be approved by ordinance following publication in a local newspaper and a public hearing. The petitioner argued that the charter provision applies to any contract lasting more than five years, while the city countered that the provision only applies to agreements that require the city to expend funds. After finding that the charter language was ambiguous and could support either interpretation, the court explained that the city's interpretation of its own charter is entitled to deference. The city's longstanding interpretation of the provision was that it applied solely to agreements requiring the city to expend funds. Because it found this interpretation to be reasonable and consistent with the legislative history, the court deferred to the city and ruled that the charter provision did not apply to the amended lease.

**The First District Court of Appeal upheld the City of Berkeley's issuance of three use permits for single-family homes under CEQA's Class 3 categorical exemption, holding that possible earthquake or landslide zones are not "environmental resources" under the "location" exception to categorical exemptions.** *Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880.

In 2016, a group of landowners submitted applications to the City of Berkeley for permits to construct three new single-family homes on three neighboring parcels in the Berkeley Hills. In connection with the permit applications, the property owners hired a consulting firm to prepare a geotechnical and geologic hazard investigation of the proposed residences. The report indicated that a portion of the site is within the Alquist-Priolo Earthquake Fault Zone (APEFZ) and is also located in a potential earthquake-induced landslide area mapped by the California Geologic Survey on its Seismic Hazard Mapping Act map for the area. The city later retained its own consultants to peer review the report and provide additional information regarding slope stability and seismic hazards.

The city ultimately approved the use permits in 2017 after finding the proposed homes were categorically exempt from CEQA under the Class 3 categorical exemption for new construction of small structures. A group of petitioners filed a petition for writ of mandate challenging the city's approval. In contesting the city's CEQA exemption findings, the petitioners argued the "location" exception under Guidelines, section 15300.2, subdivision (a), precluded the city from relying on the exemption. The petitioners also argued the city's approval violated zoning requirements regarding "fifth bedrooms."

The trial court denied the petition for writ of mandate and the petitioners appealed. Although the petitioners conceded that the projects fell within the "Class 3" categorical exemption for "construction and location of limited numbers of new, small facilities or structures," including "up to three single-family residences" in "urbanized areas," they alleged that the city was precluded from relying on the exemption because the projects met the "location" exception set forth in Guidelines, section 15300.2 (a). That section provides that Class 3 exemptions may not be used "where the project may impact on an *environmental resource* of hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state, or local agencies." The petitioners argued that this exception applied because the projects were located in the APEFZ, which the petitioners asserted was an environmental resource of hazardous concern. The court disagreed.

At the outset, the court clarified that the same bifurcated standard of review applicable to the unusual circumstances exception (CEQA Guidelines, § 15300.2(c)), also applies to the location exception in section 15300.2(a). According to the court, whether a project is located where there is "an environmental resource of hazardous or critical concern" is a factual inquiry subject to review for substantial evidence. If this standard is met, the court then applies the fair argument standard in determining whether a project "may impact on" the environmental resource due to the project's location.

Applying this standard, the court held that the exception did not apply to the projects. The court first explained that for the location exception to apply, it is the "environmental resource" which must be "designated, precisely mapped, and officially adopted pursuant to law." The petitioners, however, cited statutes that mapped the physical locations of potential earthquakes and landslides. Citing the dictionary definition of "resource," the court concluded that earthquakes and landslides are geologic events, not environmental resources, as contemplated by the location exception. Moreover, while the APEFZ is "officially mapped" in accordance with the Seismic Hazards Mapping Act, that statute was enacted for the purpose of preventing economic loss and protecting health and safety, not to identify the locations of environmental resources. Similarly, as the Supreme Court affirmed in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, CEQA concerns a project's significant effects on the environment, not significant effects of the environment on the project. Accordingly, the court held that the location exception was inapplicable if based solely on the fact that the project was located in a potential earthquake and landslide zone.

The court then considered whether the city's determination that the project site was not located in an environmentally sensitive area was otherwise supported by substantial evidence and found that it was. The geotechnical reports produced during the administrative process were designed to evaluate the potential impact of landslides and fault ruptures on the project. There was no evidence that the project posed a risk of harm to the APEFZ. The court therefore held that the petitioners failed to meet their burden of showing that the projects were located where there is "an environmental resource of hazardous or critical concern."

Because the court found the city's determination was supported by substantial evidence, it did not need to reach the second prong of the location exception inquiry—whether substantial

evidence supports a "fair argument" that the project "may impact" the mapped resource—but it did anyhow. The court found that the petitioners failed to identify any substantial evidence that would support a fair argument that the project would have an adverse effect on the environment. The petitioners pointed to no evidence in the geologic reports that construction of the proposed residences would exacerbate existing hazardous conditions or harm the environment. Nor did petitioners submit their own geotechnical evidence, or any other evidence, to establish as much.

Turning to the municipal code claim, the court considered whether the city violated a code provision that requires a use permit before adding a fifth bedroom. The petitioners alleged that the city violated this provision because it did not require additional use permits, despite the fact that all of the residences had more than four bedrooms. The court was unpersuaded.

