ABBOTT & KINDERMANN, LLP

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ENVIRONMENTAL LAW UPDATE

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CALIFORNIA WATER RIGHTS AND SUPPLY

A. Regulatory Framework

- The California Water Code regulates water rights addressing appropriative, riparian and prescriptive rights associated with surface water within the state. (Wat. Code, §§ 1-81674.)

- The jurisdiction of the Water Code over the appropriation of groundwater is limited to "subterranean streams flowing through known and definite channels." (Wat. Code, § 1200.)

- The water right process may include State Water Resource Control Board ("SWRCB") determination of all rights for adjudicated surface waters. (Wat. Code, § 2501.)

- The water rights program is administered by the SWRCB.

B. Suggested Water Due Diligence Approach

Water issues should be a priority when performing due diligence for certain real property transactions. A proposed outline for commencing water due diligence analysis follows:

Water Requirements

- How much water will the project require?

  – Is the purpose of the water requirement inconsistent with general limitations imposed by state law (rules of beneficial and reasonable use)?

What Is the Status of Your Water Right?

- At the SWRCB

  – Run the names of seller and predecessors-in-interest through the database of holders of appropriative rights and riparian owners who have filed riparian diversion statements (not all riparian holders file the statements).

  – Review maps to determine if there is a record of diversion that could lead to finding a water right.

- Other

  – Review contract documents for direct evidence of water rights and water rights descriptions.

- Examine the property for actual river diversion or pipelines leading from river diversion, and check for current or abandoned groundwater wells.

- Review seller's documents for assessments and taxes paid to water districts.

- Go to county courthouse for possible pre-1914 appropriative rights or post-1914 licensed rights.

- Work with an experienced title company to create a water chain of title.

Determine the Validity and Type of the Water Right

- Appropriative Rights

  - If pre-1914 right, check for historical diversions to support the full amount claimed and determine if it has been abandoned or forfeited.

  - If post-1914 right, determine if the place of diversion, purpose, use, season and quantity allowed under permit and license are sufficient for the project's needs.

- Riparian Rights

  - Has the stream system been adjudicated?

  - Is the water used within the stream's watershed?

  - Is storage required?

  - If used outside the watershed or if storage required, then an appropriative right must be obtained from the SWRCB.

  - Is there sufficient water in the stream, or are correlative cutbacks likely and what about the ESA's impact on the ability to take water?

  - Determine if there are other water uses on the stream, both appropriative and riparian that may have priority of use.

- Percolating Groundwater Rights

- Overlying Rights

  - Is there sufficient groundwater and have there been any basin adjudications or any other limitations of use of quantity needed (including groundwater management plans)?

- Appropriative Rights
    - Has the basin been or is it being adjudicated and are there any prescriptive rights?
    - Is the water appropriate for the intended use?
    - Determine water suitability for use in the proposed area.
    - Determine if water can be transferred from one location of the project to another.
- Water Quality Issues
    - Is the chemical makeup appropriate for the intended use?
- Other Types of Water
    - Reclaimed Water
        - Consider if secondary treated or tertiary treated wastewater is appropriate for the intended use.
    - Desalinated Water
        - Treatment and use of a brackish groundwater or seawater.

C. Update

1. *Montana v. Wyoming* (U.S. Supreme Court, No. 137 (undecided as of Jan. 5, 2009))

The State of Montana sued the State of Wyoming in the U.S. Supreme Court to enforce the provisions of the Yellowstone River Compact, entered into and ratified by Montana, Wyoming, and North Dakota in 1950 and consented to by the U.S. Congress in 1951. Montana filed a complaint asking the court to order Wyoming to deliver more water in the Tongue and Powder Rivers and award damages and costs to Montana. The Court asked for briefing from the Solicitor General regarding the importance of the case and the federal issues involved before delving into the details. Developments include the denial of a dismissal motion brought by the State of Wyoming in January 2008. Additionally, on October 20, 2008 the Court has appointed a Special Water Master, Barton H. Thompson, to render an advisory decision for adoption by the Court.

2. ***Phelps v. State Water Resources Control Board*** **(2008) 2008 Cal. Lexis 6744**

On May 30, 2008, the California Supreme Court upheld a $62,000 penalty against persons for illegal pumping in the San Joaquin-Sacramento River Delta. The Supreme Court affirmed the published decision reached in *Phelps v. State Water Resources Control Board* (2007) 57 Cal.App.4th 89 without comment. The penalties were assessed by the SWRCB in 2004 because the parties were found guilty of pumping water from the Delta in violation of their water right permits. The permits contained conditions to protect water quality in the Delta for fish, agriculture and drinking water supplies.

California's water right system sets up priorities for which users are allowed to take and use water when supplies are not sufficient to meet the needs of all users. When there is insufficient water, junior water right holders are required to curtail their diversions so that more senior water right holders have sufficient water to meet their needs. The permits of the defendants included limitations on the defendants' water rights, which require the permit holders to cease pumping when flows are insufficient for senior water rights holders and Delta water quality objectives. Under those circumstances, the state and federal water projects are required to release water from upstream reservoirs to meet those objectives, and some other water users are required to curtail their diversions. The provision (known as Term 91) is designed to protect water used for agricultural irrigation from excessive salinity and to protect Delta water quality for fish and drinking water supplies. The provision is also designed to ensure that the reservoir releases made by the water projects reach the Delta to meet their intended purposes and are not diverted by junior water right holders. The California Supreme Court decision leaves in place a unanimous decision of the Third District Court of Appeal, which had affirmed the SWRCB's enforcement action.

3. ***Nicoll v. Rudnick*** **(2008) 160 Cal.App.4th 550**

On February 27, 2008, the Fifth Appellate Court of Appeal held that water rights should be divided in proportion to the size of the land subdivided or sold rather than the historic water use on each parcel. The case involved land owned by Nicoll that was separated into two lots: the "Nicoll Ranch" lot, comprising 142.79 acres, and the "Nicoll Field" lot, comprising 157.70 acres. In 1902, Nicoll acquired a right to appropriate water via canal to both lots from the Kern River. In 1932, Nicoll Field was foreclosed upon and sold by Nicoll's bank, and was eventually acquired by Rudnick. Nicoll retained ownership of Nicoll Ranch. A dispute arose between Nicoll and Rudnick over the shared water rights. Rudnick claimed that "Nicoll Field" was entitled to 52 percent of the original appropriative right acquired in 1902 because he owned 52 percent of the original property. Nicoll alternatively claimed the historical division of water used between the two lots was 75 percent for Nicoll Ranch and 25 percent for Nicoll Field, and that he was entitled to the 75/25 percent proportion based upon historical use. The trial court awarded 52 percent ownership rights to Rudnick. Nicoll appealed.

The appellate court affirmed as follows: water is a property right that runs appurtenant to the land, and that the adjudicated water right given in 1902 was appurtenant to the entire parcel of property. Therefore, the proportionate use of water before the separation of the two parcels in 1932 did not determine the respective rights between the parties. The Court adopted Rudnick's reasoning and apportioned the water usage based upon the percentage ownership of the original water right to the physical property owned after the foreclosure of Nicoll Field in 1932.

4. *Brewer v. Murphy* (2008) 161 Cal.App.4th 928

This case involved three riparian owners and a dispute over a spring box and pipeline. The riparian owners are listed in order from the lower riparian to the upper riparian: Brewer, Hagg and Murphy/Klein. In 1979, Brewer acquired property in eastern Fresno County. The source of water was a spring box on property owned by Murphy/Klein's predecessor, located roughly one mile away. When Murphy (and later Klein, who acquired a part interest from Murphy) took title, neither claimed they were aware of the spring box or pipeline. Hagg's property sat between Brewer and Murphy/Klein, and it was crossed by the Brewer pipeline. Hagg unilaterally tapped into Brewer's line, leading to litigation between those two parties. Brewer obtained a judgment against Hagg, establishing a waterline easement and terminating Hagg's connection. While this litigation was pending, Brewer filed an application to appropriate water with the SWRCB. Eventually, the SWRCB granted the permit. Brewer sought to obtain formal access to the spring box from Murphy/Klein, but the parties ended up in litigation.

After a judgment in favor of Brewer, on April 3, 2008 the Fifth District Court of Appeal ruled that the evidence was sufficient to find that Brewer was a downstream riparian owner, even though the stream did not flow year round to Brewer's property. The appellate court focused on the openness of use. The court found that the water line, while mostly underground, was visible in limited areas. Additionally, there was evidence that it was visible (if one had occasion to look off the road) as it passed through a road culvert. On the other hand, the spring box was in a remote location, sitting on a ledge and was buried. Murphy/Klein argued that while an easement may exist for the water line, the spring box should be treated differently. However, the appellate court viewed perfection of the pipeline easement as sufficient to also protect Brewer's claim to the water source. The court held the pipeline put a reasonable person on notice of the existence of the spring box.

5. *Solano County Water Agency v. California Dept. of Water Resources* (2008) (Sup. Ct. Sac. County, 2008 No. 2008-00016338)

A lawsuit filed on August 21, 2008 in Sacramento County Superior Court alleges that the Department of Water Resources ("DWR") cannot reduce water deliveries to four northern California counties. The complaint alleges that the original contracts underlying the State Water Project give priority to counties located in the water source's area of origin, the Sacramento River Delta. If the suit is successful, DWR would have to give Napa, Solano, and Butte counties, as well as Yuba City, one hundred percent of their water allocation every year, notwithstanding the existence of a drought. The lawsuit was filed in response to the DWR cutting water supply deliveries by sixty-five percent in response to the current drought gripping the state. The outcome of this lawsuit may have far-reaching effects on the availability of water for existing and future projects in the Central Valley and Southern California. Abbott & Kindermann will keep you updated on major changes in the status of this case.

For more information, see
http://amcaneagle.com/articles/2008/08/21/news/local/doc48ace0e92093c343262370.txt

6. The State of Bay-Delta Science, 2008

On January 8, 2008 CALFED released *The State of Bay-Delta Science, 2008,* which summarizes and synthesizes the Agency's current scientific understanding of the Bay-Delta area. Research on the Bay-Delta system increased dramatically with the creation of the CALFED Bay-Delta Program in 2000 and this new research has both improved the understanding of how the Bay-Delta functions and has challenged some long-held beliefs about the Bay-Delta. This State of Bay-Delta Science report focuses on the public's understanding of the California Delta and what it means for policymaking. The chapters are written by respected scientists from government and academia and details scientific progress in eight areas, including water supply, scientific research, and levee integrity.

For more information, see
http://www.science.calwater.ca.gov/pdf/publications/sbds/sbds_2008_final_report_101508.pdf)

7. SWRCB Issues Strategic Work Plan for Bay-Delta (Resolution 2008-0056)

On July 16, 2008, the SWRCB adopted Resolution 2008-0056 approving a Strategic Workplan for the Bay-Delta. The SWRCB issued the work plan for the Bay-Delta that describes a series of priority activities the Water Boards will pursue over the next five years to address the water supply and environmental crisis in the Bay-Delta. Workplan activities touch on a wide variety of flow-related and water quality actions to better protect the Bay-Delta natural environment, while still protecting diverse public interests. SWRCB staff will provide quarterly updates to the SWRCB on implementation of the strategic workplan and, as appropriate, recommend modifying activities in the workplan to ensure that SWRCB's actions continue to protect beneficial uses in the Bay-Delta.

The Strategic Workplan is controversial for numerous reasons, the most controversial element of which is a plan to fast track construction of a water canal around the Delta with construction commencing in 2011. The canal will deliver water to water contractors south of the Delta. The Department of Water Resources has already stated that it has the legal authority to build the canal without approval from lawmakers or California voters. Stakeholders and others have raised significant objections and will likely turn to the courts for relief if this course is followed.

For more information, see
http://www.waterrights.ca.gov/baydelta/docs/strategic_plan/baydelta_workplan_final.pdf

8. DWR Re-Opens Drought Water Bank For 2009

The DWR is implementing a Drought Water Bank for 2009. The Drought Water Bank will buy water primarily from local water agencies and farmers upstream of the Delta and make it available for sale to public and private water systems expecting to run short of water next year. DWR has initiated dry year water purchasing programs in the past, including drought water banks during the early 1990s, and dry year water purchase programs in 2001-2004. Since 2008 was a critically dry year and extremely low reservoir storage levels are forecast for this fall, DWR expects that some California water suppliers will need to supplement local and imported supplies with water transfers from willing sellers.

For more information, see http://www.water.ca.gov/drought/docs/2009water_bank.pdf.

9. Managing an Uncertain Future - Climate Change Adaptation and Strategies for California's Water

In October of 2008 the DWR released a report detailing strategies for coping with decreased or inconsistent water supply based upon global warming impacts. This report, titled *Managing an Uncertain Future-Climate Change Adaptation and Strategies for California's Water*, recommends a series of adaptation strategies for state and local water managers to improve their capacity to handle change. Many of the strategies will also help adapt water resources to accommodate non-climate demands including a growing population, ecosystem restoration and greater flood protection. Several of the recommendations in this report are ready for immediate adoption, while others need additional public deliberation and development. Some can be implemented using existing resources and authority, while the majority will require new resources, sustained financial investment and significant collaborative effort. Many of California's most important water resource investments remain dependent on bond funding approved by voters. As a result, they are well funded in some years, but underfunded in most. This history of uneven and irregular investment has delayed progress in areas that have the potential to yield substantial gains over short periods of time. DWR presents this report as part of the process of updating the California Water Plan, and as part of the California Resources Agency's draft statewide Climate Adaptation Plan. Overall, this report urges a new approach to managing California's water and other natural resources in the face of a changing climate.

For more information, see http://www.water.ca.gov/climatechange/docs/ClimateChangeWhitePaper.pdf

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STREAMBED ALTERATION AGREEMENTS

A. Regulatory Framework

Streambed Alteration Agreements or Permits

- California Fish and Game Code sections 1600-1616 authorize the Department of Fish & Game ("DFG") to enter into agreements for activities that will divert, obstruct, or change the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any such body of water.

- There is no longer a distinction between agreements with public entities (formerly section 1601) and private entities (formerly section 1603). All agreements are now issued under section 1602.

- Fish and Game Code section 1602 requires any person, state or local governmental agency, or public utility to notify the DFG before beginning any activity that will substantially modify the bed, bank or channel of a river, stream or lake.

B. Update

1. *Environmental Protection Information Center v. California Department of Forestry* (2008) 44 Cal.4th 459

Continuing the litigation saga over the Headwaters Forest in Humboldt County, on July 17, 2008 the California Supreme Court issued a decision over a host of environmental challenges to proposed forestry practices over a large area of remaining redwoods after over 7,500 acres were preserved from logging operations. A portion of the opinion deals with streambed alteration agreements entered into between Pacific Lumber Company and DFG. The complaint, brought by the Environmental Protection Information Center ("EPIC"), presented questions regarding: whether there is a requirement for official findings to be made when DFG approves a streambed alteration agreement; and whether the agreement entered into between DFG and Pacific Lumber was lawful under the relevant statutory authority. The agreement in question broadly identified "covered activities", including timber harvesting and road building, and identified general mitigation measures that Pacific Lumber was required to undergo on any particular project. Further, the agreement stated that additional site-specific agreements would be completed as the course of the harvesting project became more defined.

EPIC claimed that the region-wide streambed alteration agreement was beyond the scope of authority for DFG to enter into. Rather, DFG was required to enter into individual agreements on each streambed that Pacific Lumber entered into. The Supreme Court disagreed. After analyzing the text of the Fish and Game Code section 1603, it found that nothing in the text of the law required DFG to enter into site-specific agreements from the beginning.

Secondly, the Court dismissed the EPIC's claim that DFG was required to display administrative findings before issuing the agreement. Rather, the statutes creating streambed alteration agreements only require a detailed study by DFG before an agreement can be reached. No administrative decision is required, because no public comment or hearing period is required in the statutory scheme. As such, administrative findings, such as required by CEQA, were not required.

2. ***Martin v. Riverside County Dept. of Code Enforcement*** **(2008) 166 Cal.App.4th 1406**

On September 18, 2008, the Fourth District Court of Appeal ran through an array of possible defenses to work undertaken in a seasonal creek. Martin owns property in Riverside County that is bisected by Tucalota Creek. When a spillway washed out in heavy rains, Martin obtained a grant from the Federal Emergency Management Agency ("FEMA") to make repairs. Martin did not obtain a grading permit from the County. Martin was cited by the County under a County ordinance that was a direct adoption of the state housing code. Martin claimed he did not need a County grading permit because it was pre-empted by state and federal law, notably Fish & Game Code, section 1602. At trial, he lost. Although obstruction of streams was addressed in section 1602, the court noted that the State Housing Law expressly required cities and counties to adopt its minimum building standards pursuant to Health & Safety Code section 17910 et seq., and therefore the ordinance was not preempted by Fish & Game Code sections 1600 et seq. Rather, the county ordinance, required by state law, and the Fish and Game Code section were both equally applicable, and there was no pre-emption. Furthermore, even though Martin's grant from FEMA was for emergency repairs, FEMA requires compliance with local permit requirements. Finally, the situation did not constitute an emergency exemption because the flood damage to the spillway had occurred seven months previously, and Martin had an alternative route to the separated property. The appellate court affirmed the trial court's judgment. The ultimate result: Martin was required to pay a $500 fine.

This case illustrates that even though construction permitting has been acquired from one agency, landowners should be careful to obtain permits from all applicable regulatory authorities.

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WETLANDS

A. Regulatory Framework

Federal Clean Water Act (33 U.S.C. § 1251 et seq.)

- The Clean Water Act ("CWA") is a 1977 amendment to the Federal Water Pollution Control Act of 1972, which set the basic structure for regulating discharges of pollutants to waters of the United States.

- The purpose of the CWA is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. (33 U.S.C. § 1251(a).)

- Section 301(a) of the CWA (33 U.S.C. § 1311(a)) generally prohibits the discharge of pollutants into waters of the United States except in accordance with the requirements of one of two permitting programs established under CWA: Section 404 (33 U.S.C. § 1344), which regulates the discharge of dredged and fill material, or section 402 (33 U.S.C. § 1342), which regulates all other pollutants under the National Pollutant Discharge Elimination System ("NPDES") permit program.

Clean Water Act Section 404 (33 U.S.C. § 1344)

- One of the two national permit programs under CWA is the 404 permit program. Section 404 of CWA restricts the "discharge of dredged or fill material into navigable waters at specified disposal sites" without a permit from the U.S. Army Corps of Engineers ("USACE"). (33 U.S.C. § 1344(a)); (33 C.F.R. § 323.2(d)(1).)

- Section 404 authorizes USACE to issue permits for the discharge of dredged or fill material into navigable waters as either standard (individual) or general (nationwide) permits. (33 U.S.C. § 1344(e)(1), (e)(2).)

- Section 10 of the Rivers and Harbors Act restricts activities that could affect the course, location, condition, or capacity of navigable waters, including the construction of structures in, under, or over navigable waters, without a permit from USACE. (33 U.S.C. § 403.)

- Standard (Individual) permits are issued on a project-specific basis, with public notice requirements. Such permits require compliance with the Environmental Protection Agency's ("EPA's") Section 404(b)(1); Guidelines (33 C.F.R. § 320.4(a)(1)) and, if involving federal actions, the National Environmental Policy Act ("NEPA", 42 U.S.C. § 4321 et seq.). *Zabel v. Tabb* (5th Circuit, 1970) 430 F.2d 199. For specific EPA guidelines see 40 C.F.R. § 230.10.

- Environmental assessment and environmental impact statement processes may generate consideration of other federal laws including the Endangered Species Act (16 U.S.C. §§ 1531-1534), the Fish and Wildlife Coordination Act (16 U.S.C. § 662), the Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1276), the Antiquities Act (16 U.S.C. § 433), and the Coastal Zone Management Act (16 U.S.C. §§ 1451-1464.)

- General permits are issued on a nationwide, regional or programmatic basis for like activities that have minimal direct and cumulative effects. NEPA compliance is achieved when the permit is issued for the entire category of authorized actions, and not on a project-specific. (33 U.S.C. § 1344 (e)(1).)

- The term "waters of the United States" includes navigable waters, interstate waters and wetlands, impoundments, tributaries, adjacent wetlands and possibly other waters such as ground water and intrastate wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce. (33 C.F.R. § 328.3.)

B. Update

1. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers* (9th Cir. 2007) 486 F.3d 638 [Cert. granted at 128 S.Ct. 2995]

Coeur Alaska ("Coeur"), a mining company, intended to begin a gold mining project in southeast Alaska. To extract and process the gold ore, Coeur planned to construct a froth-flotation mill, which would allow the gold to bubble to the surface of a tank, but would also result in nearly 1,500 tons of tailings per day. Originally, the tailings would be disposed via a dry tailings facility which would be re-vegetated after the mine closed operations. However, after the price of gold dropped, Coeur decided to dispose of the tailings in a cheaper manner by discharging it into the nearby Lower Slate Lake. Over the 10 to 15 year life of the mine, the discharge would raise the bottom of the lake by 50 feet and kill off all fish and aquatic life. The USACE reasoned that the discharge was a "fill" under CWA section 404 and granted a permit. Environmental groups sued, claiming that the grant of a permit violated section 301 and section 306 of the CWA.

The Ninth Circuit agreed with the environmental groups. CWA section 301 prohibits all discharges of any pollutant except in compliance with the CWA (e.g. issuance of an NPDES permit). It also requires the EPA adopt effluent limitations for point sources. CWA section 306 requires the EPA implement standards of performance for new sources such as the Coeur mining project. The EPA set a zero-discharge standard for gold mines using the froth-flotation process. Coeur and the USACE argued that the discharge would be considered "dredged or fill material" and thus a section 404 permit could be issued and section 301 and section 306 did not apply. They also contended that these sections of the CWA were in conflict. However, the court held that the plain language of the CWA resolved any apparent conflict. The court pointed to the USACE and EPA definitions of fill material which stated that any waste subject to a performance standard or effluent limitation could not be considered fill material. Thus, since the discharge from a froth-flotation mill is considered a pollutant subject to limitations, it cannot also be considered fill under section 404. The court held that the permit was issued in error. The ninth circuit vacated the permit.

Both Coeur Alaska and the State of Alaska petitioned for certiorari. The U.S. Supreme Court granted both petitions to determine whether the activities in this case only require a Section 404 permit, or are subject to more stringent NPDES permits for wastewater discharge under Section 303 of the CWA.

2. ***Bering Strait Citizens for Responsible Resource Development v. United States Army Corps of Engineers*** **(9th Cir. 2008) 511 F.3d 1011**

Alaska Gold Company ("AGC") proposed to operate two open-pit gold mines outside of Nome, Alaska. The Rock Creek Mine Project ("Project") would result in over 15 million cubic yards of fill being placed in nearly 350 acres of wetlands. The two sites for the mines consisted of areas that had been previously mined early in the Alaskan gold rush. Due to the lack of regulations at that time, there was extensive environmental damage. USACE placed various mitigation measures on the Rock Creek Mine Project to mitigate environmental damage from this project as well as damage caused by the earlier mining activities. For example, a creek that had been diverted due to earlier mining activities would be restored to its natural flow. Following preparation of an Environmental Assessment ("EA") and a "Finding of No Significant Impact," USACE granted the permit.

Plaintiffs, Bering Strait Citizens for Responsible Resource Development ("BSC"), brought suit claiming that the permit was invalid because it was issued in violation of the CWA and NEPA. The District Court of Alaska held that USACE had acted according to the law and the permit was valid. BSC appealed. The Ninth Circuit Court of Appeals agreed with the district court's analysis and affirmed the judgment.

Plaintiffs claimed that the section 404 permit was issued in violation of the CWA. BSC alleged three deficiencies under the CWA: 1) USACE failed to adequately consider practicable alternatives; 2) USACE "did not properly consider whether the Rock Creek Mining Project would 'cause or contribute to significant degradation of the waters of the United States';" and 3) USACE "did not require the appropriate mitigation measures."

Under the regulations promulgated by USACE and the EPA, a permit cannot be issued "if there is a practicable alternative to the proposed discharge which would have less adverse impact on the aquatic system." (40 C.F.R. § 230.10, subdivision (a)) The court found that USACE "extensively and properly considered alternatives" and reasonably concluded that the current design offered the best design alternative.

The court narrowed the second CWA issue to "whether [USACE's] decision to issue the permit was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Again, the court refused to enter into an analysis of the factual evidence to reach what it believed to be the proper conclusion. The court focused on the extensive discussion by USACE of the impacts from the project. The court found that USACE had adequately considered the impacts, and its decision was not arbitrary and capricious.

Finally, BSC argued that the mitigation measures were not sufficient because some of them were not fully developed. Specifically, there was one mitigation measure, suggested by the US Fish and Wildlife Service, stating that further mitigation measures would be implemented as the Project advanced. Although the court hinted that this alone would not be adequate mitigation, there were many other mitigation measures that were fully developed and clearly able to be implemented. Additionally, the mitigation measure at issue was not suggested by USACE but by another agency. The court held that the mitigation measures satisfied the requirements under the CWA.

3. ***Fairbanks Northstar Borough v. United States Army Corps of Engineers*** **(9th Cir. 2008) 543 F.3d 586**

The Ninth Circuit held that USACE determination that a Clean Water Act section 404 wetlands permit would be required is not a final agency decision. Consequently, USACE's jurisdictional determination ("JD") cannot be reviewed by the courts under the Administrative Procedures Act ("APA") (5 U.S.C. § 704), if the JD concludes waters are present.

The City of Fairbanks, Alaska began construction plans to develop 2.1 acres of property for a community park ("Property"). In October 2005, the City wrote to the USACE to ask for its review and determination that it could place fill material on the Property without a permit. It asked USACE to provide a detailed, scale drawing showing the wetlands in relation to the lot boundaries. The USACE district engineer thereafter issued a preliminary JD finding that the City's entire parcel contained wetlands. The City then requested that USACE provide a final JD which asserted jurisdiction. An appeal occurred to the division engineer. In December 2005, the USACE division engineer obliged: "this approved jurisdictional determination is valid for a period of five years." The City took a timely administrative appeal, which USACE rejected in May 2006. In August 2006, the City filed suit to set aside the approved JD by arguing that USACE could not, under its existing regulations, find that the property was a wetland. USACE filed a motion for judgment on the pleadings, alleging that, under the APA, an approved JD is not, in and of itself, a final decision from which an appeal can be taken. The trial court agreed with USACE, and dismissed the complaint on the grounds that the case was not yet justiciable under the APA. The instant appeal to the Ninth Circuit followed.

The Ninth Circuit, recognizing that this is a matter of first impression, first laid out the decisional test for examining what constitutes final agency action, not under USACE regulations, but under the APA:

> "First, the action must mark the consummation of the agency's decision-making process—it must not be of a tentative or interlocutory nature. Second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." (*Bennet v. Spear* (1997) 520 U.S. 154, 177-178.)

Using this framework for analysis, the Court agreed with the City that the USACE's JD constituted a final agency decision on the jurisdictional subject matter, but under the *Bennet* two-part analysis, it did not impose an obligation, deny a right, or fix some legal relationship. The Court reasoned that because the City did not yet suffer some definitive legal injury until it went through with the permit process, there was no final agency decision sufficient for judicial review. Citing to *Bennet* and other supporting case law, the Court explained that the USACE's JD was not an "action…by which 'rights or obligations have been determined,' or from which legal consequences will flow." *Bennett*, 520 U.S. at 178.

The City countered by pointing to situations in which the determination has consequences: First, it prevents the City from claiming in mitigation that it acted in good faith if it gets penalized for construction without a permit by USACE; Second, that it requires the City to obtain a permit before proceeding with the project; Third, it deprives the City of a JD stating that no "waters of the United States" were on the property, which would have protected the City from a later enforcement action by USACE (referred to in the case as a 'negative' JD). The court analyzed each of these arguments in turn, explaining that the "legal" consequences, referred to by the City, were actually factual

risks involved in following the permit process. While the approved JD makes future contentious issues within the permit process more likely, the JD does not fix the legal status between the parties. The approved JD by USACE only informs the City that USACE both believes a permit application is necessary for the project, and that it has jurisdiction over the Property under the CWA.

4. *U.S. v. McWane* (No. 08-223) Denied Review in Supreme Court, No Clarification Of *Rapanos* Forthcoming

The Eleventh Circuit, in a decision date October 24, 2007, published a ruling that created a direct conflict between circuit courts. In *U.S. v. Robison/McWane* (11th Cir. 2007) 505 F.3d 1208, the Eleventh Circuit ruled that the federal law's ban on pollution into "waters of the United States" does not apply to wetlands unless they have a "significant nexus" to traditional streams. The Eleventh Circuit found the legal analysis in a separate opinion in *Rapanos,* authored by Justice Anthony M. Kennedy, as the controlling examination of non-contiguous wetlands. Other circuits have proclaimed that both tests, that elucidated by the Scalia minority, and Justice Kennedy's separate opinion, which suggested a "substantial nexis" test, can be used to determine the scope of USACE jurisdiction over non-contiguous wetlands of the United States. The USACE agrees with these other circuits that either legal analysis elucidated by Scalia or Kennedy can be used.

On December 1, 2008, the U.S. Supreme Court denied discretionary review of the case. The U.S. government, arguing that the lower courts have fallen into confusion and disagreement over federal power to protect wetlands, has petitioned the Supreme Court to clarify its ruling two years ago in *Rapanos v. U.S.* (2006) 547 U.S. 715.

5. John Rapanos Reaches Settlement with U.S. Attorney General's Office Over Wetlands Fill Dispute

On December 30, 2008, John Rapanos, the now infamous Michigan developer who was charged with multiple violations of the Clean Water Act, and whose case led to the precedent-setting *Rapanos v. U.S.* Supreme Court case in 2006, has settled his lawsuit with the U.S. government. Rapanos and other defendants have agreed to pay a $150,000.00 penalty. The settlement also requires Rapanos to construct an additional 100 acres of wetland and buffer areas to make up for the 54 acres that were filled. Separately, 134 acres will be preserved in a conservation easement, with the state of Michigan holding the property. Rapanos did not admit any wrongdoing.

6. EPA And USACE Issue Final Rule on Compensatory Mitigation under Section 404 of the Clean Water Act

On March 31, 2008, the EPA and the USACE issued a new final rule on compensatory mitigation for impacts to "waters of the United States" under Section 404 of the Clean Water Act. This final rule was published in the Federal Register on April 10, 2008. Under the CWA, a 404 permit applicant must first take all "appropriate and practicable steps" to minimize impacts to aquatic resources. (40 CFR section 230.10(d).) If there are

unavoidable impacts, however, the CWA requires compensatory mitigation to replace any lost aquatic resources. Compensatory mitigation typically is accomplished by three methods:

1. Obtaining credits from a mitigation bank;
2. Payments to an in-lieu fee program, usually administered by a government agency or non-profit organization; and
3. The permittee restores, establishes, or preserves an aquatic resource either on-site or at another location.

The new rule consolidates the previous guidance documents, making it easier for permittees to understand and follow. The new rule also requires mitigation plans to be prepared by permittees. The mitigation plans must all include the same twelve components. These components include information such as the project objectives, site selection criteria, and a description of the long-term maintenance plan. The rule also requires public notice and comment for standard permits as well as a brief statement describing how impacts to aquatic resources will be avoided, minimized, and any compensation.

Most importantly, the new compensatory mitigation rule establishes a hierarchy for mitigation. The most preferred method is mitigation bank credits, followed by in-lieu fee programs, and finally permittee-responsible mitigation. The regulations are designed to help meet the national goal of "No Net Loss" of wetlands. The rule is effective June 9, 2008.

For more information, see 73 Fed.Reg. 19,593.

7. **USACE Releases Mitigation Bank Templates (Public Notice Number: 200500420)**

On May 9, 2008, the Sacramento, San Francisco, and Los Angeles Districts of the USACE released standard templates for mitigation banks. Included are templates for:

- Bank Enabling Instrument ("BEI")
- Conservation Easement
- Management Plan
- Property Assessment and Warranty
- Various Checklists

These templates were developed to address concerns over the long timelines for development and approval of individual banks. It is hoped that the templates will give consistency to the process for both bank proponents and the Interagency Review Team. Given the recent issuance of final rules regarding compensatory mitigation and the prioritization of the use of mitigation banks, these templates will be useful to those wishing to establish new banks. Banks can be developed to provide mitigation for impacts from development in navigable waters or discharge of dredged or fill material pursuant to a Section 404 permit.

The templates reflect current regulations and policies from all involved agencies. This includes the USACE, the U.S. Fish and Wildlife Service, the National Marine Fisheries Service, the Natural Resources Conservation Service, the EPA, the California Resources Agency, and the California Department of Fish and Game.

Full drafts of the templates can be found at the USACE's website: http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/banking.html.

8. USACE Changes Processing Procedures for Jurisdictional Determinations for the Sacramento District and other District Offices (SPK-2008-01557)

On November 7, 2008, the Sacramento District of the USACE changed processing procedures in an attempt to streamline the process to receive JDs or permit authorizations. The Sacramento District will now automatically assume that an applicant electing to seek permit authorization based on a preliminary JD has voluntarily waived or set aside questions over jurisdiction unless an approved JD is specifically requested in writing. Now, permit decisions would generally be made on the basis of the preliminary JDs, even though USACE retains the right to issue an approved JD in specific instances. Permit decisions include computation of impacts, compensatory mitigation requirements, and other resource protection measures. USACE further asserts that authorization for projects may be based on no "official" JD of any type in appropriate circumstances, such as general inquiries or authorizations for non-reporting general permits. General procedures for permit denials, or circumstances where an approved JD are requested by an applicant, remain the same.

For more information, see http://www.spk.usace.army.mil/pub/outgoing/co/reg/pn/20080 1557-pn.pdf

9. EPA and USACE Issue Revised Guidance Letter to *Rapanos*

On December 2, 2008, USACE, in conjunction with the EPA issued a guidance letter directly addressing implementation of *Rapanos v. U.S.* (2006) 126 S.Ct. 2208, by the agencies in making JDs. While not making radical changes, the new guidance letter further defines over what waters USACE will categorically assert jurisdiction, and what waters USACE will individually evaluate on a fact-specific basis when making JDs. The following are the most substantive changes to USACE policies:

Clarifies how to determine the reach of "Traditional Navigable Waters"

The revised guidance letter clarifies that Traditional Navigable Waters ("TNWs") are broader than the definition contained in the Rivers and Harbors Act definition of waters, and TNWs, include waters that have been determined navigable in fact by the courts, are currently being used or have historically been used for commercial navigation, or which may be practicably used for future commercial navigation.

Clarifies the Regulatory Term "adjacent wetlands"

The revised guidance clarifies that the term "adjacent wetlands" are those wetlands that have an unbroken hydrologic connection to jurisdictional waters, or is separate from those waters by a berm or similar feature, or if it is in reasonably close proximity to a jurisdictional water.

Refines the Concept of "relevant reach" in Determining Tributary Flow

The revised guidance permits flexibility when the individual stream's outflow is not representative of the entire reach of the stream in determining whether it is relatively permanent. If the downstream limit is not representative of the stream reach as a whole, the flow regime that best characterizes the applicant's reach should be used.

Clearer Definitions of the Scope of Regulated Waters Under Section 404

USACE further re-stated the types of waters it will continue to assert jurisdiction over:

- TNWs subject to the clarified definition, *supra*.

- Wetlands adjacent to navigable waters. Under USACE's definition, "adjacent" means "bordering, contiguous, or neighboring." A continuing surface connection is not required. Wetlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are adjacent wetlands. Adjacent wetlands will be considered waters if the U.S., if they satisfy one of the following criteria:

    - If there is an unbroken surface or shallow subsurface connection to jurisdictional waters. The hydrologic connection may be intermittent.
    - If the wetlands are physically separated from jurisdictional waters by man-made dikes or barriers, natural river berms, beach dunes, and the like.
    - Their proximity to jurisdictional water is reasonably close, supporting the science-based inference that wetlands have an ecological connection with jurisdictional waters.

- Non-navigable tributaries of traditional navigable waters that are relatively permanent (either they flow year-round or have continuous seasonal flow).

    - This does not include ephemeral tributaries which flow only in response to precipitation and intermittent streams which do not typically flow year-round or have continuous flow at least seasonally. These tributaries will be evaluated using significant nexus factors.
    - Wetlands that directly abut or are adjacent to such tributaries.

Waters that do not fit into this category will be decided on a case-by-case basis using fact-specific, significant nexus analysis. This includes:

- Non-navigable tributaries that do not typically flow year-round or have a continuous seasonal flow.
- Wetlands adjacent to such tributaries.
- Wetlands adjacent to but that does not directly abut relatively permanent non-navigable tributaries.

Ephemeral waters in the Arid West that serve downstream tributaries, and may serve as a transitional area between the upland environment and TNWs may be subject to regulation. Ephemeral waters in these regions that may serve to decrease sediment runoff or increase biological nutrient supply (i.e. serve important hydrologic or ecological functions) are likely still subject to regulation.

Factors the USACE will use to evaluate whether a water is subject to Section 404 Permitting under the *Rapanos* Decision.

If the water is subject to the significant nexus test (i.e., it is not a categorical water of the U.S., see above) USACE will evaluate accordingly. A significant nexus test will assess the flow characteristics and functions of the tributary itself and the functions performed by all wetlands adjacent to the tributary to determine if in combination they significantly affect the chemical, physical and biological integrity of downstream TNWs. Significant nexus includes USACE's consideration of hydrologic and ecologic factors of the water.

Waters that are not covered under Section 404 of the Clean Water Act

USACE will not generally assert jurisdiction over:

- Swales, gullies, small washes, and those land features which are characterized by low, infrequent or short duration water flows.
- Ditches (including roadside ditches) excavated wholly in and draining only uplands and that do not carry a relatively permanent flow of water.
- These physical features may be regulated by other CWA sections.

For more information, see http://www.epa.gov/owow/wetlands/pdf/CWA_Jurisdiction_Following_Rapanos120208.pdf

10. Proposed Amendment to Appendix C of 33 CFR 325 Stalled Due to Disagreement over Implementation

In 1990, the Corps Regulatory Program published public Appendix C, which addresses the implementation of procedures to comply with Section 106 of the National Historic Preservation Act ("NHPA"). These procedures were amended in 2002 and again in 2005. The Advisory Council on Historic Preservation's implementing regulations were revised in 2000 and 2002. The impetus behind the recent proposed amendments was to bring the

Corps Regulatory Program into line with the Advisory Council's regulatory rulemaking regarding historical properties. (33 CFR 800) The amendments were submitted to the Advisory Council in February of 2008. Substantial changes were proposed by the Advisory Counsel and no agreement has been reached.

For more information, see http://www.usace.army.mil/cw/cecwo/reg/hptc/conpaper protect histprop_may09.pdf.

Notes:

WATER QUALITY

A. Regulatory Framework

Federal Clean Water Act (33 U.S.C. § 1251 et seq.)

- The purpose of Clean Water Act ("CWA") is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. (33 U.S.C. § 1251(a).)

- Section 301(a) of CWA generally prohibits the discharge of pollutants into waters of the United States except in accordance with the requirements of one of the two permitting programs established under CWA: Section 404, which regulates the discharge of dredged and fill material; or section 402, which regulates all other pollutants under the NPDES permit program.

California Porter-Cologne Act (Wat. Code, § 13000 et seq.)

- The Porter-Cologne Act was used as the basis of the 1972 Federal Clean Water Act. The Porter-Cologne Act entrusts the State Water Resources Control Board ("SWRCB") and the nine Regional Water Quality Control Boards ("RWQCBs") with protecting California's waters. (Wat. Code, § 13001.)

- The RWQCBs are responsible for developing Basin Plans and regulating all pollutant or nuisance discharges that may affect either surface water or groundwater in the region's jurisdiction. (Wat. Code, § 13240.) Any person proposing to discharge waste within any region must file a report of waste discharge with the appropriate regional board. (Wat. Code, § 13260.)

- No discharge may take place until a RWQCB issues waste discharge requirements ("WDRs") or a waiver of the WDRs. (Wat. Code, § 13264.)

WDRs

- Comprehensive program under Porter-Cologne Water Quality Act (Wat. Code, § 13264 et seq.) regulates point and non-point source discharges of waste to state surface and groundwaters.

- "Waste" is broadly defined, and RWQCB assertion of regulatory authority to require WDRs is becoming more expansive; e.g., industrial waste water fully contained in concrete lined holding tank in the ground is deemed a point source discharge to land. Swimming pools are considered a discharge to land.

- Some general waivers from WDRs exist (e.g. agricultural waiver).

- WDRs require reporting and monitoring according to RWQCB and statutory criteria for constituent limits. (Wat. Code, § 13260 et seq.) WDRs can be refused, thus prohibiting the applicant's necessary discharge.

- Examples triggering the need for WDRs include erosion from soil disturbance, discharge of process wastewater not discharging to a sewer (factories, cooling water, etc.).

Clean Water Act Section 401: Federal Action Impact on State Water

- Section 401 of CWA requires each federal agency authorizing an activity that could affect state water quality to obtain state certification that the proposed activity will not violate state and federal water quality standards. (33 U.S.C. § 1341.)

    - Water quality standards include beneficial uses of water, water quality objectives and anti-degradation policy. (33 U.S.C. § 1313.)

    - In California, the SWRCB and its RWQCBs are responsible for issuing water quality certification.