During the administrative proceedings, the city attorney explained that the ordinance applies only to modifications of existing dwellings—not to new construction. The purpose of the ordinance was to gain discretion over creation of "mini-dorms" via the addition of bedrooms to existing buildings, which in some cases could otherwise be done without discretionary review.

The court gave deference to the city's interpretation, finding that the ordinance was intertwined with issues of fact, policy, and discretion regarding zoning requirements and impacts to the local community. And even without such deference, the court concluded the city's interpretation was correct based on the plain meaning of the words used in the ordinance. Use of the word "addition of a fifth bedroom" implies the preexistence of four bedrooms. Because the projects were all new construction, the "fifth bedroom" ordinance did not apply.

**The Fourth District Court of Appeal found the California Coastal Act takes precedence over CEQA for de novo review of appeals to the California Coastal Commission concerning the issuance of a coastal development permit.** *Fudge v. City of Laguna Beach* (2019) 32 Cal.App.5th 193.

In April 2016, Hany Dimitry bought a house located in the city of Laguna Beach (City) between Pacific Coast Highway and the ocean. He wanted to demolish it and replace it with a new, three-story, single-family residence. Dimitry's neighbor Mark Fudge (Fudge) opposed the project, contending that the existing house had historical value as a "relatively unaltered" example of Spanish Colonial Revival Design and that the new house would obstruct "view corridors."

In January 2017, the City's Design Review Board (Board) denied Dimitry's application for a coastal development permit (CDP), citing the home's historical importance. A few months later, the City Council overturned the Board's decision, approved a CDP for demolition, but took no action on the proposed new house. Under the California Coastal Act (Coastal Act) (Pub. Resources Code, § 30000 et seq.), local agencies with certified local coastal programs (LCPs) are authorized to approve CDPs in the first instance, but their decisions may be appealed to the California Coastal Commission (Commission).

In June 2017, Fudge filed an appeal of the CDP to the Commission. The next month, while the Commission's de novo hearing was pending, Fudge filed a CEQA petition in superior court seeking to vacate the City's issuance of the CDP.

In August 2017, the Commission accepted Fudge's appeal on the CDP. The court noted the Commission must accept the appeal unless it fails to raise "substantial issues" (id., § 30625, subd. (b)(1)), therefore acceptance is likely. Once the Commission accepts an appeal, it has de novo authority over the CDP, nullifying the local agency's approval. (*Id*.,§ 30621, subd. (a)). In response to a demurrer, the trial court dismissed Fudge's CEQA lawsuit against the City, finding the dispute moot in light of the Commission's acceptance of Fudge's CDP appeal, and concluded the CDP was now *entirely* in the Commission's hands.

Fudge appealed the dismissal, arguing his appeal the CDP to the Commission would not be heard "in the same manner" as the original granting of the CDP by the City because the City was required to make its decision under CEQA, while the Commission would make its decision under the Coastal Act. The court of appeal explained that when a regulatory program of a state agency is certified by the state Secretary of Resources and requires submission of environmental information, that information may be submitted "in lieu of" the usual environmental impact report (EIR). (*Id.*, § 21080.5, subd. (a)). The court reasoned Fudge's view of de novo was incorrect because the courts are bound by the intent of the Legislature as to what hearings would look like, which is expressed in section 21080.5 and is part of CEQA.

The court of appeal stated the Legislature provided for de novo review of appeals to the Commission when it comes to a local agency's decision on a CDP. It emphasized the importance of the Commission's de novo review in section 21174, which states the Coastal Act takes precedence over CEQA for CDP decisions. The court noted the reasoning behind the Legislature's choice was to avoid allowing a project opponent "two bites at the apple," and to avoid undermining the Commission's ability to implement uniform policies governing coastal development.

The court of appeal affirmed the Superior Court decision dismissing as moot the CEQA challenge to the City's approval. The court also held that because the City's action was nullified by the Commission's acceptance of jurisdiction, judicial review against the City is not available. Finally, the court held the Superior Court correctly denied Fudge's request for attorney's fees. The court declined to contemplate the merits of any petition for writ that Fudge may bring under Coastal Act section 30801 regarding the Commission's decision to grant Dimitry the CDP.

**The Second District Court of Appeal ruled that appellant's Planning and Zoning Law claims were barred by the 90-day statute of limitations**. *1305 Ingraham, LLC v. City of Los Angeles* (2019) 32 Cal.App.5th 1253.

In October 2015, 7th & Witmer, L.P. (applicant) filed applications for a project permit compliance, an affordable housing determination, and density bonus for a multi-story mixed use project. In June 2016, the city planning director issued a Specific Plan Project Permit Compliance Review Density Bonus & Affordable Housing Incentives (Determination). The Determination was to become final 15 days after the date it was mailed.

An appellant timely challenged the planning director's approval of affordable housing incentives and site plan review. The planning commission failed to consider the appeal. No hearing was held. Nevertheless, the city approved the project and a notice of determination was filed. Nine months later, the appellant filed a petition for writ of mandate and complaint for declaratory relief. Appellant initially asserted CEQA claims but amended the petition due to CEQA's 30-day statute of limitations. The appellant instead claimed the City violated due process rights under the Los

Angeles Municipal Code (LAMC). The trial court held that appellant's claims were time-barred by the 90-day statute of limitations under the State Planning and Zoning Law (Gov. Code, § 65009). The court of appeal affirmed.