- The California Porter-Cologne Water Quality Control Act restricts any person (subject to the jurisdiction of the state) from discharging waste or proposing to discharge wastewater to land or groundwater that could affect the quality of the waters of the state without a permit from the RWQCB (known as WDRs). (Wat. Code, § 13264.) (Discussed above.)

Relevance

- Section 401 is triggered by any activity that requires a permit from a federal agency for a project that could affect state water quality, including section 404/section 10 permits from USACE. (33 U.S.C. § 1341(a).) For example:

    - Initial site development (including, e.g., vineyards, processing facilities and support buildings that are located in waters of the United States).

    - Facility expansion in waters of the United States.

    - Improvements to drainage, reservoir or other water facilities that are in waters of the United States.

- WDRs are triggered by land discharges from initial site development, facility expansion, and improvements that could affect water quality of waters of the state (not necessarily waters of the United States under USACE jurisdiction (e.g., certain isolated wetlands).)

Clean Water Act Section 303(d); Total Maximum Daily Load ("TMDLs")

Regulatory Framework

- Section 303(d) of the CWA requires each state to identify waters that will not meet applicable water quality standards after implementation of technology-based point source controls, and to rank the identified waters, taking into account the severity of pollution and designated beneficial uses of the waters. This ranking list of waters not meeting water quality standards or "impaired waters" is referred to as the "303(d) list." (33 U.S.C. § 1313(d).)

- Section 303(d) also establishes a process to set TMDLs for these waters to provide for more stringent water quality-based controls when required federal, state, or local controls are inadequate to achieve water quality standards. (33 U.S.C. § 1313(d).)

- A TMDL specifies the maximum amount of a pollutant that a water body can receive and still meet water quality standards, and allocates pollutant loadings among point and non-point pollutant sources. By law, the U.S. Environmental Protection Agency ("EPA") must approve the list of waters and TMDLs established by states, territories and authorized tribes. In essence, TMDLs are a "pollution budget" for an impaired water body and set a limit on the amount of pollutants discharged into the water body. These limits are enforceable through permits. (33 U.S.C. § 1313(d)(2).)

Relevance

- TMDLs amend the applicable basin plan once they are adopted by the regional board.

Clean Water Act Section 402; National Pollutant Discharge Elimination System ("NPDES") Program

Regulatory Framework

- Section 402 of the CWA authorizes states to develop an NPDES program to permit "point source" discharges of pollutants into surface waters of the United States, including:

    - Industrial facilities discharges,

    - Municipal stormwater discharges, and

    - Stormwater discharges associated with construction projects over a certain acreage. (33 U.S.C. § 1342(p).)

- In the past, only construction projects that directly disturb five or more acres were required to comply with the state's general construction permit. Today, since March 2003, operators disturbing one or more acres during construction must obtain NPDES coverage by filing for a construction general permit. (40 C.F.R. 9, 122-124.) New regulations published on July14, 2008 extend construction permit requirements similar to the 2003 NPDES general construction permit. (73 Federal Register 135)

- According to Section 402, discharge from any point source is unlawful unless the discharge is in compliance with a NPDES permit.

- NPDES permits can be individual (project or activity specific) or general (California's construction stormwater NPDES permit).

- In California, the SWRCB and its RWQCBs are responsible for administering the NPDES permit process.

Examples

Permits are required for:

- Runoff from construction activities;

- Discharges to surface water from processing facilities (e.g., "gray water", silvicultural point sources).

- Bilge water from large ships.

B. Update

1. *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 2008) 542 F.3d 1235

The Ninth Circuit has confirmed that, once the EPA has published a determination a particular activity is a pollution source, it has a mandatory duty to publish Effluence Limitation Guidelines ("ELGs") within three years of that publication under section 304 of the CWA.

In March of 1999, the EPA published in the Federal Register rulemaking to address pollution from stormwater discharge and its intent to establish ELGs for the construction and development industries to support state and local requirements for erosion and sediment controls and storm water best management practices. (64 Fed.Reg. 15, 158.) In 2000, EPA published final notice of an effluent guidelines plan, listing construction activities as a new source-point category. In June 2002, the EPA issued a proposed rule with three alternative guideline options to address storm water discharge.

On April 26, 2004, the EPA published its final action under the caption "Proposed Rule: Withdrawal", which effectively ended EPA promulgation of ELGs for the industry, instead relying on existing state and local government regulation for stormwater control. The EPA's stated reasoning was that the cost was overtly prohibitive to construction, that permits were already required for 80 to 90 percent of construction sites in the country under the NPDES system, and that discharge from construction activity are generally not characterized as "new sources". In February 2006, the EPA again did not identify the construction industry as new source pollution because discharges consisted of "conventional pollutants" not subject to regulation.

The Natural Resources Defense Council ("NRDC") and a number of states filed suit to challenge the EPA's de-listing of the construction industry as a new point source, and its refusal to promulgate regulations over new point sources from the 2002 publication. Section 304(m) of the CWA requires the EPA to promulgate regulations within three years after publishing a plan to regulate newly established point sources. The NRDC claimed that the EPA had a mandatory duty to promulgate ELGs and New Source Pollution Standards ("NSPS") three years after it published a new source effluent guideline plan was published in 2002. After clearing standing and jurisdictional hurdles, the NRDC filed for summary judgment in the district court and won. The district court entered judgment requiring the EPA to promulgate guidelines by December 2009. The EPA made two central arguments on appeal: that it was not mandatory to publish ELGs once it had published the construction industry as a pollution source, and that it had the authority to de-list published pollution sources after the fact. Both arguments failed.

The Ninth Circuit upheld the permanent injunction requiring the EPA to promulgate regulations establishing effluent limitation guidelines and new source performance standards.

2. *Northwest Environmental Advocates v. U.S. EPA* (9th Cir. 2008) 537 F.3d 1006

Water released from the ballast holds of large ships has been implicated in spreading invasive species throughout the United States, including the Great Lakes and California. States and environmental organizations have long argued that the EPA was shirking its duty to regulate these discharges. The EPA's regulation on the subject exempts ballast discharges from requiring a permit under the CWA. Environmental groups filed suit to challenge the EPA's regulatory exemption. A lower court decision sustained the challenge, which effectively required the EPA to regulate ballast water. The Ninth Circuit affirmed.

The EPA's challenged regulation, 40 CFR section 122.3(a), provides that vessel discharges into the navigable waters of the United States do not require permits. The lower court concluded that EPA was required to regulate these discharges and surpassed its authority under the CWA. In exempting these discharges from permitting requirements, the district court vacated section 122.3(a). The appellate court noted that the EPA was in the process of formulating regulations for ship ballast discharge:

> "The EPA informed this court at oral argument that it has been proceeding in accordance with the district court's order. We anticipate that in formulating a new regulation to replace § 122.3(a) the EPA will take advantage of the flexibility of the NPDES permitting process. For example, we take judicial notice of the fact that, in its request for comments, the EPA has indicated that "use of general permit(s) would appear to be an attractive possibility." Development of [NPDES] Permits for Discharges Incidental to the Normal Operation of Vessels, 72 Fed. Reg. 34,241, 34,247 (June 21, 2007).

The case is only one of many activities surrounding ballast water and vessel discharge regulatory activity. A federal law, H.R. 2830, is in the works which would require ocean vessels coming to any U.S. port to install treatment technology to clean their ballast water by as early as next year. EPA has also proposed a Vessel General Permit ("VGP") for large commercial and recreational vessels.

3. *Our Children's Earth Foundation v. U.S. EPA* (9th Cir. 2008) 527 F.3d 842

Our Children's Earth Foundation ("OCEF") and other environmental groups filed a citizen suit under the CWA, alleging that the EPA failed to satisfy a statutory mandate requiring the EPA to regularly review effluent guidelines and limitations in a timely manner in accord with technology-based standards under section 304 of the CWA. Specifically, OCEF claimed that EPA violated its statutorily-mandated duties by abandoning technology-based review in favor of hazard based review; neglecting to identify new polluting sources; and failing to publish timely plans for future reviews. The district court granted judgment for the EPA, finding that the challenged inaction on the part of the agency were discretionary, non-mandatory actions.

On appeal, and after analyzing the relevant statutory requirements, the Ninth Circuit agreed with the trial court's finding: "[a]bsent some provision requiring EPA to adopt one course of action over the other, we can only conclude that EPA's choice represented an exercise of discretion." (*Farmers Union Cent. Exch. v. Thomas* (9th Cir. 1989) 881 F.2d 757, 761.) After reviewing a range of complicated statutory history to determine if any particular mandates were required of the EPA, the court refused to find any such duty. The EPA was under no mandatory duty to update its technology-based review every five years, or to identify new polluting sources.

4. *Center for Biological Diversity v. Marina Point Development, Inc.* (9th Cir. 2008) 535 F.3d 1026

On August 6, 2008, the Ninth Circuit ruled that before a private enforcement action under the CWA can be undertaken, private litigants must serve a 60-day notice on all the defendants, the responsible agency, such as the Fish and Wildlife Service or USACE, and the state in which the violation is located, and the appropriate government agency must have failed to exercise their enforcement responsibility. The 60-day notice must provide enough specific information to permit the recipient to identify the law or standard being violated, the activity alleged to constitute the violation, the person responsible for the violation, and the date(s) and location of the alleged violation. (40 CFR 135.3(a).) The purpose of the notice requirement is to allow the responsible agency to pursue proper action, without burdening the courts with additional citizen suits. The notice also gives the alleged violator an opportunity to bring itself into complete compliance with the CWA and render unnecessary a citizen suit. Failure to comply with the notice requirements strips a district court of jurisdiction to hear the lawsuit.

In this case, several 60 day notices were served on the defendants, who were in the process of developing lakefront property located on Big Bear Lake, California. The notices claimed violations of Section 404 of the CWA, without any of the necessary detail. Subsequent to the notices being issued, the Corps issued a cease and desist order and an initial corrective measure order to Marina Point. Despite these orders from the Corps and Marina Point's efforts to comply with them, plaintiffs continued to litigate the case. They filed their enforcement action and eventually won at trial under the CWA. Marina Point Development appealed the decision.

The Ninth Circuit reversed the district court's ruling and vacated the judgment. The court explained that the notices were both insufficient in form and in effect by prompt USACE action:

> The notices were insufficient at their inception regarding wetlands and possible § 402 violations, and to the extent that they were sufficient, if barely so, as to possible § 404 violations, their efficiency was limited by prompt Corps and Marina Point action. In light of the fact that the Corps and Marina Point did act to cease the activities that the Center claimed were wrongful and even acted to effect ongoing repairs for any problems caused by past activity, the district court did not have jurisdiction to hear the case.

5. *Oregon Natural Desert Association v. United States Forest Service* (9th Cir. 2008) 2008 U.S.App.Lexis 24980

This case involves a challenge to the U.S. Forest Services' alleged failure to comply with Section 401 of the CWA in its issuance of grazing permits on Forest Service Lands. Oregon Natural Desert Association ("ONDA") sought to limit or prohibit the granting of grazing permits on federal lands located in eastern Oregon. They claimed that the Forest Service was required to obtain a Section 401 permit before granting grazing rights to ranchers. In the district court, the Forest Service moved for judgment on the pleadings, claiming that the case would essentially constitute a re-hearing of a case involving the same facts as the ones presently before the court. *(Oregon Natural Desert Association v. Thomas* (9th Cir. 1996) 940 F.Supp. 1534.) The essential claim made by the ONDA on appeal was that waste emitted by grazing livestock on forest service lands constitutes a "discharge" under the meaning of the CWA. ONDA further claimed that, because of case law that had been published after the *Thomas* decision that arguably expanded the meaning of "discharge" to include water releases from dams, the lawsuit should be allowed to proceed.

After analyzing the case presented by ONDA, the Ninth Circuit upheld the dismissal of the case under principals of stare decisis, concluding that the existence of negative case law prohibited ONDA from re-litigating the lawsuit.

6. *California Sportfishing Protection Alliance v. State Water Resources Control Board* (2008) 160 Cal.App.4th 1625

Deer Creek is a valley seasonal stream that meanders through El Dorado and Sacramento Counties before meeting with the Cosumnes River. Deer Creek had been designated a cold water stream suitable for trout and salmon. Because of this designation, temperatures from point sources in the stream must stay within a designated range. The Deer Creek Wastewater Treatment Plant discharges effluent water into the creek year round, causing water temperatures to exceed the maximum temperature in the basin plan. The treatment plant had been working with the regional water quality board, but prohibitive cost and analysis by the regional board led to the conclusion that water quality standards were to difficult to attain. The Regional Water Quality Control Board ("RWQCB") eventually approved a site-specific plan amendment which permitted the treatment plant to discharge water exceeding maximum temperature requirements for cold water species into Deer Creek. In protest, the California Sportfishing Protection Alliance ("CSPA") filed suit, alleging that the regional board's decision to amend the temperature requirements was not supported by the administrative record.

The appellate court analyzed the information presented at the trial level. After a review of the evidence, the court found that the RWQCB had conflicting evidence presented to it in deciding to issue the permit amendment. The court recognized that its oversight over the discretionary functions of the RWQCB was limited to determining if there was no rational basis for the decision. Here, even though CSPA pointed to conflicting facts in the record regarding the existence of cold-water fish in Deer Creek, the RWQCB determination that there was no sustainable population of cold-water fish in the creek could not be over-ruled by the courts. Judicial review of RWQCB decisions are permitted only if its decisions are "arbitrary", or not based on credible evidence. The court stated that the PCA "requires the regional board to set water quality objectives at levels that provide for the "reasonable protection of beneficial uses of water or the prevention of nuisances in the specific area." (*County of Sacramento v. State Water Resource Control Board* (2007) 153 Cal.App.4th 1579) The RWQCB decision that an amended site-specific temperature amendment was sufficiently protective of fish species in Deer Creek was upheld.

7. US EPA Publishes Final Rule Exemption for Water Transfers under the NPDES System (40 CFR 122)

On August 12, 2008, the EPA issued a regulation clarifying that water transfers are not subject to regulation under the National Pollutant Discharge Elimination System ("NPDES", permitting program). The rule, which took effect on August 12, 2008, defines water transfer to mean "an activity that conveys or connects waters of the United States without subjecting the transferred water to intervening industrial, municipal, or commercial uses." Water transfers are excluded from regulation under the CWA and do not require NPDES permits. Farmers, municipalities, and utilities that move water from one body to another for irrigation, municipal supplies, and power generation most likely will not need a pollution control permit from the EPA. A lawsuit objecting to the rule has recently been filed. The final rule was published in the federal register at 73 CFR 33708.

For a copy of the EPA's rule and a description, see http://www.regulations.gov/fdmspublic/component/main?main=DocumentDetail&o=0900006480623db6.

8. US EPA Publishes Proposed Rule Regulating Runoff from Larger Construction Sites (73 Fed. Reg. 72562, 72569)

On November 28, 2008, the EPA published for comment a proposed rule that affects all construction activity. The proposed regulations tier the level of regulation based upon construction site size. The proposed ELGs would require stormwater discharges from certain construction and development sites to meet effluent limitations designed to reduce the amount of sediment, turbidity, Total Suspended Solids and other pollutants in stormwater discharges from the site. Sites disturbing ten or more acres at one time would be required to install a sediment basin to contain and settle sediment from stormwater runoff. The proposed rule would require minimum standards of design for sediment basins; however, alternatives that control sediment discharges in a manner equivalent to sediment basins would be authorized where approved by the permitting authority. The regulations would also require all construction sites to implement erosion and sediment control best management practices ("BMPs") to manage stormwater runoff. The proposed rule will affect regulations contained at 40 CFR 450.

The public comment period on the proposed rule ends February 26, 2009.

9. State Water Resource Control Board Issues Final Policy for Compliance Schedules In NPDES Permits

On April 18, 2008, the SWRCB amended its policies with regard to compliance schedules for NPDES permits. The stated intent of the SWRCB is that compliance schedules for NDPES permits only be granted when the discharger must implement actions to comply with a more stringent permit limitation, such as designing and constructing facilities or implementing new or significantly expanded programs and securing financing, if necessary, to comply with permit limitations. The compliance schedule will only apply to dischargers implementing new, revised, or newly interpreted water quality objectives or criteria in water quality standards, and that any schedules are granted for the minimum amount of time necessary to achieve compliance.

For more information see http://www.swrcb.ca.gov/board_decisions/adopted_orders/resolutions/2008/rs2008_0025.pdf.

10. State Water Resources Control Board Publishes Draft Policy For Use of Recycled Wastewater

On February 15, 2008, SWRCB staff circulated a previous version of the draft staff report and the proposed Policy. On September 2, 2008, a group of recycled water stakeholders presented a revised policy to the SWRCB, which directed staff to work with the stakeholders to prepare the revised Recycled Water Policy for SWRCB consideration at the January 6, 2009 board meeting. The proposed final policy may adopt the following recycled water goals for California:

- Increase the use of recycled water over 2002 levels by at least one million acre-feet by 2020 and by at least two million acre-feet by 2030.
- Increase the use of stormwater by at least 500,000 acre-feet over use in 2007 by 2020 and by at least one million acre-feet by 2030.
- Increase the amount of water conserved in urban and industrial uses by comparison to 2007 by at least 20% by 2020.
- Included in these goals is the substitution of as much recycled water for potable water as possible by 2030.

For more information, including a copy of the draft policy, see http://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/

Notes:

OAK WOODLANDS LAW AND POLICY

A. Regulatory Framework

1. State Statutes

Oak Woodlands Mitigation Under CEQA (Pub. Res. Code, § 21083.4)

- Section 21083.4 requires a county to determine if a project will result in a conversion of oak woodlands that will have a significant impact on the environment. (Pub. Res. Code, § 21083.4(b).)

- The section defines oak as a native tree species in the genus Quercus, not designated as Group A or Group B commercial species pursuant to the regulations of the State Board of Forestry & Fire Protection section 4526, and that is five inches or more in diameter at breast height. (Pub. Res. Code, § 21083.4(a).) However, "oak woodlands" is not defined and has not been defined by regulations. The Department of Forestry & Fire Protection appears to use the definition provided in the Oak Woodlands Conservation Act (Fish & G. Code, § 1363(a)), but this is subject to change since no rules or regulations have been passed.

- If the project will have a significant impact on the environment through the conversion of oak woodlands, the impact must be mitigated in one or more of the following ways (Pub. Res. Code, § 21083.4(b)(1)-(4)):

  a) Conserve oak woodlands through conservation easements;

  b) Plant appropriate number of trees, but this can only account for up to half of the mitigation requirement;

  c) Contribute funds to the Oak Woodlands Conservation Fund; and

  d) Other mitigation measures developed by the county.

Professional Foresters Law (Pub. Res. Code, § 750 et seq.)

- Developers must also be wary of the Professional Foresters Law requiring that only Registered Professional Foresters engage in the practice of forestry defined as the practice of managing forested landscapes and the treatment of the forest cover in general. Exceptions to this requirement include certain professions that have an expertise in the area such as geologists. Although it is not explicitly stated in the oak woodlands mitigation statute (Pub. Res. Code, § 21083.4), the Professional Foresters Law might apply to the project, requiring a Registered Professional Forester to be involved in the mitigation process. (Pub. Res. Code, § 750 et seq.)

Oak Woodlands Conservation Act (Fish & G. Code, § 1360 et seq.)

- The Oak Woodlands Conservation Act established the Oak Woodlands Conservation Fund in order to promote the conservation of oak trees and the habitat they sustain. (Fish & G. Code, § 1363(a).)

- Oak woodlands are defined as an oak stand with a greater than ten percent canopy cover or that may have historically supported greater than ten percent canopy cover. (Fish & G. Code, § 1363(a).)

- The funds may be used as grants for the purchase of oak woodlands conservation easements, grants for land improvement, cost-sharing incentive payments to private landowners who enter into long-term conservation agreements, public education and outreach on the subject of oak woodlands, and technical assistance consistent with the purpose of preserving oak woodlands. (Fish & G. Code, § 1363(d)(1)-(6).)

- The funds may be granted to local government entities, park and open-space districts, resource conservation districts, private landowners, and nonprofit organizations. In order to receive the funds, the county or city in which the money would be spent must prepare an oak woodlands management plan that includes a description of all the oak species within the county's or city's jurisdiction. The plan must protect and restore oak woodlands above and beyond what the law in the jurisdiction already requires. (Fish & G. Code, § 1364.)

Z'berg-Nejedly Forest Practice Act of 1973 (Pub. Res. Code, § 4511 et seq.)

- In order to harvest timber, the owner or lessee of the property must submit a timber harvest plan ("THP") prepared by a Registered Professional Forester. The plan should include a description of the land and the means by which the timber will be harvested, along with other detailed requirements. (Pub. Res. Code, §§ 4581, 4582.)

- Many subdivision developments are not required to submit a THP, because they are exempted under Public Resources Code section 4628. This section exempts all subdivision projects where the city or county has approved a tentative subdivision map and granted a subdivision use permit, as long as the site is not within a timberland production zone.

2. Local Ordinances

- Many of the regulations concerning the conservation of oak woodlands will be found at the local level, instead of the state level. Both cities and counties may have more or less stringent requirements than the state. (See http://danr.ucop.edu/ ihrmp/county/ for chart of county regulations.)

- **Examples:**

  a) **El Dorado County:** In May of 2008, the board of supervisors adopted an Oak Woodlands Mitigation Plan which addresses oak woodland mitigation standards, the use of conservation easements to offset woodland losses, payment of mitigation fees, and establishing detailed guidelines to uphold the County's 2:1 mitigation ratio for large projects. The plan includes:
  • Thresholds of significance for the loss of oak woodlands;
  • Requirements for tree surveys and mitigation plans for discretionary projects;
  • Replanting and replacement standards;
  • Heritage/Landmark Tree protection standards; and
  • An Oak Tree Preservation ordinance as outlined in Policy.
  (See http://www.co.el-dorado.ca.us/Planning)

  b) **Contra Costa County:** As of 2005, the county requires a three-to-one ratio of replacement for any tree removed. The replacement tree must be of the same or similar species as the tree that was removed. (See http://www.co.contra-costa.ca.us/ for more information.)

3. State Policy

State policy is advisory, but may be used by consultants in determining impacts and mitigation for CEQA and planning documents such as general plans. State policy cited by private groups may also be used.

Joint Policy on Hardwoods, Departments of Forestry & Fire Protection and Fish & Game (1994) (http://www.fire.ca.gov/CDFBOFDB/pdfs/hdwjoint.pdf)

- Under the joint policy, both departments are charged with promoting and upholding the conservation of hardwood rangelands. Specifically, the Department of Fish & Game is charged with studying the effects of the distribution and densities of hardwoods on terrestrial and aquatic vertebrates, reviewing timber harvesting activities and recommending measures that will mitigate significant adverse impacts, and acting as liaison with the Range Management Advisory Committee. The Department of Forestry & Fire Protection is charged with administering programs consistent with the joint policy, implementing the Integrated Hardwood Range Management Program, supporting research and development on hardwood utilization, and providing staff support to the Range Management Advisory Committee.

4. Private Conservation Groups

- Various conservation groups are greatly concerned with the depletion of oak woodlands in California. Many of these groups have developed their own strategies on conservation and compliance with these policies is a potential decision for a project applicant. These groups may influence political units as well as litigate issues of mitigation and conservation generally. The following are examples of these groups:

  a) California Oak Foundation ("COF") (www.californiaoaks.org)

  b) Sierra Club (www.sierraclub.org)

  c) International Oak Society (www.saintmarys.edu/~rjensen/ios.html)

- **Sample Language for Proposed General Plan Provisions for an Oak Woodlands Mitigation Plan, California Oak Foundation** (http://www.californiaoaks.org/ExtAssets/OakWdlandMitigationProg.pdf)

  The California Oak Foundation has created sample provisions based on Tuolumne County's Oak Woodlands Mitigation Plan that it believes will effectively preserve oak woodlands. The policy provisions include:

  a) Protecting and extending the diversity of oak woodlands and associate habitats through site design and land use regulations;

  b) Reducing in scale, redesigning, or modifying any project which cannot sufficiently mitigate significant adverse impacts on oak woodlands;

  c) Encouraging property owners to establish Open Space Easements or deed restrictions;

  d) Encouraging concentration of development on minimum number of acres (density exemptions) in exchange for maximizing long term open space;

  e) As a mitigation option, allowing restoration of any area of oak woodland which is in a degraded condition.

5. Other Sources

Integrated Hardwood Range Management Program ("IHRMP"), UC Division of Agriculture and Natural Resources (2005) (http://danr.ucop.edu/ihrmp)

- IHRMP was established in 1986 by the legislature and the Departments of Forestry & Fire Protection and DFG in order to respond to rising concern over the depletion of hardwood rangeland, which consists mostly of oak woodlands. The mission of the IHRMP is to "maintain, and where possible, increase acreage of California's hardwood range resources to provide wildlife habitat, recreational opportunities, wood and livestock products, high quality water supply, and aesthetic value. IHRMP strives to fulfill its mission through research and education. Although IHRMP's policies and guidelines are not binding, they are the major source for information on proper oak woodlands management.

  For an interactive list of 41 counties' oak mitigation policies, visit http://danr.ucop.edu/ihrmp/county/

Guidelines for Managing California Hardwood Rangelands, IHRMP, Department of Fish & Game, Department of Forestry & Fire Protection (1996)

- This booklet provides advice and suggestions for property owners and managers of hardwood ranges on how to create effective management plans that balance a property owner's economic goals with the value of conservation. The authors emphasize that many different management plans will lead to a good balance of profitability and conservation.

A Planner's Guide to Oak Woodlands, 2nd Edition, Gregory A. Giusti, Douglas D. McCreary and Richard B. Standiford (2005)

- The authors of this book intended it to be used as a guide for professional planners, consultants, and landscape artists when confronted with oak woodlands during their projects. The book provides a science-based approach to the preservation of oak woodlands and was the first book of its kind back in 1992. IHRMP recommends its use during the planning process.

Oak Woodlands Impact Decision Matrix 2008-A Guide for Planners to Determine Significant Impacts on Oaks as Required by SB 1334. IHRMP, UC Division of Agriculture and Natural Resources (2008)

- In response to numerous inquiries from county planners, developers and concerned citizens on how to implement this new provision of CEQA, the IHRMP convened a working group comprised of the California DFG, the California Department of Forestry and Fire Protection and the Wildlife Conservation Board ("WCB"). The purpose of the working group was to develop information to assist county planners with the process of determining project significance including, what types of projects fall under the purview of the law, what constitutes a "significant impact", compliance standards, effective strategies to conserve oak woodlands and how to determine suitable, appropriate mitigation. Their analysis and the results were published.

- For more information, see http://danr.ucop.edu/ihrmp/OakWoodlandImpactDecisionMatrix.pdf.

Oaks 2040-The Status and Future of Oaks in California, Tom Gaman and Jeffrey Firman (2008) California Oaks Foundation

- This re-publication is designed to provide various stakeholders involved in developing or updating their Oak Woodlands Management Plans with current information on 48 of the 58 counties that contain significant oak resources. The report contains a discussion of planning resources and implementation of available tools for conservation and mitigation efforts.

- For more information see http://www.californiaoaks.org/.

B. Update

1. Summary of Events in 2008

- Tuolumne County approved an enhanced oak woodland mitigation ordinance in 2008 **(**Tuolumne County General Plan, Conservation Element)

- The El Dorado County Board of Supervisors has passed a comprehensive oak woodlands habitat conservation program and updated its general plan in May. The plan was immediately legally challenged for failure to properly address CEQA concerns.

- Placer County implemented specific oak habitat mitigation measures that are consistent with CEQA biological requirements.

- Yolo County implemented a conservation and enhancement plan in 2007 and is currently accepting applications for projects to qualify for grants under the Oak Woodlands Conservation Fund.

- The California Oak Foundation continues to push for the requirement that, under CEQA greenhouse gas reviews, carbon biological emission impacts from the removal of oak woodland resources be analyzed and mitigated for all large-scale developments.

- For more information on climate change and greenhouse gas interaction with land development, please refer to the climate change section of this outline.

Notes:

CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

National Historic Preservation Act of 1966 (16 U.S.C. § 470)

- Federal review process designed to ensure that historic properties are considered during federal project planning and execution.
- The Advisory Council on Historic Preservation reviews and comments upon USACE's permit applications, which could have an effect upon historic properties listed on the National Register of Historic Places, or those eligible for listing.
- If the proposed activity will alter terrain so that significant historical or archeological data is threatened, the Secretary of Interior may take action necessary to recover and preserve the data prior to commencement of the project.
- The USACE's guidelines on its duties under the National Historic Preservation Act are found in 33 C.F.R. Part 325, Appendix C.
- Obtaining the required cultural resource approvals can be a very complex and time consuming process and may require extensive cultural resource surveys.
- CEQA requires cultural resources review.

The California Register; Public Resources Code section 5024.1; 14 California Code of Regulations Section 4850 et seq.

- The California Register includes resources listed in, or formally determined eligible for listing on, the National Register of Historic Places, and/or California State Landmarks and Points of Historical Interest.
- Properties of local significance that have been designated under a local preservation ordinance (local landmarks or landmark districts) or that have been identified in a local historical resources inventory may be eligible for listing in the California Register and are presumed to be significant resources for purposes of CEQA unless a preponderance of evidence indicates otherwise (Pub. Resources Code, § 5024.1, 14 CCR § 4850.)
- A resource does not need to have been identified previously either through listing or survey to be considered significant under CEQA. Lead agencies have a responsibility to evaluate them against the California Register criteria prior to making a finding as to a proposed project's impacts to historical resources (Pub. Resources Code, § 21084.1, 14 CCR § 15064.5(3).)

- An archeological site may be considered a historical resource if it is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military or cultural annals of California (Pub. Resources Code, § 5020.1(j)) or if it meets the criteria for listing on the California Register. (14 CCR § 4850.)

Archeological Sites and CEQA

- CEQA provides conflicting direction regarding the evaluation and treatment of archaeological sites. Amendments to the CEQA Guidelines try to resolve this ambiguity by directing the lead agencies to first evaluate an archeological site as a historical resource (i.e., listed or eligible for listing in the California Register); potential adverse impacts to it must be considered, just as for any other historical resource. (Pub. Res. Code, §§ 21084.1 and 21083.2(l).)

- If an archeological site is not a historical resource, but meets the definition of a "unique archeological resource" as defined in Public Resources Code section 21083.2, then it should be treated in accordance with the provisions of that section.

- "Substantial Adverse Change" includes demolition, destruction, relocation, or alteration such that the significance of a historical resource would be impaired. (Pub. Resources Code, § 5020.1(q).)

- The CEQA Guidelines provide that a project that demolishes or alters those physical characteristics of a historical resource that convey its historical significance (i.e., its character-defined features) can be considered to materially impair the resource's significance.

- "Substantial Adverse Change" can be avoided or mitigated by mitigation of significant impacts and must lessen or eliminate the physical impact that the project will have on the historical resource.

- Relocation of a historical resource may constitute an adverse impact to the resource.

- In most cases the use of drawings, photographs, and/or displays does not mitigate the physical impact on the environment caused by demolition or destruction of a historical resource. (14 CCR § 15126.4(b).) However, CEQA requires that all feasible mitigation be undertaken even if it does not mitigate below a level of significance. In this context, recordation serves a legitimate archival purpose.

- Avoidance and preservation in place are the preferable forms of mitigation for archeological sites.

- When avoidance is infeasible, a data recovery plan should be prepared which adequately provides for recovering scientifically consequential information from the site.

- Merely recovering artifacts and storing them does not mitigate impacts below a level of significance.

B. Update

1. *Navajo Nation v. U.S. Forest Service* (9th Cir. 2007) 479 F.3d 1024 (*aff'd in part reversed in part on rehearing* at 535 F.3d 1058 (2008)

This case arose out of the decision of the U.S. Forest Service ("USFS") to approve a plan to use recycled sewage effluent to make artificial snow at the Snowbowl Resort ("Snowbowl") in northern Arizona, which contains the San Francisco Peaks of the Coconino National Forest ("Peaks"). After the U.S. District Court for the District of Arizona granted the defendants summary judgment motion, several Native American tribes (including the Navajo Nation, the Havasupai Tribe, the Hopi Tribe, and the Hualapai Tribe) appealed, and the case was heard by a three judge panel of the Ninth Circuit Court of Appeals. The appellants claimed that the decision of the USFS violated the Religious Freedom Restoration Act (42 U.S.C. §§ 2000bb et seq.) and NEPA, as well as the National Historic Preservation Act (16 U.S.C. §§ 470 et seq.). The three judge panel affirmed the district court's decision on all but two grounds. First, the use of the recycled snow violated the Religious Freedom Restoration Act ("RFRA"), and second, the Final Environmental Impact Statement failed to adequately address the impacts of potential human ingestion of the snow. A rehearing en banc was requested and granted.

The Ninth Circuit en banc upheld the district court's opinion on all grounds and reversed the two adverse holdings of the three judge panel. In relation to the RFRA claim, the court stated that a claim under the RFRA requires that the plaintiff show that the activity or project substantially burdens plaintiffs' religion. Substantial burden means that plaintiffs are coerced to act contrary to their religious beliefs under threat of sanctions or a governmental benefit is conditioned upon conduct that would violate their religious beliefs. The court held that although the use of recycled snow may diminish plaintiffs' spiritual fulfillment, it did not rise to the level of a substantial burden, and therefore, the RFRA was not violated.

The court overturned the three judge panel's holding on the impacts of human ingestion of the snow because plaintiffs failed to raise the claim in their complaint. Therefore, the claim must be dismissed. The U.S. Supreme Court may grant review of this case. Abbott & Kindermann will keep you updated on the status of this case.

2. *Snoqualmie Indian Tribe v. Federal Energy Regulatory Commission* (2008) 545 F.3d 1207

This case followed closely on the heels of *Navajo Nations v. U.S. Forest Service* and involved the same analysis of the RFRA claim. In this case, Puget Sound Power and Light, now Puget Sound Energy, Inc., applied to the Federal Energy Regulatory Commission ("FERC") for relicensing of its hydroelectric project, which was originally constructed in 1898. The hydroelectric plant was located on Snoqualmie Falls, which is considered a sacred site by the Snoqualmie Tribe. The tribe argued in front of the FERC that the project should be decommissioned because it violated the RFRA. The FERC disagreed with the tribe and relicensed the project. However, the FERC did require that the plant maintain higher flows over the waterfall throughout the year than was required by Washington's Water Quality Certification. Puget Sound Energy appealed the FERC's decision on the grounds that the FERC could not impose stricter water quality standards than the State Water Quality Certification. The tribe intervened alleging that the project violated RFRA and the FERC had failed to consult with the tribe as required by the National Historic Preservation Act. An appeal of a decision by the FERC is taken straight to the court of appeals.

The Ninth Circuit began by evaluating the RFRA claim. The court found that, like the tribe in *Navajo Nations*, the Snoqualmie Indian Tribe's religious beliefs were not substantially burdened by the existence of the hydroelectric plant. The existence of the plant neither coerced the tribe to participate in an act contrary to their beliefs nor did it condition the receipt of a governmental benefit on conduct that would violate their beliefs. Therefore, the RFRA claim failed.

Under the National Historic Preservation Act, Section 106, the FERC is required to consult with tribes concerning the impacts the project will have the tribe's cultural and spiritual beliefs. The tribe claimed that the FERC had failed to initiate this consultation. However, the court found that consultation was not necessary in this case because the tribe did not achieve federal recognition until 1999, whereas the Section 106 consultation process ended in 1997 when the Advisory Council on Historic Preservation signed the Programmatic Agreement. Therefore, the FERC was not required to consult with the tribe, and the tribe's claim was property dismissed by the FERC.

Puget Sound Energy asserted that the FERC violated the CWA Certification. The court held that the stricter standards did not conflict with the State Water Quality Certification and, in fact, provided more protection. Because the FERC conditions did not conflict with or weaken the water quality certification standards, the court upheld the FERC's imposition of stricter standards. This was an issue of first impression for the Ninth Circuit.

3. Community Restoration and Revitalization Act (I.R.S. Code) (Public Law 110-289)

The Community Restoration and Revitalization Act furthers the ability of tax incentives, particularly the federal Historic Rehabilitation Tax Credit (rehab credit) contained in the I.R.S. tax code, to spur greater investment in smaller commercial projects and main street properties in older neighborhoods. This is especially important in areas where there is a critical need for housing and neighborhood reinvestment. Infill and brownfield developers should consider this legislation to see if proposed or existing projects may qualify for additional tax credits. The bill amends the federal tax rehabilitation credit in numerous ways:

- Eliminates disincentives to using the Low-Income Housing Tax Credit for redevelopment projects.
- It increases the rehab credit rate from 20 to 40 percent for small projects that do not exceed $2 million.
- It permits rehabilitation tax credits for older, “non-historic” properties.
- It changes statutory designation of older buildings that are over 50 years old to qualify them for tax credits.
- Targets low-income areas for special tax credit treatment.
- Permits tax credits to be used when the property is converted from single family residential to multi-family residential within a five year period.
- Eases the rules governing non-profit deals so that more community-oriented projects move forward and permit non-profits to hold increased percentages of leased historical properties without sacrificing the availability of the tax credit.

The 110th Congress passed the "Housing Recovery Act of 2008" which was signed into law by President Bush on July 30, 2008. Public Law 110-289 includes one of the proposed amendments to the federal rehabilitation tax credit included in the "Community Restoration and Revitalization Act" affecting the leasing of historic properties to non-profits. The new provision provides an increase from 35% to 50% in the percentage of tax-exempt activity allowable in the sale/leaseback of tax credit projects. The National Trust and its preservation partners plan to push for the remaining package of amendments included in H.R. 1043/S. 584 when the 111th Congress convenes next year.

For more information, see http://www.preservationnation.org/issues/rehabilitation-tax-credits/community-restoration-and.html.

Notes:

ENDANGERED SPECIES

A. Regulatory Framework

Federal Endangered Species Act (16 U.S.C. § 1531 et seq.)

- The purpose of the Federal Endangered Species Act ("ESA") is to provide a means whereby endangered and threatened species and the ecosystems upon which they depend may be conserved. (16 U.S.C. § 1531(b).)

Section 7

- Section 7 of the ESA requires all federal agencies to ensure, in consultation with the U.S. Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS"), that their actions do not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. (16 U.S.C. § 1536(a)(2).)

- Any federal action triggers the Section 7 consultation process. Examples include: the granting of permits, licenses, leases, granting of federal funds, and easements.

- A species list is required to determine if there are listed species in the project area that may be affected by the agency action. (16 U.S.C. § 1533(a)(2)(A).)

- A Biological Assessment is required where the action may affect a listed species to determine if the action would adversely affect the listed species. (16 U.S.C. § 1536(c).)

- Formal consultation, with a Biological Opinion from USFWS and NMFS, is required if the action would adversely affect the listed species or adversely modify or destroy critical habitat.

- The Biological Opinion must state whether it is jeopardy or a no jeopardy opinion. In most cases, a no jeopardy opinion results and it will include any conditions governing an incidental take statement granted under section 7. (16 U.S.C. § 1536(b)(3).)

Section 9

- Section 9 of the ESA prohibits the "take" of a species listed as endangered. (16 U.S.C. § 1538.)

- Species listed as threatened receive protections under the ESA through special rules called 4(d) rules. (16 U.S.C. § 1533(d).)

- "Take" is defined as the act or attempt to hunt, harm, harass, pursue, wound, capture, kill, trap or collect. (16 U.S.C. 1532(19).) "Harm" is defined as any act that kills or injures a species, including significant habitat modification. "Harass" is defined as any act creating the likelihood of injury to a species, including significant disruption of normal behavior patterns. (50 U.S.C. § 17.3.)

Section 10

- Section 10 of ESA authorizes USFWS and NMFS to permit the incidental take of listed fish and wildlife species, where no incidental take authorization was issued to a federal agency through the section 7 process. (16 U.S.C. 1539(a)(1)(B).)

- A section 10 incidental take permit is cumbersome and requires preparation of a habitat conservation plan ("HCP") specifying the activities to be pursued and the measures to mitigate any take. (16 U.S.C. 1539(a)(2)(A).)

California Endangered Species Act ("CESA"); Fish & G. Code section 2050 et seq.

- Section 2080 of CESA prohibits the unauthorized take of state endangered or threatened species. (Fish & G. Code, § 2080.)

- "Take" under the CESA is defined as the act or attempt to hunt, pursue, catch, capture or kill a state-listed species. (Fish & G. Code, § 86.)

- Take of state-listed species may be authorized by Department of Fish and Game ("DFG") under section 2080.1 or 2081.

- Section 2080.1 addresses the process for those species listed under both the ESA and CESA. Section 2080.1 provides for "consistency determinations." CESA allows an applicant who has obtained a federal incidental take statement under section 7 or a section 10 incidental take permit to notify DFG that it has a federal permit and apply for a consistency determination.

- Section 2081 allows an incidental take permit for state listed-species only if specific criteria are met. CESA requires DFG to make findings regarding no jeopardy and that impacts of take are minimized and fully mitigated.

- No incidental take permit is available under section 2081 for "fully protected" species and "specified birds." (Fish & G. Code, §§ 3505, 3511, 4700, 5050, 5515 and 5517.) For example, the California condor is a fully protected species and therefore no take permits will be issued for it.

- If a project is planned in an area where a fully protected species or specified bird occurs, and applicant must design the project to avoid all take; DFG cannot provide take authorization under CESA.

- Natural Communities Conservation Plan Act ("NCCP") process authorizes DFG to enter into agreements to allow for the take of state-listed species in conjunction with a regional multi-species conservation plan. (Fish & G. Code, § 2835.)

- An NCCP identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. It is the California counterpart to the federal HCP program.

B. Update

1. *Center for Biological Diversity v. FPL Group* (2008) 166 Cal.App.4th 1349

The Appellate Court upheld the dismissal of a public trust enforcement action against the owners and operators of wind turbines in the Altamont Pass area (the "Operators"). According to the Center for Biological Diversity ("CBD"), the turbines injure and kill raptors and other birds. Ultimately, CBD was successful in clarifying that the birds are a public trust resource of all the people of the state. However, the appellate court held that the proper party to bring an action against is the public agency with permitting authority, rather than the Operators.

The appellate court ruled that a claim for breach of the public trust must be brought against responsible public agencies, and not against private defendants. The court said, "The defect in the present complaint is not that it seeks to enforce the public trust, but that it is brought against the wrong parties." The court first looked at common law trust principals by analogy. "[W]here a trustee cannot or will not enforce a valid cause of action that the trustee ought to bring against a third person, a trust beneficiary may seek judicial compulsion against the trustee." (*Saks v. Damon Raike & Co*. (1992) 7 Cal.App.4th 419.) The court rejected the attempt in this case to create a private cause of action against the Operators for enforcement of the public trust doctrine and limited private enforcement to suits brought against public agencies.

The overall ruling appears to both solidify the public trust doctrine's applicability to the protection of wildlife as a trust resource, and establishes a limitation on the public trust doctrine so that it can only be invoked to sue public agencies charged with oversight of land use projects. In general, the opinion has the potential to spread the scope of litigation challenges to land use and agency regulatory decisions.

2. *Coos County Board of County Commissioners v. Kempthorne* (9th Cir. 2008) 531 F.3d 792

The Ninth Circuit has reiterated that the appropriate way for a species to be removed from the protections of the ESA is via a petition for delisting. The court held that there is no mandatory duty imposed upon the U.S. Fish and Wildlife Service to delist species through the five year review process. (See 16 U.S.C. § 1533(c)(2).)

The Board of County Commissioners for Coos County, Oregon ("Board") filed a citizen suit to compel the USFWS to delist the marbled murrelet. The murrelet is a seabird that lives in old growth forests. The population found in Washington, Oregon, and California (the "Northwest murrelet") was listed as threatened under the ESA in 1992. The listing was the result of a lawsuit by the Audubon Society wherein a Washington district court found that the Northwest murrelets qualified for listing as a threatened species. The USFWS subsequently listed the birds. (57 Fed.Reg. 45330.)

Under the ESA, the USFWS is required to review listed species every five years and determine whether the listing status should be changed (the "five year review process"). (16 U.S.C. § 1533(c)(2).) Before the Northwest murrelet review took place, the USFWS promulgated a new policy that defined the term "distinct population segment." Under the ESA, a distinct population segment of a species may be listed as threatened or endangered. The new policy clarified that a distinct population segment must be discrete with respect to "the remainder of the species to which it belongs." If the population is discrete, then the question becomes whether the population is significant with respect to the species as a whole. The policy was upheld in the case of *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service* (2007) 475 F.3d 1136. However, the USFWS realized that some previously listed populations would not meet the criteria in the new policy and it announced that these would be reevaluated on a case-by-case basis.

The five year review process was completed for the Northwest murrelet in 2004 (the "review"). In the review, the USFWS stated that the Northwest murrelet did not qualify as a distinct population segment under the new policy. However, the review also found that the birds were still threatened and that threat had not lessened since the USFWS was directed to list the Northwest murrelet by the Washington district court. The review concluded that there should be no change in its listing status under the ESA.
The Board sued, claiming that the USFWS had a duty to delist the Northwest murrelets since the population did not meet the criteria to be considered a distinct population segment under the new policy. The district court dismissed the suit and the Board appealed. The Ninth Circuit agreed with the lower court.

The Ninth Circuit court held that the regulations implementing 14 U.S.C. section 1533(c)(2) do not require that a protected species be delisted following a five year review of a species. (50 CFR. § 424.21.) Although the regulations specify how the reviews will be conducted, they do not import "any of the deadlines from the petition process into the five-year review determination." The court emphasized that it need not address whether it had the authority to compel the USFWS to publish a final rule delisting the birds, since the USFWS had determined in the five year review that the Northwest murrelet status should not be changed. This determination was made without any reference to the distinct population segment policy. Therefore, the court held that the dismissal of the suit was proper. The court suggested that, had the Board petitioned for delisting of the bird, the substance of claims the Board was making could have been heard.

3. *Pacific Coast Federation of Commercial Fishermen v. Gutierrez* (E.D. Cal. 2008) 2008 U.S. Dist. LEXIS 89979

On April 16, 2008, the United States District Court for the Eastern District of California issued an opinion that invalidated portions of the 2004 biological opinion ("BiOp") issued by the National Marine Fisheries Service ("NMFS") for the Long-Term Central Valley Project and State Water Project Operations Criteria Plan ("2004 OCAP"). The Central Valley Project ("CVP") supplies water to approximately 30 million people in 200 water districts. The State Water Project "is the largest State-built water project in the country." Both projects share resources and facilities.

In 2004, the Bureau of Reclamation ("Bureau") and the California Department of Water Resources ("DWR") requested the initiation of formal ESA consultation for changes in the operation of the projects. Following consultation, NMFS issued the BiOp, which concluded that "the effects of proposed Project operations under the 2004 OCAP are not likely to jeopardize the continued existence of the" winter-run Chinook, spring-run Chinook, or Central Valley steelhead. Environmental groups and associations representing fishing interests brought suit in federal court on the grounds that the BiOp was invalid and that the Bureau unjustifiably relied on the BiOp. The court agreed with several of Plaintiffs' claims and remanded the BiOp back to NMFS for revision. In its opinion, the court addressed a multitude of claims against both NMFS and the Bureau, which included the following:

1) The no jeopardy conclusions in the BiOp were unsupported and contradicted by the administrative record, and therefore, the BiOp was arbitrary and capricious.

2) NMFS failed to conduct any analysis of project impacts in the context of the species' life cycles and population dynamics.

3) NMFS' focus on incremental project impacts arbitrarily ignored significant adverse effects associated with baseline conditions and was unsupported by the BiOp's findings.

4) NMFS failed to conduct a comprehensive analysis of impacts associated with the entire federal action during formal consultation.

5) NMFS failed to adequately address global climate change in the BiOp.

6) The Adaptive Management Plan and mitigation measures were insufficient.

7) The Bureau failed to satisfy its Section 7(a)(2) obligations by unreasonably relying on the BiOp.

The court held that portions of the BiOp, such as the no-jeopardy analysis and the climate change discussion, were invalid and must be remanded back to NMFS to revise. Additionally, the court agreed with certain admissions by NMFS that portions of the BiOp needed further explanation. The court dismissed these issues on the condition that NMFS adhere to its agreement to add further explanation. Further, the court disagreed with Plaintiffs on several claims, including the inadequacy of the mitigation measures and the failure of the BiOp to address the entire agency action. These claims were dismissed, and the BiOp's discussion of these areas was held to be valid.

4. *Center for Biological Diversity v. California Fish & Game Commission* (2008) 166 Cal.App.4th 597

The Center for Biological Diversity ("CBD") initially petitioned the Fish & Game Commission for candidate listing of the under the California Endangered Species Act ("CESA") of the California Tiger Salamander in 2006. Under the CESA a petition for listing must be accepted for consideration if it is supported by sufficient information to lead a reasonable person to conclude there is a substantial possibility the requested listing could occur. (*See* California Fish and Game Code § 2074.2.) The term "sufficient information" means that amount of information, when considered with the DFG's written report and the comments received, that would lead a reasonable person to conclude the petitioned action may be warranted. (*Natural Resources Defense Council v. Fish & Game Com*. (1994) 28 Cal.App.4th 1104, 1108.)

The DFG Commission held a hearing in which outside scientific studies, DFG analyses, federal studies, and expert testimony presented to the Commission identified numerous objective habitat conditions that suggest the salamander is in imminent danger of being threatened or extinct. In addition, the salamander had been listed as either threatened or endangered under the Federal Endangered Species Act. Objectors to the hearing petition presented contrary evidence that salamander populations were difficult to measure, that the species may be more numerous than expected or reported, and that existing populations were not in danger of immediate threat because of existing protections for their habitat areas, which include vernal pools and wetlands. The Commission published its decision not to list the salamander as a candidate species, citing as its main reason the objector's criticisms of the sufficiency of the petition and supporting information. CBD filed a petition for writ of mandate. The lower court sustained the writ and ordered the Commission to list the salamander as a candidate species. The Commission appealed.

After reviewing the facts de novo, the court found that the "discretion" the Commission possesses is rather limited. Once a petition makes a prima facie showing that a species in threatened, the Commission must accept the petition:

> [U]nless the countervailing information and logic persuasively, wholly undercut some important component of that prima facie showing…if the information clearly would lead a reasonable person to conclude that there is a substantial possibility that listing could occur, rejection of the petition is outside the Commission's range of discretion. In its overall judgment, the court ultimately concluded that the information presented to the Commission presented a prima facie showing that the California tiger salamander species is a threatened or endangered species within the CESA.

Further finding that the Commission either discounted or ignored significant information that had been presented, and failed to address that information in its decision, the court upheld the lower court's ruling that rejected the DFG Commission's claim that there was insufficient proof that the salamander was imperiled. Rather than send the decision back to the Commission, the court ordered it to directly advance the tiger salamander to candidacy in light of the evidence of the species' imperiled status.

5. Polar Bear Listed as Threatened under Endangered Species Act

On May 15, 2008, Secretary of the Interior Dirk Kempthorne announced that he would be accepting the recommendation of the USFWS in listing the polar bear as a threatened species. Kempthorne cited 11 recently published scientific studies that show significant loss of sea ice threatens and will likely continue to threaten polar bear habitat. This loss of habitat puts polar bears at risk of becoming endangered in the foreseeable future, the minimum standard for designation as a threatened species under the Endangered Species Act. Kempthorne, though recognizing that the polar bear was in danger because of decreasing sea ice in the arctic, announced that there was little the Fish and Wildlife Service could do to protect the polar bear because global climate change cannot be regulated under the Endangered Species Act. Rather, the Secretary suggested international cooperation on climate change, and not the Endangered Species Act, would be the best vehicle to address reduced habitat for the polar bear. Regulatory changes can be found at 50 CFR part 17.

For more information, see http://www.fws.gov/home/feature/2008/polarbear012308/polarbearspromo.html

6. Department of the Interior Passes Regulatory Changes Reducing or Eliminating Section 7 Consultation Requirements under ESA

On December 16, 2008, a rule published by the Department of the Interior revised ESA regulations governing federal intergovernmental consultation. Section 7 of the ESA requires federal agencies, when their agency actions or decisions will have an adverse effect on a threatened or endangered species, to consult with federal agencies tasked with protecting those species. The rule permits lead federal agencies to determine whether their proposed decisions will have a "significant effect" on endangered or threatened species without first consulting either the USFWS or the NMFS. Further changes to existing regulations in consultation requirements could have the effect of reducing the number of projects that require consultation with the USFWS and NMFS.

USFWS and NMFS explained their underlying rationale for the proposed rule: (1) the experience gained by the agencies, other federal and state agencies, and property owners over the past 22 years in implementing the ESA; (2) Government Accountability Office reviews of consultation implementation identify unnecessary and duplicative activities; (3) decisions by federal courts over almost every aspect of section 7 and the ESA have clarified the specific roles of the agencies; (4) "new challenges with regard to global warming and climate change" that make enforcement under the ESA difficult. The USFWS and NMFS propose that the new regulations will streamline unnecessary consultation actions between federal agencies while maintaining the legislative mandate of the ESA.

The regulatory changes omit the current requirement that agencies who determine that no substantial impact will occur from the proposed action must receive a concurrence from the USFWS and NMFS on that decision before proceeding. Additional regulatory changes affect the definition of "cumulative effects," which, under the ESA, does not have the same definition that a definition under NEPA's "cumulative impact" analysis. To cause a cumulative effect, the proposed action must undergo a two-part test if it is an indirect action: (1) the action undergoing consultation must be an "essential" or "but for" cause of the effect; and (2) the effect must be "reasonably certain to occur" based on "clear and substantial information." Further regulatory changes impose a 60 day deadline on ESA Agencies to respond to a consultation request from acting agencies. If there is no response within 60 days, the agency is free to move forward with their desired action. Other regulatory changes clarify the Service's role in analyzing global warming impacts under the ESA. (See below)

In light of the substantive changes and possible legal consequences of the rules to implementation of the ESA, California Attorney General Edmund Brown sued on December 31, 2008 for an injunction and declaratory relief.

For more information, see http://edocket.access.gpo.gov/2008/pdf/E8-29701.pdf

7. Department of the Interior Issues Memorandum Excluding Global Warming From ESA Consultation Requirements

On October 2, 2008, the Department of Interior issued a Solicitor's Opinion concluding that proposed actions involving the emission of greenhouse gases ("GHG") do not meet the "may affect" threshold set out in current regulations implementing the ESA. Because the emission of GHGs does not sufficiently trigger consultation requirements, they are not to be considered by consulting agencies or by the USFWS in implementing the ESA. The USFWS' regulations only require consultation for actions that "may affect" listed species or critical habitat that are present in the area of the proposed action. The Solicitor's Opinion argues that for GHGs to be considered for a project they would have to cause an immediate effect. These regulations would reinforce the USFWS and NMFS view that there is no requirement for consultation on GHG emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears). The paragraphs below are from the Department of Interior's published description of the proposed rules:

> First, GHG emissions from building one highway are not an "essential cause" of any impacts associated with global warming. Moreover, any such effects are later in time, but are not reasonably certain to occur (i.e., a finding that an effect is reasonably certain to occur must be based on clear and substantial information, cannot be speculative, and must be more than just likely to occur). For both reasons, impacts associated with global warming do not constitute "effects of the action" under the proposed revision to that definition.
>
> Even if these impacts would otherwise fall within the definition of "effects of the action," they need not be considered in any consultation because under the proposed Applicability section the building of one highway is "an insignificant contributor" to any such impacts. Further, any impacts associated with the GHG emissions from the building of one highway are "not capable of being meaningfully identified or detected in a manner that permits evaluation" and "are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat [from those GHG emissions] is remote."

For more information see http://edocket.access.gpo.gov/2008/pdf/E8-29701.pdf

8. U.S. Fish and Wildlife Service Completes Status Reviews and Initiates Others, Issues 90 Day reviews of numerous species; Delta Smelt Listed as Endangered; Finds CVP Water Project Jeopardizing Species Existence.

On March 5, 2008, the USFWS initiated review of 58 protected species in California and Nevada. The purpose of the reviews is to ensure that the listing of species as threatened or endangered is accurate and based on the best scientific and commercial data available, and to determine whether the listing status should be considered for change. Section 4(c)(2)(A) of the Endangered Species Act requires the USFWS to conduct a review of threatened and endangered species once every five years, and determine whether any species should be removed from the list or reclassified (from threatened to endangered and vice versa).

Many species are the subject of analysis. These included species such as the Chino Checkerspot butterfly, Sacramento Valley tiger beetle, Arroyo toad, the Bay Checkerspot butterfly, Inyo California towhee, fleshy owl's clover, Pierson's Milk-vetch, Hickman's potentilla, Riverside fairy shrimp, San Bernardino kangaroo rat, Shasta crayfish, salt marsh harvest mouse, velvet rosette, Ione manzanita, Ione buckwheat, Sierra Nevada bighorn sheep, Mono Basin sage grouse, and white sedge.

Designation of the Delta Smelt from "threatened" to "endangered" has recently been published as of December 15, 2008, as is the initial listing of the long-finned smelt. These two species already are listed on the State Endangered Species List. Of further interest, the U.S. Fish and Wildlife Service (Service) delivered its Biological Opinion (BO) to the Bureau of Reclamation on December 15, 2008, on the effects of the continued operation of the Federal Central Valley Project and the California State Water Project on the delta smelt and its designated critical habitat.

The Service has determined that the continued operation of these two water projects as described in the Biological Assessment (BA) is likely to jeopardize the continued existence of the delta smelt and adversely modify its critical habitat. The BO is accompanied by a Reasonable and Prudent Alternative (RPA) intended to protect each life-stage and critical habitat of this federally protected species.

For a complete list of affected species, see (http://edocket.access.gpo.gov/2008/pdf/E8-28986.pdf) To read the FWS biological opinion on the Delta Smelt, see http://www.fws.gov/sacramento/ea/news_releases/2008_News_Releases/Service_Delivers_DS_OCAP_BO.htm

9. U.S. Fish and Wildlife Service Increases Red Legged Frog Critical Habitat Designation Area

The USFWS is currently in the required 60-day comment period on a plan to designate 1.8 million acres as critical habitat for the threatened California red-legged frog, an area that is 300 percent larger that a 2006 designation for the species. This revised critical habitat area arises from last year's allegations of improper influence in the decision-making by former Department of Interior personnel. The new plan likely will extend the dispersal range for the frog from .7 to 1 mile. It also focuses on watersheds and adjusts units based on watershed boundaries. It seeks to provide connectivity between healthy populations of the frog.

For more information see http:// www.fws.gov/sacramento/ea/news_ releases/ 2008_News_Releases/ca_red-legged_frog_proposed_critical_habitat_revision.htm. For the federal register notification, see http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=53492&dbname=2008_register

10. Environmental Protection and Information Center v. California Department of Forestry and Fire Protection 2008 Cal. LEXIS 9318 (Cal. July 17, 2008)

In this case, the DFG approved a Habitat Conservation Plan ("HCP") and issued an incidental take permit to Pacific Lumber, authorizing the take of the marbled murrelet. The HCP provided that if changed circumstances occurred that were anticipated in the HCP, and mitigation measures were prescribed to meet the adverse impacts of those changed circumstances, then if and when the circumstances occurred, DFG would only require Pacific Lumber to implement those measures already prescribed in the HCP. Further, if unforeseen circumstances arose, the DFG would not require Pacific Lumber to commit additional land, water or financial compensation or additional restrictions on the use of land, water or other natural resources unless the landowner were to consent. Unforeseen circumstances included changes in circumstances affecting a species or geographic area covered by an HCP, that could not reasonably have been anticipated by a landowner or the wildlife agencies at the time the HCP was developed, and that resulted in a substantial and adverse change in the status of a species covered by the CHP.

Environmental Protection and Information Center ("EPIC") challenged the permit. The trial court ruled in favor of EPIC, and the Court of Appeal reversed. The Supreme Court granted review. The Supreme Court held for EPIC, finding that the impacts of any authorized activities, and the results of any natural disaster that applicants' actions cause or exacerbate, must be fully mitigated under the California ESA.

Notes:

CALIFORNIA COASTAL COMMISSION

A. Regulatory Framework

- The California Coastal Commission ("Coastal Commission") was established by voter initiative in 1972 (Proposition 20) and later made permanent by the Legislature through the adoption of the California Coastal Act of 1976. (Pub. Resources Code, § 30000 et seq.)

- The Coastal Commission is the "state coastal zone planning and management agency" with the primary responsibility for implementing the California Coastal Act. (Pub. Resources Code, § 30330.)

- The Coastal Commission, in partnership with coastal cities and counties, plans and regulates the use of land and water along the state's 1,100 mile coastline. (Pub. Resources Code, §§ 30000 - 30012.)

- The Coastal Commission reviews and approves local coastal programs ("LCPs") which are the required to be completed by each of the 15 counties and cities located in the coastal zone in order to carry out the policies of the Coastal Act. (Pub. Resources Code, §§ 30350 - 30355.)

- Development within the coastal zone is not allowed until a coastal development permit has been issued by the Commission or a local government that has a certified LCP. (Pub. Resources Code, § 30600.)

B. Update

1. *Security National Guarantee, Inc. v. California Coastal Commission* (2008) 159 Cal.App.4th 402

A dune area in Sand City had formerly been used as the largest sand quarry in California. Intent on increasing economic development, the city granted developer, National Guaranty, Inc., a coastal development permit to construct a mixed-use development on the property. Sand City had been granted authority by the Coastal Commission to run a local coastal program in the early 1980s. The disputed property had not been designated an environmentally sensitive habitat area ("ESHA") in the city's LCP. Rather, the city's LCP expressly stated that there were no ESHAs west of Highway 1, which encompassed the property. The Sierra Club and two commissioners appealed Sand City's issuance of a CDP. On administrative appeal, the Coastal Commission declared the entire property an ESHA, which placed significant limitations on permissible development.

The Coastal Commission claimed that it had the authority to designate the property an ESHA and that substantial evidence supported its finding that the habitat was sensitive. The court held that the Commission had no power to declare property an ESHA because it would have effected an amendment of the city's existing LCP. This action was in the exclusive authority of Sand City. (Pub. Resources Code, §§ 30500, 30514(a).) Since the only authority the Coastal Commission had at the administrative level was limited to determining whether Sand City's LCP complied with the Coastal Act, the Coastal Commission had overstepped its legislative authority in declaring the property an ESHA. The Coastal Act limits the grounds for appeal from coastal development permit determination to claims that the development does not conform to the standards contained in the certified LCP. Since the LCP in this case addressed changes to the property, and it was approved by the Coastal Commission, the Coastal Commission's jurisdiction was limited.

2. *Douda v. California Coastal Commission* (2008) 159 Cal.App.4th 1181

In November of 2001, the Doudas filed an application for a coastal development permit seeking to build a large two-story single family residence. The development would be four miles from the coast near the Santa Monica Mountains. Los Angeles does not have a certified LCP for the area. The Coastal Commission denied the application, finding that the residential construction would significantly disrupt both environmentally sensitive habitat values and the scenic and visual qualities of the coastal area. (Pub. Resources Code, §§ 30240, 30251.) The Doudas appealed the decision via administrative writ.

The Doudas argued on appeal that the Coastal Commission did not have the authority to designate environmentally sensitive areas because 1) the Coastal Commission only has the authority to determine whether or not a proposed development conforms to a certified land use plan or a certified LCP; 2) the Coastal Commission's power to designate environmentally sensitive habitat expired on September 1, 1977; and 3) local governments have exclusive control over the content of the LCP. The Doudas further argued that the Coastal Commission lacked the authority to regulate scenic and visual resources.

The Doudas first argued that the issuing agency's only task was to determine whether a proposed development conformed to a certified LCP. The court held that the issuing agency is obligated to uphold the policies contained in the Coastal Act. The court explained that the oversight given to an issuing agency prior to the certification of a LCP is much broader than the oversight given to it after certification. In the former case, the issuing agency must ensure that the Coastal Act's policies are met, while in the latter, the issuing agency must do no more than confirm compliance with the LCP. Los Angeles County does not have a certified LCP. Since this was the case, the Doudas property was subject to direct supervision by the Commission.

The Doudas secondly claimed that since Public Resources Code section 30502 provided the Coastal Commission with the power to designate environmentally sensitive coastal resource areas only until September 1, 1977, the Coastal Commission's ability to designate environmentally sensitive habitat areas ("ESHA") also terminated in September 1977. The court quoted and approved the holding in *LT-WR, L.L.C. v. California Coastal Commission*, (2007) 152 Cal.App.4th 770, 792-793 and held that that the two terms are not synonymous. There is no date limitation on the Commission's ability to designate sensitive habitat areas for purposes of issuing a coastal development permit.

The Doudas next argued that the Coastal Commission's review of a land use plan is limited to a determination as to whether the local coastal program conforms to the Coastal Act's policies. (Public Resource Code, § 30512.) The Court rejected this interpretation. The Coastal Commission, when it is the issuing agency, is obligated to reject developments that contravene the policies of the Coastal Act. However, it has no power to force a local government to select one use that conforms to the policies of the Coastal Act over other uses that also conform. If there are multiple conforming uses, then only the local government can determine which of those conforming uses will be allowed.

Finally, the Doudas argued that the Coastal Commission lacked the authority to regulate scenic and visual resources four and a half miles from shore. The Coastal Act does not define coastal areas but does define coastal zone. The Doudas argue that the two are not synonymous. Interpreting the Coastal Act broadly, the court found that coastal area must be coextensive with coastal zone, and that the Coastal Commission had authority to regulate land use four and a half miles from shore.

3. *Charles A. Pratt Construction Co., Inc. v. California Coastal Commission* (2008) 162 Cal.App.4th 1068

Charles A. Pratt Construction Co., Inc. ("Pratt") brought suit against the Coastal Commission, claiming that the Coastal Commission's decision violated Pratt's vested right to develop its property and, in the alternative, if the decision was valid, the Coastal Commission committed a regulatory taking by denying the coastal development permit.

Over 30 years ago, San Luis Obispo County approved Pratt's tentative subdivision map. The original map split the property into two units: Unit I and Unit II. In 1990, Pratt submitted a new vesting tentative subdivision map for Unit II, and the County approved the new map and granted Pratt a coastal development permit. The Coastal Commission overturned the County's approval and denied the coastal development permit because it did not conform to the LCP.

Pratt's appeal consisted of three arguments: 1) Unit II was exempt from requiring a coastal development permit because Pratt had a vested right to develop the property; 2) the Coastal Commission's decision was arbitrary and capricious and therefore invalid; and 3) if the Coastal Commission's decision was upheld, the Coastal Commission committed a regulatory taking of Unit II by denying the permit.

Pratt first argued that the LCP was local law, and his development rights were vested before it was certified, citing to Government Code section 66474.2(a) to claim a vested right to develop the property in conformance with the map and the laws in place at the time the map was completed. The Court disagreed, and interpreted both Government Code sections 66498.6 and 66474.2 to mean that Section 66474.2(a) only applies to local laws. In this court's interpretation, the current state laws must be applied to Pratt's project regardless of when the vesting tentative map was deemed complete. The court found that the County only had the authority to issue coastal development permits because the Coastal Commission delegated its power as a state agency to the County. Since the County was merely exercising state authority granted to it, the LCP and the California Coastal Act fell under the category of state law, not local law. The appellate court held that the Coastal Commission acted properly in applying the current state policies.

Pratt secondly contended that the Coastal Commission acted arbitrarily and capriciously in denying the permit for numerous reasons. The Court found that the Coastal Commission's decision was supported by substantial evidence and the Coastal Commission had properly exercised its discretion in denying the permit.

As to the third argument, "Pratt contends that if the [Coastal] Commission's interpretations of the LCP are correct, there is no economically productive use that can be made of its property." In other words, the Coastal Commission has committed a constitutional regulatory taking. The appellate court dismissed the claim for lack of ripeness and never reached the merits of the claim because no final agency decision on the development had yet been made.

4. ***Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 Cal.App.4th 215**

Ocean Harbor House Homeowners Association ("HOA") sits at the edge of the shoreline in the City of Monterey. The HOA applied to the City for a permit to reconstruct a seawall. Following approval by the City, the HOA approached the Coastal Commission for a coastal development permit. Although the permit was granted, the Coastal Commission imposed conditions on the permit – one of which required the HOA to pay over $5 million to mitigate the loss of recreational beach caused by the seawall. The HOA brought suit against the Coastal Commission to overturn the imposition of the $5 million fee. After losing at trial, HOA appealed on four grounds: 1) the fee amounted to an unconstitutional taking, 2) "the [Coastal] Commission lacked statutory authority to impose the fee," 3) "the fee is not supported by substantial evidence," and 4) "the [Coastal] Commission arbitrarily increased the amount of the fee."

The HOA first argued that a taking occurred because there was no nexus between the fee and the impact of the project: "purchasing beach property somewhere else has no tendency to mitigate the loss of beach at the complex" and the fee related more to the loss of economic business than the loss of recreational use. In disagreeing with the HOA, the court found that the purpose of the fee as stated in the record was to recoup the recreational value beach goers place on one acre of beach in the City and use it to purchase equivalent beach elsewhere. This purpose is directly related to the impact – the loss of recreational use of the beach. Therefore, a proper nexus existed. The court then found the mitigation cost was roughly proportionate to the impact and the Coastal Commission's mitigation fee. The Coastal Commission's conditional permit did not qualify as a governmental "taking" for constitutional purposes. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374.)

Second, HOA argued that the Coastal Commission was required to grant a permit for an existing seawall without conditions or mitigation, citing Pub. Resources Code section 30235. The court held that section 30235 must be read in conjunction with the rest of the Coastal Act. Even if the Coastal Commission was required to grant a permit, mitigation measures can still be imposed in order to ensure that the seawall will have the least impact possible. Therefore, the Coastal Commission had the statutory authority to impose the fee.

Third, after a detailed review of the record, the court found that the Coastal Commission had decided to grant the conditioned permit, and determined the valuation of the beach loss due to the construction of the seawall based upon substantial evidence. Substantial evidence supported the Coastal Commission's analysis of the beach loss under a "benefit transfer" methodology.

Finally, relying on cases where a governmental body made a decision before the rationale for that decision was documented, the HOA argued that the Coastal Commission decided to impose the fee at the first hearing and then staff developed the reasoning for that decision prior to the approval hearing. The court, after review of the record, found against the HOA. Although staff did change its recommendation to reflect the Coastal Commission's selection of the recreational value methodology, the support for that recommendation was already in the record. The court found that the record showed the rationale for the imposition of the fee existed and was relied on prior to the Coastal Commission's decision. Therefore, the Coastal Commission did not engage in any illegal post hoc rationalization. After finding against the HOA on all grounds, the court upheld the Coastal Commission's decision.

5. ***North Pacifica LLC v. California Coastal Commission*** **(2008) 166 Cal.App.4th 1416**

In 2002, North Pacifica LLC received a coastal development permit for a residential construction project from the City of Pacifica. After an appeal to the Coastal Commission on the issuance of the permit, the Coastal Commission notified North Pacifica that it was holding a meeting to review the CDP. Formal notice of the hearing was sent to North Pacifica on January 3, 2006, in part because of the New Year's Holiday. The meeting was to be held on January 11, 2006. During the meeting, the Coastal Commission found that substantial issues remained and a de novo hearing was required on the validity of the project CDP. North Pacifica had already received constructive notice of the hearing via informal notice sent to a valid address in late December of 2005. Coastal Commission regulations and California's Bagley-Keene Open Meeting Act have notification requirements that apply to Coastal Commission administrative actions. North Pacifica attempted to nullify the Coastal Commission's actions and oversight by claiming that improper notice of the hearing stripped the Coastal Commission of jurisdiction.

The Second Appellate District first analyzed the Bagley-Keene Open Meeting Act ("Act"), in which a 49 business-day notice of administrative hearings is required to be sent to interested parties, and provides for proper internet publication of the notice. The Act further provides for a nullification procedure in which interested parties can challenge decision-making that does not comply with the Act. Under the Act, a challenging party must first show that there was no "substantial" compliance with the notification procedures, and, must show that the party was prejudiced by the non-compliance. After looking at the notification dates in this case, and based upon the undisputed record, the court found that the Coastal Commission, though a few days late, substantially complied with the Act. Further, even had the Coastal Commission complied with the Act, based upon North Pacifica's declarations that it had never would have had time to prepare for the January 11th meeting, no prejudice resulted.

North Pacifica additionally claimed that under the Coastal Commission's own regulations, 14 C.C.R. 13063, provide for a ten business-day notification of administrative hearing. Unlike the Bagley-Keene Act, however, the regulations do not provide for nullification of an administrative decision in the event of non-compliance. The Court held that there was no remedy for substantial compliance with the Coastal Commission regulations.

6. *Burke v. California Coastal Commission* (2008) 168 Cal.App.4th 1098

A homeowner's property was on top of a bluff overlooking the ocean, with the bluff sloping down to a public beach below. A portion of the fence was on the homeowner's property at the very bottom of the cliff. A 1988 boundary agreement with the State Lands Commission, other state entities, a city, and affected homeowners specifically described the fence as an essential component of an agreed upon boundary separating a sandy beach easement for public use from adjacent privately owned land. The court concluded that the fence was exempt from the Coastal Commission's jurisdiction because it was an integral part of a boundary settlement within the meaning of the statutory exemption set forth in Public Resources Code, section 30416(c). This statutory exception promoted the state's interest in settling land disputes. The court found that it was of no consequence that the fence was not actually on the boundary separating private from public ownership of land. The boundary was by its nature ambulatory and not fixed and it would have been impossible to use a stationary fence to mark an ambulatory boundary. The court concluded that because the fence was part of the boundary settlement, the homeowner's writ petition ordering the trial court to dismiss the case should have been granted. The judgment was reversed. The trial court was directed to grant the homeowner's petition for a writ of mandamus and to enter a judgment that the Coastal Commission lacked jurisdiction over the fence.

7. *Alberstone v. California Coastal Commission* (2008) 2008 Cal.App.Lexis 2471

Alberstone owns a piece of coastline property in Malibu. When two adjacent coastline lots were purchased by Stibel for merger and construction of a new home, Alberstone attempted to block the development of the parcels first with the Malibu planning commission, and then with an appeal to the city council. After losing at both levels, Alberstone then appealed the local decision to the Coastal Commission. The Coastal Commission denied hearing the appeal because it failed to raise a “substantial issue”. Alberstone, undaunted, petitioned in state court for a writ of administrative mandamus to force the Coastal Commission to hear the matter. Alberstone argued throughout the entire process that the approval of the lot merger and home construction violated requirements contained in the LCP for lot size restrictions, construction of shoreline protective devices and bluff stabilization, and would alter natural shoreline conditions. After the trial court denied his writ petition, Alberstone appealed.

In upholding the trial court decision, the appellate court recognized that the Coastal Commission's decision finding that no "substantial issues" were raised by Alberstone was subject only to limited review. It is for the Coastal Commission to weigh the preponderance of conflicting evidence, as the court may reverse its decision only if, based on the evidence before it, a reasonable person could not have reached the conclusion reached by it. (*Sierra Club v. CCC* (1993) 12 Cal.App.4th 602, 610.) Further, the court recognized that the Coastal Commission, in interpreting its own regulations, was entitled to significant deference in applying the facts of the present case to its understanding of those regulations in the absence of contrary statutory mandate. Alberstone claimed the Local Implementation Plan ("LIP") required the denial of the creation of new lots, such as Stibel's proposed merger of existing lots. The Coastal Commission argued that it intentionally did not include lot mergers for consideration under specific LIP regulations. Alberstone's claims regarding lot size and development approval from the California State Land Commission were both rejected as well.

8. *McAllister v. California Coastal Commission* (2008) 2008 Cal.App.Lexis 2480

An appellate case published on December 30, 2008 highlights the resolution of two statutory claims in relation to approval of residential construction in an ESHA on the Big Sur coast. The case clarifies the scope of permissible development in the coastal zone if the development is situated in an ESHA, and what required findings must be made by the Coastal Commission before an permit exemption can be made to avoid the creation of a regulatory takings claim. The case also deals with the interpretation of language contained in a local coastal program in relation to statutory authority and policy contained in the Coastal Act. Similar to many Coastal Commission cases, this case involves property disputes over development that has an effect on the scenic and visual enjoyment of existing landowners.

McCallister, a homeowner, attempted to block the development of Laube & Engal's property, located at Rocky Point in the Big Sur area of Monterey County ("County"). McCallister claimed that the County's grant of a CDP permit violated statutory requirements that limit development of property that has been designated as ESHA. The Coastal Commission, after a de novo hearing, granted the CDP permit with restrictions. McCallister appealed the decision, petitioning for a writ of mandate to prohibit the grant of the permit.

Section 30240 of the Coastal Act provides heightened protection for areas that are designated ESHAs and establishes strict preferences and priorities that guide development permit approval; it allows only uses dependent upon habitat areas such as nature education, research, hunting and fishing. McCallister claimed that since the Coastal Commission had identified the property as containing sensitive and endangered habitat areas, it should not have permitted the development to occur, albeit even with the significant mitigation measures as a condition of the permit. The appellate court's legal interpretation of the statute establishes that once a property has been found to be an ESHA:

> (1) There can be no significant disruption of habitat values; and (2) only resource-dependent uses are allowed….[T]hus the two restrictions limit development inside habitat areas to uses that are dependent on the resources to be protected and that do not significantly disrupt habitat values. (*Sierra Club v. California Coastal Commission* (2004) 12 Cal.App.4th 602.)

The Coastal Commission claimed that the mitigating development restrictions it placed on the permit were sufficient to comply with the statute's habitat policies. The court rejected the Coastal Commission's interpretation, finding that "the statute does not authorize the separation of habitat values from an existing habitat and the relocation of those values elsewhere as a form of protective mitigation". Rather, the statute protected the designated habitat itself, regardless of its continued viability, and mitigation measures could not be used to circumvent the statute's strict limits on the uses permissible in habitat areas.

Laube & Engal claimed that the County LCP designation of the Rocky Point area, which created a residential development exemption from infringing upon coastal views, allowed them to avoid the consequences of an ESHA designation. Effective resolution of the conflict between the statute and the LCP under the Coastal Act hinged on the conflict between sections 30240 and 30250 (allows and encourages residential development to maximize open space and be near existing residential development). Finding that there was no contradiction with Section 30240 and Section 30250, and that the overall scheme of the Coastal Act is to be most protective of significant coastal resources, the court perceived no conflict between the sections. McCallister claimed the Coastal Commission erred on application of other sections of the LCP land use plan to the development permit, but was denied relief on those grounds. However, since the Coastal Commission did not identify a conflict, or resolve the above statutory conflict with appropriate findings of fact and a conclusion regarding the takings issue, the permit should not have been granted.

The Coastal Commission claimed that it approved the permit to avoid an unconstitutional taking of Laube & Engel's property without compensation. Section 30100 of the Coastal Act provides that "[T]he Commission should not exercise its power to grant or deny a permit which will take or damage private property for public use, without payment of just compensation." This statute creates a limited exemption from the Coastal Act for the purposes of avoiding a takings claim. The court held that before the Coastal Commission could grant the permit under the exemption it was required to make findings of fact in the administrative record on that issue. Here, however, since there were no findings of fact under the statute or under the LCP's additional requirements, the Coastal Commission did not properly substantiate the exemption to Section 30240 regarding an unconstitutional taking. The court remanded the permit approval to the Coastal Commission to consider the takings issue and make appropriate findings to resolve the conflict between the statutes.

9. Fee Schedules and Revised Fees Modified Under Coastal Commission Regulations

As of April 2008, the California Coastal Commission will be increasing filing fees, modifying the method by which they are calculated, and applying them to some new categories of filings. Regulatory changes include indexing the fees to inflation, and authorizing fee reductions for certain categories of projects.

For more information, see
http://www.coastal.ca.gov/legal/CCMP_April_2008_Notice.pdf

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SURFACE MINING AND RECLAMATION ACT ("SMARA")

A. Regulatory Framework

- The Surface Mining and Reclamation Act ("SMARA") (Pub. Resources Code, § 2710 et seq.) was enacted by the California Legislature in 1975 to address the need for a continuing supply of mineral resources, and to prevent or minimize the negative impacts of surface mining to public health, property and the environment.

- The California Department of Conservation oversees SMARA at the state level. Within the California Department of Conservation are three offices each with a different responsibility. They are the Office of Mine Reclamation, the State Mining and Geology Board ("SMGB"), and the Division of Mines and Geology.

- The Office of Mine Reclamation renders technical assistance, maintains a database of all mines in California, and regulates compliance statewide.

- The SMGB promulgates regulations, sets California policy regarding mining issues, and conducts the Appeals Board in disputed issues.

- The Division of Mines and Geology is an information resource. They maintain the Mineral Resource Library, publish the California Geology magazine and classify all identified mineral resource land in California.

- SMARA applies to anyone, including government agencies, engaged in surface mining operations within the state which disturb more than one acre or remove more than 1,000 cubic yards of material.

- The local city or county's "lead agency" adopts ordinances for land use permitting and reclamation procedures which provide the regulatory framework under which local mining and reclamation activities are conducted.

- The SMGB reviews these lead agency ordinances to determine whether they meet or exceed SMARA requirements. If the SMGB determines that the lead agency is not in compliance with SMARA, the SMGB has the authority to step in and exercise the powers of the lead agency, except for permitting authority.

B. Update

1. New Regulations Adopted Changing Procedures for Vested Rights (14 CCR 3506)

On September 13, 2008, the State Resources Management Board for the Department of Resources adopted permanent regulation language adding Section 3506 to Title 14, Article 1, of the California Code of Regulations, for Administrative Procedures for the State Mining and Geology Board to conduct vested rights determination hearings when serving as a lead agency under the Surface Mining and Reclamation Act of 1975.

The proposed amended regulatory language is intended to clarify the administrative procedure for the public and claimant in the submission of written and responsive materials to the SMGB during conduct of a vested rights determination when SRMB is acting as a lead agency under SMARA.

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AIR QUALITY

A. Regulatory Framework

Federal Clean Air Act (42 U.S.C. § 7401 et seq.)

- The Clean Air Act ("CAA"), enacted in 1970, regulates air emissions from area, stationary and mobile sources. This law authorizes the U.S. Environmental Protection Agency ("EPA") to establish National Ambient Air Quality Standards ("NAAQS") to protect public health and the environment. (42 U.S.C. § 7401(b).)

- The goal of the CAA was set to achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans ("SIP") applicable to appropriate industrial sources in the state. (42 U.S.C. § 7410.)