Relying on relevant provisions of the LAMC, which state that prior to deciding an appeal, the planning commission shall hold a hearing, appellant asserted that a hearing was a prerequisite to any decision. The court disagreed, relying on a later LAMC code provision, which by its plain terms stated that the planning director's decision becomes final where the planning commission fails to timely act. The court further found that interpreting Government Code section 65009 to allow a decision to become final despite a procedural irregularity did not violate procedural rights of appellants, but instead advanced the purposes of site plan review set forth in the LAMC. The court rejected the appellant's argument that the term "legislative body" contemplates more than the findings of the planning director, a single person. The court held that it is the subject matter of the decision being reviewed that controls application of Government Code section 65009—not the legislative body charged with making the decision.

**The Third District Court of Appeal held a petitioner's new arguments challenging a partially recirculated and certified EIR were precluded by the doctrine of res judicata.** *Ione Valley Land, Air, and Water Defense Alliance, LLC, v. County of Amador* (2019) 33 Cal.App.5th 165.

In 2012, the County of Amador approved the Newman Ridge Project and certified an Environmental Impact Report. The project involved an aggregate quarry and related facilities owned by Newman Minerals (applicant). The project consisted of two parts: the Newman Ridge Quarry and the Edwin Center. After the EIR was certified, the petitioner (LAWDA) filed a petition for writ of mandate under CEQA. LAWDA raised a multitude of issues, including air quality, traffic, and alleged inadequate responses to comments.

The trial court granted the petition in part, finding the 2012 EIR's analysis of traffic deficient. All other claims were denied. The trial court ordered the county to decertify the EIR, and revise and recirculate the traffic analysis. After recirculation the county certified the revised EIR, reapproved the project, and sought to discharge the writ.

The trial court granted the motion to discharge the writ. LAWDA filed a new petition for writ of mandate. The trial court denied the petition, and LAWDA appealed.

Previously, in April 2015 and prior to discharge of the first writ, LAWDA filed a second petition challenging the partially recirculated EIR on grounds other than traffic. The trial court sustained a demurrer with leave to amend, claiming the contentions were already litigated and resolved. No record of the hearing was available to the court of appeal.

The court of appeal agreed with the county and applicant's contention that LAWDA was barred from raising nearly all the claims contained in the second petition. The trial court's writ required the county to revisit only the traffic impacts from the 2012 EIR. The court of appeal held all of LAWDA's objections to the partially recirculated EIR and project approval were barred by the doctrine of res judicata, except for the issues regarding the revised traffic analysis.

The court of appeal rejected LAWDA's claim that decertification of the EIR enabled the petitioner to pursue new arguments, reasoning that the decertification did not alter the sufficiency of the remainder of the EIR which had already been litigated and resolved. The court held that because LAWDA failed to include the counter-argument to the application of res judicata in their opening brief, they forfeited the argument. The court noted that " 'the rule is that points raised in the reply brief for the first time will not be considered, unless good reason is shown for failure to present them before.' " (*Neighbors v. Buzz Oates Enterprises* (1990) 217 Cal.App.3d 325, 335, fn. 8.).

LAWDA also argued that the county's responses to Caltrans' comments were deficient and the partially recirculated EIR did not account for an expansion of Mule Creek State Prison or concerns raised by the City of Galt. The court of appeal found LAWDA's first assertion lacking merit; the response to Caltrans' concerns was adequate. The court also found the revised EIR's consideration of the Mule Creek State Prison expansion sufficient, as well as the response to concerns raised by Galt. The court affirmed the trial court's decision.

**First District Court of Appeal Applies New Standard of Review Articulated by Supreme Court in *Sierra Club v. County of Fresno* and Upholds Approval of a Mixed-Use Development Project in San Francisco.** *SOMCAN v. City and County of San Francisco* (2019) 33 Cal.App.5th 321.

The City of San Francisco certified an EIR and approved the development of a mixed-use project that included office, retail, cultural, educational, and open-space uses for a four-acre property in downtown San Francisco. The EIR described two "options" for the project, an "Office Scheme" and a "Residential Scheme."

In determining that the EIR was legally adequate against a variety of claims, the court applied the three "basic principles" articulated by the Supreme Court in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 5, regarding the standard of review for adequacy of an EIR: (1) An agency has considerable discretion to decide the manner of the discussion of potentially significant effects in an EIR; (2) however, a reviewing court must determine whether the discussion of a potentially significant effect is sufficient or insufficient, i.e., whether the EIR comports with its intended function of including detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project; and (3) the determination whether a discussion is sufficient is not solely a matter of discerning whether there is substantial evidence to support the agency's factual conclusions.