- The CAA requires states to develop plans and adopt and enforce regulatory programs to attain (by specified deadlines) and to maintain Federal ambient air quality standards adopted by the EPA. It was amended in 1977 primarily to set new goals (dates) for achieving attainment of NAAQS since many areas of the country had failed to meet the deadlines. (42 U.S.C. § 7407.)

- The 1990 amendments to the CAA in large part were intended to meet unaddressed or insufficiently addressed problems such as acid rain, ground-level ozone, stratospheric ozone depletion, and air toxics.

California's Air Resources Law and Clean Air Act (Health & Saf. Code, §§ 39000-44563)

- California administers the Federal program and clarifies California's air quality goals, planning mechanisms, regulatory strategies and standards of progress. (Health & Saf. Code, §§ 39656-39659.)

- In addition, the CAA provides the state with a comprehensive framework for air quality planning regulation and requires attainment of state ambient air quality standards as soon as possible. (Health & Saf. Code, §§ 40919-40930.)

- The California Air Resources Board ("CARB") is responsible for promulgating regulations and is also responsible for monitoring the regulatory activity of California's 35 local air districts. (Health & Saf. Code, § 39500.)

- In a non-attainment area, CARB must adopt and implement regulations to reduce emissions from stationary, mobile, indirect and area-wide sources. (Health & Saf. Code, § 39614(d)(1).)

- Constraints are placed upon real estate development by requiring projects to include:
    - Transportation control measures;
    - Commute alternatives; and
    - Transit-oriented development designs.
- Will result in the regulation of land use forms and placement of development to avoid significant exacerbation of non-attainment status. (CEQA compliance.)
- Practical considerations for undeveloped property:
    - Know attainment status for specific criteria pollutants in area proposed for purchase, etc., if development is anticipated.
    - Consider project design that will not result in significant impacts to air quality, or ensure adequate mitigation to reduce the impacts to less than significant.
- Regarding developed property, illegal air quality emissions resulting from existing land use can result in criminal or civil enforcement actions against responsible party.
    - Investigate emissions from existing use prior to foreclosure, purchase, or any other transactions.

Stationary Sources

- Construction permits are required from the local air pollution control authority if equipment is a stationary source.
- If equipment is a major stationary source, operating permits are required. Major stationary sources are primarily industrial facilities and large commercial operations that emit 100 tons or more per year of a regulated air pollutant. But certain sources are considered “major” in areas with extreme ozone problems even if those sources are only releasing 10 to 25 tons of pollutants emissions per year.
- State and local governments tailor their permit programs to the areas individual needs while meeting minimum federal requirements.

Mobile Sources

- Title II of the Act seeks to force technological changes in motor vehicles and the fuels they use.

- Reformulated gasoline, diesel fuel, MTBE, tailpipe emissions and clean fuel vehicles are some of the areas regulated, with many control strategies implemented in California Health and Safety Code sections 43013, 43018 and 13 CCR sections 1950-1976, 2250-2254, 2258-2259, for example.

CEQA Impacts

- Direct Impacts to Air Quality - mitigated by the local air quality management district rules.

- Indirect Impacts - Operator is less able to control - can be used as a bargaining chip by project opponents to try to impose limitations on operations; e.g., hours of operation, number of vehicles and vehicle trips, or to extract additional offsetting measures. Operator should be prepared to have a plan to negotiate these items.

Climate Change

- See Climate Change section below.

B. Update

1. *North Carolina v. Environmental Protection Agency* (9th Cir. 2008) 531 F.3d 896

Under the CAA **(**42.U.S.C. §§ 7400 et seq.) the Bush administration promulgated a series of rules designed to allow individual point-source emitters, such as stationary large-scale power plants, to reduce the overall emissions of large particulate matter and nitrogen oxides. This program is similar to the cap and trade system designed to reduce acid rain implemented in the 1980s. In the present trading system, called the Clean Air Interstate Rule ("CAIR"), sources could sell or purchase emission credits from sources in other states; states could emit more or less pollution than their caps would permit and not properly report the offset pollution.

In this case, North Carolina challenged the CAIR, alleging that the system punished downwind states by those states who could comply with statewide emissions standards by buying clean air credits from another state. North Carolina essentially argued that if a nearby state would not actually reduce their emissions, then North Carolina's individual attempts to comply with the CAA's mandate under its state implementation plan ("SIP") would fail because of upwind pollution. Under the CAA, states who have had their SIPs approved the by the EPA must implement those directives according to a timeline provided under the CAA. The court compared the CAIR to existing statutory mandates contained in the CAA, specifically section 7410(a)(2), which requires states to quantify air pollution that is blown onto downwind states that had not attained goals contained in their SIPs. Finding that the CAIR effectively nullified an existing statute in the CAA, the appellate court vacated the entire rule and required the EPA to promulgate another rule consistent with the court opinion.

2. El Comité Para El Bienestar De Earlimart v. Warmerdam (9th Cir. 2008) 539 F.3d 1062

On August 20, 2008, the Ninth Circuit published an opinion ruling that private citizens could not force California to undertake the promulgation of certain new regulations under the CAA. The case involved a challenge under section 304 of the CAA, see 42 U.S.C. section 7604(a) -- the citizen suit provision. A coalition of community organizations ("El Comité") brought suit against California state officials responsible for designing and implementing the SIP.

El Comité argued that both the process by which California obtained EPA approval of the SIP and the final outcome of that approval process were improper under the CAA. El Comité argued that California violated federal law by failing to adhere to the SIP approved by the EPA, which allegedly required California to implement additional regulations in five areas where air quality standards for reducing harmful emissions have not been met. The lower court ruled in favor of El Comité. The Appeals Court vacated the lower court's decision:

> "As it [district court] carefully worked through the parties' labyrinthine administrative law arguments, the court acknowledged that its rulings were potentially incongruous. We agree. In our view, the district court ultimately exceeded its jurisdiction. Because § 304 of the CAA provides jurisdiction only to enforce an 'emission standard or limitation,' and because the challenged conduct did not implicate such a standard or limitation, the court was without jurisdiction to order a remedy."

Summary judgment for plaintiff and a remedies order were reversed and vacated where, because section 304 of the CAA provides jurisdiction only to enforce an "emission standard or limitation," and because the challenged conduct did not implicate such a standard or limitation, the court was without jurisdiction to order a remedy.

3. *Romoland School District v. Inland Empire Energy Center, LLC* (9th Cir. 2008) 548 F.3d 738

The Ninth Circuit examined when the citizen suit provision of the CAA may be used to halt construction of a power plant that was granted an integrated permit.

The Inland Empire Energy Center ("IEEC"), intended to construct a power plant in Romoland, an unincorporated area of Riverside County. IEEC submitted applications to the South Coast Air Quality Management District ("SCAQMD") for a permit to construct the project and for a Title V permit under the CAA. After a number of public hearings, the SCAQMD issued IEEC a combined Title V/construction permit.

The Romoland School District and several individuals and environmental groups filed a complaint in United States district court under the CAA's citizen suit provision. (42 U.S.C. § 7604(a).) IEEC then moved to dismiss the two causes of action against it for failure to state a claim under Federal Rule of Civil Procedure, rule 12(b)(6). IEEC based its motion to dismiss on the ground that the district court lacked jurisdiction over the suit since IEEC had been granted a permit under Title V of the CAA, and since such permits may not be challenged via the CAA's citizen suit provision.

The district court denied the motion for a preliminary injunction, concluding that the injunction factors (i.e., likelihood of success on the merits, irreparable harm and the balance of hardships) favored the defendants. The district court also granted IEEC's motion to dismiss with prejudice for the reasons stated in that motion. Plaintiffs then moved for voluntary dismissal, without prejudice, of their two remaining claims against SCAQMD in light of the district court's rationale in granting IEEC's motion to dismiss. The district court granted Plaintiffs' motion for voluntary dismissal. Plaintiffs then appealed the "Court approved voluntary dismissal" and the "interlocutory orders that gave rise to the judgment, including, but not limited to, order granting motion to dismiss without leave to amend and order denying motion for preliminary injunction." The Ninth Circuit Court of Appeals affirmed the district court's dismissals of all Plaintiffs' claims.

The court of appeals clarified the procedural rule where a state or local air pollution control district has integrated the preconstruction requirements of Title I with the permitting requirements of Title V and a permit is issued under that integrated system; a claim that the terms of that permit are inconsistent with other requirements of the CAA may only be brought in accordance with the administrative and judicial review procedures authorized by Title V of that Act (42 U.S.C. §§ 7661-7661(f).), and may not be brought in federal district court under the CAA's citizen suit provision. (42 U.S.C. § 7604.)

4. ***Sierra Club v. Environmental Protection Agency*** **(D.C. Cir. 2008) 536 F.3d 673**

The U.S. Court of Appeals for the District of Columbia has recently vacated an EPA rule that prohibited state and local air permitting authorities from imposing additional monitoring requirements in permits issued under Title V of the CAA. The court's decision in *Sierra Club v. Environmental Protection Agency* (2008) 536 F.3d 673 is the latest installment in a decade-long dispute over Title V's requirement that all operational permits "set … forth monitoring … requirements to assure compliance with the permit terms and conditions." In 2006, the EPA issued a rule interpreting its regulations as prohibiting state and local authorities from including additional monitoring requirements in Title V permits.

In 1990, Congress added Title V to the CAA in an effort to guide government agencies and regulated industry through the complicating maze of federal and state regulations. Title V created a national permitting program under which major stationary sources obtained an operational permit that included, in a single document, all applicable emission limits and monitoring requirements, among other permit terms and conditions. Congress required EPA to establish the "minimum elements" for permits, which are codified in the EPA's Part 70 regulations. State and local permitting authorities, on the other hand, are charged with issuing permits consistent with state programs approved by the EPA. In 2006, the EPA, through the present rule promulgation, chose to deny state and local agencies the right to supplement permits altogether. The Sierra Club and other environmental groups challenged the rule, by arguing that the EPA's actions were prohibited by the plain language contained in Title V of the CAA.

The court analyzed monitoring requirements under Title V, finding that the CAA requires that "each permit issued under [Title V] shall set forth … monitoring … requirements to *assure compliance* with permit terms and conditions." The monitoring requirements in a Title V permit must be sufficient to ensure that the permitted facility is complying with the emission requirements set forth in the permit. The case dealt with situations in which stationary permits were issued, but the permits themselves did not contain adequate compliance tools. Since 1990, the EPA has taken several positions on this issue. Although the EPA attempted to argue that it had authority to forbid state and local agencies from ensuring new permit compliance, the court refused to accept the agency's logic. As a result, the court held that the EPA's 2006 rule could not be reconciled with Title V's statutory mandate. The rule was struck down. The court has since reconsidered its ruling and permitted ESA to "conduct further proceedings consistent with the prior proceeding without wholly vacating the rule.

5. *Sierra Club v. Environmental Protection Agency* (D.C. Cir. 2008) 2008 U.S.App.Lexis 25578

The Sierra Club challenged final rules promulgated by EPA that exempt major point sources of air pollution from normal emission standards during periods of "startups, shutdowns, and malfunctions" (SSMs); and imposing alternative, and "arguably less onerous requirements in their place."

The appellate court ruled that because the general duty to regulate emissions found in the section 112 of the CAA was more rigorous than that which applies during SSM events, EPA's regulations were inconsistent with the plain text of section 112 of the CAA. The SSM exemption violates the CAA's requirement that some section 112 standard apply continuously. Section 112(d) of the Clean Air Act provides that emissions standards promulgated must require maximum achievable control technology standards. (42 U.S.C.S. § 7412(d)(2).) The CAA defines "emission standard" as a requirement established by the State or the EPA Administrator that limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard that has been promulgated.

The appellate court rejected EPA's claim of retained discretion to enact the rule in the face of the plain text of section 112. "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of a contrary legislative intent." The 1990 Amendments to the CAA confined the EPA Administrator's discretion and Congress was explicit when and under what circumstances it wished to allow for such discretion. "EPA may not construe [a] statute in a way that completely nullifies textually applicable provisions meant to limit its discretion." The court granted the petitions without reaching the Sierra Club's other contentions, and vacated the SSM exemption promulgated by EPA.

6. EPA Issues Advance Notice of Proposed Rulemaking After *Massachusetts v. EPA* Decision

Regulators, industry groups, and environmentalists are each pushing to get their opinions heard in the regulatory world after the *Massachusetts v. EPA* (2008) 549 U.S. 497 (2007) decision issued by the Supreme Court last year. Pursuant to the Court's directive, EPA has issued advanced notice of proposed avenues by which greenhouse gasses may be regulated under the CAA. The EPA's proposed rulemaking attempts to treat greenhouse gases similar to other presently regulated pollutants, which emphasizes a top-down, command and control regulatory scheme. In conjunction with the proposed rule, criticism from other agencies and industry groups focused on the difficulty of regulating carbon dioxide in this manner and the effects on the economy. Criticism leveled at the proposed rule included:

- The possibility of legal limitations in the use of the CAA as a proper vehicle for regulation.
- The possibility that the regulation would be extraordinarily intrusive and burdensome on businesses and consumers.
- That the proposed regulations would be cost-prohibitive and inflexible.
- Regulating greenhouse gas emissions via rulemaking, given the extraordinary effect on the economy, should be undertaken by elected officials and not by appointed bureaucrats.
- Input source control, such as CAFÉ standards regulating fuel efficiency standards, are a better way to control greenhouse gas emissions than direct pollutant control.
- Alternative means may avoid increased regulatory bureaucracy, maintain jobs, and boost efficiency without penalizing the economy.

EPA has signaled that its intention is to receive as much commentary as possible to highlight the difficulty in choosing an appropriate vehicle for regulations of this nature, given the global effect of greenhouse gases, and their wide dispersal throughout the atmosphere. For more information on this subject area, please consult our global warming section.

For more information, see http://www.epa.gov/fedrgstr/EPA-AIR/2008/July/Day-30/a16432a.htm

7. AB 2922 (Chapter 678) Retroactively Authorizes Air Resource Board Regulations to Avoid Legal Challenges and Increases Individual Per-Day Penalties

CARB's mobile source penalty provision was enacted in 1976. Since that time, CARB has expanded its regulatory reach to many recently adopted programs. Due to the lack of clarity, the existing penalty structure may be subject to legal challenges which would threaten the effective enforcement of several air quality programs, including regulation of small off-road engines, off-road diesel engines, large spark ignition engines, and portable fuel containers. This bill also sets the maximum civil penalty for a violation of these

provisions to be an amount not to exceed $500 per vehicle, portable fuel container, spout, engine, or other unit subject to regulation under these provisions.

For legislative analysis and chapter information see http://www.leginfo.ca.gov/pub/07-08/bill/asm/ab_2901-2950/ab_2922_bill_20 080930_chaptered.html

8. EPA Emission Standards Finalized for Mobile Sources and Fuel Containers (40 CFR 80)

Section 202(l) of the CAA requires EPA to set standards to control hazardous air pollutants from motor vehicles, motor vehicle fuels, or both. EPA published a rule under this authority in March 2001 that established toxics emissions performance standards for gasoline refiners and committed to additional rulemaking to evaluate the need for and feasibility of additional controls. This final rule fulfills that commitment from the 2001 rule. In addition, EPA is adopting emission standards for portable fuel containers (such as gas cans) under the consumer products authority of the CAA (Section 183(e).

The new fuel benzene standard and hydrocarbon standards for vehicles and gas cans will together reduce total emissions of mobile source air toxics by 330,000 tons in 2030, including 61,000 tons of benzene. As a result of this rule, new passenger vehicles will emit 45 percent less benzene, gas cans will emit 78 percent less benzene, and gasoline will have 38 percent less benzene overall.

In addition, the hydrocarbon reductions from the vehicle and gas can standards will reduce volatile organic compound ("VOC") emissions (which are precursors to ozone and can be precursors to PM2.5) by over 1 million tons in 2030. The vehicle standards will reduce direct PM2.5 emissions by 19,000 tons in 2030 and may also reduce secondary formation of PM2.5. Once the regulation is fully implemented, the Agency estimates these PM reductions will result in the avoidance of nearly 900 premature deaths annually.

9. CARB Phases Out Gas Used in Keyboard Cleaning Canisters (17 CCR 94505 et seq.)

On June 27, 2008, CARB approved regulations limiting emissions of climate-changing chemicals from air canisters used to blow dust off equipment such as computer keyboards to cameras, the nation's first for consumer products.

In addition to decreasing greenhouse gases, the board's decision will reduce smog forming emissions and toxic air contaminants. The regulation establishes specifications for consumer products that will annually reduce greenhouse gases by 200,000 metric tons; smog-forming volatile organic compounds by 2,000 tons; and, toxic air contaminants by over 70 tons. The greenhouse gas cuts will come from replacing the use of HFC-134a with HFC-152a in gas-duster canisters. HFC-134a is known to have a massive heat-trapping potential and is rated 1,300 times more damaging to the climate than carbon dioxide.

10. CARB Restricts Use of Formaldehyde In Composite Wood Products (17 CCR 93120-93120.12)

CARB will phase in formaldehyde emission limits for composite-wood products beginning January 1, 2009. By mid-2009, plywood, particle board and fiberboard produced and sold for the California market will be required to reduce the level of emitted formaldehyde in their products. Full regulation will be implemented by 2012. All businesses that manufacture, sell, use or supply composite-wood products to California will be subject to aspects of regulation. The regulation allows for current stocks of non-compliant inventories to be sold for a period of time in California. This regulation will most likely increase the cost of building construction via increased building cost and less availability of materials that do not conform to the new formaldehyde regulations. CARB asserts that consumer exposure to formaldehyde will be reduced by 680 tons per year once all regulations are implemented.

11. CARB Proposes Regulations on Heavy Diesel Regulation, Subsidizing Fleet Modernization in January 2009 (17 CCR 95300-312)

CARB staff is developing a regulation to reduce diesel particulate matter (PM) and other emissions from in-use heavy-duty diesel powered vehicles operating in California. A proposed regulation is planned to be presented to the Air Resources Board in December 2008. The proposed regulation would apply to diesel shuttle buses, vehicles greater than 14,000 pounds Gross Vehicle Weight Rating (GVWR), and does not include pickups. A decision on the matter is expected on January 14, 2009.

The first proposed regulation will require truck owners to install diesel exhaust filters on their rigs starting in 2010, with nearly all vehicles upgraded by 2014. Owners must also turn over engines older than the 2010 equivalent according to a staggered implementation schedule between 2012 and 2022. Further, long haul truckers must install fuel efficient tires and aerodynamic devices on their trailers that lower greenhouse gas emissions and improve fuel economy.

The state is offering truck owners more than a billion dollars in funding opportunities to help with the cost of the proposed diesel rule. Funding options include Carl Moyer grants, which are designated for early or surplus compliance with diesel regulations; Proposition 1B funds, for air quality improvements related to goods movement; and AB 118, which establishes a low-cost truck loan program to help pay for early compliance with the truck rule.

For more information, see http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm

12. CARB Adopts New Off-Road Diesel, Off-Road Equipment and Large Spark Ignition Equipment Regulations (13 CCR §§ 2403-2408, 13 CCR § 2433)

CARB has adopted a "no idling" rule for in-use off-road diesel fueled vehicle, limiting idling for such vehicles to no more than five minutes. The new rule went into effect on June 16, 2008. The idling rule applies to any person, business, or government agency in California that owns, rents, leases, operates, or sells any diesel-fueled off-road vehicle engine with 25 horsepower or more. Examples include forklifts, cranes, and skip loaders. Exceptions to the rule include testing for safety and diagnosis, warming vehicles for cold-weather operation, queuing, or idling to ensure safe operation of a vehicle. Waivers can be applied for. The rule does not apply to stationary or portable equipment or farm equipment. Non-commercial vehicles are not subject to this regulation.

For more information, see http://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm.

Notes:

HAZARDOUS SUBSTANCE CONTROL AND CLEANUP

A. Regulatory Framework

Carpenter-Pressley Tanner Hazardous Substances Account Act – Health & Saf. Code, §§ 25300-25395

- California counterpart to CERCLA (see below) creates a fund to finance cleanup of releases of hazardous substances.
- Definitions of hazardous waste, responsible party, et al., similar to CERCLA but more expansive.
- Single-family residence special rules - Owner of less than five (5) acres not liable unless:
    - Contamination occurred after acquisition; or
    - Contamination occurred prior to ownership, but owner knew or had reason to know of contamination.
- Priority list of sites established.
- Cost recovery actions similar to CERCLA for contribution and indemnity.
- Strict liability. Liability is limited to actual causation, and can be apportioned according to fault, a type of comparative fault idea. *Fireman's Ins. Fund v. City of Lodi* (1992) 302 F.3d 928.

Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) --- 42 U.S.C. §§ 9601 et seq.

- Under CERCLA, 42 U.S.C. §§ 9601-9675, owners and operators of property may be held liable for the full costs of cleaning up contaminated property, even though they may have not actually caused the contamination and creates a Superfund, financed through a combination of appropriations, industry taxes and judgments.

Empowers State and Federal Governments to:

- Clean up the hazardous substance releases.
- Recover costs of cleanup from "responsible parties," i.e., "owners and operators".
- Order abatement actions if imminent and substantial endangerment to the public health, welfare or the environment.

- Any other person may clean up the hazardous substance release and recover costs of the cleanup from responsible parties.

Strict Liability - Responsible party liable even if no fault involved.

Responsible Party/Owner and Operator Broadly Defined - Includes lender who acquired property from its mortgagee at a foreclosure sale. See "Secured Creditor's Exemption."

Secured Creditor's Exemption

- Holds indicia of ownership primarily to protect security interest in property and does not participate in the management of the property. Not liable under exemption.

- Secured Creditor may be Owner and Operator. *U.S. v. Fleet Factors* 901 F.2d 1550 (11th Cir. 1990). Court expanded potential for lender liability finding that a secured lender participates in management of facility when it participates in management to a degree indicating a capacity to influence the corporations' treatment of hazardous waste.

- *In re Bergsoe Metal Corporation* 910 F.2d 668 (9th Cir. 1990). Must be actual management of facility.

- "Safe Harbor" rule for lenders in flux.

B. Update

1. *Kotrous v. Goss-Jewett Co. of Northern California et al.* (9th Cir. 2008) 523 F.3d 924

The Ninth Circuit held that Potentially Responsible Parties ("PRPs"), 42 U.S.C. section 9607(a)(1), could bring suit under section 107(a) to recover response and investigation costs against other PRPs before a lawsuit has been filed against them; whereas section 113(f) provides an action for contribution only after one of the PRPs has been sued. In so doing, the 9th Circuit follows other circuits in clarifying the scope of permissible litigation before an enforcement suit under CERCLA has been initiated. This change in direction arose from last year's U.S. Supreme Court case *U.S. v. Atlantic Research Corp.* (2007) 127 S.Ct. 2331. That case was heard to resolve a split of authority in the circuits over whether PRPs can recover voluntarily undertaken response costs before an enforcement action had been filed.

2. *U.S. v. Burlington Northern & Santa Fe Railway Co.* (9th Cir. 2008) 520 F.3d 918 [rehearing en banc denied] [pet. for certiorari granted Oct. 1, 2008, no. 07-1607]

A three-judge panel of the Ninth Circuit decided to amend their opinion overruling a district court decision regarding apportionment of liability under CERCLA. The saga of this case continues on from last year's update.

Brown & Bryant, Inc. ("B&B") operated a facility at which toxic chemicals were stored and distributed. Part of the land on which the chemical operation was located was owned by two railroad companies ("the Railroads"), and Shell Oil ("Shell") manufactured and delivered chemicals used by B&B to the facility. U.S. EPA and the State of California's Department of Toxic Substances Control ("DTSC") spent significant funds to clean the site and jointly pursued a litany of defendants, including the Railroads and Shell.

The two agencies sought to recover response costs under CERCLA, but the district court held the Railroads and Shell liable for only a minor portion of the total cleanup costs. B&B was inoperative by then and non-recoverable for cleanup costs. The agencies were "left holding the bag for a great deal of money". Seeking to hold the Railroads and Shell jointly and severally liable for the entire judgment, the agencies appealed to the Ninth Circuit. Shell cross-appealed, claiming that it was not an "arranger" under CERCLA, section 9607(a)(3), and therefore is not a party on whom any cleanup liability can be imposed.

In the latest activity in this case, the Ninth Circuit panel has voted to amend its opinion and to deny appellees' petitions for rehearing. The amendments to the original opinion ultimately support the district court's original assessment of fault based upon geographical location. Generally, in resolving contribution claims, a court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Federal statutes generally governing contribution claims are based upon fault, whereas CERCLA is a strict-liability statutory scheme. CERCLA does not permit equitable considerations to have any bearing in an action to determine whether defendants have presented sufficient evidence to apportion liability. Absent such a showing by the defendants, they are jointly and severally liable.

The disarray in this case suggests strongly that a future decision emanating out of the Supreme Court will alleviate confusion over evidentiary burdens for defendants attempting to apportion liability before being jointly liable for the entire cost of clean-up and remediation efforts. The case will be heard by the Supreme Court in this year's judicial session.

3. *City of Waukegan v. National Gypsum Co*. (N.D. Ill 2008) 560 F.Supp.2d 636

Waukegan, Illinois sits on the shores of Lake Michigan at Waukegan Harbor. Several commercial and industrial entities sit on the shoreline of the harbor. A defunct company, Outboard Marine Corp. for many years owned and operated a testing facility for marine products that allegedly discharged the toxic chemical polychlorinated biphenyl ("PCB") into the mud layer of the harbor. Waukegan sued under CERCLA for damages and declaratory relief for contamination of the harbor. In a novel approach to charging liability, the City claimed that several entities who had engaged in goods transportation via cargo ships should be jointly and severally liable under CERCLA for propeller wash that disturbed the PCB contaminated soil. Waukegan additionally sued Bombardier Motor Corp., who operates a submerged engine testing facility in the Harbor and sued the Harbor Port District, alleging ownership over physical areas of the Harbor.

All Defendants filed motions to dismiss by arguing that they could not be considered possibly responsible parties ("PRP"s). The Harbor Port District (Port District) claimed it could not be a PRP under CERCLA, because, although superficially it could approve dredging and leasing on the harbor, its authority was limited and it could not be considered an "owner" as required by Section 107 of the Act. Rather, the harbor belonged to the State of Illinois. Waukegan further claimed that the Port District could be held liable as an operator. The Court rejected this argument, finding that, for "operator" liability to attach to a government entity, direct "hands on" management of the facility was required. Possession and use of regulatory authority was insufficient. (*U.S. v. Dart Indus., Inc*. (4th Cir. 1988) 847 F.2d 144.)

The Court then upheld the dismissal of charges against those defendants who had caused ships to enter the harbor. Though it could not find a particular case on point, the court opined that "CERCLA does not undercut the principle that a parent is not, without more, liable for its subsidiary's torts." Rather, the vessel owners must be in some way in control of the pollution creating operations at the time of the release of the hazardous substances to be liable as "operators" under CERCLA.

Finally, the Court did uphold the complaint against Bombardier. Bombardier, according to the complaint, conducted operations in the Harbor that may have caused a "release" of PCB into the harbor. Under CERCLA, "release is defined as spilling, leaking, pumping, pouring, emitting, emptying, discharging, escaping, leaching, dumping, or disposing into the environment." This case illustrates how a defendant's particular ownership, right of control, and activities in a contaminated facility contribute to its ultimate liability under CERCLA, and how state law determines ownership under CERCLA.

4. ***U.S. v. Capital Tax Corporation*** **(7th Cir. 2008) 2008 U.S. App. Lexis 20056**

Capital Tax Corporation ("Capital Tax") is an Illinois company that purchases distressed real estate and re-sells them for profit. Capital Tax acquired a "tax certificate" at a Cook County tax sale that would allow for it to sell the property to a third party. Capital Tax acquired the tax certificate and then allegedly sold the property to Mervyn Dukatt . Dukatt allegedly made a significant payment to Capital Tax, but then never made another payment. No contract for sale was produced in writing and the connection between the two parties remains unclear. Capital Tax retained legal title to the property as security for the alleged sale.

The property was the site of a former paint mixing facility ("Facility"). After community reports of chemical discharge and leaking from the Facility, Capital Tax was instructed to remediate the Facility by state and federal authorities. After refusing to do so, the federal government voluntarily remediated the Facility itself. Capital Tax was sued by the federal government for the expended remediation costs. The government filed a summary judgment motion on the issue of ownership and won. Capital Tax appealed that decision. Throughout the proceedings, Capital Tax asserted that it had only legal ownership of the Facility, and hence could not be considered an "Owner" for purposes of CERCLA liability. Under Illinois law, once Capital Tax sold the Facility to a third party, it did not have "equitable" ownership, which had been transferred, in this case, to Dukatt. Capital Tax asserted that it maintained only a security interest in the Facility, placing it in a protected position under CERCLA's secured creditor exemption. (42 U.S.C. § 9601 (20)(A).) Because there was a material dispute over whether equitable ownership of the property had occurred, and who had exercised control over the Facility after the tax certificate had been purchased by Capital Tax, summary judgment for the United States was improper. The Court was skeptical of the arguments Capital Tax made regarding its relationship with Dukatt and the extent of control it had over the Facility. However, because CERCLA did not define "Owner" in the statutory scheme, courts have historically relied on state law to determine ownership of real property. In this case, the defendant had raised a colorable legal claim sufficient to avoid summary judgment for the government.

5. ***United States v. Honeywell*** (E.D. Cal. 2008) 542 F. Supp. 2d 1188

The EPA brought suit against Honeywell International and other parties to recover the costs expended to cleanup the Central Eureka Mine Superfund Site in Amador County. The defendant filed a contribution action against a third party who had excavated, trenched, graded, and installed underground utilities on the property from 1978 to 1982. These activities were found to accelerate the rate at which arsenic contamination migrated from adjacent mine tailings onto the property. The district court found that the record supported a finding that the third party was liable under CERCLA as a former owner.

6. ***Royal Indemnity, Co. v. United Enterprise, Inc.*** (2008) 164 Cal.App.4th 194

In this case, an insurance company brought a declaratory relief action against its insured land company, United Enterprises, Inc. ("United"), to determine the extent or existence of an insurable event. United was embroiled in a CERCLA contribution case as a PRP with Flat Rock Land Company ("Flat Rock") to share in the remediation costs. Flat Rock attempted to intervene in the insurance coverage case and was denied by the trial court.

The appellate court agreed that Flat Rock was not entitled to intervene. Flat Rock did not have a direct interest in the litigation as a "potential judgment creditor" as the insurance litigation was only at a stage where the duty to defend was in issue. According to discretionary factors considered by courts to determine if permissive intervention is proper, the facts of this case did not support permissive intervention. Flat Rock's appeal that the trial court abused its discretion by incorrectly denying it leave to intervene is unsupported by authority or public policies such as judicial economy.

Notes:

ENVIRONMENTAL ENFORCEMENT

A. Regulatory Framework

- Federal, state and local environmental laws provide enforcement mechanisms for ensuring compliance with the various statutory schemes that protect the environment. The various agencies work together to ensure compliance and pursue enforcement.

- Violations of state and local laws can also be referred to the Attorney General or local district attorney for civil penalties or criminal charges. (See Water Code, § 1052; Fish & G. Code, § 5650.)

- Citizen Enforcement Actions under section 505 of the CWA are increasingly popular for discharges to waters of the United States. 33 U.S.C. §1365. While some claims proceed to trial, many businesses end up settling frivolous suits to avoid the expense of litigation.

B. Managing Environmental Inspections or Investigations

1. Designate an environmental representative for each site:

    - Requires thorough familiarity with all environmental aspects.

    - Representative to be principal contact and spokesman for inspections or investigations.

    - Representative maintains written record of all inspections and investigations.

2. Follow formal procedure for receiving inspectors or investigators:

    - Conduct pre-inspection interview prior to site visit
        - Set respectful, responsive and friendly tone.
        - Confirm purpose.
        - Agree on scope.
        - Inquire if routine inspection pretext for inspection or investigation of regulatory violation.
        - Request copy of checklist.
        - Arrange for split/duplicate sampling & photographs, if necessary.

- Accompany Inspector or Investigator
  - Provide personal protection equipment, if necessary.
  - Environmental representative should act as sole spokesman.
  - Take careful notes.

- Conduct post-inspection interview
  - Discuss findings.
  - If notice of violation is indicated, request regulatory reference.
  - Secure copy of field notes or inspection report.
  - Discuss time frames for further communications, cease and desist, responses, etc.
  - Obtain all contact numbers.

3. Document and file inspection notes and results

C. Update

1. Energy Company Pays Largest Civil Penalty In EPA History for Water Permit Violations

In a corporate-wide settlement, Massey Energy agreed to pay a $20 million settlement arising out of CWA violations from coal mining activities in West Virginia and Kentucky. This is the largest civil penalty in the EPA's history levied against a company for wastewater discharge permit violations. EPA estimated Massey released 380 million pounds of sediment, slurry and other pollutants into the nation's waters between January 2000 and December 2006, totaling 4,500 individual violations of the CWA. Massy will also be required to invest $10 million in remediation and prevention measures.

For more information, see http://yosemite.epa.gov/opa/admpress.nsf/b1ab9f485b098972852562e7004dc686/6944ea38b888dd03852573d3005074ba!OpenDocument.

2. Northern California Tribe Agrees to Restore Damaged Klamath River Wetland

In December 2006 and January 2007, the Resighini Rancheria placed 15 acres of fill material without a permit into wetlands adjacent to the Klamath River just east of the Highway 101 Bridge crossing in Del Norte County, California. The EPA entered into a consent order with the Coast Indian Community of the Resighini Rancheria that requires the tribe to restore approximately 15 acres of willow forest that it cleared causing unauthorized discharges to wetlands adjacent to the Klamath River in Northern California. The CWA prohibits the placement of dredged or fill materials into wetlands, rivers, streams and other waters of the United States without a permit from the USACE. The tribe agreed to begin restoring the wetlands within 90 days, submit quarterly progress reports, and submit annual monitoring reports to the EPA once the work is completed.

For more information, see http://yosemite.epa.gov/opa/admpress.nsf/0/147F50EA0D69E720852574C1006717EC.

3. U.S. EPA Requires Six Chino Dairies To Protect Water From Manure Waste

The EPA ordered six Chino, California-area dairies to comply with California Regional Water Quality Control Board permit requirements to comply with the CWA. Through an administrative order, the EPA ordered the following dairies to prevent runoff of discharge from their operations to nearby waterways: Brothers Three Dairy, Quality Dairy, Jorritsma and Anema Dairy, Martin Vander Laan Dairy, TLC Sonlight Dairy #2 and Goyenetche Dairy #2, to comply with the permit requirements.

For more information see http://yosemite.epa.gov/opa/admpress.nsf/e51aa292bac25b0b85257359003d925f/ae93c9371d3e8a35852574d30066dae8!OpenDocument.

4. EPA And U.S. Justice Department File $22 Million Lawsuit Against Landowner in Nevada County

The U.S. Department of Justice, on behalf of the EPA, and the California Department of Toxic Substances Control, filed a complaint today seeking more than $22 million to recover past cleanup costs at the Lava Cap Mine Superfund Site in Nevada County.

The complaint, filed against alleged former owner and operator Canadian-based Sterling Centrecorp Inc., and current owners Stephen P. Elder and Elder Development, Inc., seeks past and future costs associated with cleaning up mine tailings and waste rock, collecting and treating contaminated water from the mine, and diverting the flow of clean surface water around contaminated tailings. Consistent with its policies, the EPA sought to resolve this matter prior to filing the complaint, without success.

For more information see http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb852 57359003fb69d/88edce10f1be4594852574ef00702e9f!OpenDocument

5. Propane Distribution Firm pays Air Resources Board $36,375 for Diesel Emissions Violations.

CARB has fined a Cameron Park ropane distributor $36,375 for diesel truck emission violations. A CARB audit of Suburban Propane found that the company did not annually inspect its heavy duty diesel vehicles in 2006 and 2007 at fleet centers in Placerville, Rancho Cordova, Redding, Yreka, Grass Valley, Clearlake, Lancaster, Santa Cruz, Marina, Turlock, Oakhurst, Fresno, Escondido, Lake Isabella, San Jose and Concord.

For more information see http://www.arb.ca.gov/newsrel/nr090508.htm

6. Businessman Sentenced for Tearing Down Asbestos-Filled Building in Violation of the Clean Air Act

A Tracy, California businessman was convicted in 2008 for failure to comply with the federal CAA (42. U.S.C. §§ 7401 *et seq*, 42 C.F.R. §§7412 and 7413(c)(1).) regulating the removal of asbestos-containing material when he demolished a building that contained significant amounts of asbestos. He was convicted of violating several work practice standards, including failing to properly notify the Air District, failing to wet the asbestos-containing material, failing to keep the material in leak-tight containers, and failing to dispose of the material at an unauthorized location.

The CAA requires that any activity involving asbestos-containing material, a hazardous air pollutant, be in compliance with "work practice" standards. Among other requirements, these standards require that the owner and operator: (a) contact the EPA or its delegate at least ten days prior to beginning any activity; (b) properly label bags containing regulated asbestos-containing material; (c) manage the asbestos-containing material so that there is no discharge of visible emissions; (d) keep the asbestos-containing material wet and sealed in leak-tight containers, so that it does not generate airborne dust; and (e) deposit the asbestos-containing material at an authorized and approved disposal site.

For more information see http://www.usdoj.gov/usao/can/press/2008/2008_08_28_azizi.sentenced.press.html.

7. **Laidlaw Buses, Durham School Services Settle Private Prop. 65 Litigation Alleging Failure to Warn of Exposure to Hazardous Chemicals to Schoolchildren**

Laidlaw and Durham both provide school busing and transportation support services to schools throughout the state. In January 2007, they were sued via private enforcement action for failing to provide warnings on school buses informing occupants that they were being exposed to hazardous chemicals. Proposition 65 (Health and Safety Code §§ 25249.5 *et seq*.) requires businesses to notify Californians about significant amounts of chemicals in the products they purchase, in their homes or workplaces, or that are released into the environment. After significant litigation incurred, both defendants agreed to phase out highly polluting buses and place warnings on existing buses. Because of this settlement, both defendants were required to do more in remediation than Proposition 65 actually requires of California businesses.

For more information see http://www.envirolaw.org/documents/ NEWSRELEASE-TX_000.pdf.

8. California Settles $6 Million Lawsuit with MCM Construction Company over Air Pollution Permits

MCM Construction settled a $6 million lawsuit brought by the California Attorney General's Office, resolving allegations that the company was operating diesel cranes, pile drivers, and other portable engines without the required air district pollution permits.

Under California laws designed to protect air quality, construction companies must obtain a permit from air pollution control districts or the CARB before operating certain diesel engines over fifty horsepower. (Health & Safety Code, §§ 39600 *et seq.* 13 C.C.R. §§ 2450 *et seq.)* The California Attorney General's Office alleged that MCM Construction operated dozens of engines at multiple locations without required permits on hundreds of days. Diesel exhaust contains carcinogens, particulate matter, and oxides of nitrogen.

The parties settled for $6 million in advance of trial, agreeing that MCM Construction will obtain necessary permits prior to operating any of its portable, diesel-burning equipment and will train its personnel to take precautions to protect rivers at bridge construction sites.

For more information see http://ag.ca.gov/newsalerts/release.php?id=15 63&year =2008&month=5.

CLIMATE CHANGE

A. Regulatory Framework

1. Executive Order S-3-05

In June 2005, Governor Schwarzenegger issued Executive Order S-3-05 calling for statewide reductions in greenhouse gas emissions ("GHG") and creating the Climate Action Team.

The Executive Order set the following emission targets:

- By 2010, reduce GHG emissions to 2000 levels.
- By 2020, reduce GHG emissions to 1990 levels.
- By 2050, reduce GHG emissions to 80 percent below 1990 levels.

The Climate Action team reports biannually on progress toward emission targets.

For more information, see http://gov.ca.gov/executive-order/1861.

2. AB 32 (Chapter 488, Statutes 2006) Global Warming Solutions Act of 2006

- Codifies the state's goal by requiring that the state's global warming emissions be reduced to 1990 levels by 2020.

- Defines GHG to include carbon dioxide, methane, nitrous oxide, hydroflourocarbons, perflourocarbons, and sulfur hexafluoride. (Health & Saf. Code § 38505 (g).)

- By June 30, 2007, CARB must publish Discrete Early Action GHG emission reduction measures. Discrete early actions are regulations to reduce GHG emissions adopted by the Board and enforceable by January 1, 2010.

- By January 1, 2008, California Air Resources Board ("CARB") must identify what the state's GHG emissions were in 1990 and approve a statewide emissions limit for the year 2020 that is equivalent to 1990 levels. (Health & Saf. Code, § 38550.)

- By January 1, 2008, CARB must adopt regulations to require the reporting and verification of statewide GHG emissions.

- By January 1, 2011, CARB must adopt emission limits and emission reduction measures to take effect by January 1, 2012.

3. CEQA

- **SB 97 (Chapter 185, Statutes 2007) CEQA: Greenhouse Gas Emissions**

  No CEQA guidelines currently exist for the analysis or mitigation of GHG. SB 97 requires that by July 1, 2009, the Governor's Office of Planning and Research ("OPR") prepare and transmit to the Resources Agency CEQA guidelines for the mitigation of GHG emissions. The Resources Agency must then certify and adopt the guidelines by January 1, 2010.

- ***State of California v. County of San Bernardino*** **(Super. Ct. Bernardino County, 2008, No. CNCIVSS0700329)**

  In 2007, Attorney General Brown filed suit against the County of San Bernardino alleging that the EIR prepared for the County's General Plan failed to comply with the requirements of CEQA in its analysis of GHGs, climate change, and diesel engine exhaust emissions. In the absence of guidelines informing agencies how to deal with GHG in CEQA documents, the terms of this settlement serve as guideposts to agencies updating their general plans.

  The case settled with the County agreeing to amend the General Plan within 30 months, and the adoption of a GHG and emissions reduction plan. The amended General Plan will include an inventory of all known, or reasonably discoverable, sources of GHG in the County. Because definitive data sources for this inventory do not yet exist, the parties agreed that the measurements will be estimates, but the estimates will be supported by substantial evidence and will represent the County's best efforts. The agreement provides that the County will inventory past emissions for 1990, the current year, and will project emissions for 2020. In addition, the County will create a target for the reduction of sources of emissions reasonably attributable to the County's discretionary land use decisions.

  The settlement allowed the updated General Plan to remain in effect. The County will conduct a CEQA review of both the General Plan Amendment and the Greenhouse Gas Emissions Reduction Plan.

  For more information, see http://ag.ca.gov/cms_pdfs/press/2007-08-21_San_Bernardino_settlement_agreement.pdf.

- **Mitigation**

  Various sources suggest strategies for the mitigation of GHG, including:

  - ICLEI – The International Council on Local Environmental Initiatives ("ICLEI") - Local Governments for Sustainability released "Preparing for Climate Change," A Guidebook for Local, Regional, and State Governments, by recommending a detailed process for climate change preparedness. ICLEI has also released a new version of their GHG emissions analysis protocol in August, 2008. The attorney general has recognized ICLEI as a resource for climate change mitigation.

  For more information, see http://www.iclei.org/.

  - Attorney General Paper - The Attorney General has issued a white paper suggesting potential mitigation measures in the areas of transportation, energy efficiency, land use, solid waste, and carbon offsets. Examples of land use related mitigation include:

    - Encouraging mixed-use, infill, and higher density development.
    - Discouraging development that will increase passenger vehicle VMT.
    - Incorporating public transit into project design.
    - Requiring measures that take advantage of shade, prevailing winds, landscaping and sun screens to reduce energy use.
    - Preserving and creating open space and parks.
    - Facilitating "brownfield" development located near existing public transportation and jobs.
    - Requiring pedestrian-only streets and plazas within developments.

  For more information, see http://ag.ca.gov/globalwarming/pdf/GW_mitigation_measures.pdf.

4. NEPA

- ***Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508**

  In this case, the Ninth Circuit held that the analyzing the impact of GHG emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires before major federal actions significantly affect the human environment. In April 2006, the National Highway Traffic Safety Administration ("NHTSA") adopted a Final Rule setting corporate average fuel economy ("CAFE") standards for light trucks for model years 2008-2011. The Center for Biological Diversity claimed, among other things, that NHTSA's Environmental Assessment ("EA") for the proposed rule was inadequate under NEPA because it failed to take a "hard look" at the GHG implications of its rulemaking.

The court found that the Environmental Assessment's cumulative impacts analysis was inadequate because it failed to evaluate the incremental impact of GHG emissions on climate change. The court ordered NHTSA to prepare a new Environmental Impact Statement ("EIS") stating that NHTSA "failed completely to discuss in any detail the global warming phenomenon, or to explain the benchmark for its determination of insignificance in relation to that danger."

5. Air Quality

- ***Massachusetts v. EPA* (2007) 127 S.Ct. 1438**

In 1999, several states including California and Massachusetts and some environmental groups brought suit to challenge the Environmental Protection Agency's ("EPA") failure to grant a rulemaking petition which requested the Environmental Protection Agency to regulate carbon dioxide emissions from new motor vehicles under Section 202 of the federal Clean Air Act ("CAA"). The Court found that GHGs meet the CAA's definition of air pollutants, which the EPA could not avoid regulating, notwithstanding EPA's arguments it would interfere with governmental foreign policy, and the inability of regulations to address a global issue.

B. Update

1. CEQA

a. SB 375 (Chapter 728) – Transportation planning: travel demand models: sustainable communities strategy.

SB 375's major elements include:

- Regional Transportation Plans ("RTP") are expanded to include a sustainable communities strategy ("Strategy"), to reduce GHG by coordinating land use and transportation planning. Cities and counties retain land use jurisdiction.

- Local governments now have three or possibly four years to rezone property to accommodate regional housing needs. Failure to timely do so, alone, is not sufficient reason to deny or condition a development project.

- Transit priority projects are exempt from CEQA if the project can satisfy a myriad of qualifying conditions.

The Strategy is designed to meet GHG targets set for each region by CARB. The threshold target dates are set for 2020 and 2035. Each of the state's 18 metropolitan planning organizations ("MPO") then designs a land use pattern, to enable the region to achieve those emission targets. The MPO must quantify the reductions the Strategy will achieve and submit the Strategy to the CARB for approval. If the Strategy is rejected, the MPO must revise it to meet the target.

The housing element provisions of SB 375 provide some relief to both local governments working to rezone property to accommodate regional housing needs and developers awaiting local government action.

SB 375 gives local government three years from the time the housing element is adopted to accomplish the necessary rezone. If the housing element is not adopted within 120 days of the statutory deadline to do so, the rezoning shall be accomplished 120 days from the statutory deadline.

SB 375 penalizes a local government delinquent in accomplishing the necessary rezone. In the event that a local government fails to complete the required rezoning within the mandated timeframes, and a developer proposes a residential project on one of the sites to be rezoned (so long as the project complies with applicable, objective general plan and zoning standards and criteria), then local government discretionary approval with respect to the application is severely restricted. Under those circumstances, a city or county may not disapprove a housing development nor require a conditional use permit, planned unit development permit, other locally imposed discretionary permit, or impose a condition that would render the project infeasible.

A local government may only disapprove a development if it makes written findings supported by substantial evidence that the project would have a specific adverse impact upon public health or safety. Additionally, it must find the only feasible way to mitigate or avoid the adverse impact is to disapprove the project. The applicant or any interested person has a private cause of action to enforce the new development zoning requirements under this subdivision.

The law requires that when each council of governments develops the regional housing needs allocation, it must do so in a manner that is consistent with the Strategy and the RTP. The resolution approving the allocation must demonstrate this fact.

The law creates a CEQA exemption for a narrow group of transit priority projects.

As defined, a transit priority project:

- Contains at least 50 percent residential use;
- Provides a minimum net density of at least 20 dwelling units per acre;

- Within one-half mile of a major transit stop or high quality transit corridor.

In order for the transit priority project to qualify for the exemption, the legislative body must hold a hearing and find that the project satisfies a list of 17 environmental, housing, and public safety conditions and criteria, representing the needs of every imaginable interest group. While the exemption is intended to encourage the development of transportation priority projects, the conditions are cumbersome and the exemption may have limited effect. For local governments, a more effective strategy to encourage similar projects would be to include them in the specific or general plan so that developers can take advantage of the streamlined environmental review available under CEQA Guidelines sections 15162 and 15183.

b. Preliminary Draft Staff Proposal: Recommended Approaches for Setting Interim Significance Thresholds for Greenhouse Gases under California Environmental Quality Act

OPR, directed by Senate Bill 97 to develop guidelines for the mitigation of GHGs, asked CARB to develop GHG-related thresholds of significance. The initial proposal is limited in scope and focuses only on residential, commercial, and industrial projects. The proposal addresses three types of residential and commercial projects:

- Statutory and categorical CEQA exemptions - CARB staff suggests that CEQA's categorical and statutory exemption provisions continue to apply because projects described in the sections "appear to be relatively small from a GHG perspective."

- Programmatic Documents – CARB reiterates the importance of addressing GHGs in program level documents and suggests what a programmatic document must contain with respect to GHG emissions.

A commercial or residential project that is not exempt under an existing categorical or statutory exemption will be presumed to have a less than significant impact if the project complies with a previously approved qualifying plan.

- Project Level Documents - A non-exempt project is presumed to have a less than significant impact related to climate change if:

  - The construction meets an interim CARB performance standard for construction-related emissions;

- The operations: a) meet the California Energy Commission's Tier II Energy Efficiency goal; b) meet an interim CARB performance standard for water use; c) meet an interim CARB performance standard for waste; and d) meet an interim CARB performance standard for transportation; and
- The project will emit no more than a to be established limit for metric tons CO2e per year. Criteria for this level have yet to be aired.

For industrial projects, CARB proposes a combination of quantitative and performance standard thresholds. CARB notes that a change in the combination may be appropriate as regulatory requirements are developed.

For more information, see http://www.arb.ca.gov/cc/localgov/ceqa/ceqacomm.htm.

c. Technical Advisory CEQA and Climate Change: Addressing Climate Change Through California Environmental Quality Act Review

On June 19, 2008, OPR offered a preview of the perspective from which it will prepare the CEQA guidelines for the mitigation of GHG by issuing this technical advisory.

OPR's Advisory places the burden on lead agencies to devise a strategy to deal with GHG emissions. It calls for each lead agency to "develop its own approach to performing climate change analysis for projects that generate GHG emissions." It calls for lead agencies to apply a consistent approach based on the best available information. The approach should involve three basic steps: "identify and quantify GHG emissions; assess the significance of the impact on climate change; and if the impact is found to be significant, identify alternatives and/or mitigation measures that will reduce the impact below significance."

- Identify and quantify GHG emissions – The lead agencies should: "make a good faith effort, based on available information," to estimate the GHG emissions from the "vehicular traffic, energy consumption, water usage, and construction activities," associated with a proposed project.

- Assess the significance of the impact on climate change - The lead agency must determine what constitutes a significant impact by undertaking a project-by-project analysis. Lead agencies should carefully consider and document the proposed project's direct, indirect and cumulative impacts.

- Identify alternatives and/or mitigation measures – The lead agency must impose all feasible mitigation measures necessary to reduce GHG emissions to a less than significant level. Mitigation measures may include alternative project designs or locations that conserve energy and water, reduction in vehicle miles traveled, contribution to established regional or programmatic mitigation strategies, and carbon sequestration.

OPR acknowledged the difficulty of approaching the issue of climate change on a project by project basis. The Advisory recognized that "the global nature of climate change warrants investigation of statewide thresholds of significance for GHG emissions." Further, OPR explained that,

> "CEQA can be a more effective tool for GHG emission analysis and mitigation if it is supported and implemented by sound development policies that will reduce GHG emissions on a broad planning scale and that can provide the basis for a programmatic approach to project-specific CEQA analysis and mitigation."

OPR points out that CEQA authorizes reliance on previously approved plans and mitigation programs that have adequately analyzed and mitigated GHG emissions to less than significant levels.

Perhaps the most valuable part of the Advisory are the three attachments which include a comprehensive inventory of organizations, laws, and reports related to GHGs; an inventory and descriptions of modeling tools; and GHG reduction measures. The Advisory and attachments largely reiterate the strategies advocated by the Attorney General, including the Chart of Modeling Tools and the Fact Sheet on Mitigation Measures.

For more information, see http://opr.ca.gov/index.php?a=ceqa/index.html. See also OPR's list of CEQA documents addressing climate change http://opr.ca.gov/ceqa/pdfs/Environmental_Assessment_Climate_Change.pdf

d. Draft CEQA Guidelines for Greenhouse Gas Emissions, January 8, 2009

The OPR issued *Preliminary Draft CEQA Guideline Amendments for Greenhouse Gas Emissions* on January 8, 2009 ("Amendments".) The Amendments were developed in response to Senate Bill 97 (Chapter 185, Statutes 2007; Pub. Resources Code, § 21083.05) which directs OPR to develop draft CEQA Guidelines for the mitigation of GHG emissions or the effects of GHG emissions by July 1, 2009.

Significance

The Amendments explain both how an agency should "describe, calculate, or estimate" a project's GHG, and what the agency should consider in determining the significance of the emissions. The Amendments allow agencies to identify emissions by either selecting a "model or methodology" to quantify the emissions or relying on "qualitative or other performance based standards. (Guidelines, § 15064.4 (b).) When assessing the significance of GHG emissions, lead agencies should consider the extent to which the project:

- Could help or hinder attainment of the state's goals of reducing GHG emissions to 1990 levels by the year 2020;
- May increase the consumption of energy resources, especially fossil fuels;
- May result in increased energy efficiency of and a reduction in overall GHG emissions from an existing facility;
- Impacts or emissions exceed any threshold of significance that applies to the project; (Guidelines, § 15064.4 (c)) and
- Produces GHG emissions which would be cumulatively considerable. (Guidelines, § 15130 (f).)

Mitigation

Consistent with CEQA's provision that a public agency should not approve a project if there is a feasible alternative or feasible mitigation measure available which would substantially lessen the significant environmental effects of the project, the Amendments provide that, "[l]ead agencies should consider all feasible means of mitigating greenhouse gas emissions." (Pub. Resources Code, § 21002 & Guidelines, § 15126.4 (c)(1).) Mitigation may include:

- Project features, project design, or other measures which are incorporated into the project to substantially reduce energy consumption or GHG emissions;
- Compliance with the requirements in a previously approved plan or mitigation program for the reduction or sequestration of GHG emissions; and
- Measures that sequester carbon or carbon-equivalent emissions. (Guidelines, § 15126.4 subd. (c)(2)-(4).)

The Amendments further provide that if off-site measures or the purchase of carbon offsets are proposed as mitigation, the measures must be part of a reasonable plan of mitigation that the relevant agency commits itself to implementing. (Guidelines, § 15126.4 (c)(5).)

Tiering

The Amendments encourage the reliance of project-level documents on general plan EIRs or other programmatic EIRs by providing that:

Project level CEQA documents need not provide additional project-level GHG emissions analysis or mitigation measures, if the proposed project is consistent with an applicable regional or local plan that adequately addresses greenhouse gas emissions, and the plan is one for which an EIR has previously been certified. (Guidelines, § 15152 subd. (i).)

Sustainable Communities Strategy

The OPR revised the Guidelines to reflect the SB 375 requirement that each region develop a sustainable community strategy. Guidelines section 15125 requires EIRs to discuss any inconsistency between the proposed project and applicable general plans and regional plans. The revision adds specific plans to this list, and defines regional plan to include, among other things, regional blueprint plans, sustainable community strategies, and climate actions plans.

Appendix G

The Amendments add GHG to the list of issues the Appendix suggests considering whether the project will generate GHG emissions and whether it will conflict with any applicable plan, policy or regulation of an agency adopted for the purpose of reducing GHG emissions. Further, the Amendment changed the transportation/traffic section to reflect smart growth strategies by removing reference to LOS and adequate parking.

For more information, see
http://opr.ca.gov/ceqa/pdfs/Workshop_Announcement.pdf.

e. **Trial Court Cases**

The issue of GHG analysis in CEQA documents has made its way to the superior court in several counties. These cases are fact specific, non-binding and are of no precedential value.

- In *Environmental Council of Sacramento v. California Department of Transportation* (Sup. Ct. Sacramento County, No. 2008-00004668, 2008), the Sacramento Superior court held that a project that fell within the SB 97 exemption for transportation projects, is nevertheless exempt from conducting a GHG analysis because the Final EIR had been certified months before the effective date of the legislation.

- In *Westfield v. City of Arcadia* (Sup. Ct. Los Angeles County, No. BS108923, 2008), the Los Angeles Superior Court found that the quantification of carbon dioxide emissions expected from an 800,000 square foot commercial project constituted sufficient climate change analysis.

- In *Natural Resources Defense Council, Inc. v. South Coast Air Quality Management District* (Sup. Ct. Los Angeles County, No. CV08-05403, 2008), the Los Angeles Superior Court set aside a rulemaking because the environmental analysis failed to fully quantify or analyze GHG effects and failed to consider how to mitigate them. Notably, the environmental analysis had discussed the potential generation of carbon dioxide.

- In *Highland Spring v. City of Banning* (Sup. Ct. Riverside County, No. 460950, 2008), the Riverside County Superior Court found that CEQA did not require the city to consider the GHG impacts of a project to develop 1,453 housing units with a school site and other amenities since "no law required the Banning City Council to consider global warming at the time it approved [the] project." The EIR in this case was set aside on other grounds.

- In *Center for Biological Diversity v. City of Perris* (Sup. Ct. Riverside County, No. 477632, 2008), the Riverside County Superior Court upheld the city's conclusion that analysis of a large commercial shopping center's impact on climate change could be limited as merely speculative.

- In *Center for Biological Diversity v. City of Desert Hot Springs* (Sup. Ct. Riverside County, No. 464585, 2008), Plaintiff challenged the City's EIR prepared for a 520,000 square foot commercial development. The Riverside Superior Court held that the City violated CEQA by failing to make a meaningful attempt to analyze GHG emissions from the city's approval of a luxury resort.

f. California Attorney General Agreements

The California Attorney General has threatened litigation against several notable local government agencies and private companies to encourage a reduction in their GHG emissions. Citing to CEQA and AB 32 as grounds for the lawsuits, Brown has successfully negotiated increased consideration of GHG emissions from the Port of Los Angeles, Great Valley Ethanol, the San Diego Port Authority, and the City of Stockton.

For more information, see http://ag.ca.gov/globalwarming/ceqa.php.

2. Air Quality

a. Climate Change Proposed Scoping Plan

On December 11, 2008, CARB adopted the Proposed Scoping Plan outlining the State's strategy to achieve the GHG reductions established by AB 32. According to CARB, in 1990 California emitted 427 million metric tons of carbon dioxide equivalents ($MMTCO_2E$) of GHGs. In order to reduce emissions to this level by 2020, the state will have to lower emissions by 169 $MMTCO_2E$, a 30 percent reduction from the business as usual emissions levels projected for 2020. On a per capita basis, this represents a reduction from 14 to 10 tons per year per person.

The key elements of the plan are:

- Expanding and strengthening existing energy efficiency programs as well as building and appliance standards;
- Achieving a statewide renewable energy mix of 33 percent;
- Developing a California cap-and-trade program that links with other Western Climate Initiative partner programs to create a regional market system;
- Establishing targets for transportation-related GHG emissions for regions throughout California and pursuing policies and incentives to achieve those targets;
- Adopting and implementing measures pursuant to existing State laws and policies, including California's clean car standards, goods movement measures, and the Low Carbon Fuel Standard; and
- Creating targeted fees, including a public goods charge on water use, fees on high global warming potential gases, and a fee to fund the administrative costs of the State's long-term commitment to AB 32 implementation.

b. *In re Deseret Power Electric Cooperative* (*PSD Appeal No. 07-03*, Issued Nov. 13, 2008 Environmental Appeals Board, United States Environmental Protection Agency)

On November 13, 2008, the EPA's Appeals Board ruled that all new and proposed coal-fired power plants must have their carbon dioxide emissions evaluated for possible regulation. The Appeals Board ruled that the EPA was required to evaluate global warming emissions from Deseret Power's proposed 110-megawatt coal-fired power plant in Vernal, Utah before issuing the facility permit.

In July 2007, EPA issued a permit for a proposed Bonanza coal-fired power plant in Utah. The Sierra Club, Western Resource Advocates, and Environmental Defense filed a request that the permit be overturned because it did not require any controls on carbon dioxide pollution. The petitioners argued that the CAA prohibits the construction of a new major stationary source in areas that have attained National Ambient Air Quality Standards except in accordance with a prevention of significant deterioration ("PSD") construction permits. (42 U.S.C. § 7475(a); 40 C.F.R. §52.21(a)(2)(iii).) Section 165 of the CAA requires that a PSD permit must include a best available control technology ("BACT") emission limit "for each pollutant subject to regulation under this chapter emitted from, or which results from" the facility. (42 U.S.C. § 7475(a)(4).) Petitioners argued that, because of the recent court ruling in *Massachusetts v. EPA*, EPA was required to issue a BACT emission limit for CO_2 emissions before issuing the permit.

Citing to the Supreme Court's April 2007 decision in *Massachusetts v. EPA*, the board ruled that the analysis undertaken by the regional board in permitting the new power plant was inadequate.

In its decision, the appeals board ruled that the EPA had failed to offer a good reason for not regulating GHG emissions from the proposed Bonanza plant. The board remanded the permit decision to the regional EPA district with instructions that it should reconsider whether the best available pollution controls for CO_2 should be required, and stressing that it must adequately explain its decision. "[T]his is an issue of national scope that has implications far beyond this individual permitting proceeding," the board wrote. In recent years there has been a significant expansion of new coal-burning generation facilities. More than 100 facilities are subject to permit renewal or awaiting new permits. This ruling would effectively require each new facility's permit to be reviewed to determine CO_2 emissions standards. The overall effect of the ruling will be to delay construction of proposed coal-fire power plants until all pending permits consider CO_2 emissions.

c. EPA Issues Advance Notice of Proposed Rulemaking After *Massachusetts v. EPA* Decision

Pursuant to the Court's directive in *Massachusetts v. EPA* (2008) 549 U.S. 497 (2007), EPA has issued advanced notice of proposed avenues by which GHGs may be regulated under the CAA. The EPA's proposed rulemaking attempts to treat GHG similar to other presently regulated pollutants, which emphasizes a top-down, command and control regulatory scheme. In conjunction with the proposed rule, criticism from other agencies and industry groups focused on the difficulty of regulating carbon dioxide in this manner and the effects on the economy. Criticism leveled at the proposed rule included:

- The possibility of legal limitations in the use of the CAA as a proper vehicle for regulation;
- The possibility that the regulation would be extraordinarily intrusive and burdensome on businesses and consumers;
- That the proposed regulations would be cost-prohibitive and inflexible;
- Regulating GHG emissions via rulemaking, given the extraordinary effect on the economy, should be undertaken by elected officials and not by appointed bureaucrats;
- Input source control, such as CAFE standards regulating fuel efficiency standards, are a better way to control GHG emissions than direct pollutant control; and
- Alternative means may avoid increased regulatory bureaucracy, maintain jobs, and boost efficiency without penalizing the economy.

EPA has signaled it intends to receive as much commentary as possible to highlight the difficulty in choosing an appropriate vehicle for regulations of this nature, given the global effect of GHGs, and their wide dispersal throughout the atmosphere.

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REAL ESTATE LITIGATION AND EASEMENTS UPDATE

Glen C. Hansen

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LITIGATION

A. Regulatory Framework

Summary

- Proceedings to foreclose mechanics' liens are governed by equitable principles. Thus, where a contractor built a street through a subdivision, the several owners benefitted by that street do not have to post multiple bonds to release duplicate liens to address a single debt owed to the contractor. The court could use its equitable powers to allow a single bond to release the multiple liens recorded against the several parcels.

- A contractor must be fully licensed at all times during performance of a remodeling contract; otherwise the contractor is not entitled to recovery for work performed. The contractor's failure to satisfy that licensure requirement will support a prejudgment writ of attachment.

- A purchase contract that gives a real estate buyer the absolute and sole discretion to cancel the contract at any time during a specified due diligence period, with no affirmative obligation to do anything, is a unilateral option agreement that can be revoked by the seller prior to the buyer's acceptance.

- Pre-litigation mediation provisions in real property purchase agreements will be strictly enforced, and substantial performance of such provisions will not suffice.

- In order to recover attorneys fees under the private attorney general provisions of Code of Civil Procedure section 1021.5, a plaintiff must *either* (1) ultimately achieve judicially sanctioned relief *and* establish that the financial burden of pursuing the litigation outweighed the plaintiff's personal financial stake in the litigation; *or* (2) demonstrate that the defendant provided the "primary relief" or "primary objective" that the plaintiff sought in the litigation.

- Real parties in interest can be liable for attorneys' fees under the private attorney general provisions of Code of Civil Procedure section 1021.5 if they have done or failed to do something that compromised public rights, or if they are responsible in some way for the violation of public rights.

B. Update

1. Construction Law

a. *T.O. IX, LLC v. Superior Court* (2008) 165 Cal.App.4th 140

In this case, a contractor built a street through a nine-home subdivision developed by the property owners. The contractor alleged that he had not been paid. The contractor then recorded nine individual mechanic's liens against each home; or, as the court summarized: "nine separate liens, at the full amount each, to secure the contractor's right to be paid once." The property owners applied *ex parte* for an order permitting them to release the parcels from the nine mechanic's liens by posting a single surety bond in an amount equal to one and one-half times the total amount of the contractor's claim, as provided under Civil Code section 3143. The trial court denied the owners' application. The Court of Appeal, Second Appellate District, reversed.

The Court of Appeal explained that although the mechanic's lien statutes are to be liberally construed for the protection of laborers and material-men, proceedings for the foreclosure of mechanic's liens are nevertheless governed by equitable principles. In this case, both sides advocated inequitable positions.

First, the court held that the contractor and trial court were wrong in their position that the owners had to post multiple bonds to release duplicative liens to address a single debt. Just as Civil Code section 3130 allows a trial court to divide a single lien claim among several parcels, so too a court could use its equitable powers to allow a single bond to release several liens recorded against several parcels reflecting a single claim. In the end, the contractor has the necessary security for the payment of its entire claim. And in this case, the contractor failed to present any evidence that it would be prejudiced by the posting of a single bond.

Second, the court held that the owners were wrong in their position that the contractor's lien rights were forfeited solely because the contractor insisted that section 3130 required the contractor to record the duplicative liens, and did in fact record such liens. Civil Code section 3118 does provide that a mechanic's lien is forfeited by anyone who willfully includes in a claim of lien labor, services, equipment or materials that were not furnished for the property described in the claim. However, that would be an "absurd" result if applied to this case. So the court denied such forfeiture here.

The Court of Appeal granted the owners' petition for writ of mandate and instructed the trial court to enter a new order authorizing the owners to post a single surety bond in the amount mandated by section 3143 to release the nine mechanic's liens. The court held that the purpose of the mechanic's liens statutes are to secure a contractor's right to receive payment for the reasonable value of the labor, material and/or services provided, "not to secure that same right nine times over." The court tersely explained: "Unlike a cat, the mechanic's lien here has one life, not nine."

b. *Goldstein v. Barak Construction* (2008) 164 Cal.App.4th 845

Plaintiffs Amanda Goldstein and Eric Mizrahi contracted with Ami Weisz and his company Barak Construction ("Defendants") to build a new garage and related remodeling at the projected cost of $363,000. Neither Defendant was a licensed contractor at the time the parties entered into the contract nor when work on the project commenced. Although it is unclear whether Plaintiffs were initially aware of Defendants' licensure status, Defendants concede they were not licensed until some three months into the project. Plaintiffs contend that Defendants subsequently abandoned the project prior to completion and with material defects despite having allegedly already been paid $362,660.50.

Plaintiffs sought a prejudgment writ of attachment against Defendants, claiming Defendants' failure to comply with the licensure requirements of the California Contractors' State License Law, Business and Professions Code sections 7000 *et seq*. ("CSLL"), as the basis for the writ. Defendants argued, in part, that the CSLL could not provide the basis upon which attachment could be issued. Specifically, attachment is only available "if the claim sued upon is: 1) a claim for money based upon a contract, express or implied; 2) of a fixed or readily ascertainable amount not less than $500; 3) either unsecured or secured by personal property, not real property (including fixtures); and 4) commercial in nature." (Code Civ. Proc., § 483.010.)

The appeals court upheld the trial court's conclusion that the CSLL appropriately provides "the basis for a right to attach the order since an agreement for the performance of services lies at the heart of such claim." The claim is "fundamentally contractual in nature since it is based on an unlicensed contractor's agreement with the beneficiary to provide services, and the beneficiary's agreement to pay for the same." Further, the contractor must be fully licensed at all times during performance of the contract otherwise the contractor is not entitled to recovery for work performed, "even when the person for whom the work was performed has taken calculated advantage of the contractor's lack of licensure." Although the trial court respected Barak Construction as a distinct legal entity, its order to Weisz not to sell, encumber, or diminish the value of his residence until further order of the court was also upheld.

Goldstein reemphasizes the strong public policy in favor of protecting against unlicensed contractors, despite the potential for arguable "injustice to the unlicensed contractor." An unlicensed contractor may still be protected if the licensure deficiency only existed at the time the contract is entered into. Upon the commencement of work, however, the unlicensed contractor proceeds entirely at its own risk.

2. Real Estate Law

a. *Steiner v. Thexton* (2008) 163 Cal. App.4th 359 (nonciteable/superseded by grant of review)

On May 28, 2008, the Third Appellate District for the Court of Appeal hammered home that technical form over substance rules in real property purchase transactions, irrespective of the parties' original intent. At issue was a run of the mill purchase and sale transaction, overseen by attorneys on both sides, which granted the buyer a due diligence period to inspect the property and the ability to cancel the transaction if the buyer concluded the property ultimately did not meet its specifications. In this instance, however, the seller chose to cancel the deal during the due diligence period despite the jilted buyer having already spent some $60,000 obtaining a parcel split and related entitlements. The court not only rejected the buyer's request to enforce the contract but also required the out-of-luck buyer to pay the seller's $80,000-plus in attorneys' fees incurred in defense of the buyer's challenge of the deal cancelation.

The Court of Appeal upheld the trial court's conclusion that the agreement between the parties was not a purchase contract, but instead an option agreement (unilateral contract) to enter into a purchase contract. The agreement empowered the buyer to purchase the property at a set price for a set period of time but did not require the buyer to perform. The option agreement was void, however, because the buyer did not tender any consideration for the option.

Interestingly, the distinction between a unilateral contract and a bilateral contract is one of the first concepts aspiring lawyers learn in law school. Specifically, a unilateral contract only requires the promise to perform by one of the parties to a transaction. A bilateral contract, on the other hand, is a promise for a promise that requires performance by both parties. Since the language of the contract at issue gave the buyer "*absolute and sole discretion*" to cancel the agreement at any time during the due diligence period, with no affirmative obligation to do anything, the court concluded that the contract was in fact an (unilateral) option agreement. Nevertheless, "*(t)o be enforceable, an option, like any contract, must have consideration*." The Court of Appeal agreed with the trial court that, here, no consideration was tendered. Therefore, no enforceable option existed and the seller, like the buyer, was free to walk away at any time.

The document executed by the parties on September 4, 2003, entitled "REAL ESTATE PURCHASE CONTRACT", provided, in relevant part:

Martin A . Steiner and/or Assignee, hereinafter called 'Buyer,' offers to pay to FAS Family Trust, Paul Thexton, hereinafter called 'Seller', the purchase price of Five Hundred Thousand Dollars ($500,000.00) for 10 acres of a 12.29 acre property situated in the County of Sacramento … hereinafter … the 'Property' …

TERMS OF SALE:

1. Upon Seller's acceptance escrow shall be opened and $1,000.00 … shall be deposited by Buyer, applicable toward the purchase price.

2. During the escrow term, Seller shall allow Buyer an investigation period to determine the financial feasibility of obtaining a parcel split for development of the Property. Buyer shall have no direct financial obligation to Seller during this investigation period as Buyer will be expending sums on various professional services needed to reach the financial feasibility determination …

10. If any condition herein stated has not been eliminated or satisfied within the time limits and pursuant to the provisions herein, or if, prior to close of escrow, Seller is unable or unwilling to remove any exceptions to title objected to … then this Contract shall … become null and void …

CONTINGENCIES:

7. It is the intent of Buyer that the time period from execution of this contract until the closing of escrow is the time that will be needed in order to be successful in developing this project. It is expressly understood that Buyer may, at its absolute and sole discretion during this period, elect not to continue in this transaction and this purchase contract will become null and void.

CLOSE OF ESCROW:

Upon successful completion of subdividing the 10 acres from the existing parcel, Buyer will pay Seller the balance of the purchase price to escrow and close immediately.

The seller notified the title company to cancel the escrow in October 2004.

The buyer argued that the seller incurred a benefit from the buyer's work done and expenses incurred to obtain the parcel split which, therefore, constituted sufficient consideration to support an option. However, the court did not deem any of this effort or cost to confer actual benefit on the seller. Further, the court concluded that consideration "*must be measured as of the time the contract is entered into*" – a time at which the contract imposed no affirmative obligations on the buyer and the buyer could unilaterally cancel. Thus, the court concluded no consideration was tendered.

The buyer also argued that the $1,000 deposit constituted the consideration necessary to support an option. Again, however, the Court was not persuaded because these funds were to either be applied to the purchase price or, if the deal was not consummated, returned to the buyer. The funds were not tendered in exchange for the option to purchase.

A majority of those commenting on this decision have appropriately looked to the buyer's lack of affirmative obligations and unilateral ability to cancel as key drafting areas to address so as to avoid a similar result. Unfortunately, there are a large number of form agreements in circulation that have analogous due diligence inspection periods, including an optional provision of the California Association of Realtors (CAR) form, that are potentially subject to being deemed void (lacking consideration) option agreements. This is understandable because Buyers frequently desire exactly these types of provisions to limit what is expected of them and to give them the greatest flexibility to get out of the deal. Like anything else, however, the only sure way to get what you want is to pay for it. In this case, the buyer's misfortune could likely have been avoided by simply requiring forfeiture of the $1,000 initial deposit in the event the buyer canceled the escrow during the due diligence period.

b. *Lange v. Schilling* (2008) 163 Cal.App.4th 1412

The Court of Appeal (Third Appellate District) has reaffirmed the judicial trend to give great deference to the terms of an executed real property purchase agreement as written, emphatically stating that the pre-litigation mediation provision at issue "means what it says and will be enforced." Substantial conformity with the provision requirements is not enough to qualify to recover attorney's fees.

At issue in *Lange* was an attorney fees award in excess of $80,000 (of the more than $113,000 sought) to the plaintiff purchaser of real property in the construction defect and misrepresentation case, filed against the seller and broker. The amount of damages awarded to the plaintiff was just over $13,000. The defendant broker appealed the attorney fees award contending that the plaintiff buyer failed to comply with the mediation-before-litigation requirement of the form CAR California residential property purchase agreement ("Agreement") executed between the parties. The appellate court agreed with the defendant.

Paragraph 22 of the Agreement provides: "*In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing Buyer or Seller, except as provided in paragraph 17A.*"

Paragraph 17A states, in relevant part: "*Buyer and Seller agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court action … If, for any dispute or claim to which this paragraph applies, any party commences an action without first attempting to resolve the matter through mediation, or refuses to mediate after a request has been made, then that party shall not be entitled to recover attorney fees, even if they would otherwise be available to that party in any such action.*"

The plaintiff buyer tried unsuccessfully to locate the seller prior to filing his complaint. This inability to locate the defendant further precluded him from serving the defendant until an investigator he hired located a potential mailing address some 16 days after the complaint was filed. The defendant seller subsequently failed to respond to this service by mail and a default was entered. During subsequent discussions, the plaintiff's attorney made a written offer to stay the litigation to allow the parties to mediate. The letter concluded by stating that, if no response to the mediation offer was received, plaintiff would "assume both parties are waiving paragraph 17 of the sales agreement in its entirety." The parties later stipulated to set aside the default, but no response to the mediation offer was forthcoming and the matter went to trial.

The jury returned a mixed verdict and the trial court concluded that plaintiff was entitled to $80,710.26 of the $113,096.03 in attorney fees he sought. The seller had limited financial resources, so the plaintiff and seller entered into an agreement by which the plaintiff agreed to perfect the judgment against the seller's broker. The broker then objected to the attorney fees on the grounds that the plaintiff had bypassed the mediation step. The trial court ruled that the plaintiff had substantially complied with the requirements of the Agreement and that the plaintiff's purported inability to locate the defendant prior to filing suit reasonably justified his failure to mediate. The trial court concluded that it could not say the defendant seller "suffered any prejudice due to the tardy offer to mediate in that, at that time plaintiff offered to mediate, the sellers had not filed any responsive pleading."

However, the appellate court reversed, ruling that it is irrelevant to whether the plaintiff buyer substantially complied with the requirement of the Agreement. The court stated that "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve absurdity." Even absent this clear standard, there is a "strong policy in favor of mediation … Had the parties resorted to mediation, their dispute may have been resolved in a much less expensive and time consuming manner. Here, plaintiff spent more than $113,000 in attorney fees to recover a $13,000 judgment. The economic inefficiency of this result may have been avoided … (a)ll he had to do was attempt to mediate with the seller before he filed suit." Accordingly, the plaintiff buyer was required to pay his own attorney fees. The bottom line is that with a standard purchase agreement, the plaintiff must be able to establish a bona-fide effort to mediate <u>before</u> filing a lawsuit if the plaintiff hopes to recover attorney's fees.

3. Attorneys' Fees Under the Private Attorney General Provision (Code of Civil Procedure section 1021.5)

a. *Marine Forest Society v. California Coastal Commission* (2008) 160 Cal.App.4th 867

Only in California can you (1) pay taxes to create and support an unconstitutional agency, (2) pay taxes so that the unconstitutional agency defends itself, (3) win a ruling on the unconstitutionality, (4) force a legislative change, and (5) retain the privilege of paying for your own attorneys fees. Who says government is broken?

A lawsuit by a nonprofit corporation that challenged orders by the California Coastal Commission ("Commission") forced the Legislature to change an unconstitutional appointment and removal process for members of the Commission. But that is not the relief that the nonprofit ultimately wanted in the case. When the case was over, the nonprofit still had to comply with the Commission's orders. As a result, the Court of Appeal for the Third Appellate District held that the nonprofit was not entitled to attorneys fees under Code of Civil Procedure section 1021.5.

The Marine Forests Society is a nonprofit corporation that developed experimental research programs for the creation of marine forests to replace lost marine habitat. After it planted an artificial reef near Newport Harbor in Orange County, California, the Commission issued cease and desist orders to remove the reef. Marine Forests sued. Among other things, Marine Forests argued that the Commission should be enjoined from issuing cease and desist orders because the Commission was made up of members who were appointed and removed in a manner that violated the separation of powers clause of the California Constitution. The trial court and the Court of Appeal agreed. The Legislature then statutorily changed the appointment and removal procedures in order to save the Commission.

The trial court then awarded Marine Forests its section 1021.5 attorney fees. But the Court of Appeal reversed on the ground that the public's interest in the resolution of the separation of powers issue was incidental to Marine Forests' primary objective of preventing the Commission from ordering it to remove its artificial reef or pay monetary penalties. Marine Forests failed to meet its burden under section 1021.5 of proving that the financial burden of pursuing the litigation outweighed its personal stake in maintaining its artificial reef and avoiding penalties.

The Supreme Court then granted review of the Court of Appeal's decision on the separation of powers issue. The Supreme Court held that Marine Forests was not entitled to the injunctive relief it sought against the Commission because the new statutory changes governing the composition of the Commission were constitutional, and because the Commission's actions in the past were valid under the *de facto* officer doctrine.

After the case was returned to the trial court, Marine Forests was again awarded its section 1021.5 attorneys fees, this time under the "catalyst" theory. The trial court found that the lawsuit triggered, and was the catalyst for, the legislative amendments. Recently, the Court of Appeal reversed the attorney fee award, again.

The Court of Appeal explained that Marine Forests no longer was the prevailing party because it did not ultimately achieve judicially sanctioned relief after the Supreme Court decision. In addition, Marine Forests was not entitled to attorneys fees under the catalyst theory since the Commission did not change its behavior substantially because of, and in the manner sought by, the litigation. The catalyst theory requires that the plaintiff establish "that (1) the lawsuit was a catalyst motivating the defendants to provide the primary relief sought; (2) that the lawsuit had merit and achieved its catalytic effect by threat of victory, not by dint of nuisance and threat of expense, …and (3) that the plaintiffs reasonably attempted to settle the litigation prior to filing the lawsuit." In this case, Marine Forests failed to meet the criteria. The "primary relief" or "primary goal" of the litigation was to preserve the artificial reef, and to prevent its removal, not to have a statute regarding the Commission declared unconstitutional or to change the composition of the Commission. "In sum, Marine Forests failed to establish that defendant provided the primary relief sought in its litigation."

Collectively, the *Marine Forests* decisions demonstrate that, in order to recover attorneys fees under section 1021.5, a plaintiff must *either* (1) ultimately achieve judicially sanctioned relief *and* establish that the financial burden of pursuing the litigation outweighed the plaintiff's personal financial stake in the litigation; *or* (2) demonstrate that the defendant provided the "primary relief" or "primary objective" that the plaintiff sought in the litigation. While its lawsuit forced the Legislature to correct an unconstitutional governmental structure and change the makeup of a state commission, Marine Forests nevertheless failed to satisfy this criteria, remaining liable for its attorney's fees.

b. *In re Joshua S.* (2008) 42 Cal.4th 945

The Supreme Court affirmed the Court of Appeal's reversal of a trial court award of attorney fees under Code of Civil Procedure section 1021.5 to an adoptive mother after the birth mother unsuccessfully challenged a petition for adoption. In that case, the Supreme Court cited its earlier holding in *Connerly v. State Personnel Board* (2006) 37 Cal.4th 1169, 1181, that attorneys fees may be assessed against "real parties in interest that had a direct interest in the litigation, the furtherance of which was generally at least partly responsible for the policy or practice that gave rise to the litigation." The *Joshua S.* Court recognized that "parties against whom attorney fees should be assessed should be those responsible for the policy or practice adjudged to be harmful to the public interest." In this particular case, however, the Court held that the birth mother was a private litigant with no institutional interest in the litigation, and the judgment she sought only settled her private rights and those of her children and the adoptive mother. In her defense of the litigation, she simply raised an issue that gave rise to important appellate precedent decided adversely to her. She did not fall within the Court's requirement that the party against whom section 1021.5 fees are awarded "must have done or failed to do something, in good faith or not, that compromised public rights," or "is responsible in some way for the violation of [public] rights…"

In the context of land use litigation involving the governmental approval of projects, real parties in interest whose projects are being challenged will rarely be in a position like that of the birth mother in *Joshua S.* Real parties who actively advocate approval of their projects will likely be found "at least partially responsible" for resulting approvals and/or governmental practices that violate public rights (if any there be in a particular case). In such cases, section 1021.5 fees may be awarded against the real parties.

c. *Amarel v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157

The Court of Appeal, First Appellate District, reaffirmed that expert witness fees may not be recovered in a private attorney general action because Code of Civil Procedure section 1021.5 speaks only to attorney fees and does not expressly authorize an award of expert witness fees.

d. *Bernardi v. County of Monterey* (2008) 167 Cal.App.4th 1379

This appellate case illustrates the definition and limits of recoverable attorneys fees to prevailing parties who sue under the California Public Records Act ("CPRA"). The case suggests that responsible agencies should take care to comply with the CPRA's requirements to avoid incurring costly attorney's fees awards, even when the most of the records requested are not eventually granted.