The court rejected the petitioners' claim that the EIR's project description was unstable because the draft EIR presented two alternative schemes. The court first noted that the petitioners did not dispute that the EIR's project description met CEQA's technical requirements. The court then found that the project description was not confusing or misleading despite presenting two different options. According to the court, the EIR described only one proposed project—a mixed use development with two options for different allocations of residential and office units—and the analysis was not curtailed, misleading, or inconsistent. The court also rejected the petitioners' argument that the final EIR adopted a "revised" project that was a variant of another alternative

identified in the draft EIR—emphasizing that the CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project, but is instead intended to allow consideration of other options that may be less harmful to the environment.

The court upheld the EIR's cumulative impacts analysis, finding no evidence in the record to support the petitioners' claim that the EIR's list of project was inadequate because it was developed in 2012 (during the "Great Recession") and did not reflect the recent increase in development. Accordingly, the court held that the petitioners had not met their burden of proving the EIR's cumulative impacts analysis was not supported by substantial evidence. Notably, the court cited *Sierra Club v. County of Fresno* for the proposition that agencies have discretion in selecting the methodology to be used in evaluating environmental impacts, subject to review under the substantial evidence standard.

In upholding the EIR's traffic analysis, the court deferred to the city's determination of the geographic boundaries to use for the intersection analysis. The court noted that the city explained its reasoning for selecting certain intersections and excluding others, and the analysis was supported by substantial evidence. The court further held that the city did not need to include a plan in the EIR that was not reasonably foreseeable when the city initiated EIR preparation. Finally, the court found that the EIR addressed the mitigation measures that the petitioners alleged were missing and did not need to analyze additional alternatives because the alternatives were not feasible, would not meet the project objectives, or would not reduce environmental impacts.

The court rejected the petitioners' argument that the developer was required to provide an alternative configuration was infeasible under the city's comfort criterion for wind speed impacts because the exceedance of the comfort criterion did not establish significant impacts for CEQA purposes.

The court also rejected petitioners' assertion that the project failed to provide adequate onsite open space where the EIR provided that the project includes more space than the local code requires and would result in a less-than-significant impact related to demand on existing parks and open spaces.

The court determined the EIR clearly set forth specific information about shade and shadow impacts and analyzed why they would not produce a significant environmental effect. The court rejected the petitioners' argument that sunlight is a "special and rare resource" warranting "special emphasis" under the CEQA Guidelines, section 15125, citing the petitioners' failure to cite any authority.

The court found that the city made a good faith effort to discuss inconsistencies with the applicable general plans—noting that CEQA does not mandate perfection.

The court upheld the statement of overriding considerations for the project against the petitioners' claim that the city improperly considered the benefits before considering feasible mitigation measures or alternatives. The court emphasized that the project was modified to substantially conform to the identified environmentally superior alternative, which would not have occurred if there had been no consideration of mitigation measures or alternatives.

**Regulatory Updates**
No summaries or updates this quarter.

# *CLIMATE CHANGE*

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**

**Organic Waste.** In January 2019, the Department of Resources, Recycling and Recovery provided notice of a proposed rulemaking to implement regulatory requirements to reduce landfill disposal of organic waste in order to achieve greenhouse gas reductions required by Senate Bill 1383. The requirements include reducing organic waste by 75 percent by 2025. Cal. Reg. Notice Register 2019, Vol. No. 3-Z, p. 109.

**Federal Regulatory Updates**

**Inventory of U.S. Greenhouse Gas Emissions and Sinks.** In February 2019, the EPA provided a notice of availability of, and requested comments on, the Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017. The EPA is requesting recommendations for improving the overall quality of same. 84 Fed. Reg. 3444.
**Standards of Performance.** In February 2019, the EPA provided notice of an extended comment period for the rule titled "Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." 84 Fed. Reg. 2485.

# *COASTAL RESOURCES*

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**

**Coastal Commission.** In April 2019, the California Coastal Commission provided notice of a public hearing and proposed amendments to the coastal commission regulations. The proposed amendments would update, correct, and modernize the regulations. Cal. Reg. Notice Register 2019, Vol. No. 17-Z, p. 654.

# *ENDANGERED SPECIES*

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**
No summaries or updates this quarter.

**Federal Regulatory Updates**

**Inventory of U.S. Greenhouse Gas Emissions and Sinks.** In February 2019, the EPA provided a notice of availability of, and requested comments on, the Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2017. The EPA is requesting recommendations for improving the overall quality of same. 84 Fed. Reg. 3444.

**Standards of Performance.** In February 2019, the EPA provided notice of an extended comment period for the rule titled "Review of Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units." 84 Fed. Reg. 2485.

**Coastal Dunes Milkvetch.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for the Coastal dunes milkvetch. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Fisher.** In January 2019, the U.S. Fish and Wildlife Service provided notice of a reopened comment period on the proposed rule to list the West Coast distinct population segment of fisher as a threatened species. This action is a result of a Court order directing a new determination to be prepared. 84 Fed. Reg. 644.

**Gambel's Watercress.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for Gambel's watercress. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Greater Sage-Grouse.** In April 2019, the U.S. Fish and Wildlife Service provided notice of a proposed rule and reopened comment period for the proposed rules to list the Bi-State distinct population segment of greater sage-grouse as threatened and to designate a critical habitat. 84 Fed. Reg. 14909.