Patricia Bernardi filed a petition to enforce the California Public Records Act, in which she sought public records from the County of Monterey. The entire dispute arose around the approval of the September Ranch Project. Litigation ensued when the county refused to turn over records to the petitioner. After the appointment of a special master, who recommended that the county turn over certain documents, the County did so. The County fought the records requests because it asserted governmental privileges and exemptions from the CPRA regarding certain documents. The special master's recommendations eventually led to the release of approximately one third of the petitioned material that Bernardi had requested. After securing the documents, Bernardi petitioned the court for an award of attorneys' fees and costs that totaled $244,287.50. The fee petition was accompanied by supporting documents and calculated using a lodestar amount, with an additional multiplier for the contingency of the case and the risk involved. Further supporting declarations regarding the time spent and the complexity of the case were attached in support.

The County argued that Bernardi was not entitled to attorney's fees because she was not a prevailing party under Government Code section 6259(d). The County appealed.

The County further claimed that the attorney fee award should be reduced by Bernardi's percentage of success. Since Bernardi only won on approximately one third of her petition claims, she should only be awarded one third of her total fees. The appellate court found that Bernardi was the prevailing party in the litigation. After reviewing the trial court's decision, the court upheld the full amount of the fees, their manner of calculation, and the overall reasonableness of the fees, notwithstanding Bernardi's less than perfect success in obtaining the demanded records. Importantly, the court held that the amount of fees granted is not proportional to the success of the litigant. Bernardi's fee award was upheld in its entirety.

e. *Galbiso v. Orosi Public Utility District* (2008) 167 Cal.App.4th 1063

Mary Jane Galbiso became involved in a long-running dispute relating to the sewer assessments imposed by the Orosi Public Utility District ("OPUD"). Among the many lawsuits pending over the dispute, this case involved the trial court's denial of a petition for attorneys fees under California's Brown Act (Gov. Code section 54950, et seq.), and under the California Public Records Act ("CPRA") (Gov. Code section 6252). Galbiso's underlying claim was that the utility district had improperly held meetings, improperly not given her an opportunity to publicly speak at the meetings, and had not permitted her access to documents which she had verbally requested at OPUD headquarters. The parties settled their dispute in open court and then memorialized their agreement. The settlement left open the issue of liability and attorneys' fees.

Galbiso then filed her motion for attorney fees. She claimed she was the prevailing party under the Brown Act and the Public Records Act, and that both statutes have provisions authorizing the recovery of attorney fees to a prevailing party.

The appellate court determined that the trial court should have awarded Galbiso attorneys fees. Under the Brown Act "the trial court has the discretion to deny successful plaintiffs their attorney fees, but only if the defendants show that special circumstances exist that would make such an award unjust." Since the incontrovertible facts presented to the trial court showed that at least two violations of the Brown Act had occurred, the trial court erred. Since the error was an abuse of discretion, fees should have been awarded. Additionally, since Galbiso presented evidence that OPUD had released previously withheld documents, and her litigation was the motivating factor in the release of those documents, she was entitled to attorney fees under the CPRA. Since the undisputed settlement agreement acknowledged that an officer of OPUD had ordered Galbiso out of the office on three occasions when she demanded particular records during business hours, there was a prima facie showing a violation of the CPRA. Reading the attorney fee provisions expansively, the court found that Galbiso's vindication of her basic right to request the records in person was sufficient to trigger an award of fees under the CPRA. While the case is highly dependent on the unusual facts presented, the underlying holding supports overall broad interpretations of both the Brown Act and the CPRA attorney fee provisions.

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EASEMENTS

A. Framework

1. Definition

Easements are essentially property rights that do not rise to the level of complete ownership of property. Generally, an easement allows one person to undertake a specified activity on the property of another. The most common type of easement is the right to travel over another person's land. In addition, easements are used for the placement and maintenance of utility poles, utility trenches, and water or sewer lines.

The owner of property that is subject to an easement is said to be "burdened" with the easement, because he or she is not allowed to interfere with its use. The property on which the easement is located is called the “servient” estate, while adjoining property that has the benefit of the use is considered the “dominant” estate. Easements run with the land, meaning that subsequent property owners receive the burdens and benefits of an existing easement when they are deeded the property.

Most easements are considered non-possessory, meaning that the easement owner cannot exclude others from the easement unless they are interfering with her use. However, in some cases an exclusive easement can be created, in which the easement owner can exclude everyone to the extent of his allowed use. There are many types of easements recognized in California. (Civ. Code, § 801 et seq.)

2. Creation

Easements can be created in a number of ways. The most common modes of easement creation are:

- Easements by deed – easements created in this manner are generally defined by the terms of the easement contained in the grant. Generally, they cannot be enlarged past the intended use contained in the language of the grant. Generally these types of easements must be recorded. These types of easements must meet all deed formalities to be valid.

- Easements by implication - An implied easement can be created only when the grantor conveys a portion of the real estate he owns or when he divides a larger tract among separate grantees.

- Easements by necessity - When property is divided in a way that leaves a part of the property without access to a road (i.e., landlocked), an easement of ingress and egress is implied across the other part(s). An easement by necessity exists only as long as the need exists. If the landlocked property later has direct access to another public road, the prior implied easement by necessity would go away.

- Easements by prescription - are implied easements that give the easement holder a right to use another person's property for the purpose the easement holder has used the property for a certain number of years. Prescriptive easements must be hostile to the underlying property owner's right of ownership. Prescriptive easements do not convey the title to the property in question, only the right to utilize the property for a particular purpose.

- Easements by dedication – this type of easement generally occurs when a property owner or subdivider provides for a dedicated parcel to the local responsible agency, usually the county of city government. The acceptance of the easement can be expressly made by the governmental agency, or it can occur through "implied acceptance" by the public's use at large.

3. Permitted Scope of Easements and Responsibilities

The scope of an easement is most often determined by how the easement was created. The general rule is that an easement extends only as far as its grant, and can never be increased from what was contemplated by the original easement grantor. Reasonable steps can be taken to maintain and provide continuing access to the easement. Many times, cost-sharing agreements between owners demand additional financial responsibility for maintenance costs.

4. Termination of Easements

- Unity of ownership/merger of property.

- Valid written release by the owner of the dominant estate.

- Abandonment; must be affirmative and for a prescriptive period.

- Lapse of time for easements limited in duration (such as a temporary construction easement).

- End of necessity; access to public road created in another area.

- By eminent domain.

5. Determining Rights and Liabilities

- Identify whether easement benefits or burdens the property, or both. Visual inspection of real property should always be done before a purchase-sale agreement is signed.

- Identify the type/nature of the easement. Check deed history, obtain title report, due diligence.

- Determine the location and description of the easement.

- Identify if maintenance obligations exist, if any.

- Identify whether there are any costs/payment obligations that come with the easement.

- Identify if there is any way to remove a burdensome easement or obtain third party relief.

B. Update

1. *Grant v. Ratliff* (2008) 164 Cal.App.4th 1304

In the area of prescriptive easements, courts and practitioners have been challenged by the issue of who has the burden to prove "adverse use." In this case, a husband and wife owned 33 acres of land that was divided into two parcels, referred to as Parcel A and Parcel B. A roadway ran along the boundary between the parcels at various locations. The couple separated in 1985 and divorced in 1986. When the couple separated, Parcel A was conveyed to the wife, while Parcel B was conveyed to the husband. In 1991, the husband sold Parcel B to defendant. In 1997, the wife sold Parcel A to plaintiffs. The court rejected plaintiffs' argument that a presumption of adverseness arose from the open, notorious, and continuous use of the road by the divorced couple's sons. Evidence that the alleged adverse users of the road were the sons traveling to and from their former family home was more than sufficient to rebut a presumption affecting the burden of producing evidence, and even sufficient to rebut a presumption affecting the burden of proof. The trial court's conclusion that the sons' use of the road was not adverse but was a matter of family accommodation was reasonable. Moreover, under the circumstances, it was the only reasonable conclusion.

"The elements necessary to establish an easement by prescription are open and notorious use of another's land, which use is continuous and uninterrupted for five years and adverse to the land's owner." Some courts have held that by providing evidence that the use is open, notorious and continuous, a presumption arises that the use is also adverse, and therefore, the defendants, and not the plaintiffs, must prove that the use is not adverse. The appellate court in this case disagreed with these courts and held along with the other California courts that even if the plaintiff provides evidence of open, notorious and continuous use, the plaintiff still bears the burden of producing evidence to show that the use was adverse. The burden does not shift to the defendant

2. ***Brewer v. Murphy*** **(2008) 161 Cal.App.4th 928**

This case involved three riparian owners and a dispute over a spring box and pipeline. The riparian owners are listed in order from the lower riparian to the upper riparian: Brewer, Hagg and Murphy/Klein. In 1979, Brewer acquired property in eastern Fresno County. The source of water was a spring box on property owned by Murphy/Klein's predecessor, located roughly one mile away. When Murphy (and later Klein, who acquired a part interest from Murphy) took title, neither claimed they were aware of the spring box or pipeline. Hagg's property sat between Brewer and Murphy/Klein, and it was crossed by the Brewer pipeline. Hagg unilaterally tapped into Brewer's line, leading to litigation between those two parties. Brewer obtained a judgment against Hagg, establishing a waterline easement and terminating Hagg's connection. While this litigation was pending, Brewer filed an application to appropriate water with the SWRCB. Eventually, the SWRCB granted the permit.

Brewer sought to obtain formal access to the spring box from Murphy/Klein, but the parties ended up in litigation. After a judgment in favor of Brewer, the appellate court ruled that the evidence was sufficient to find that Brewer was a downstream riparian owner, even though the stream did not flow year round to Brewer's property. The appellate court focused on the openness of use. The court found that the water line, while mostly underground, was visible in limited areas. Additionally, there was evidence that it was visible (if one had occasion to look off the road) as it passed through a road culvert. On the other hand, the spring box was in a remote location, sitting on a ledge and was buried. Murphy/Klein argued that while an easement may exist for the water line, the spring box should be treated differently. However, the appellate court viewed perfection of the pipeline easement as sufficient to also protect Brewer's claim to the water source. The court held the pipeline put a reasonable person on notice of the existence of the spring box.

3. ***Gray v. McCormick*** **(2008) 167 Cal.App.4th 1019**

The easement holder, Gray, claimed that McCormick, the owner of the servient property had no right to use a connecting driveway that ran across their property because Gray held an exclusive easement over McCormick's land.

McCormick's property fronts on the street. Gray's property is set off the street directly behind McCormick and is connected to the street by an extended driveway that is located on the side of McCormick's property paralleling the property line. Gray owns an "exclusive" easement over the driveway. McCormick had been using the easement for passage of their horses, transportation for their horse feed and manure, and access to their stables in their backyard. Gray had plans to improve the driveway, and preferred no horse refuse on the driveway. The parties could not agree on McCormick's use and Gray brought suit, alleging that he had an absolute right to exclude McCormick from any driveway use.

McCormick countered that the term “exclusive” was intended only to exclude outsiders from using the driveway, but was not intended to exclude the McCormick’s use. McCormick argued that so long as his use did not interfere with the Gray’s access, ingress and egress, McCormick could continue to use the easement for access and use to the back yard. McCormick further argued that exclusive easements are not permitted under California law. A trial court judgment was entered in favor of McCormick.

On appeal, Gray argued that the exclusive easement permitted him to exclude McCormick from the property. After reviewing the easement terms, the court declared that the overall structure of the grant, along with the specific enumerated rights of the easement, such as the right to construct, install, maintain and repair; and requirements to insure the driveway, showed that the easement was intended to be exclusive. The court distinguished this case from the general rule of easements which permits mutual use so long as there is no interference with the easement holder’s rights by the servient landowner because a general easement was not at issue. This case involved an exclusive, rather than a general easement.

The appellate court rejected McCormick’s argument that exclusive easements are prohibited under California law holding that previous case law recognized the viability of exclusive easements in California. The court further held that exclusive easements can be created by prescription, including the mistaken construction of improvements on another’s land.

The appellate court reversed the trial ruling, holding that any use of the surface easement area by McCormick was inconsistent with the exclusive use granted to the Grays. The appellate court held that exclusive easements had been recognized by a variety of cases in California, and were not prohibited.

4. ***Zanelli v. McGrath*** **(2008) 166 Cal.App.4th 615**

In 1981, the owners of 60 and 66 Clarendon Avenue conveyed 66 Clarendon (the dominant tenement) to Mr. and Mrs. Soffer along with a written easement "for receiving light, air, and view" that explicitly stated the maximum roofline for any future structure on 60 Clarendon (the subservient tenement). In 1992, Richard Sommer and Jeffrey Dunham purchased 66 Clarendon as joint tenants from the Soffers. The deed for that purchase referenced the 1981 view easement benefitting 66 Clarendon. In 1994 Sommer and Dunham purchased 60 Clarendon from the original owner of both parcels. They each purchased an undivided 50 percent interest, as tenants in common, but Dunham held his interest as trustee for the Jeffrey S. Dunham Revocable Trust. The deed did not refer to a 1981 view easement. In 1998 Dunham transferred his interest in 66 Clarendon to Sommer by a grant deed that did not include the specific description and limitations of the 1981 view easement. In 2002, defendant Thomas McGrath entered into a vacant land purchase agreement to buy 60 Clarendon from Sommer and Dunham. A dispute arose between Sommer and McGrath as to whether the 1981 view easement had been extinguished by merger, and escrow ultimately closed without resolution of the dispute. Although the deed did not reference that easement, McGrath closed escrow knowing that the property was potentially burdened by that easement. In 2003, plaintiff Gaetano Zanelli purchased 66 Clarendon from Sommer with a full knowledge of the dispute between Sommer and McGrath.

The trial court held that the 1981 view easement was extinguished under the doctrine of merger codified in Civil Code sections 805 and 811 when Sommer and Dunham owned both 66 Clarendon and 60 Clarendon. The trial court also denied Zanelli's alternative request that the easement be enforced on equitable grounds, because it found that the equities favor McGrath. The court of appeal affirmed.

The court of appeal clarified three legal principles regarding the doctrine of merger. First, the doctrine of merger applies when the ownership of the right to the dominant and servient tenements are united not only in the same person, but also in the same persons.

Second, although Sommer and Dunham held an undivided half interest in 60 Clarendon as tenants in common and an undivided half interest in 66 Clarendon as joint tenants, they together owned the entirety of the interests in both the dominant and servient tenements such that the doctrine of merger applied. They each acquired present possessory, fee simple absolute estates with respect to both properties. And no other person held either a fractional share of either property, or any future nonpossessory interests in either property. Nor did Dunham holding title to 60 Clarendon as trustee for his revocable inter vivos trust mean that he should not be deemed the owner of the property because California law recognizes that the settler has the equivalent of full ownership of property under this type of trust. Thus, the "unity of ownership" necessary for the doctrine of merger existed in this case.

Third, once extinguished, the 1981 view easement was not revived upon severance of the formerly dominant and servient parcels. The act of severance alone does not revive the extinguished easement. The easement was not newly created by an express stipulation in the conveyance by which the severance was made. And the circumstances were not appropriate for implication of a reservation of the servitude. An implied reservation of an easement may be inferred only when there is an obvious ongoing use that is reasonably necessary to the enjoyment of the land granted. Here, no such ongoing use was obvious because there were no structures at all on 60 Clarendon.

The court concluded with a discussion of equities in applying the doctrine of merger. The court reiterated that the merger doctrine applies only where it prevents an injustice and serves the interests of the person holding the two estates, in the absence of evidence of a contrary intent. The doctrine is not applied where it results in an injustice, injury, or prejudice to a third person. The court of appeal held that the trial court was within its discretion to decline Zanelli's request for equitable enforcement of the 1981 easement because the trial court reasonably concluded that the equities weighed in favor of McGrath.

5. *Biagini v. Beckham* (2008) 163 Cal.App.4th 1000

In this case, a parcel map was recorded with an offer of dedication in 2001, which the County of Nevada elected not to accept. In subsequent years, the roadway, a dead-end road upon which existed private easement rights (albeit narrower compared to the express offer of dedication) for various owners, their guests, invitees and business clients. A dispute emerged between the underlying property owner and easement holders regarding the clearing of brush on the easement. The issue for the appellate court in *Biagini* was whether or not the clearing of the roadway was within the easement rights, and if so, could this level of use also rise to the level of a public dedication. Reviewing prior precedent, the appellate court concluded that the level of use disputed in this case was consistent with the express easement rights, but that there was no basis for concluding that that easement holder's use amounted to acceptance by the public at large of the offer of dedication under the common law.

The appellate court next turned to the legal issue of common law revocation of a statutory offer of dedication insofar as the offer could be accepted by the public. The trial court also found that the owners burdened by the offer of dedication, had taken actions to repudiate claims of acceptance by the public by objecting to the use pre-litigation, building a fence, and by the litigation itself. Biagini argued that the SMA provisions pertaining to dedications abrogated common law rights of revocation. The court of appeal disagreed, ruling that the SMA offer of dedication can be accepted two different ways: by formal acceptance and by common law. The rights of the County to accept a dedication at a later date remained intact, however, inconsistent acts of the offeror could constitute a revocation of the offer to the public to the extent it was subject to potential acceptance by public use.

6. *Hines v. Lukes* (2008) 167 Cal.App.4th 1174

Plaintiff Noel Hines brought suit against his immediate neighbor, Pat Lukes. Lukes owned an easement over a portion of the Hines property and the parties disputed the scope of that easement. Hines alleged that the easement was "solely for ingress, egress and drainage," as stated in an easement recorded on May 14, 1979. Hines also alleged that Lukes had exceeded the scope of permissible uses of the easement by "permanently parking vehicles" in the easement area, and by placing trash bins, a dumpster, and waste in the easement area. In a cross-complaint, Lukes alleged that the easement is not only for ingress, egress, and drainage, but also for "general driveway purposes," as stated in a recorded easement dated February 7, 1980. The parties participated in a mandatory settlement conference, at the conclusion of which the parties orally, before the court, agreed to a settlement on stated terms.

Two years later, Hines filed a motion for entry of judgment settlement (Civil Code, § 664.6) based on the settlement orally read into the record. The parties strenuously disagreed as to whether both of the parties were in breach of the terms of the settlement. After giving the parties opportunity to mediate the dispute pursuant to the terms of the settlement, the trial court granted the motion. In the tentative ruling, the trial court quoted some, but not all, of the settlement terms from the reporter's transcript of the mandatory settlement conference. A minute order granting the motion attached the tentative ruling, but no formal judgment was entered by the trial court. Lukes appealed from that order. The court of appeal reversed.

Initially, the court of appeal amended the trial court's minute order to include an appealable judgment.

Then, the court of appeal focused on whether the parties entered into a valid and binding settlement. To make that determination, the court may consider the parties' declarations and other evidence of the terms to which the parties agreed. If the court determines that the parties entered into an enforceable settlement, it should grant the motion and enter a formal judgment pursuant to the terms of the settlement.

The court of appeal held that the trial court's order failed to comply with section 664.6 because it failed to accurately reflect the parties' agreement. The minute order stated some of the settlement terms, but omitted others. Thus, the court of appeal reversed the trial court's judgment with directions to either: 1) enter a new judgment pursuant to the terms of the settlement, setting forth all of the material terms that have yet to be fully performed (the terms must be stated "clearly and concisely, rather than quote an extended colloquy from the reporter's transcript"), or 2) if the trial court finds that the parties failed to agree to all material terms, deny the motion for entry of judgment pursuant to a settlement because there is no enforceable settlement.

As the court of appeal reasoned, the failure to enter a judgment reflecting all of the material terms of settlement that have yet to be fully performed could defeat the purposes of the settlement and spawn further litigation.

Notes:

LAND USE LAW UPDATE

William W. Abbott and Kate J. Hart

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CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

A. Regulatory Framework

Summary

- Over 30 years old, CEQA requires lead agencies to prepare environmental documents prior to granting discretionary approvals. CEQA documents are subject to numerous court decisions applying case law and the CEQA Guidelines. (Pub. Resources Code, §§ 21000 et seq.; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.)

- Substantive mandate: Public agencies should not approve projects that will significantly affect the environment if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (Pub. Resources Code, § 21002.)

- Applies to all governmental agencies at all levels. (Pub. Resources Code, § 21000(g).)

Trends

- Sufficiency of water supply analysis.

- Sufficiency as to the level of detail in mitigation measures.

- Global warming. (See section on Climate Change.)

B. UPDATE

1. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116

The City of West Hollywood entered into an agreement with Laurel Place, a nonprofit corporation proposing to develop a 35-unit housing project for low-income seniors on City-owned property designated as a cultural resource. The first agreement, signed on May 3, 2004, provided that upon satisfaction of the conditions of the agreement, the City would convey the property to Laurel Place and provide it with a loan, and Laurel Place would construct the housing units. One of the conditions precedent was that, "all applicable requirement of CEQA… [would be] satisfied, as reasonably determined by the city manager." The city manager had the right however, to waive the conditions.

Save Tara, a neighborhood group, filed a lawsuit alleging that the City violated CEQA by failing to prepare an environmental impact report ("EIR") prior to approving the May 3 Agreement. On August 9, 2004, three weeks after the suit was filed, the City and Laurel Place executed a revised agreement under which the city manager no longer had the authority to waive the CEQA requirements.

The superior court denied Save Tara's petition, finding that the EIR was not required before approving the May 3 Agreement because it was expressly conditioned on CEQA compliance. During the pendency of the litigation, the City completed and certified a final EIR for the project. The appellate court reversed and remanded. Upon request of the City, the Supreme Court granted review.

The first issue before the Supreme Court was whether the City's 2006 approval of a final EIR (unchallenged) rendered Save Tara's claim as moot. The Court found that the preparation and certification of the EIR did not render the appeal moot because no irreversible physical or legal change had occurred.

The Court next considered whether the City's approval of the May 3 Agreement, conditioned upon later CEQA compliance, constituted an approval for CEQA purposes. According to the court, if an agreement, viewed in light of all the surrounding circumstances commits a public agency to a project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review.

The Supreme Court looked to its own decisions holding that an agency approved a project although further discretionary governmental decisions would be needed before any environmental change could occur. The Court explained that CEQA review may not always be postponed until the last governmental step is taken, because postponing the environmental review may incentivize ignoring environmental concerns. If the CEQA review is completed after bureaucratic and financial momentum builds behind the project prior to the environmental review, it may provide a strong incentive to ignore environmental concerns, rendering the EIR a "post hoc rationalization" of the project.

The Court then turned to the facts of the particular case, finding that the City had approved the project and should have completed an EIR prior to approving the Agreement. The court based its decision on statements in the Agreement, the terms of the Agreement, the City's representations to Housing and Urban Development and the public, and the fact that the City had begun to relocate the current residents of the property to be developed.

The Court agreed with the Court of Appeal, ordering the City to declare its May 3 and August 9, 2004 agreements void. Unlike the Court of Appeal however, the Supreme Court did not directly order the preparation of a new EIR. The EIR certified in 2006 was presumed, under Public Resources Code section 21167.2, to comply with CEQA unless subsequent or supplemental environmental review was needed.

2. *Sunset Skyranch Association v. County of Sacramento* (2008) 164 Cal.App.4th 671 (Review granted Oct. 1, 2008, partially depublished at 2008 Cal. Lexis 11608)

Sunset Skyranch Airport obtained a conditional use permit ("CUP") in 1999 for airport operations. Approximately five years later, the Airport requested a renewal of its CUP. The County denied the renewal without conducting environmental review under CEQA. The County claimed that the area surrounding the Airport was changing, and the Airport would no longer be an appropriate use of the property. The Airport lost at the trial court and appealed.

First, the appellate court found that the language of the State Aeronautics Act ("SAA") makes it clear that jurisdiction over the operation of any airport remains with the local agency. The SAA places local control over development decisions regarding the local airports and the areas immediately surrounding them. The court concluded that nothing in the SAA requires "existing airports to keep on existing." The power to grant or deny a CUP lies with the local agency, and therefore, the County has the authority to deny the Airport's CUP renewal.

Second, the appellate court found that the denial constituted a project for the purposes of CEQA. The appellate court looked at the whole of the denial and the inevitable result, which was closure of the Airport and "transfer of pilots to other airports." Although "CEQA does not apply to projects which a public agency rejects or disapproves," denial of a CUP renewal is not a "mere denial of the project." Instead, the court found that the "whole of the action…has the potential for physical change in the environment." Therefore, CEQA was triggered. The court emphasized, however, that the mere trigger of CEQA did not necessarily mean that an EIR was required.

3. *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041

The Landowner and project applicant, Michael Moss, submitted a tentative map application to the County of Humboldt in August of 1995 to divide his 94-acre property into four lots ranging in size from 20 to 33 acres for agricultural and residential use. The property is divided by Luffenholtz Creek, which supplies water for the downstream city of Trinidad. The applicant intended to have the Creek provide water for three of the four subdivided parcels. After over two years of processing, the Planning Commission held a public hearing and adopted the proposed tentative map and mitigated negative declaration ("MND"). The MND included reference to a 1995 study indicating that the project would not have any impact on the water supply for the City of Trinidad since 228 additional hook-ups could be supplied by the Creek even in a dry year and only four of those hook ups would be utilized by the proposed development. The tentative map expired in November 1999.

In January 2004, Moss submitted a new subdivision application for the same tentative map that expired almost five years earlier. At this time, the County Planning staff said it would require an EIR for the application, despite the fact it was the same exact project. Moss appealed County staff's decision to the Board of Supervisors. Moss then appealed to the trial court, which held an EIR was required, although it determined the subdivision was not a new project. Both parties appealed – Moss on the grounds that an EIR was not required and the County on the basis that the court incorrectly determined the project was not "new."

The County asserted review of the project should be undertaken in compliance with both Sections 21151 and 21166 of the Public Resources Code. In addressing the inapplicability of Section 21151, the Court determined the resubmitted application was not a "new" project and noted that the "fair argument" test outlined in Section 21151 does not apply to projects that have already been evaluated under CEQA. Instead, the Court emphasized that the presumption that environmental review is required "flips in favor of the developer and against further review." Further, Section 21166 applies to prohibit further environmental review unless substantial changes are proposed in the project or new information is made available about the project that was not previously studied. The court conducted a de novo review of the Board's determinations.

The Court disagreed with the County's argument that expiration of an approved subdivision map extinguished the development project for purposes of CEQA review and therefore, that the resubmittal was a new project for purposes of CEQA. The Court pointed out that a County had the authority to extend the expiration of a tentative map after such a map has expired, so long as the application for the extension was filed prior to the expiration of the map. It further highlighted that the term "project" does not mean each separate governmental approval, and that the definition of "project" is based on the activity undertaken not the individual governmental approvals considered. Finally, the Court underscored the impracticality of the County's position – mainly that to argue the expiration of a tentative map renders previous CEQA inapposite would have "potentially absurd and wasteful consequences." Thus, the Court determined that Section 21166 applied and that the resubmitted application was not a "new" project under CEQA.

4. ***Committee to Save the Hollywoodland Specific Plan and Hollywood Heritage v. City of Los Angeles*** **(2008) 161 Cal.App.4th 1464**

This case involved the construction of a fence. The first builders of the disputed fence, the Armstrongs, owned a home in the Hollywoodland area of Los Angeles. In 1992, the City of Los Angeles adopted the Hollywoodland Specific Plan ("HSP"), which prohibits new fences from being erected within three feet of any lot line of property located within the HSP. The HSP also prohibits anything from being attached to the historic walls that run along the streets and behind the houses of Hollywoodland.

The Armstrongs' property sits below street grade and one of the historic walls runs nearly around the perimeter of their backyard, supporting the street. In 2002, they built a six-foot tall wooden fence along the top of the wall. A new owner, R.J. Cutler, continued to assert that the fence was required, appealing through the local building administrative process to the Planning Commission, and then to the City Council. The City Council granted an exception to the HSP to construct the fence. The City also found that the action was categorically exempt from CEQA as a minor alteration to land. Two groups of neighbors, the Committee to Save the Hollywoodland Specific Plan and Hollywood Heritage (collectively "Committee"), filed a petition for writ of mandate.

The trial court upheld the exception. The appellate court affirmed the trial court decision. The City's decision to grant the exception was supported by substantial evidence. The record showed that strict adherence to the HSP would create excessive hardship because the property had an unusual layout and there were safety issues for cars and people without the fence in place. Further, enforcing the setback requirement would create a dangerous gap between the street and the fence, into which people and debris could fall. Thus, the appellate court upheld the exception.

The Committee also argued that the City erred in using the categorical exemption for minor alterations to land. Here, the court held that there was not substantial evidence in the record to show that there would be no environmental effect and no change in the historic resources. It was unclear how the fence would affect the historic walls. There was also evidence to show that the fence would impair nearby views of the walls. Therefore, because the City improperly relied upon the categorical exemption, the court held that the City must go back and conduct an initial study to see if the fence will actually have an effect upon the environment.

5. *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 94 (opn. modified 2008 Cal.App.Lexis 367)

The appellate court held that the inquiry of whether a resource should be listed in the local historic register cannot be relied upon for purposes of CEQA to determine whether a resource is historic. Additionally, the court held that the fair argument standard does not apply to the question of whether a resource is a discretionary historical resource under CEQA.

Perez, Williams & Medina ("Perez"), the real party in interest, applied for a demolition permit to demolish a 90-year-old apartment building and build a parking lot. The City of Fresno required that before a demolition permit could be issued for a building over 50-years-old, the historic preservation staff must review the potential listing of the structure in the local register. The City's historic preservation project manager recommended the denial of the permit and listing of the apartment building in the local register to the Historic Preservation Commission ("Commission"). The Commission agreed with the recommendation and nominated the apartment building for listing. After reviewing the nomination, the City Council disagreed and voted to allow demolition.

Following the City Council's meeting, the City's planning and development department filed a Notice of Exemption on the project. The Notice of Exemption was then appealed to the City Council by Valley Advocates and other City residents on the grounds that the apartment building was a historical resource under CEQA, and therefore, none of the exemptions applied. The City Council found that the exemption under CEQA applied, and the appeal was denied. Valley Advocates appealed.

The appellate court faced two issues: 1) did the City Council violate CEQA by relying on the earlier determination that the apartment building was not a historic resource, and 2) what standard of review applies to a local agency's determination of whether or not a resource is historic?

The definition of historical resource under CEQA includes three types of historical resources: mandatory, presumptive and discretionary. The court found that since the apartment building was not listed in the State Register, a local register or other historical survey, the first two types of historic resources did not apply. However, the court found that the apartment building might fall under the third type, discretionary historical resources.

Although the court declined to address the exact scope of the discretion granted to the City, the court held that regardless of the prior determination, by failing entirely to consider whether the apartment building was historic for purposes of CEQA, the City violated its affirmative obligation under section 15064.5(a)(3). Therefore, the decision to uphold the exemption was void.

The court went on to address whether the fair argument standard applies to the determination of whether the apartment building qualifies as a historical resource under the discretionary historical resource category. Here, the court found that the fair argument standard did not apply. The court stated that the fair argument standard would be inconsistent with the concept of a discretionary historical resources category because the fair argument standard presents a question of law.

Additionally, the court found that an exception under the presumptive resources category would be negated if the fair argument standard was applied to the discretionary historical resources category. Therefore, the court held that the fair argument standard did not apply and that the traditional, more deferential substantial evidence test applies to a lead agency's determination concerning the characterization of certain resources as historic.

6. *Citizens for Responsible and Open Government v. City of Grand Terrace* (2008) 160 Cal.App.4th 1323

In this case, the appellate court held that a mitigated negative declaration approved for a senior residential project was inadequate under CEQA. In doing so, the court discussed density calculations and the weighing of evidence under the fair argument test.

The City of Grand Terrace, located in Southern California near San Bernardino, purchased six acres in an area mostly populated by single family residences. Four acres of the land was previously approved as a public park. The City negotiated with the Corporation for Better Housing ("BH"), a nonprofit, to develop the site and the resulting project consisted of 120 senior housing units, a four acre park, and an expansion to a pre-existing senior center. The City certified an MND and a local citizens group appealed.

When reviewing a local agency's adoption of a negative declaration, the court applies the "fair argument" test to determine if environmental review should have occurred. The plaintiffs, under this standard, first contended that the project's density would have a significant effect on the environment. The City's general plan specified that the density limit was 12 units per acre. The general plan amendment approved as part of the project increased the density to 20 units per acre. BH calculated that this was the density of the project, as it divided 120 residential units by the 6 acres of property (the 2 acres of residential land plus the 4-acre park). The court, however, said that this method of calculating density was "disingenuous…particularly when the 4-acre public park was already approved as a public park…" The court held that the density was actually 60 units per acre, which was far above the amount allowed under the general plan amendment. The court held that because of this, there was substantial evidence of a fair argument that the high density development would result in a substantial change to the environment.

The plaintiffs also claimed that the three-story height of the proposed residential buildings would create a significant environmental impact due to the aesthetic impact. The court stated:

> The impact creates a change in the aesthetic environment and interferes with scenic views of the public in general by introducing into the primarily single-family, residential neighborhood a large, high-density, residential building, which includes mixed two-story and three-story structures.

Finally, the plaintiff group alleged that the project would create significant noise impacts due to the air conditioners for the residential buildings

The court held that BH showed no evidence that the noise levels would be reduced and there was:

> [a] sufficient basis for concluding that, even with the mitigation measures in place, there was enough evidence to support a fair argument that the Project's noise from 20 or more noisy air conditioners would have a significant environmental impact.

Further, the court held that there was no evidence to show that the noise standards of the general plan would even be monitored or enforced. Because the plaintiff group presented substantial evidence of a fair argument that the project would have a significant effect on the environment, the court held that the City must prepare an EIR for the project.

7. *Ebbets Pass Forest Watch v. California Department of Forestry and Fire Protection* (2008) 43 Cal.4th 936

The Supreme Court held that the Department of Forestry and Fire Protection ("Department") properly approved several timber harvest plans ("THPs") for land located in Tuolumne County. In doing so, the Court examined the requirements for cumulative impacts analysis and the analysis of foreseeable actions.

Under the Forest Practice Act ("Act"), a THP serves as the functional equivalent of an EIR and must give the public detailed information on the proposed project. The Act's regulations adopt CEQA's definition of cumulative impacts. (See Cal. Code Regs., §§ 895.1 and 15355.) The Act's regulations specify that cumulative impacts shall be assessed based on the methodology of the Board of Forestry's Technical Addendum Memorandum Number 2. Regulations further specify that the discussion of cumulative impacts "shall be guided by standards of practicality and reasonableness." (Cal. Code Regs., § 898.)

Plaintiff Ebbetts Pass Forest Watch argued that the THPs approved by the Department did not comply with the Act because they did not follow the methodology specified in the technical addendum. Ebbetts Pass specifically alleged that the THPs' discussion of the California spotted owl and the Pacific fisher was insufficient because "biological assessment areas [did not] vary with the species being evaluated and its habitat." While agreeing that Ebbetts Pass was technically correct because the description of the analysis was limited to the project's watershed, the Court nevertheless held that the substance of the discussion in the THPs complied with the regulations. The Court said that the THPs "in fact devoted ample discussion to cumulative impacts on the two species at issue, on a much broader geographic scale, up to and including logging on all [Real Parties'] forest lands in the Sierra Nevada."

Ebbetts Pass also argued that the THPs' discussion of potential herbicide use was insufficient. The THPs explained that herbicides are sometimes used as part of the vegetation management program, but the decision whether or not to use them is made by an advisor at the time that the site is prepared for timber harvest. They concluded that the use of herbicides was too speculative to include in the impacts analysis. However, the THPs went on to say that there was a reasonable probability that herbicides would be used. The THPs also discussed the four herbicides that had previously been used for past projects, their effects, and possible alternatives.

The Court disagreed with Ebbetts Pass and held that the THPs were adequate. The court stated:

> Where the exact parameters of generally foreseeable future actions cannot confidently be predicted, the full-disclosure goals of CEQA and the Forest Practice Act may nonetheless be met with an analysis that "acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives … and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact."

Since the Department did discuss the potential impacts, mitigation measures, and alternatives to herbicide use, the court upheld the Department's approval of the THPs.

8. *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523

The Appellate Court upheld a combined supplemental environmental impact report ("SEIR") and environmental impact report for a large mixed use development. In its opinion, the court covered a wide range of CEQA issues, including timely filing of a lawsuit after a notice of determination, the exhaustion doctrine, project baselines, and alternatives.

In the 1980s, the City certified a program-level EIR and adopted the East Orange General Plan for an area covering nearly 7,000 acres within the City's sphere of influence. Subsequently, a project-level SEIR was certified for part of the East Orange General Plan area in 2000. In 2003, Irvine Company, the real-party-in-interest, submitted several applications for several large projects within the East Orange General Plan area. These included over 3,000 residential units, commercial development, open space, and institutional development. The combined Draft SEIR/EIR was released for public comment in 2004 and the final document was issued in May 2005. It was certified by the City Council on November 8, 2005. A notice of determination ("NOD") was posted on November 9; however, it listed an incorrect approval date. A second, correct NOD was posted on November 14. Plaintiff Sierra Club ("SC") filed its petition for writ of mandate on December 14.

SC asserted that the SEIR/EIR violated CEQA because it "[broke] up impacts by separate project components." The City argued that the plaintiff was barred from asserting this issue because it failed to exhaust its administrative remedies. Here, SC employed a "string-cite response" and referred to pages in the administrative record. However, the court held that SC did not meet its burden to show that the exact issue had been raised. It said, "These [references to comments] constitute the type of 'isolated and unelaborated comments by members of the public' that courts have held fail to 'fairly raise the piecemealing argument to the City."

SC also argued that the SEIR/EIR was insufficient because it did not adequately describe the baseline conditions in the project area. Specifically, SC asserted that the water quality section did not include adequate discussion of the baseline pollutant levels in Irvine Lake. SC also claimed that the traffic analysis improperly included trips approved by the 2000 entitlements.

The appellate court disagreed with SC on the water quality issue. The court said, however, that information regarding pollutants was contained in the water quality section of the document as well as in the runoff management plan ("ROMP") which was adopted as part of the project. The ROMP was available for public viewing and was made part of the Final SEIR/EIR. The court also pointed out that CEQA Guidelines Section 15147 expressly authorizes the use of appendices for technical data.

Regarding the traffic impacts analysis, the appellate court also disagreed with SC. The court pointed out that the portion of the environmental document challenged by SC functioned as an SEIR to the entitlements previously approved in 2000. Therefore, the City acted in conformance with CEQA when it described the traffic baseline and impacts.

The final issue concerns the alternatives analysis contained in the SEIR/EIR. SC claimed that the City failed to consider a reasonable range of alternatives and the analysis was not sufficiently detailed. SC alleged that each alternative presented in the SEIR/EIR was environmentally disadvantageous and only one alternative had substantial environmental advantages over the proposed project. Therefore, SC concluded that the SEIR/EIR only analyzed one alternative.

The appellate court disagreed with SC's contention. The court said:

> The apparent premise for this approach is the plaintiff's assumption that an alternative which is superior only in some respects to the project cannot satisfy the alternatives analysis reasonable range requirement. This is incorrect.

The court said that it would be "practically impossible" to develop an alternative that would provide environmental advantages in all areas. Further, CEQA Guidelines section 15126.6 authorizes consideration of alternatives that would "avoid or substantially lessen any of the significant effects of the project."

9. *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099

The appellate court grappled with several issues related to CEQA along with the Senate Bill 610 water supply analysis, the Surface Mining and Reclamation Act, and general plan consistency. Among the court's various holdings, the court found examples of improper deferral of mitigation under CEQA. Additionally, the court refined the definition of a "probable future project" for purposes of cumulative impacts. The project at issue involved the development of an aggregate mining operation in the unincorporated area of Madera County.

In challenging an EIR, petitioners made the following arguments in relation to impacts to surface water and groundwater: 1) the EIR improperly relied on a groundwater analysis prepared by a consultant, and 2) the mitigation measures were inadequate.

On the issue relating to the groundwater report, petitioners attempted to undermine the report by showing a difference in pumping rates from those proposed by the applicant and those alleged in the report. The court found that although the numbers differed, the report still supported the County's finding that the wells would be sufficient to provide the necessary water to the project. Additionally, the court found that petitioners misstated the contents of the report. Under these circumstances, the court held that no further investigation was necessary and certain inconsistencies between the report and data from the project proponent relating to the amount of water to be produced from each well did not constitute an abuse of discretion.