**Hickman's Potentilla.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for Hickman's potentilla. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Indian Knob Mountainbalm.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for the Indian Knob mountainbalm. The amendment concerns changes to the recovery criteria which

would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Marsh Sandwort.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for the Marsh sandwort. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Monterey Clover.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for the Monterey clover. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Pismo Clarkia.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for the Pismo clarkia. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Scotts Valley Spineflower.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for Scotts Valley spineflower. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

**Yadon's Piperia.** In January 2019, the U.S. Fish and Wildlife Service provided a notice of availability of, and requested comments on, a draft recovery plan amendment for Yadon's piperia. The amendment concerns changes to the recovery criteria which would assist in determining when an endangered species may be reclassified as threatened or removed from the list completely. 84 Fed. Reg. 790.

# *ENERGY*

**Recent Court Rulings**

No summaries or updates this quarter.

**Regulatory Updates**

No summaries or updates this quarter.

# *FEES/TAXES*

**Recent Court Rulings**

No summaries or updates this quarter.

**Regulatory Updates**

No summaries or updates this quarter.

# *FISHING RIGHTS*

**Recent Court Rulings**
No summaries or updates this quarter.

# *FOREST RESOURCES*

**Recent Court Rulings**

**State Regulatory Updates**

**Fire Safety Survey, 2019.** In March 2019, the Board of Forestry and Fire Protection provided notice of a proposed action to establish the criteria for identifying subdivisions to survey under a program that requires identification of certain subdivisions in a State Responsibility Area or a Very High Fire Hazard Severity Zone that are at a significant fire risk. Cal. Reg. Notice Register 2019, Vol. No. 12-Z, p. 470.

**Registered Professional Forester.** In March 2019, the Board of Forestry and Fire Protection provided notice of proposed amendments and a hearing resulting from a petition requesting administrative rulemaking relating to a disciplinary case. The proposed action is a comprehensive regulatory program for the licensing and administration of Registered Professional Foresters, Certified Rangeland Managers, and other specialists, and provides a disciplinary process. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 384.

**Safety Element Review.** In January 2019, the Board of Forestry and Fire Protection provided notice of a proposed revision to the Safety Element Review regulation as a result of Senate Bill 1260. The Senate Bill added California Government Code Section 65302.5, which allows the Board to request a consultation with a jurisdiction if they did not accept certain Board recommendations following review of a general plan safety element. Cal. Reg. Notice Register 2019, Vol. No. 2-Z, p. 52.

**Subdivision Map Findings.** In January 2019, the Board of Forestry and Fire Protection provided notice of a proposed revision to the Subdivision Map Findings. The proposed revision would develop a process for legislative bodies to make tentative/parcel map findings and transmit them to the Board for subdivisions within the State Responsibility Area or a Very High Fire Hazard Severity Zone. Cal. Reg. Notice Register 2019, Vol. No. 2-Z, p. 56.

**Very High Fire Hazard Severity Zone Adoption.** In January 2019, the Board of Forestry and Fire Protection provided notice of a proposed action as a result of Senate Bill 1260. The Senate Bill revised Government Code Section 51179(c) to require local agencies to send ordinances concerning the designation of Very High Fire Hazard Severity Zones to the Board. The proposed action would provide a process for submittal of ordinances. Cal. Reg. Notice Register 2019, Vol. No. 2-Z, p. 59.

# *HAZARDOUS MATERIALS/ WASTE*

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**
No summaries or updates this quarter.

**Federal Regulatory Updates**

**Federal Lead-Based Paint Program System of Records.** In March 2019, the EPA provided notice of its proposal to update the existing Federal Lead-Based Paint Program System of Records to include additional information such as adding lead-based paint to the category of uses, the addition of renovator professionals' photographs, and other information. 84 Fed. Reg. 5673.
**Hazardous Waste Compliance Docket.** In April 2019, the EPA provided notice of the thirty-fifth update of the Federal Agency Hazardous Waste Compliance Docket. The Docket contains certain information reported to EPA by federal facilities that manage hazardous waste or have a reportable quantity of hazardous substances that has been released. It is used to identify facilities that may pose a threat to public health and the environment. 84 Fed. Reg. 18029.
**Methylene Chloride.** In March 2019, the EPA provided notice of an action to prohibit the manufacture, processing and distribution in commerce of methylene chloride for consumer paint and coating removal as the EPA has determined that its use presents an unreasonable risk of injury to health due to acute human lethality. 84 Fed. Reg. 11420.
The EPA also provided notice of an advance notice of proposed rulemaking for public input on training, certification, and limited access requirements that could address any unreasonable risks that EPA could potentially find to be presented by methylene chloride when used for commercial paint and coating removal. 84 Fed. Reg. 11466.
**Methylmercury.** In April 2019, the EPA provided notice of a public comment period for the draft IRIS Assessment Plan for Methylmercury. The IRIS Assessment evaluates information on the health effects that may result from exposure to the chemical found in the environment. 84 Fed. Reg. 13286,
**Municipal Solid Waste Landfills.** In March 2019, the EPA provided notice of an advanced proposed rulemaking and extended comment period for the rule titled "Revisions to the Criteria for Municipal Solid Waste Landfills to Address Advances in Liquids Management." The comment period has been extended in response to requests for same. 84 Fed. Reg. 8496.
**Significant New Use Rules.** In March 2019, the EPA provided notice of a proposed rule concerning significant new use rules under the Toxic Substance Control Act (TSCA) for 28 chemical substances which were the subject of premature notices. This action would require that advance notice be given before commencing an activity that intends to manufacture or process these chemical substances for an activity that is proposed as a significant new use. 84 Fed. Reg. 9999.
In April 2019, the EPA provided notice of a proposed rule concerning significant new use rules under TSCA for 11 chemical substances which were the subject of premature notices. This action