With respect to the mitigation measures, petitioners argued that the mitigation measures failed to properly mitigate the impacts to groundwater. In holding that the mitigation measures were inadequate, the court focused on three aspects of the mitigation measures. First, the court found that none of the mitigation measures would "provide neighboring residents with the ability to use water in substantially the same manner that they were accustomed to doing if the Project had not existed." As to the bottled water, the court pointed out that the landowners will have fluctuating water usage, and it would not be feasible to predict the amount of water needs in advance.

Second, the "EIR does not address the potentially significant impacts associated" with the mitigation measures. What impact would the use of non-potable water for irrigation have on livestock, wildlife and habitats? How would the bottled water be replaced and recycled? What would the impacts of a new water system be? The EIR failed to address any of these issues.

Third, the court found that Measure 3.9-1b improperly deferred mitigation to a later date. Although mitigation may be deferred if there is a specific performance standard associated with the deferred mitigation, the court found that no such performance standard had been adopted. Instead, the County "had committed itself to a specific mitigation goal," not a specific standard. The court held that this was insufficient.

On these grounds, the court agreed with petitioners and held that the mitigation measures were inadequate.

Also, petitioners claimed that the mitigation measures improperly deferred mitigation. The court agreed, in part, with petitioners. Although petitioners challenged several mitigation measures, the court found that only one mitigation measure was inadequate. This mitigation measure required the project proponent "to pay a long-term maintenance fee based upon annual aggregate tonnage mined." However, the measure failed to provide a formula for calculating the fee and there was no specific plan for the improvements the fee would pay for. The court found that without a specific improvement plan, there was no definite commitment to make the improvements. Additionally, without a specific improvement plan or other evidence of when the improvements would take place, the improvements may be instituted long after the negative impacts of the project occurred. Therefore, the court held that the mitigation measures were inadequate.

Petitioners' argument in relation to noise impacts focused not on the mitigation measures, but on the level of significance used by the County in finding that the impacts to noise were less than significant. In agreeing with petitioners, the court found that the EIR failed to take the cumulative noise impacts into account. Because the EIR ignored the cumulative impacts, the court held that the noise impact analysis was inadequate.

Petitioners claimed that the County used an incorrect methodology in evaluating the impacts to biological resources and wildlife habitat, and the County should have used the guidance promulgated by California Department of Fish and Game in cooperation with the United States Fish and Wildlife Service. The court held that CEQA does not require the County to use a specific methodology or perform countless studies, as long as its decision is supported by substantial evidence. In this case, the court found that the studies performed by the County constituted substantial evidence, and therefore, the biological resources impact analysis was adequate.

Petitioners attempted to make the same argument regarding air quality impacts as it had with respect to biological resources impacts. The court again disagreed with petitioners and held that the studies performed supported the County's decision.

Petitioners also argued that mitigation of lighting and glare had been improperly deferred. Unlike petitioners' previous arguments on deferred mitigation, the court held that the mitigation was adequate.

The court found that this mitigation sufficiently committed the project proponent to future mitigation by detailing specific performance standards. Although the specifics of how the specific performance standards would be met were lacking, this aspect of the mitigation could be properly deferred as long as a specific performance standard was in place. Therefore, the court held that the mitigation was adequate.

Petitioners argued that the EIR failed to adequately analyze the cumulative impacts by ignoring the impacts of other proposed projects and failing to provide information on where the documents relied upon in the EIR could be found.

The court began by clarifying that only "probable future projects" must be analyzed under the cumulative impacts analysis. The court held that "any future project where the applicant has devoted significant time and financial resources to prepare for any regulatory review should be considered as probable future projects for the purposes of cumulative impact."

In this case, the County could not locate any probable future projects that had been filed for review with the County Planning Department. Therefore, substantial evidence supported the DEIR's exclusion of these purported future projects.

Although the court found for the respondents on the substantive issues, the court held that the cumulative impacts analysis was inadequate because it failed to identify the planning documents used to conduct the analysis and state where those documents could be viewed by the public. Because of this failure, the court found that there was no substantial evidence supporting the EIR's analysis of cumulative impacts.

Petitioners claimed that the growth inducing impacts were not adequately analyzed because the EIR failed to conclude that the reduced cost of aggregate in the area would be a growth-inducing impact. In disagreeing with petitioners, the court found that although reducing the cost of aggregate might lower one of the barriers to growth, there were other barriers that the DEIR could reasonably conclude still existed. Therefore, the County adequately analyzed the growth inducing impacts.

As to the AB 610 analysis, the court began by noting that the project, by itself, did not impact a "public water system," and therefore, it was not required to conduct a water supply assessment pursuant to SB 610. However, the court looked back to its discussion under surface and groundwater impacts and found that the inadequate mitigation measure that may result in construction of a water system brought the project under SB 610. Therefore, a water supply assessment must be conducted to evaluate the potential construction of a water system, or the County must provide an explanation as to why it does not have to comply with SB 610.

10. *In Re Bay Delta Programmatic Environmental Impact Report Coordinated Proceedings Cases* (2008) 43 Cal.4th 1143

CALFED is a consortium of 18 federal and state agencies. Formed in 1994, CALFED's task was to develop a comprehensive Delta water management strategy. In 2000, CALFED certified a programmatic EIR/EIS.

The trial court in the case upheld the adequacy of that environmental document. Following a timely legal challenge, the court of appeal ruled otherwise, concluding that the EIR was inadequate because it failed to evaluate an alternative with reduced water exports, failed to identify future potential sources of water, and lacked detail on the Environmental Water Account, a program within CALFED. The appellate decision was appealed to the Supreme Court.

The program is a 30 year management strategy that identifies four primary objectives: improve aquatic and terrestrial habitat; reduce the mismatch between supplies and project beneficial uses; provide good water quality for all beneficial uses; and reduce the risk to infrastructure, economic supplies and the ecosystem from levee failure. All four objectives must be met to achieve the project purpose. Six solution principles were adopted to more closely evaluate the appropriateness of particular strategies.

With respect to the reduced water export alternatives, the appellate court found that although it would not meet all of the defined objectives, it was still an appropriate alternative which had to be considered, because it would be responsive to a number of impact considerations and be responsive to the balance of the objectives.

The Supreme Court disagreed with the court of appeal, holding that CALFED need not analyze an alternative that did not respond to the four stated objectives. In its holding, the Court drew a very fine line: While an alternative cannot be rejected if it impedes to some degree attainment of the project objectives, it need not be studied if it fails to achieve the project's "underlying fundamental purpose."

With respect to future potential sources of water, the appellate court held that water supply was too significant of an issue to be deferred to second tier projects. The Supreme Court disagreed, holding that:

> CEQA does not mandate that a first-tier program EIR identify with certainty particular sources of water for second-tier projects that will be further analyzed before implementation during later stages of the program…Similarly, at the first-tier program stage, the environmental effects of obtaining water from potential sources may be analyzed in general terms, without the level of detail appropriate for second-tier, site specific review.

The Court elaborated on the differences between project and programmatic level review and distinguished CALFED, as a broader policy examination, from more specific development projects such as those found in *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182 and *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.

With respect to the final remaining issue of the Environmental Water Account, the Supreme Court held that the issue of the level of detail was more appropriate for the later CEQA tiers. As long as the first level decision was more of a policy oriented, geographically non-specific evaluation, CEQA does not require that more detailed information be evaluated in the first tier.

11. *California Water Impact Network v. Newhall County Water District* (2008) 161 Cal.App.4th 1464

The facts involve California Water Impact Network's ("CWIN") legal challenge to a SB 610 WSA analysis prepared by the Newhall County Water District ("NCWD") for the City of Santa Clarita. The WSA was required as part of the CEQA review prepared in response to a development application for a 584 acre industrial/business park, located in the City at the intersection of Interstate 5 and the Antelope Valley Freeway.

This particular project was already the subject of CEQA litigation, in which the court invalidated the EIR based upon the water supply analysis (*California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219). The City subsequently updated the EIR in conformance with the appellate court decision. Those efforts included a request to NCWD to prepare an updated WSA. CWIN urged NCWD to not approve the updated WSA. However, in March 2006, the NCWD board approved the WSA, and forwarded the report to the City for processing as part of the updated EIR. Before the EIR was finalized, CWIN sued the NCWD to set aside the WSA. In response, NCWD, the City, and developer filed a motion for judgment on the pleadings. They argued that the WSA was not a legally reviewable document by itself; that the plaintiff had to exhaust its administrative remedies against the City; that the plaintiff lacked standing and that the Water Code did not allow for private third party claims involving a WSA. The trial court granted affirmative relief and dismissed CWIN's petition. CWIN appealed.

At the outset, the Court considered whether it should stay its decision, pending the resolution of the ongoing EIR litigation in the *California Oak* matter, as this litigation would resolve the issue of the sufficiency of the EIR including the WSA. However, the appellate court felt that the issue presented posed sufficient public interest and was capable of repetition, so it elected to address the claim of third party challenges. The appellate court affirmed the trial court ruling and dismissed CWIN's petition. The appellate court disagreed with CWIN that the District's action on the WSA constituted a reviewable decision. Rather, the WSA was a report, similar to a myriad number of other reports prepared for EIRs. The vehicle for challenging those reports is through the EIR. The appellate court also concluded that CWIN failed to exhaust its administrative remedies against the City, as it was the City who would ultimately make the determinations regarding reliability of water supply as part of its CEQA review process.

12. *St. Vincent's School for Boys v. City of San Rafael* (2008) 161 Cal.App.4th 989

The property owned by St. Vincent's School for Boys lay within the City's sphere of influence and the city had discussed its annexation. The prior general plan had discussed the annexation of the area as part of the City's growth and had evaluated the property in relation to the other goals and policies. In January of 2003, the City Council passed Resolution No. 11237, which directed staff "to prepare proposed amendments to the City's General Plan relating to" St. Vincent's property. Three months later in April of 2003, the City denied an application for annexation and development of St. Vincent's property. The approved new general plan eliminated any references to annexation of the property, and the City Council directed staff to begin the process with the Local Agency Formation Commission to take the property out of the City's sphere of influence.

Petitioner brought suit against the City, claiming that the City had violated CEQA, the Housing Element Law, and exceeded its police powers. Petitioner sued the City Council on three grounds:

(1) Defendant and respondent City . . . unlawfully amended the provisions of its general plan to delete plans for the future annexation of property owned by St. Vincent's;

(2) The City violated [CEQA] by certifying an inadequate environmental impact report (EIR) for the revisions to the general plan;

(3) The housing element outlined in the City's amended general plan is legally deficient.

The trial court found in favor of the City, and Plaintiff appealed.

According to Plaintiff, the City's amended general plan provisions were unlawful because the City decided not to annex the properties prior to conducting review under CEQA. The appellate court found that Resolution No. 11237 directing staff on certain policies was not "approval" of a project, and therefore did not require environmental review. Furthermore, the environmental review would not have been meaningful at that stage of the decision-making process.

Plaintiff claimed that the City's decision was arbitrary and capricious because it was based solely on the City's desire not to approve Plaintiff's permit application. The court focused on the fact that Plaintiff's property had never been under the City's jurisdiction and the City had never previously approved development permits on the property. In light of the fact that the City maintained the status quo, the court held that the City did not extend beyond its police power in adopting the amendments to the general plan. In conclusion the court stated, "St. Vincent's may have preferred to remain with the City's sphere of influence and ultimately to have been annexed to the City, but such preferences do not translate into a legal right to such annexation."

Plaintiff next asserted that the EIR was insufficient because it failed to discuss the growth displacement and other effects of not annexing Plaintiff's property. The court emphasized that: "[A]n EIR is required to assess the impact of amendments to the general plan against existing conditions on the ground, not against the impact of the amendments on the previous version of the general plan." The court held that the EIR properly compared the amendments to the existing conditions, and therefore, the EIR's analysis of the amendments was sufficient.

Lastly, Plaintiff argued that the housing element violated the housing element law by failing to identify adequate sites for residential development. The court started with the presumption that the housing element was valid and found that Plaintiff did not produce sufficient evidence to show that the City had not adequately identified sites. In conclusion, the court held that although Plaintiff may disagree with the City's policy to satisfy the housing need within the City's boundaries, the City had the power to make this decision. Therefore, the housing element was valid. Once again the court pointed out that St. Vincent's opinions are irrelevant: "While St. Vincent's may disagree with the City's policy decision . . . it has failed in its burden to overcome the presumption."

13. *St. Vincent's School for Boys, Catholic Charities CYO v. City of San Rafael* (2008) 160 Cal.App.4th 1426

The substantive issue in this case was a land use dispute over whether or not to annex properties owned by St. Vincent's to the City of San Rafael. The issue decided here was whether an award of costs could be granted to the City when petitioner had elected to prepare the record. Specifically, the question the court asked was whether "section 21167.6 [of the Public Resources Code] precludes an award of costs in favor of the prevailing [lead agency] if the plaintiff elects to prepare the record pursuant to section 21167.6, subdivision (b)(1)."

The court held that "where necessary to preserve the statutory purposes of cost-containment and expediting CEQA litigation," a prevailing party that did not prepare the record may be awarded reasonable costs associated with the preparation.

The City had given 2,208 documents to petitioner for preparation of the record. After searching through the documents, petitioner found that there were very few emails among the documents and submitted a Public Records Act request to the City for "all writings evidencing or reflecting communications, stored on computer hard drive or server of any City employee, relating to or in connection with St. Vincent's property or the Silveira property." The substantive land use dispute in the case involved the City's decision not to annex these two properties.

The City responded to petitioner, explaining that over nine boxes worth of emails would have to be searched for responsiveness. Additionally, the City would have to determine which of the communications were privileged. It took the City approximately four months to sort through the emails and send them to the petitioner. In spite of the City's efforts, St. Vincent's was not satisfied with the City's response, claiming that the City had only produced two stacks of emails out of the nine boxes that had been searched. Petitioner sent another demand for inspection of documents to the City. After a meet-and-confer, the City produced a privilege log covering 181 documents. St. Vincent's continued to insist that the City was not disclosing all of the responsive emails and demanded to know why the other emails had been withheld.

These facts led the court to conclude that St. Vincent's had not acted reasonably in its preparation of the record. The court stated: "The statutory scheme for controlling the costs of record preparation have been undermined by St. Vincent's additional, broad, unrestricted, and apparently nonessential discovery demands."

In light of the petitioner's abuse of the record preparation process, the City was entitled to the reasonable costs incurred in searching for and producing the emails. The issue left unanswered by the court is whether the City could have recovered its costs if it had not prevailed in the case.

14. ***Friends of Riverside's Hills v. City of Riverside*** **(2008) 168 Cal.App.4th 743**

The petitioner association brought an action against the City of Riverside to set aside the City's approval of a Final Tract Map for a development project. In the first cause of action under CEQA, petitioner alleged the City violated CEQA by: (1) weakening the conditions of approval regarding natural open space without holding a public hearing and by substituting equivalent conditions; and (2) failing to enforce and implement the previously approved mitigation measures regarding natural open space. Petitioner alleged additional causes of action regarding violations of the Subdivision Map Act ("SMA") (Gov. Code § 66410 et seq.). The petitioner served a copy of the petition in compliance with CEQA. However, the petitioner did not serve a summons within 90 days after the date of the City's approval, as is required under the SMA (Gov. Code, § 66499.37.)

The trial court dismissed the petition in its entirety because petitioner did not comply with the service of summons requirement of Section 66499.37. On appeal, petitioner only challenged the dismissal of the CEQA cause of action. The appellate court affirmed for two reasons.

First, the appellate court held that the 90-day service of summons requirement in Section 66499.37 of the SMA applies to a petition for writ of mandate alleging a CEQA cause of action, where the decision challenged under CEQA concerns a subdivision under the SMA. The court noted that, in prior decisions, the 90-day statute of limitations resulting from the 90-day filing and service of summons requirements of Section 66499.37 was held to apply to all causes of action brought to challenge a local body's decision under the SMA. The court rejected the petitioner's argument that a CEQA cause of action should be an exception to that general rule because: (1) CEQA causes of action challenging governmental decisions made under other statutory schemes must comply with the procedural requirements of both CEQA and the other statutory scheme where the two statutory schemes do not conflict with each other; and (2) both CEQA and section 66499.37 can be harmonized because the SMA requires the petitioner to serve the summons on the legislative body within 90 days of the challenged decision, whereas nothing in CEQA prohibits service of the summons or mandates dismissal if the summons is not served.

Second, the court addressed the issue of whether the petitioner's CEQA cause of action in this particular case was a matter "concerning a subdivision" under the SMA. The court held that it did because it overlapped with the other SMA causes of action in the petition and could have been brought under the SMA. Petitioner's second cause of action, which was brought under the SMA, alleged that the City "failed to require compliance with the Conditions of Approval," and directly overlapped with the first cause of action under CEQA, in that they both sought to compel the City to require compliance with the conditions of approval regarding open space. The same was true for the petitioner's third cause of action under the SMA, which alleged that "[a]ll parties failed to comply with the Subdivision Map Act and Riverside Municipal Code Title 18." The same was true for the fourth cause of action under the SMA, which alleged that "[t]he Project is inconsistent with the Rancho La Sierra Specific Plan," because the first cause of action also alleged that the City failed to enforce the mitigation measures adopted as part of the Specific Plan, and thereby violated CEQA. Thus, the first cause of action for violation of CEQA was merely another vehicle for challenging the City's failure to require the applicant to implement open space and other mitigation measures that were part of the Project's conditions of approval and of the Specific Plan. The petitioner not only could have brought the first cause of action under the SMA rather than CEQA, but in fact did just that in causes of action two through four.

The appellate court laid the procedural error solely at the feet of the petitioner:

> Friends could easily have complied with the SMA service of summons requirement without running afoul of the CEQA procedures; it simply failed to do so… Petitioner could have satisfied the requirements of both statutory schemes without conflict.

15. SB 375 (Chapter 728) Regional Planning Density and Development

This bill: 1) requires the Air Resources Board to provide each region with GHG emission reduction targets for the automobile and light truck sector; 2) requires a regional transportation plan to include a Sustainable Communities Strategy designed to achieve the targets for greenhouse gas emission reduction; 3) requires the California Transportation Commission to maintain guidelines for travel demand models; 4) requires cities and counties, in general, to revise their housing elements every eight years in conjunction with the regional transportation plan and complete any necessary rezoning within a specific time period; and 5) relaxes CEQA requirements for housing developments that are consistent with a Sustainable Communities Strategy. For a detailed analysis, please see the global warming section.

16. AB 2650 (Chapter 248) Department of Transportation Environmental Review Process: Reports

This bill streamlines CEQA/NEPA review for transportation projects so that they can be unified into one document. Mostly pertains to Department of Transportation ("Caltrans"). The bill extends the state's existing limited waiver of its Eleventh Amendment sovereign immunity from citizens' lawsuits for Caltrans transportation projects, thereby enabling the Caltrans to continue its assumption of National Environmental Policy Act ("NEPA") responsibilities under an ongoing pilot program until 2011.

17. AB 2720 (Chapter 148) CEQA Definitional Changes

This bill makes technical, non-substantive changes to CEQA with respect to the siting of school facilities near or on hazardous waste sites or facilities emitting hazardous emissions.

18. SB 947 (Chapter 707) CEQA Consultation: Transportation Facilities

This bill increases notification and consultation requirements governing lead agencies overseeing significant projects under CEQA. Specifically, this bill requires a lead agency, for a project with statewide, regional or area of significance, to notify relevant transportation agencies and other public agencies about project scoping meetings. The bill adds overpasses, on-ramps and off-ramps to the list of transportation facilities where consultation with these agencies is required to better determine the project's impact.

19. AB 1358 (Chapter 657) Planning Circulation Element: Transportation (indirect)

This bill requires, commencing January 1, 2011, that the legislative body of a city or county, upon any substantive revision of the circulation element of the general plan, modify the circulation element to plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways, defined to include motorists, pedestrians, bicyclists, children, persons with disabilities, seniors, movers of commercial goods, and users of public transportation, in a manner that is suitable to the rural, suburban, or urban context of the general plan.

20. SB 732 (Chapter 729) CEQA mandate for 2006 Safe Drinking Water Bond Act

While this bill mostly deals with the implementation and disbursement moneys raised by the 2006 Safe Drinking Water, Water Quality and Supply, Flood Control, River and Coastal Protection Bond Act of 2006, it does have CEQA considerations. If a project is granted money from the bond act, CEQA review is required.

Notes:

PLANNING, ZONING, AND DEVELOPMENT

A. Regulatory Framework

Summary

- California's planning, zoning, and development law was formed largely in the mid-1970s. There has been little legislative movement except to deal with very specific issues.
- Developers need to be concerned with the legal sufficiency of the local general plan.
- The Permit Streamlining Act is anything but streamlined.
- Zoning law remains largely static except for periodic inroads into affordable housing and density bonuses.
- Impact fees have become a cottage industry to various consultants.
- Development is not a level playing field in California.

Trends

- No particular movement afoot although impact fee litigation probably represents the area of greatest interest.
- Over time, more cities and counties are warming up to development agreements.

B. Update

1. *Stonehouse Homes, LLC. v. City of Sierra Madre* (2008) 167 Cal.App.4th 531

In this case, the appellate court held that to maintain a declaratory relief action, a plaintiff must be able to demonstrate a present conflict in addition to showing the existence of tangible injury.

Stonehouse Homes LLC ("Stonehouse") owns a large portion of property in the City of Sierra Madre, California. A portion of Stonehouse's property fell within the City's Hillside Management Zone ("HMZ"). The HMZ imposes special development conditions on covered property. Stonehouse applied to the City for a vested tentative map and conditional use permit to develop some of its land, a portion of which fell within the HMZ. After Stonehouse's application was filed, the City passed an ordinance extending the HMZ to cover all of Stonehouse's property. After the ordinance was enacted, the City planned to develop further amendments to the HMZ that would make development more costly.

Subsequently, on January 19, 2006, Stonehouse submitted two additional applications to the City for approval, which attempted compliance with the existing HMZ conditions. On February 15, 2006, the City responded, informing Stonehouse that its applications were not complete and that more information was required. Concurrently, in March 2006, the City planned to amend the HMZ ordinance to address minimum lot size, dimensions, and density standards. Stonehouse submitted additional materials to comply with the City's request for more information. The City again demanded more information, delaying the approval process further. Stonehouse, attempting to avoid the proposed HMZ conditions, filed a lawsuit for declaratory relief on July 17, 2006. Stonehouse claimed violations of statutory law, constitutional due process, and equal protection. Stonehouse asserted that the City was attempting to deprive it of the safe harbor provision contained in Government Code section 66474.2(a), as to the application for a tentative map.

The City demurred, claiming that the case was not sufficiently ripe for adjudication until it had passed a final ordinance. The City argued that since Stonehouse was essentially seeking an advisory ruling on an ordinance that had not yet passed, no lawsuit had yet arisen. The trial court agreed, finding that the City had not taken any final action and that Stonehouse's applications had not yet vested. Stonehouse refused to amend its complaint, accepted a dismissal, and appealed the trial court's ruling.

The appellate court employed a two-prong test to analyze Stonehouse's claims: First, whether the dispute is sufficiently concrete that declaratory relief is appropriate; second, whether withholding judicial consideration will result in the parties suffering hardship. The court found that Stonehouse's claims failed both prongs of the test.

Regarding the first prong, the court reasoned that to adopt Stonehouse's argument would require a court to speculate on hypothetical future actions by the City, the city Council and the planning commission. Under the second prong, plaintiff must show "an imminent and significant hardship inherent in further delay." The mere fact that the parties disagree over the meaning of the present and pending resolutions does not create a controversy. The court found that since there had been no application of the proposed amendments to the HMZ ordinance to Stonehouse's subdivision applications, declaratory judgment would be improper based upon the conjecture and present lack of imminent harm.

2. *Martin v. Riverside County Department of Code Enforcement* (2008) 166 Cal.App.4th 1406

Martin failed to obtain a county grading permit for the work he completed repairing a spillway washed out by a storm. The County of Riverside brought a code enforcement action with a $500 enforcement citation, resulting in a hearing before an administrative officer, who, after hearing the evidence, levied a $500 fine. Martin appealed. The trial court, and subsequently the appellate court, affirmed the County's action.

Martin asserted a number of claims. First, Martin argued that the Department of Fish and Game ("DFG") laws preempted County regulation, alleging that the County ordinance on grading permits was in conflict with the DFG statute (Fish & G. Code § 1600 et. seq.) establishing requirements of a Lake and Streambed Alteration Agreement. Second, Martin held that he was not required to obtain a permit from the County, citing an emergency exemption under DFG Code section 1610 and Public Resources Code section 21060.3. Third, Martin asserted that the spillway was a private road, and therefore subject to exemption from the County ordinance. Last, Martin argued that the amount of fill he used did not meet the requisite threshold under the County ordinance resulting in an exemption to the law. The trial and appellate courts disagreed with all four of Martin's arguments.

With respect to the pre-emption claim, the courts held that there was no conflict between the DFG law and the County ordinance because a County's grading ordinance originates from the State Housing Law, which requires cities and counties to adopt minimum building standards, including those regarding grading and excavation. Thus, the County ordinance is of equal dignity and authority as DFG Code (Health & Saf. Code, § 17910 et. seq), and accordingly, there was no preemption of local authority through state enactment. The courts also observed that the DFG application/notification requirement acknowledged the need for the applicant to obtain local permits.

With respect to the emergency exemption claim, Martin stated that the damages to the spillway constituted an emergency under Public Resources Code section 21060.3, because the severe rains were a "sudden and unexpected occurrence" subsequently denying him access to a mobilehome located on the rear portion of his property. Martin argued that a County grading permit was not required because the circumstances fell under the emergency exemption clause under DFG Code section 1610, and that the exemption, coupled with the grant from FEMA, constituted permission to proceed with the repairs. The courts however disagreed, stating that "there was no emergency because Martin did not repair the spillway for seven months and because there were two residences on the property, the mobilehome being a secondary residence with alternate access."

The courts also rejected Martin's private road exemption claim because the spillway served as only one of two access roads to the rear portion of the property, and Martin failed to repair the alternate road when it was previously damaged.

Finally the courts rejected Martin's argument that the amount of fill did not meet the requisite threshold under the County ordinance. Both courts found the County's mathematical calculation to be more probable, which made the activity subject to county regulation. Martin did not meet the other requirements for the exception. Martin was engaged in "fill" not "excavation," making the grading exception for smaller excavations inapplicable.

3. *County of Humboldt v. McKee* (2008) 165 Cal.App.4th 1476

Arthur Tooby and Humboldt County entered into a Williamson Act contract in February 1977. The Humboldt County Williamson Act guidelines, adopted in 1973, provided that land under Williamson Act contract could not be divided into parcels of less than 160 acres. Subsequent to the Tooby contract, the County adopted the new guidelines in 1978 ("1978 Guidelines") which changed the minimum parcel size to 600 acres. In 2000, the Tooby Ranch was sold to McKee, who created 44 parcels. Some of the resulting parcels were sold to third parties and McKee retained control of roughly 3,000 acres. Although none of the new parcels were smaller than 160 acres, many were smaller than 600 acres in size. McKee did not file a notice of non-renewal of the contract and he continued to receive tax breaks under the Williamson Act. The County filed suit against McKee for breach of the contract in December 2002. The trial court found that McKee did not violate the Williamson Act, and the County appealed.

First, the appellate court held that the 1978 Guidelines, upon adoption, were intended to apply to all contracts, even those previously enacted. The County pointed out that the 1973 guidelines were rescinded upon adoption of the 1978 Guidelines. If the 1978 guidelines were not intended to apply to the pre-1978 contracts, then there would be no valid guidelines at all. The court accepted this reasoning, despite McKee's argument that the County itself advised him in letters that 160-acre parcel sizes were permissible. The court said that the letters did not reference either version of the guidelines and they instead directed McKee to the County's zoning code. The court said, "A county's agricultural preserve guidelines are separate from, and may be more restrictive than, it's zoning regulations." McKee asserted that he relied upon the County's letters, but the court held that he could not demonstrate that this was an extraordinary case which justified application of the very narrow governmental estoppel doctrine.

Then, the court held that upon renewal of the Williamson Act contract, the 1978 Guidelines were incorporated into the contract. The court said:

> Each year, a landowner bound by a Williamson Act contract has a choice: give timely notice of nonrenewal, which preserves the current 10-year contract, or decline to give notice of nonrenewal, which renews the contract for a new 10-year term. By choosing not to give notice of nonrenewal, the landowner gains both the burdens and the benefits of a new 10-year contract. The landowner remains burdened by restrictions on the use of the contracted land for the balance of the new 10-year term, but also benefits from the preferential tax assessment guaranteed for enforceable restricted agricultural land. This preferential tax assessment is not available once the landowner gives notice of nonrenewal: upon notice of nonrenewal, taxes gradually return to the level of taxes on comparable non-restricted property. Thus, the decision not to give a notice of nonrenewal binds the landowner to a new 10-year contract.

When the contract was automatically renewed in 1979, all laws then in effect (including the 1978 guidelines) were made part of the new contract. If either of the landowners, Tooby or McKee, objected to the new rules, the court reasoned that they could have submitted notice of non-renewal. This would have begun the winding down of the Williamson Act contract and the landowner would stop receiving the preferential tax treatment. However, without non-renewal, the contract was still in force.

Thus, the court held that the 1978 guidelines were incorporated into the contract upon renewal and the division of parcels smaller than 600 acres was a breach of the Williamson Act.

4. *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561

A nonprofit affordable housing corporation, along with a very low income single mother, brought a petition for writ of mandamus and complaint for declaratory relief action against the City of Pleasanton over the City's failure to meet its share of Regional Housing Needs Allocation ("Allocation") under the California Housing Element Law (Gov. Code, § 65580 *et seq*). Petitioners alleged that the City violated the Housing Element Law due to a combination of a lack of effort on the part of the City to fulfill housing policies that were mandated by state law, and the practical effects of a voter-approved "Housing Cap."

In 1996, the voters approved the "Housing Cap" initiative, which amended the City's general plan to provide that the City maintain a maximum housing buildout and permits, and which provided that a vote of the people was needed to amend the Housing Cap. Meanwhile, the City's share of Allocation of low and moderate housing was established by the Association of Bay Area Governments. Then, in 2003, the City belatedly enacted its housing element, which recognized: 1) that the City would fall 871 units short of high-density, lower income housing; and 2) that 30 to 40 acres of land needed to be re-designated from non-residential use to high-density residential no later than June 2004. This action date continued to slide until the City announced in January 2007 that the rezoning would not be completed until December 2007 or later.

For years the City asserted that the number of units that could permissibly be built under the Housing Cap was sufficient to meet its Allocation. However, in April 2006, the City Manager wrote a memorandum to the City Council that stated that the City's unmet portion of its Allocation was 2,889 units. The lawsuit was brought on the ground that, under the Housing Cap, the remaining residential potential was only 1,686 units, and therefore the City allegedly could not meets its Allocation. As alleged in the Complaint, the Housing Cap "poses an immediate regulatory barrier to the construction of new affordable housing," this prevents the City from meeting its statutorily mandated Allocation. Furthermore, the 2003 Housing Element contained a provision that allowed the City Council to override the annual housing allocations of the Growth Management Ordinance in order to grant approvals to projects so the City could meet its Allocation requirements. But the City Council never did that. The complaint alleged that the City concealed the conflict between those ordinances and the Allocation until the April 2006 memorandum. Thus, the failure to provide state-mandated low income housing was the result of both the voter-approved initiative and the lack of political will on the part of the City to complete the rezoning.

The Court of Appeal addressed a dispute between the petitioners and the City regarding the applicable notice and statute of limitations provisions that applied to this lawsuit. The Court initially held that, under Government Code section 65009, subdivision (d), a party bringing an action under a variety of land use planning statutes in order to encourage the development of low-income housing has 90 days from the date a legislative action is taken or approval is given to notify the local land use authority of any claimed deficiencies in such action or approval. That party then has 60 days after that notice is given within which to file a lawsuit.

However, many of the claims in the complaint in *Urban Habitat* did not challenge any "action or approval" that was taken by the City. Petitioners complained that, with the passage of time, the City's Housing Cap and Growth Management Ordinance came into conflict with the City's obligations under state law to meet the Allocation requirements. Petitioners' claims challenged a local government's decision based on events that occurred after that decision took place and, therefore could not have been brought during the statutory time limits governed by Section 65009. In *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, the Supreme Court held that a challenge to an ordinance claiming preemption by state law is not governed by section 65009. Those challenges are subject to the three year statute of limitations in Code of Civil Procedure section 338, subdivision (a), for "[a]n action upon a liability created by statute, other than a penalty or forfeiture." The *Urban Habitat* court took the next step. The Court of Appeal held that section 338, subdivision (a), also applies where a local ordinance conflicts with statutory or constitutional provisions already in effect when the ordinance is adopted. Many of the petitioners' claims in *Urban Habitat* fell under that rule because they did not attack a specific land use planning decision but, rather, related to events that occurred after that decision. In other words, a violation of a state housing element law can, in many circumstances, be brought well after enactment of a land use policy or regulation.

5. *Sprint Telephony PCS, L.P. v. County of San Diego* (2008) 543 F.3d 571

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in U.S.C. Titles 15, 18 & 47) ("the Act"), precludes state and local governments from enacting ordinances that prohibit or have the effect of prohibiting the provision of telecommunications services, including wireless services. In 2003, the County of San Diego enacted a Wireless Telecommunications Facilities Ordinance ("Ordinance") (San Diego County Ordinance No. 9549, § 1, codified as San Diego County Zoning Ord. §§ 6980-6991, 7352. The Ordinance imposes restrictions and permit requirements on the construction and location of wireless telecommunications facilities. Plaintiff Sprint Telephony PCS alleges that, on its face, the Ordinance prohibits or has the effect of prohibiting the provision of wireless telecommunications services, in violation of the Act, which provides that no government entity may "prohibit…or effectively prohibit…personal wireless service." The district court permanently enjoined the County from enforcing the Ordinance, and a three-judge panel of the Ninth Circuit affirmed, as presented in Abbott & Kindermann LLP's conference materials from last year. (*Sprint Telephone PCS, L.P. v. County of San Diego* (2007) 479 F.3d 1061.) In 2008, the Ninth Circuit Court of Appeals, sitting en banc, reversed the panel decision.

The court harmonized the interpretations of the identical relevant text in sections 253(a) and 332(c)(7)(B)(i)(II) as effectively pre-empting, through federal statutes, San Diego's Ordinance restricting wireless facilities. However, under both federal statutes, a plaintiff must establish either an outright prohibition or an effective prohibition on the provision of telecommunications services; a plaintiff's showing that a locality could *potentially* prohibit the provision of telecommunications services is insufficient. Since Sprint could not show that there was an effective or actual prohibition, there was no violation of the federal laws. In conclusion, San Diego County's ordinance did not effectively prohibit Sprint from providing wireless services. Therefore, the federal laws do not preempt the County's Ordinance. The court reversed the permanent injunction.

6. *Muzzy Ranch Co. v. Solano County Land Use Commission* (2008) 164 Cal.App.4th 1

In 2002, the Solano County Airport Land Use Commission ("Commission") adopted the Travis Airport Land Use Compatibility Plan ("TALUP"), which sets forth land use compatibility factors for six geographic zones around the airport. Compatibility Zone C, at issue in this case, "encompasses locations exposed to potential noise in excess of approximately 60 dB CNEL," and areas occasionally affected by low-altitude aircraft overflights. The TALUP freezes residential development within Compatibility Zone C to levels currently permitted under existing general plans and zoning regulations.

Muzzy Ranch, located within Compatibility Zone C, challenged the TALUP on the following grounds: it violated CEQA; it was not consistent with an Air Force Air Installation Compatible Use Zone ("AICUZ") study prepared for Travis Air Force Base; and the Commission had suppressed data, employed an erroneous noise contour, and erroneously used a "maximum mission" scenario.

In January 2005, the appellate court found that the Commission violated CEQA and ordered the trial court to issue a writ of mandate ordering the Commission to set aside the adoption of the plan. In 2007, the Supreme Court reversed, finding the adoption of the plan was exempt from CEQA.

In 2008, the appellate court considered whether the TALUP was consistent with the AICUZ study prepared for Travis; and whether the Commission had suppressed AICUZ data, employed an erroneous noise contour, and erroneously used a “maximum mission” scenario.

An airport land use commission plan for any military airport must be consistent with the safety and noise standards in the AICUZ prepared for that airport. (Pub. Util. Code, section 21670 subdivision (b).) Muzzy Ranch Co. contended that this consistency provision requires the TALUP to adopt or incorporate the safety and noise standards in the AICUZ. To resolve the issue, the court interpreted the meaning of "consistent with." Concluding that the phrase "consistent with" did not mean that the TALUP must adopt or incorporate the safety and noise standards from the AICUZ, the court found that “consistent with” means that the land use plan must be at least as protective of airport operations as the applicable AICUZ, but it need not literally adopt the safety and noise standards of the AICUZ.

The court next considered whether the appellants remaining contentions, which related to the Commission’s adoption of the TALUP was arbitrary and capricious.

The court rejected appellant’s argument that the Commission failed to comply with the conditions placed on the exemption of Travis from the new AICUZ, namely that the Commission’s adoption of the Travis AICUZ 2000 study noise contour map and the AICUZ land use recommendations in their revision of the TALUP. The court explained that appellant had not shown that the TALUP failed to satisfy the Air Force’s expectations, or that the Commission failed to consider the 2000 AICUZ data.

Next the court rejected appellant’s argument that the Commission acted unlawfully in using 60 db instead of the 65 db CNEL as the basis for its noise contour. The court found that the Commission is not required by law to adopt the 65 db CNEL and in fact, the Handbook suggests 65 db CNEL may be too high of a noise level for less urban areas.

Finally, the court rejected appellant’s argument that the TALUP was invalid because it was based on a “maximum mission” scenario devised by the Commission, instead of the Air Force’s own project. The TALUP assumed that future use would be double the current level, currently unused flight tracks and assault landing strips would be used, and a civilian air cargo hub would be established. The court found that the approach to the “maximum mission” was consistent with the Handbook. Therefore none of the Commission’s actions with respect to the exemption conditions the noise contour, and the maximum mission scenario were arbitrary and capricious.

7. ***O.W.L. Foundation v. City of Rohnert Park*** **(2008) 168 Cal.App.4th 568**

Petitioner O.W.L. Foundation brought suit against the City of Rohnert Park on the grounds that the SB 610 water supply assessment ("WSA") for one of the City's specific plan areas was inadequate. Pursuant to SB 610, the City drafted and approved the WSA to accompany the EIR for the specific plan area. The trial court found that the WSA was inadequate because the study area used in the WSA did not entirely cover the relevant groundwater sub-basin and it failed to analyze how much water is being consumed by existing users or projects. In disagreeing with the trial court, the appellate court held that SB 610 does not mandate that a WSA cover all existing users or a specific methodology for determining sufficiency. According to the court, a WSA is sufficient as long as the methodology and study area applied are not arbitrary, capricious or completely lacking in evidentiary support. Each case must be decided on its specific facts.

The appellate court framed the issue before it in this manner: "how much discretion section 10910(f)(5) affords to a water supplier in analyzing groundwater sufficiency." Under SB 610, if one of the sources of water supply is groundwater, additional analysis must be done. Under subdivision (f)(5),

> The WSA must include "an analysis of the sufficiency of the groundwater from the basin or basins from which the proposed project will be supplied to meet the projected water demand associated with the proposed project."

The court held that a WSA need not evaluate the pumping of all users in the basin or sub-basin. Additionally, the appellate court rejected the argument that the WSA must evaluate a specific study area and that study area could not include areas outside of the sub-basin. The court stated that substantial discretion is given to administrative agencies, and there is not one methodology that must be used. As with most agency decisions, the legality of the decision is based on the reasonableness of the decision, not whether the methodology used is the "best."

The court then went on to evaluate the specific facts in this case to determine whether the WSA was sufficient under SB 610. The court found that the study area and methodology chosen by the City had a logical connection to a previous study done of the same area. In other words, the City's decision was rational and not arbitrary and capricious. Therefore, the writ of mandate was denied and the WSA upheld.

8. ***Charles A. Pratt Construction Co., Inc. v. California Coastal Commission*** **(2008) 162 Cal.App.4th 1068**

Charles A. Pratt Construction Co., Inc. ("Pratt") brought suit against the Commission, claiming that the Commission's decision violated Pratt's vested right to develop its property and, in the alternative, if the decision was valid, the Commission committed a regulatory taking by denying the coastal development permit.

Over 30 years ago San Luis Obispo County approved Pratt's tentative subdivision map. The original map broke the property into two units: Unit I and Unit II. In 1990, Pratt submitted a new vesting tentative subdivision map for Unit II, and the County approved the new map and granted Pratt a coastal development permit. The California Coastal Commission overturned the County's approval and denied the coastal development permit because it did not conform to the Local Coastal Program ("LCP").

Pratt's appeal consisted of three arguments: 1) Unit II was exempt from requiring a coastal development permit because Pratt had a vested right to develop the property; 2) the Commission's decision was arbitrary and capricious and therefore invalid; and 3) if the Commission's decision was upheld, the Commission committed a regulatory taking of Unit II by denying the permit.