would require that advance notice be given before commencing an activity that intends to manufacture or process these chemical substances for an activity that is proposed as a significant new use. 84 Fed. Reg. 16432.

**Statement of Findings.** In February 2019, the EPA provided notice of a statement of findings on TSCA section 5(a) notices during September 2018. The statement includes findings following review of notices for new chemical substances or significant new uses that are not likely to present an unreasonable risk of injury to health or the environment. 84 Fed. Reg. 2861.

**Substance Prioritization.** In March 2019, the EPA provided notice of the initiation of a prioritization process for 20 chemical substances as candidates for designation as High Priority Substances for risk evaluation and 20 chemical substances as candidates for designation as Low Priority Substances for risk evaluation. 84 Fed. Reg. 10491.

**Toxic Substance Control Act.** In February 2019, the EPA provided notice of extended review periods under the TSCA due to the partial federal government shutdown. Specifically, review periods for pre-manufacture notices, significant new use notices, microbial commercial activity notices and exemption notices received under section 5 of the TSCA during a certain time period will be extended. 84 Fed. Reg. 2851.

In March 2019, the EPA provided a notice of availability of information for the period September 1 to September 30, 2018 pertaining to the receipt and status information for submissions under TSCA section 5. 84 Fed. Reg. 10499.

In April 2019, the EPA provided a notice of availability of information for the periods November 2018, December 2018, and January 2019 pertaining to the receipt and status information for submissions under TSCA section 5. 84 Fed. Reg. 14360; 84 Fed. Reg. 14368; 84 Fed. Reg. 14365.

# *INSURANCE COVERAGE*

**Recent Court Rulings**

No summaries or updates this quarter.

**Regulatory Updates**

No summaries or updates this quarter.

# *LAND USE*

**Recent Court Rulings**

No summaries or updates this quarter.

**State Regulatory Updates**

**Building Standards.** In March 2019, the Building Standards Commission provided notice of proposed amendments to the 2016 Administrative Code of the Building Standards of the Office of Statewide Health Planning and Development. Cal. Reg. Notice Register 2019, Vol. No. 9-Z, p. 334.

**Federal Regulatory Updates**

No summaries or updates this quarter.

# *MINING*

**Recent Court Rulings**
No summaries or updates this quarter.

**Regulatory Updates**
No summaries or updates this quarter.

# *PESTICIDES*

Recent Court Rulings

**The California Court of Appeal affirmed the Department of Pesticide Regulation's finding that Caltec's products were pesticides, and not fertilizers, under the Food and Agricultural Code.** *Caltec Ag, Inc. v. Department of Pesticide Regulation (2019) F074334*

The California Department of Pesticide Regulation (DPR) determined that three of Caltec's products were pesticides under the Food and Agricultural Code (FAC) and should have been registered as pesticides. DPR issued a fine of $784,000 for the sales of pesticides that were not registered with DPR.

Caltec challenged DPR's decision claiming that the products were fertilizers and not pesticides under the FAC. Caltec also claimed that DPR was precluded from deciding because Caltec's products had previously been registered as types of "fertilizing materials" with the Department of Food and Agriculture. Greenfield 27-0-0 was registered as a "commercial fertilizer," Terra Treat as an "auxiliary soil and plant substance," and Kelpak as an "organic input material."

The FAC's definition of pesticide includes any "spray adjuvant" and "any mixture of substances intended to be used for regulating plant growth, and any substance used to prevent, destroy, repel or mitigate any pest." (§ 12753.) DPR determined that Greenfield 27-0-0 was a spray adjuvant because it is a spreading agent intended for use with another pesticide to improve the other pesticide. DPR determined that Terra Treat was also a spray adjuvant because it was a wetting agent that aids application of pesticides and improves the effectiveness of insecticides and herbicides. DPR determined that Kelpak was a substance intended to be used for regulating plant growth, and therefore a pesticide.

The appellate court held that DPR's determination as to each product was supported by substantial evidence. The court also concluded that prior registration of Caltec's products as "fertilizing materials" does not preclude the DPR from determining that those products are pesticides.

The appellate court affirmed the judgement and DPR's decision that Greenfield 27-0-0, Terra Treat and Kelpak were pesticides within the meaning of the statute and were required to be registered with DPR prior to being sold in California. The court affirmed the fines imposed by DRP.

# *PLANNING AND ZONING*

**Recent Court Rulings**
No summaries or updates this quarter.

**Regulatory Updates**
No summaries or updates this quarter.

# *PROPERTY RIGHTS/FEDERAL TORT CLAIMS*

**Recent Court Rulings**
No summaries or updates this quarter.

# *PROPOSTITION 65*

**Recent Court Rulings**
No summaries or updates this quarter.

**State Regulatory Updates**

**Bevacizumab.** In March 2019, the Office of Environmental Health Hazard Assessment (OEHHA) provided notice of adding *Bevacizumab* to the list of chemicals known to the state to cause reproductive toxicity. The chemical is being listed under the "formally required to be labeled or identified" listing mechanism. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 402.
**Bisphenol A.** In March 2019, the OEHHA provided notice of an acceptance of a request for a safe use determination for exposures to Bisphenol A in certain eyewear products. The request was for a determination that exposures to Bisphenol A in certain eyewear products do not present significant risk of birth defects or reproductive harm under Proposition 65 and, therefore, do not require a warning. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 401.
**Chemicals in Coffee.** In March 2019, the OEHHA provided notice of changes to a previously proposed regulation concerning exposures to listed chemicals in coffee posing no significant risk. The changes would clarify the scope of the listed chemicals covered by the proposed regulation. Cal. Reg. Notice Register 2019, Vol. No. 11-Z, p. 445.
**Cobalt and Cobalt Compounds.** In March 2019, the OEHHA provided a notice of availability, public comment period, and workshops on the draft cancer inhalation unit risk factors for cobalt and cobalt compounds. The inhalation cancer unit risk factors were developed using the most recent "Air Toxics Hot Spots Program Technical Support Document for Cancer Potency Factors." Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 399.

**List of Chemicals Known to the State to Cause Cancer or Reproductive Toxicity.** For OEHHA's most current list of chemicals known to the state to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 403.

**Natural Occurring Levels of Lead in Candy.** In March 2019, the OEHHA provided notice of a proposed new chapter and section regarding naturally occurring levels of lead in candy. If adopted, the regulation would establish the naturally occurring level of lead in candies containing chili and/or tamarind as required under the Health and Safety Code. Cal. Reg. Notice Register 2019, Vol. No. 11-Z, p. 442.

**Public Health Goal.** In March 2019, the OEHHA provided a notice of availability of, and requested comments on, a draft technical support document for the proposed update of the Public Health Goal for *1,2-dibromo-3-chloropropane* in drinking water. Cal. Reg. Notice Register 2019, Vol. 13-Z, p. 507.

**Rental Vehicle Exposure Warnings.** In March 2019, the OEHHA provided notice of proposed amendments concerning rental vehicle exposure warnings. The proposed amendments would ensure that renters are provided with rental vehicle warnings prior to their exposure to listed chemicals from the use of rental vehicles. Cal. Reg. Notice Register 2019, Vol. No. 10-Z, p. 396.

# *RESOURCE CONSERVATION*

**Recent Court Rulings**

No summaries or updates this quarter.

**State Regulatory Updates**

**Draft Gill Net Transition Program.** In April 2019, the Department of Fish and Wildlife provided notice of proposed regulation amendments that would direct the Department to establish a voluntary Drift Gill Net Transition Program. The program would: (i) incentivize drift gill net permittees to transition out of the drift gill net shark and swordfish fishery, (ii) reduce bycatch, and (iii) provide a sustainable swordfish fishery. Cal. Reg. Notice Register 2019, Vol. No. 14-Z, p. 532.

**Hagfish.** In April 2019, the Department of Fish and Game provided notice of a proposed regulation concerning the use of traps to take hagfish. The proposed amendment would re-establish the number of allowed barrel traps and require hagfish fishermen to include the vessel's California commercial boat registration number when marking buoys for hagfish traps. Cal. Reg. Notice Register 2019, Vol. No. 17-Z, p. 658.

# *SOLID WASTE*

**Recent Court Rulings**

No summaries or updates this quarter.

**Regulatory Updates**

No summaries or updates this quarter.

# *WATER RESOURCES AND RIGHTS*

**Recent Court Rulings**

No summaries or updates this quarter.

**State Regulatory Updates**

No summaries or updates this quarter.

**Federal Regulatory Updates**

**Waters of the United States.** In February 2019, the EPA provided notice of a February public hearing concerning a proposed rule revising the definition of Waters of the United States. The revised definition would clarify the scope of waters federally regulated under the Clean Water Act. 94. Fed. Reg. 2483. That same month, the EPA also provided notice of a proposed rule to define the scope of the definition to increase the Clean Water Act program predictability and consistency. 84 Fed. Reg. 4154.

# *WATER QUALITY*

**Recent Court Rulings**

No summaries or updates this quarter.

**State Regulatory Updates**

No summaries or updates this quarter.

**Federal Regulatory Updates**

**Community Water Systems.** In March 2019, the EPA provided a notice of availability of requirements for community water systems serving more than 3,300 persons to complete risk and resilience assessments and emergency response plans as well as additional related information. 84 Fed. Reg. 11536.

**Hazardous Substances Survey.** In February 2019, the EPA provided a notice of, and requested comments on, data received in response to a survey titled "2018 Clean Water Act Hazardous Substances Survey." 84 Fed. Reg. 4741.

**National Pollutant Discharge Elimination System (NPDES).** In February 2019, the EPA provided notice of a final rule concerning revisions to certain NPDES permitting regulations. The revisions are minor and would improve and clarify the regulations in the following major categories: (i) regulatory definitions, (ii) permit applications, and (iii) public notice. 84 Fed. Reg. 3324.

In April 2019, the EPA provided notice of a proposed rule to update e-Rule data elements within the NPDES Electronic Reporting Rule. The proposed rule would: (i) update data elements to be consistent with the current MS4 regulations, (ii) corrects minor errors, and (iii) make other clarifying changes. 84 Fed. Reg. 18200.

**Water Quality Standards.** In February 2019, the EPA provided notice of an extended comment period for the proposed rule "Water Quality Standards; Establishment of a Numeric Criterion for

Selenium for the State of California." The comment period was extended to ensure it remained open during the public hearings which were rescheduled due to the Federal government shutdown. 84 Fed. Reg. 3395.

# ***Federal Case Summaries of Interest***

## Energy

## Forest Service

**The Ninth Circuit Court of Appeals has held that a Travel Management Rule allowed the United State Forest Service (USFS) to define the types of limits on motorized use and upheld three USFS travel management plans as compliant with the Travel Management Rule, the National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA).** *Wildearth Guardians v. Provencio* (9th Cir. May 6, 2019) No. 17-17373.

In this case, petitioners challenged as arbitrary and capricious three travel management plans for three ranger districts in the Kaibob National Forest. These travel management plans reduced the number of miles designated road, but expanded to one mile or one-half mile from any designated road the areas where off-road vehicle use is allowed for the limited purpose of dispersed camping and big game retrieval. The applicable Travel Management Rule allowed the travel management plans to designate a "specific distance" from "certain forest roads or trails" for limited motor-vehicle use solely for the purposes of dispersed camping or retrieval of a down big game animal. Petitioners further challenged the travel management plans under NEPA and the NHPA due to potential impacts to habitat and cultural resources. The District Court granted summary judgment to the USFS and petitioners appealed.

On review, the Ninth Circuit affirmed summary judgment and upheld the USFS's travel management plans. It interpreted the Travel Management Rule to allow the USFS to define the types of restrictions on off-road trips for dispersed camping and game retrieval. The Rule did not mandate that these vehicle uses be limited only spatially. Because the travel management plans established defined restrictions based on the time of year, the species of animal to be retrieved, and the number of trips per person, the plans adequately limited off-road vehicle use under the Travel Management Rule. Further, the Environmental Assessments (EA) for each plan did not raise substantial questions regarding environmental or human effects because the USFS adequately explained that the limits would reduce or increase only insignificantly effects related to weed introduction and species conflicts. Similarly, the court ruled the USFS did not violate the NHPA because it adequately explained that overall motor vehicle use would not increase to cause substantially greater impacts to area cultural resources.

# Fish and Wildlife

# NEPA

**The Ninth Circuit Court of Appeal has held that the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRARA) authorized the Department of Homeland Security (DHS) to waive environmental and other federal laws to construct or replace border barriers.** *In Re Border Infrastructure Environmental Litigation* (9th Cir. Feb 11, 2019) No. 18-55474.

In this case, the DHS Secretary authorized the construction of (a) border barrier prototypes for evaluation in San Diego, California; (b) fourteen miles of replacement primary barriers in San Diego; (c) fourteen miles of replacement secondary barriers in San Diego; and (d) three miles of replacement primary barriers near Calexico, California. With the exception of (c) – replacement of secondary barriers in San Diego – construction had commenced before the instant litigation. For each authorization under construction, the DHS Secretary published in the Federal Register a notice of determination waiving all otherwise applicable legal requirements, including compliance with the National Environmental Policy Act (NEPA) and the Coastal Zone Management Act (CZMA). Section 102(c) of IIRARA authorizes the DHS Secretary to "waive all legal requirements" that the "Secretary, in such Secretary's sole discretion, determines necessary to ensure expeditious construction." Relevant to the appeal, petitioners challenged the border projects as not authorized under IIRARA and approved in violation of federal environmental laws.

The District Court rejected petitioners' arguments and granted summary judgment to DHS. First, it concluded that IIRARA imposes no limits on the use of a waiver to only new, rather than replacement, barrier projects. Second, it concluded that the DHS Secretary's waiver determination is within its sole discretion. Finally, it concluded that the authorized waivers negated the environmental claims under NEPA and CZMA.

On appeal, the Ninth Circuit *affirmed* the District Court's decision. It held that IIRARA granted broad authority to the DHS Secretary to authorize the construction of border barriers and waive environmental laws for border barrier projects, including removal, replacement, and addition of barriers. It further held that specific provisions in the IIRARA declaring certain border projects as priority projects did not limit this authority. Thus, Petitioners could not claim violations of NEPA or the CZMA because the DHS Secretary issued valid waivers as to these environmental laws.

## Trail Development

## Transportation

## Water Quality

## Water Resources