Pratt first argued that the LCP was local law, and his development rights were vested before it was certified, citing to Government Code section 66474.2(a) to claim a vested right to develop the property in conformance with the map and the laws in place at the time the map was completed. The Court disagreed, and interpreted both Government Code sections 66498.6 and 66474.2 to mean that Section 66474.2(a) only applies to local laws. In this court's interpretation, the current state laws must be applied to Pratt's project regardless of when the vesting tentative map was deemed complete. The court found that the County only had the authority to issue coastal development permits because the Commission delegated its power as a state agency to the County. Since the County was merely exercising state authority granted to it, the LCP and the California Coastal Act fell under the category of state law, not local law. The appellate court held that the Commission acted properly in applying the current state policies.

Pratt secondly contended that the Commission acted arbitrarily and capriciously in denying the permit for numerous reasons. The Court found that the Commission's decision was supported by substantial evidence and the Commission had properly exercised its discretion in denying the permit.

As to the third argument, "Pratt contends that if the Commission's interpretations of the LCP are correct, there is no economically productive use that can be made of its property." In other words, the Commission has committed a regulatory taking. The appellate court dismissed the claim for lack of ripeness and never reached the merits of the claim because no final agency decision on the development had yet been made.

9. SB 375 (Chapter 728) Regional Density Planning and Development Requirements

SB 375 has significant consequences for development projects approved by local and regional governments. For a breakdown of all the relevant sections of the bill, please see the Climate Change section.

10. AB 2921 (Chapter 503) Amendments to Williamson Act

This legislation expands and clarifies statutory procedures for the Department of Conservation to identify and respond to material breaches of Williamson Act contracts, and makes adjustments to provisions of the Williamson Act dealing with contract rescissions and open space and agricultural easements. This bill prohibits a city or county from canceling a Williamson Act contract to resolve a material breach dispute between the county and the landowner. This bill also now prohibits a city or county from cancelling a contract if it is found that the landowner is in material breach of the contract. This bill also provides that if a potential material breach of a Williamson Act contract involves extenuating circumstances, the city or county and the landowner may agree to request that the Department of Conservation meet and confer with them for the purpose of developing a resolution of the potential material breach. This bill revises the conditions under which a landowner may cancel a Williamson Act contract to place other land under an agricultural conservation preserve. The bill authorizes the rescission of a contract for the purpose of restricting the same land by an open-space contract or an open-space easement agreement under specified circumstances. The Williamson Act, until January 1, 2009, authorizes parties to a contract subject to the act's provisions to rescind the contract and simultaneously enter into a new contract in order to facilitate a lot line adjustment, if certain findings are made by the governing body of the city or county where the land is located. This bill extends the above authorization until January 1, 2010.

11. AB 1358 (Chapter 657) Complete Streets Act

Commencing January 1, 2011, upon any substantive revision of the circulation element, a local or regional legislative body shall modify the circulation element to plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways for safe and convenient travel in a manner that is suitable to the rural, suburban, or urban context of the general plan. The bill defines "users of streets, roads, and highways" to mean bicyclists, children, persons with disabilities, motorists, movers of commercial goods, pedestrians, users of public transportation, and seniors.

12. AB 2069 (Chapter 491) Residential Development: Reduction in Residential Density: Finding Requirements

AB 2069 redefines lower residential density for planning and zoning laws that apply to local or regional governments. Under the new law, no city, county, or city and county shall, by administrative, quasi-judicial, legislative, or other action, reduce, require or permit the reduction of the residential density for any parcel to, or allow development of any parcel at, a lower residential density, unless the local government makes written findings supported by substantial evidence of both of the following: 1) the reduction is consistent with the adopted general plan, including the housing element; 2) the remaining sites in the housing element are adequate to meet the jurisdiction’s share of housing need under Government Code section 65584. The law permits governments to additionally define and identify adequate and available future sites for avoiding net loss of residential unit capacity. The law further defines the term “lower residential density.”

13. AB 242 (Chapter 11) Amendments to Regional Housing Needs Transfers

This bill, in addition to making various changes for clarity and consistency with the rest of the Housing Element law (Gov. Code, § 65584.07) specifies the process by which a county can transfer regional housing needs allocation to a city, and requires that transfer agreements or transfer requests be forwarded to the Council of Governments or Department of Housing and Community Development within 90 days of an incorporation or annex of new lands. Either of those agencies then have 180 days to finalize the transfer after receipt of the request.

14. AB 1246 (Chapter 330) State and Local Agencies: Authority to Transfer Mitigation Lands to Non-Profits for Their Own Projects

AB 1246 makes changes to existing law to authorize a state or local government, in the development of its own project, when required to transfer an interest in real property to mitigate an adverse impact upon natural resources, to transfer the interests to a non profit organization that meets specified requirements contained in Government Code section 65965, and the federal IRS Code. Previously state and local governments were authorized to allow nonprofits to own mitigation projects required of landowners who need permitting authorization from the county.

15. AB 2280 (Chapter 454) Density Bonus Amendments

This measure makes several changes to the Density Bonus Law:

- This amendment was added in response to last year's *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 187. This measure clarifies that the 20 percent bonus must be based on the total number of senior affordable units, not the total number of units in the development.
- A developer can now only seek an additional waiver of local development standards when they "physically" preclude the construction of the allowed number of units.
- The public agency's share of moderate income units can now be recaptured at a later sale for up to five years after the original sale, an increase from three years.
- The density bonus limits may be exceeded beyond the state imposed minimums if authorized by local ordinance.
- Changes the development standards definitions contained in the authorizing statutes.

16. AB 2016 (Chapter 664) Housing Omnibus Bill-Housing Element

Each city, county, or city and county is required to prepare and adopt a general plan for its jurisdiction that contains certain mandatory elements, including a housing element. Existing law requires that the housing element identify the existing and projected housing needs of all economic segments of the community. In the proposed final allocation plan of regional housing needs, the council of governments or delegate sub-region is required to adjust allocations to local governments based upon the results of a specified appeals process.

This bill, additionally, requires the council of governments or delegate subregion, as applicable, to adjust allocations of regional housing needs in the proposed final allocation plan based upon the results of a specified revision request process. Other revisions and changes have been made. The amended legislation is contained in Sections 65583, 65583.2, 65400, 65584.04, and 64484.05 of the Government Code.

Notes:

SUBDIVISION MAP ACT

A. Regulatory Framework

Summary

- The Subdivision Map Act ("SMA") was enacted in 1893, making it the earliest area of land use regulation. (For current statutes, see Gov. Code, §§ 66410-66499.58.)
- Over time, the SMA has evolved from a consumer protection law into a land use planning tool.
- Currently, the pressing area of interest is how to extend approved tentative maps.
- The rule on when offsite improvements can be used to trigger a mandatory extension is uniformly misunderstood by cities, counties, developers and consultants.

Trends

- When do old maps create separate legal parcels?
- When does an exclusive use easement constitute a subdivision?

B. Update

1. *Witt Home Ranch, Inc. v. County of Sonoma* (2008) 29 Cal.4th 990

This case involved the Houx Subdivision, approved by the Sonoma County Board of Supervisors ("Board") and recorded in 1915. Notwithstanding the recorded map, the property was held and managed as a single unit of land. Witt Home Ranch ("Ranch"), the current owners of the property, sought a certificate of compliance pursuant to Government Code section 66499.35(a), for each of the twenty-five lots. The Sonoma County Permit and Resources Management Department ("PRMD") denied the certificates, and the Ranch appealed. The Board determined that the 1915 map was not a legal subdivision and denied the request for certificates of compliance. The applicant subsequently sued.

The Ranch argued that the SMA in 1915 authorized cities and counties to regulate "design" and "improvement," thus potentially validating a subdivision map under the "grandfather statute." (Gov. Code, § 66499.30(d).)

The appellate court first rejected the Ranch's argument that the legislative history should be used to interpret the grandfather clause and that since the language of the statute was clear, that there was no reason to examine the legislative history materials.

After reviewing the plain language of the statute and applying it to the Ranch's map, the court held that the 1915 laws did not regulate the design and improvement of subdivisions. The court said that the local government had no authority to impose constraints on configuration of the subdivision, the number of lots, the minimum size, or on installation of drainage and sewer improvements. Instead, the landowner determined those factors and the local government was limited to ensuring that those features were depicted on the map. Further, the court said that in 1915, the local government's authority to approve the map was limited to ensuring that the map was accurate and prepared by a licensed professional. While it was noted that the local government could require the subdivider to make roads of a certain width, the court held that this was insufficient to satisfy the "design and improvement" requirements of the grandfather clause. Therefore, the court held that since the 1915 laws did not regulate the design and improvement of subdivisions, the map could not be recognized as valid under the grandfather clause.

The court also noted that public policy supported its conclusion. Holding that the 1915 map was valid would authorize development without regard to current regulations, mitigation fees, and without giving notice and an opportunity to be heard to neighboring residents and interested citizens. The purpose of the grandfather clause is to protect those who detrimentally relied upon an earlier version of the law. Here, the court could not find any detrimental reliance on the recorded map. The Ranch held and managed the property as a single unit for over 70 years and never attempted to take advantage of the recorded map before this instance. Therefore, the court affirmed the Board's decision in denying the certificates of compliance.

2. *Christian v. Flora* (2008) 164 Cal.App.4th 539

This case involves a map originally recorded in 1977. The map included a number of non-exclusive road easements. Of interest in this litigation is an easement depicted across parcels 8, 14 and 15, which provided access for parcels 28, 29 and 30 to Latrobe Road. The subdivider also recorded a set of CC&Rs which provide for the obligation of the lot owners to financially participate in road maintenance.

In 1979, the subdivider filed a new parcel map covering parcels 14 and 15. This map reconfigured the parcel lines. The later map omitted any depiction of the easement shown on the 1977 maps described above. It did include a new non-exclusive road and utility easement which connected at one point to the easement, located along the boundaries of parcels 28, 29 and 30, reflected on the 1977 map. The owners of parcels 14 and 15 also quitclaimed to each other, their respective interests in the easement shown on the 1977 map (the same easement omitted on the 1979 map). The subdivider sold parcel 30 in 1978, and this deed referred to the 1977 map. The subdivider then sold parcels 28 and 29 after the 1979 parcel map was recorded, but these deeds also referred to the 1977 map and made no mention of the 1979 amendment pertaining to parcels 14 and 15.

The first issue addressed by the appellate court was the effect of the 1979 map covering parcels 14 and 15, coupled with the exchange of quitclaim deeds. These actions constituted a re-subdivision under the SMA (formerly Gov. Code, § 66499 ¾; now § 66499 ½), and resulted in abandonment of streets and easements not shown on the new map. The inquiry did not stop there. Looking at the CC&Rs and other factors, the appellate court concluded that the easement depicted on the 1979 map operated as a relocation of the easement shown on the 1977 map, and this was the reasonable conclusion to be reached regarding the subdivider's intent. The court concluded that the owners of 28, 29 and 30 could rely upon the subdivider's representation of easement rights by virtue of the reference to the 1977 subdivision map as a form of estoppel as well. Thus, the owners of 28, 29 and 30 could make use of the easement created on the 1979 even though their respective deeds referenced only the 1977 subdivision map.

3. SB 1185 (Chapter 1245) Subdivision Map Act Approval of Time Extensions

This law contains three operable provisions. First, it extends the life of certain maps by one year. Second, it extends the life of any state approval by one year. Third, it extends the total period for which discretionary extensions may be granted from five to six years.

<u>One Year Extension</u>

Senate Bill 1185 extends the life of any tentative, vesting tentative, or parcel map for which a tentative or vesting tentative map has been approved, if the map has not expired as of July 15, 2008, but will expire before January 1, 2011. The law extends the life of these maps by one year. (Gov. Code, § 66463.5.)

Prior to the passage of Senate Bill 1185, the SMA provided that a tentative map expires two years after its approval or conditional approval. Local ordinances can lengthen that period for up to one additional year. (Gov. Code, § 66452.6.) The SMA also provided that a subdivider could apply for, and a local agency may grant, a discretionary extension of up to five years. (Gov. Code, § 66452.6, subd. (e), § 66463.5, subd. (c).) Therefore, depending on the jurisdiction, prior to the passage of Senate Bill 1185 a tentative map had an initial life of between two and three years with a potential discretionary extension of five years.

The legislation addresses two categories of tentative maps: approved tentative maps without statutory extensions, and approved tentative maps operating with an extension.

An approved tentative subdivision or parcel map, without any existing extension, is granted an automatic one year extension by Senate Bill 1185 if the map was approved prior to July 15, 2008 and will expire prior to January 1, 2011. For tentative subdivision maps, if by July 15, 2008 the map had an extension past January 1, 2011 by virtue of either a discretionary extension or the offsite improvement rule, then the one year automatic extension imposed by Senate Bill 1185 does not apply. If the life of the tentative subdivision map extends past January 1, 2011 due to a litigation stay or development moratorium, the map qualifies for the automatic extension. For a tentative parcel map, if by July 15, 2008 the map had an extension past January 1, 2011 by virtue of a litigation stay or the offsite improvement rule, then the one year extension does not apply. If the life extends past January 1, 2011 due to a development moratorium, then the map qualifies for the Senate Bill 1185 extension.

State Approvals

The law also provides that any legislative, administrative or other approval by any state agency that pertains to a development project whose tentative map life has been extended by Senate Bill 1185, is also extended for the same length of time. (Gov. Code, § 66452.21, subd. (c).)

Discretionary Extension

Finally, the law extends by one additional year the total period for which a city or developer filed for an extension prior to the expiration of the tentative map, the legislative body or agency authorized to conditionally approve tentative maps could grant an extension for up to five years. After the passage of Senate Bill 1185, the total length of permissible discretionary extensions is now six years. (Gov. Code, § 66463.5, subd. (c).)

4. AB 1510/SB 1124 (Chapter 709) Exemption from Subdivision Map Act for Solar Power and Biogas Projects

Existing law exempts certain activities from the SMA, such as specified types of property, mineral, oil, and gas leases, boundary line or exchange agreements held in trust grant. This bill also exempts from the SMA the leasing of or the granting of an easement to a parcel or portion of land in conjunction with the sale, lease, or operation of a solar electrical device on the land. An exemption for biogas projects that uses, as part of its operation, agricultural waste or byproducts from the land where the project is located and reduces overall greenhouse gas emissions from the agricultural operations on the land. The project is still subject to review under other local agency ordinances regulating design and improvement or if the project is subject to discretionary action by the advisory agency or legislative body.

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LOCAL GOVERNMENT

A. Regulatory Framework

This is a catchall category. The thing to remember is that much of what local government does is not preempted by state law. The California Constitution, Article II, section 7 supports a wide range of legislative enactments under the police power.

B. Update

1. *San Joaquin Local Agency Formation Commission v. Superior Court* (2008) 162 Cal.App.4th 159

The appellate court held that a "disappointed" applicant to a local agency formation commission ("LAFCo") could not take the depositions of the commission or the commission's executive officer to learn what information outside of the record the commissioners either had when they denied the application, or needed to approve the application. The court ruled that the depositions were not permitted for two reasons.

First, the extra-record evidence that the applicant wanted to obtain in the depositions was not admissible anyway. The action involved a quasi-legislative administrative decision by the commission, which is limited to evidence in the administrative record. Therefore, because judicial review is limited to the administrative record, the extra-record evidence sought by the applicant in the depositions was not admissible.

The applicant then tried, unsuccessfully, to shoe-horn the case into an exception to the "no extra-record evidence" rule. Extra-record evidence is allowed in the rare situation where 1) the evidence existed before the agency made its decision, and 2) it was not possible in the exercise of reasonable diligence for the party to have presented this evidence to the agency before the decision was made. However, the applicant in this case failed to satisfy that criteria. The applicant failed to convince the court that the commissioners applied some "secret standards" that the applicant was not aware of during the administrative proceedings.

Second, the depositions that the applicant wanted to conduct would have violated the "deliberative process privilege." Under that privilege, senior officials of all three branches of government enjoy a qualified, limited privilege not to disclose or be examined about 1) the mental processes by which they reached a decision, and 2) the substance of deliberations that reflect advice, opinions and recommendations by which they form government policy. The concept is that an agency's "decision-making process" should not have to be exposed.

2. ***Defend Bayview Hunters Point Committee v. City and County of San Francisco*** **(2008) 167 Cal.App.4th 846**

In May 2006, the San Francisco Board of Supervisors approved an ordinance "Adopting the redevelopment plan for the Bayview Hunters Point Redevelopment Project" ("Ordinance"). The ordinance increased the size of redevelopment activity in Bayview-Hunter's Point from 147 acres to 1,500 acres.

In response to the ordinance passage, a community group, Defend Bayview Hunter's Point Committee ("DBHPC"), began circulating a petition to collect enough signatures to place the ordinance in front of San Francisco voters via referendum. Pursuant to California Community Redevelopment Law, an ordinance adopting or amending a redevelopment plan is subject to referendum if a petition containing signatures of at least 10 percent of the entire vote cast within the City is submitted to the responsible Clerk within 90 days of the plan's adoption. (Health & Saf. Code, § 33378, subd. (b).)

After receiving sufficient signatures, DBHPC presented the referendum petition to the Board of Supervisors Clerk's office. The Clerk refused to process the petition. The Clerk claimed that the ordinance did not comply with section 9238 of the California Elections Code, which requires that all petitions must attach or include the text of the redevelopment plan that was subject to the referendum petition. The Clerk asserted that the failure to include the plan with the petition prevented prospective signers from understanding the substance of either the ordinance or the referendum overturning it. DBHPC filed a petition for writ of mandate to suspend the operation of the redevelopment plan ordinance.

The court found that DBHPC's failure to include the 57 page redevelopment plan in the petition documentation, even though directly referenced in the City's own ordinance, was fatal. The court then dismissed DBHPC's claims that it had substantially complied with the law. Since the redevelopment plan was the direct subject matter of the referendum to overturn it, omission of the text of the plan entirely frustrated the purpose of the text requirements contained in the Elections Code.

3. *Sustainability of Parks, Recycling and Wildlife Legal Defense Fund v. County of Solano Department of Resource Management* (2008) 167 Cal.App.4th 1350

The California Integrated Waste Management Act (Pub. Resources Code, § 40000 et seq.) regulates existing and proposed landfills in California, and specifies the responsibilities of local governments to develop and implement integrated waste management plans. Local agencies are charged with granting use permits. When an existing facility is expanded, the local agency is required to hold a public hearing before granting the permit if it is requested. Potrero Hills operates a landfill in Solano County. Potrero Hills petitioned to receive an expanded permit to increase daily tonnage and expand its hours of operation. Objectors to the expansion, Sustainability of Parks, Recycling and Wildlife Legal Defense Fund ("SPRAWLDEF"), filed a request for public hearing with the Solano Department of Resource Management ("Department"), alleging that the Department had failed to consider existing repeated violations of minimum operating standards of the facility, impacts on surrounding marshlands and grassland ecology, defective leachate discharge into the surrounding environment, and the impacts of noise and other enumerated reasons. The Department rejected the request, claiming that no administrative hearing was required. The expanded permit was procedurally approved by the Department and the State Integrated Waste Board. SPRAWLDEF filed a writ of mandate, charging that the Department's failure to hold a hearing should void the permit, requesting injunctive relief and a stay of operations under the revised permit should be granted, and that a procedural violation under the Integrated Waste Management Act had occurred. (Pub. Resources Code, § 44307.) The Department demurred to the petition, eventually claiming that it was not required to hold a hearing to any interested party. The trial court sustained the demurrer. However, after an additional hearing and a briefing, the court dismissed the petition for writ of mandate. This appeal followed. SPRAWLDEF claimed that the Department had a ministerial duty to honor its request for a public administrative hearing under section 44307 and that its writ of mandate should not have been dismissed.

The appellate court held that the petition, as amended, stated a claim for mandamus relief. Section 44307 allowed parties other than permit applicants to request an administrative hearing to challenge permit conditions that resulted from an agency's failure to act as legally required; thus the organization had standing to request a hearing.

4. ***South San Joaquin Irrigation District v. Superior Court of San Joaquin County, et al.*** **(2008) 162 Cal.App.4th 146**

Petitioner South San Joaquin Irrigation District ("SJID") sued the local agency formation commission ("LAFCo"), seeking a judicial declaration that it had the right to provide retail electric service without LAFCo's prior approval. The trial court agreed with the LAFCo, finding that SJID's expansion into providing retail electrical services constituted a new or expanded service. The appellate court agreed with the trial court. While traditionally irrigation districts were authorized to sell wholesale electrical service under regulation by the Federal Energy Regulatory Commission, retail service entailed supervision by an entirely different governmental entity, the California Public Utilities Commission. Additionally, case law treated the two utility services differently. Because the passage of the LAFCo laws under Article 1.5 of the California Government Code required utilities to seek approval from their regional LAFCo when they sought to expand a new or different class of service, SJID's petition for writ of mandate was properly denied.

5. ***Citizens for Responsible Open Space v. San Mateo County Local Agency Formation Commission*** **(2008) 159 Cal.App.4th 717**

A citizen's group petitioned the trial court to invalidate the annexation to the Midpeninsula Regional Open Space District of 144,000 acres along the Coast of San Mateo County. The trial court upheld LAFCo decision to annex, but held that LAFCo should not have excluded protests by registered voters who did not include their residence address on the protest form.

The appellate court held that the LAFCo's omission of a statement of reasons for the annexation in the public notice of the protest hearing was not prejudicial. There was nothing in the record to suggest that the omission adversely and substantially affected the rights of any person. The annexation was properly finalized without an election. LAFCo did not improperly delegate its statutory responsibilities to the elections division and properly determined the number of registered voters residing within the annexation area as of the date of the protest hearing.

The appellate court found that LAFCo had properly excluded protests that did not include the protester's residence address. However, even though the trial court committed error, the invalidated protests did meet the minimum percentage required to affect the outcome of the protest. Thus, while the trial court erroneously determined that the protests invalidated on this basis should have been counted, it properly upheld the annexation.

6. SB 1732 (Chapter 63) Amendments to the Brown Open Meeting Laws

This bill prohibits a majority of members of a Legislative body of a local agency from using, outside a meeting authorized by the act, a series of communications of any kind, directly or through intermediaries, to discuss, deliberate, or take action on any item of business that is within the subject matter jurisdiction of the legislative body. It also states the Legislature's declaration that it disapproves a recent holding of the appellate court to the extent it construes the prohibition on serial meetings and would state its intention that the changes made by this bill supersede that holding. It also provides that the changes made by this bill shall not be construed as preventing an employee or official of a local agency, from engaging in separate conversations or communications, outside of a meeting authorized by the Ralph M. Brown Act, with members of a legislative body in order to answer questions or provide information regarding a matter that is within the subject matter jurisdiction of the local agency, if that person does not communicate to members of the legislative body the comments or position of any other member or members of the body.

This bill provides that, notwithstanding any other provision of law, when the members of a legislative body of a local agency are authorized to access a writing of the body or of the agency as permitted by law in the administration of their duties, the local agency shall not discriminate between or among any of those members as to which writing or portion thereof is made available or when it is made available.

7. AB 642 (Chapter 314) Design-Build Contracts, Cities and Local Governments

A number of bills authorize cities, counties, wastewater treatment districts, water recycling districts, and sanitary districts to enter into design-build contracts for the purposes of construction of public works projects. This includes the use of alternative bidding procedures as specified in the Public Contracts Code. The amended statute is Public Contracts Code section 20175.2.

8. Prop 99 - Amendment to the California Constitution Powers of the Government Limited in Eminent Domain When Purchasing Private Property

Early last year, California voters by proposition limited the circumstances by which government may take land. Specifically, Proposition 99 placed a condition on the use of eminent domain for the taking of an owner-occupied residential property for the purpose of conveying it to a private purpose. The amendment further provides exceptions to this rule for the purpose of protecting public health and safety; preventing serious, repeated criminal activity; responding to an emergency; or remedying environmental contamination that poses a threat to public health and safety; or acquiring property for public works or improvement. The changes are reflected in Article 1, Section 19 of the state constitution.

9. AB 1263 (Chapter 64) Local Agency Formation Commissions

Assembly Bill 2484 ("AB") prohibits a LAFCo from approving a special district's application to establish new or different functions or classes of services unless LAFCo determines that the district will have sufficient revenues. If the district lacks those revenues, AB 2484 allows LAFCo to approve the district's application if it imposes a condition that requires the approval of sufficient revenue sources. If the revenue sources are not approved, the district cannot provide the new services.

The AB expands the definition of a "change of organization" to include a special district's proposal to provide new services or divest itself of existing services. The AB clarifies that only a special district's legislative body can apply to LAFCo to provide a new service or divest itself of a service. The bill expands the required contents of a district's plan for services by requiring officials to explain which services they intend to provide or stop providing.

AB 2484 clarifies that voter approval is not needed before a district provides a latent power or divests itself of an existing power, unless the district's principal act requires voter approval or there is sufficient protest to trigger an election. However, majority protest by the district's voters (or, in some cases, landowners) can stop the district from exercising a latent power or divesting itself of an existing power.

10. SB 732 (Chapter 729) Proposition 84 Bond Fund Allocation Authorization

This bill allocates money from Proposition 84, including loans for revising local general plans and improving regional planning.

11. AB 3047 (Chapter 68) Substantive Changes to LAFCo Law

AB 3047 makes nine changes to the state laws affecting LAFCo and local governments' boundaries. Important changes include:

- Time limits. Although the Cortese-Knox-Hertzberg Act ("Act") imposes various time limits for landowners, residents, and public officials to act, the statute says that, with two exceptions, these deadlines are directory rather than mandatory (Gov. Code, §56106). The Act clearly states that two deadlines are mandatory: the time limit for calling a LAFCo hearing and the time limit for requesting that LAFCo reconsider a decision. However, the section on time limits references the former, but not the latter. To avoid confusion, LAFCo's want the statute to list both exceptions. Assembly Bill 3047 adds a cross-reference to the mandatory deadline for requesting that LAFCo reconsider a decision to the section that describes time limits.

- Duplicate mailed notices. The Act requires local officials to mail notices of LAFCo hearings, including notices to landowners and registered voters (Government Code §56157). LAFCo's want to avoid costs and confusion that can result from duplicate notices. Assembly Bill 3047 requires only one mailed notice to an individual who is both a landowner and a registered voter.

- Island annexations. The Act calls boundary changes "changes of organization," and a "reorganization" is a combination of two or more changes of organization. The Act contains expedited procedures for cities to annex islands of unincorporated territory that are surrounded or substantially surrounded by the annexing city (Gov. Code §56375.3). LAFCo's note that annexing county islands often involves reciprocal detachments from special districts. Because the county island procedures refer only to annexations, LAFCo's cannot concurrently process expedited district detachments. Assembly Bill 3047 applies the expedited procedures for annexing county islands to reorganizations.

- Deadline for mailing notices. At least 20 days before a city or special district adopts a resolution applying for a boundary change, the Act requires local officials to mail notices to the LAFCo and other local agencies (Gov. Code, §55554). LAFCo's say that the usual deadline for mailing notices is 21 days (Gov. Code, §56154, §56156, §56157). AB 3047 increases from 20 days to 21 days the time period for mailing notices to LAFCo and local agencies before a city or special district can adopt a resolution applying for a boundary change.

- Deadline for checking petitions. When LAFCo receives a petition applying for a boundary change, the executive officer has 30 days to have the county elections officials check the signatures (Gov. Code, § 56706). LAFCo's note that county officials have 30 days, excluding Saturdays, Sundays, and holidays, to check the validity of other petitions (Elections Code, § 9115). AB 3047 excludes Saturdays, Sundays, and holidays from the 30-day time limit for LAFCo executive officers to check signatures on petitions.

- Protests on island annexations. The Act contains expedited procedures for cities to annex islands of unincorporated territory that are surrounded or substantially surrounded by the annexing city. If a city proposes to annex a county island before January 1, 2014, LAFCo must waive the usual protest proceedings (Gov. Code, § 56375.3). The bill that extended this time limit from 2007 to 2014, neglected to extend the time limit in the parallel section that waives the protest proceedings (AB 2223, Salinas, 2006). AB 3047 extends from January 1, 2007 to January 1, 2014, the time limit on waiving protest provisions for expedited city annexations of county islands.

12. SB 1458 (Chapter 158) Overhaul of Existing County Service Area Laws

SB 1458 repeals the 1953 County Service Area ("CSA") Law and offers a new statute that differs from the current law in various ways:

Policy. The existing CSA Law contains statements of legislative intent to guide county supervisors, property owners, and residents in the use of CSAs. SB 1458 opens with seven revised statements of legislative findings and declarations.

Powers. Responsible and effective local governments need enough (but not too much) power to carry out their statutory policies. The Working Group scrutinized the 1953 Law and recommended improvements. SB 1458 contains these differences relating to local government powers:

- Restructures the provisions for forming new CSAs. (§ 25211)
- Consolidates the scattered sections authorizing CSAs' basic powers. (§ 25212)
- Requires CSAs to follow standard real estate management procedures. (§ 25212.3)
- Allows CSAs to provide any services or facilities that counties can provide. (§ 25213)
- Creates an illustrative list of many of those services and facilities. (§ 25213)
- Avoids the archaic distinction between extended services and miscellaneous services.
- Preserves CSAs' special powers in specific counties. (§ 25213.1 - § 25213.4)
- Clarifies how CSAs can activate their latent powers. (§ 25213.5 & § 25210.2 (g))
- Streamlines how counties loan money to CSAs. (§ 25214.4 & § 25214.5)
- Explains how CSAs can raise additional operating revenues. (§ 25215)
- Explains how CSAs can generate capital for public works. (§ 25216)
- Streamlines how CSAs use internal zones to finance services (§ 25217)

Procedures. SB 1458 cuts the bulk of the 1953 Law, reducing the number of code sections from 166 to 50. SB 1458 uses a contemporary drafting format, reorganizes related topics for quicker reference, and renumbers the entire CSA Law. To improve effective administration and political accountability, SB 1458 relies on the practice of "billboarding," providing statutory cross-references to other existing laws that apply to CSAs as well as to other local governments:

- Lawsuits to challenge CSAs' validity, debts, and decisions. (§ 25210.6)
- Boundary changes under the Cortese-Knox-Hertzberg Act. (§ 25210.7 (e))
- Election procedures under the Uniform District Election Law. (§ 25210.8)
- Using the Joint Exercise of Powers Act. (§ 25212 (g))
- Record retention and destruction. (§ 25212.1 (d))
- Changing a CSA's name. (§ 25212.1 (e))
- Land use planning, zoning, and surplus land. (§ 25212.2)
- Annual appropriations limits under the Gann Initiative. (§ 25214.1)
- Annual allocation of property tax revenues. (§ 25215.1)
- Adopting special taxes with 2/3-voter approval. (§ 25215.2)
- Levying benefit assessments under Proposition 218. (§ 25215.3 & § 25216.3)

- Charging property-related fees under Proposition 218. (§ 25215.5)
- Standby charges under the Uniform Standby Charge Procedures Act. (§ 25215.6)
- Issuing general obligation bonds and revenue bonds. (§ 25216.1 & § 25216.2)

Oversight. Responsive government is accountable government. SB 1458 promotes public accountability and responsiveness by:

- Recognizing the county supervisors as a CSA's "governing authority." (§ 25210.2(a))
- Allowing advisory elections. (§ 25210.8 (c))
- Clarifying the requirements to retain and destroy records. (§ 25212.1 (d))
- Authorizing advisory committees to help county supervisors. (§ 25212.4)
- Requiring formal budgets, audits, financial reports, and fiscal transparency. (§ 25214)

13. Attorney General Opinion 07-206, 2008 Cal.Ag.Lexis 7

Sacramento's County Counsel asked whether a LAFCo has the authority to enlarge the boundaries of a proposed incorporation beyond those set forth in the petition for incorporation. In concluding that indeed a LAFCo does have the authority to do so, the attorney general found sufficient statutory and case law authority to support the conclusion.

Notes:

FEES

A. Regulatory Framework

- Impact fees and exactions are largely governed by constitutional principles of nexus. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854.) These constitutional doctrines are reflected in statute (Mitigation Fee Act; Government Code section 66000 et seq.). In addition, there are a limited number of statutes which also govern the exaction process (e.g. The Quimby Act, Government Code section 66477).

- Not every governmental regulation is an exaction. Compare a 50 foot no-build setback from a stream from a requirement to dedicate a 100 stream conservation easement to the Department of Fish and Game.

- Difficulties can arise in distinguishing regulations of use from divestment of interests in real property -- one time fees versus fees of broad based application.

B. Update

1. *Silicon Valley Taxpayers Association, Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431

The California Supreme Court clarified the standard of review in actions challenging the imposition of a special assessment under Proposition 218 (Cal. Const. Art. XIIID) and invalidated a special assessment imposed by the Santa Clara County Open Space Authority. The assessment at issue involved the creation of an open space assessment district in which each single family home would pay an increase of $20 with their property taxes. Other types of property, such as commercial, were also charged based on a slightly different formula than that used for single family homes.

The Santa Clara Open Space Authority ("OSA") decided that the "tax" fell under the definition of "special assessment" pursuant to Proposition 218, and thus, the tax could be imposed if it was passed by a majority of the property owners, instead of two-thirds as required when a special tax is imposed. The Silicon Valley Taxpayers Association, Inc. ("SVTA") along with the Howard Jarvis Taxpayers Association and individual taxpayers brought suit alleging that the tax had not been properly balloted and passed pursuant to Proposition 218. Specifically, they alleged that the "notice and balloting procedures did not comport with Proposition 218 and the Government Code" and the assessment was actually a special tax, requiring two-thirds voter approval. The trial court and the court of appeal ruled in favor of the taxpayers, and the California Supreme Court agreed to review the case on appeal.

Before addressing the substantive issues of the case, the Supreme Court spent the majority of the opinion discussing the standard of review that applies in challenges brought under Proposition 218. The court ruled that "courts should exercise their independent judgment in reviewing local agency decisions that have determined whether benefits are special and whether assessments are proportional to special benefits within the meaning of Proposition 218." It appears that the court not only shifted the burden to the local agency but eliminated any presumption of validity that used to apply to local agency decisions.

In applying the standard of review to the facts in this case, the court held that the assessment amounted to a special tax, and therefore two-thirds of the voters must approve it in order for it to be valid. Because the court found that the assessment was a special tax and the assessment had been approved by only a little over 50 percent of the voters, the court invalidated the assessment.

2. *Los Altos Golf and Country Club v. County of Santa Clara* (2008) 167 Cal.App.4th 198

Plaintiffs brought a class action demanding a refund from the City of Los Altos for sewer service charges paid by plaintiffs on the grounds that the fees violated Article XIII D of the California Constitution and the Health and Safety Code. Instead of allowing plaintiffs to make any substantive arguments, the City and the County ("Respondents") claimed that the case should be dismissed because the plaintiffs had failed to pay the fees under protest, as required by the Health and Safety Code. The Court of Appeal, Sixth Appellate District agreed with the Respondents and dismissed the case. Sewer service charges must first be paid *under protest* in order to later request a refund.

The crux of this case involved the detailed statutory interpretation of various provisions of the local municipal code, the Health and Safety Code, and the Revenue and Taxation Code. Sewer service charges are generally governed by Article 4, Chapter 6, Part 3, Division 5 of the Health and Safety Code. Section 5472 of Article 4 states:

After fees, rates, tolls, rentals or other charges are fixed pursuant to this article, any person may pay such fees, rates, tolls, rentals or other charges under protest and bring an action against the city or city and county . . .

If this was the only sentence you read, you would easily conclude that payment under protest is required. However, that section later states:

Payments made and actions brought under this section, shall be made and brought in the manner provided for payment of taxes under protest and actions for refund thereof in Article 2, Chapter 5, Part 9, of Division 1 of the Revenue and Taxation Code. . .

In addition, section 5473.8 of the Health and Safety Code makes all laws applicable to the levy, collection and enforcement of general taxes applicable to sewer-related charges.

Neither Article 1 nor Article 2 of Chapter 5 in the Revenue and Taxation Code contain provisions for payment under protest. In fact, the payment under protest provisions were previously repealed by the legislature.

Relying on the applicability of the Revenue and Taxation Code to sewer-related charges, plaintiffs argued that although sewer service charges *may* be paid under protest, it was not required pursuant to the scheme laid out for general taxes. The court had a different perspective. When the legislature repealed the protest procedures for property taxes under Articles 1 and 2 of Chapter 5, the legislature chose not to repeal the protest requirement under section 5472 of the Health and Safety Code. Therefore, the court reasoned that the legislature thus intended that anyone desiring a refund must first pay the charge under protest. The specific requirement in the Health and Safety Code trumped the generally applicable requirements in the Revenue and Taxation Code.

Because plaintiffs failed to protest their charges upon payment, they were barred from now coming before the court to request a refund, no matter how valid their substantive claims were.

3. *Ocean Harbor House Homeowners Association v. California Coastal Commission* (2008) 163 Cal.App.4th 215

In this case, the California Coastal Commission ("Commission") imposed a $5.3 million mitigation fee on a homeowner's association that needed a permit to build a seawall to protect residences that would otherwise fall into the ocean. The HOA brought suit against the Commission in order to overturn the imposition of the $5 million fee.

After losing at the trial court, the HOA appealed on four grounds: 1) the fee amounted to an unconstitutional taking, 2) "the Commission lacked statutory authority to impose the fee," 3) "the fee is not supported by substantial evidence," and 4) "the Commission arbitrarily increased the amount of the fee." The court found against the HOA on all four grounds and upheld imposition of the fee.

A fee amounts to a taking if it lacks the proper nexus or it is not roughly proportionate. Here, the impact identified by the Commission and referred to by the court consisted of the elimination over the next 50 years of an acre of recreational beach resulting from construction of the seawall. In order to mitigate this impact, the Commission imposed a $5.3 million mitigation fee that would be used to purchase and maintain a beach off-site.

In disagreeing with the HOA, the court found that the purpose of the fee as stated in the record was to recoup the recreational value beach goers place on one acre of beach in the City and use it to purchase equivalent beach elsewhere. This purpose is directly related to the impact – the loss of recreational use of the beach. Therefore, a proper nexus existed.

Secondly, the court addressed whether the fee was roughly proportionate to the impact. According to the court, the Commission went above and beyond what was necessary to show the direct proportionality of the fee to the identified impact. Relying on the same studies and reports as used in its takings analysis, the court had no problem finding that the fee and its amount were supported by substantial evidence.

The California Coastal Act requires that the Commission *shall* grant permits to construct seawalls "to protect existing structures… and when designed to eliminate or mitigate adverse impacts on local shoreline and supply." (Pub. Resources Code, § 30235.) Although the Commission agreed that Section 30235 applied, it did not agree with the HOA's argument that Section 30235 requires the Commission to grant the permit without any conditions, or at least without the $5.3 million mitigation fee. In agreeing with the Commission's interpretation, the court found that Section 30235 must be read in conjunction with the rest of the Coastal Act. Even if the Commission had to grant a permit, mitigation measures can still be imposed in order to ensure that the seawall will have the least impact possible. Therefore, the Commission had the statutory authority to impose the fee.

The HOA argued that the Commission decided to impose the fee at the first hearing and then staff developed the reasoning for that decision prior to the approval hearing. The court again pointed to the record and the plethora of evidence that was before the board at the first hearing. The court found that the record showed the rationale for the imposition of the fee existed and was relied on prior to the Commission's decision. Therefore, the Commission did not engage in any illegal post hoc rationalization.

4. AB 2604 (Statutes 2008) (Chapter 246) Deferral of Residential Impact Fees Until Close of Escrow

Existing law prohibits a local agency that imposes any fees or charges on a residential development for the construction of public improvements or facilities from requiring the payment of those fees or charges until the date of the final inspection or the date the certificate of occupancy is issued, whichever occurs first, with specific exceptions. If the fee or charge is not fully paid prior to issuance of a building permit, existing law authorizes the local agency issuing the building permit to require the property owner, as a condition of issuance, to execute a contract to pay the fee or charge within a specific time frame. The new law permits local agencies to defer payment of fees or charges for public improvements until the close of escrow on the residential development.

5. AB 3005 (Chapter 692) Community Development: Mitigation Fees

This measure requires local agencies to reduce vehicle impact fees for housing developments that meet three characteristics: 1) The project must be located within a half-mile of a transit station via a barrier-free walkable pathway; 2) the project must also be within a half-mile of retail-convenience uses, at least one of which must sell food; 3) the project may only include a minimum number of parking spaces. The measure further defines a "housing development," under "common ownership and financing" which is near a "transit station."

Notes:

COMMON INTEREST DEVELOPMENTS

A. Regulatory Framework

Summary

- This category includes detached projects with common areas as well as common wall projects.
- Condominiums and town homes have, in the last 15 years, been dormant as a product type due to insurance considerations. While still expensive, the insurance market has become more competitive, and the number of common wall projects has significantly increased.
- Cities and counties like to see common interest developments as it creates a private entity which can be given the legal obligation to maintain facilities that the city or county would otherwise have to deal with.
- Common interest projects require greater additional processing steps by the Department of Real Estate.

Trends

- Courts are unsure what standard to apply to review homeowner association actions.
- Full compliance with the association CC&Rs is, however, mandatory.
- Can be a valuable tool for infill and revitalization.

B. Update

1. *Golden Rain Foundation v. Franz* (2008) 163 Cal.App.4th 1141

Plaintiff trustee appealed a judgment from the Superior Court of Orange County which denied the trustee's request for a declaration that it was not liable to defendant apartment residents pursuant to the Davis-Stirling Common Interest Development Act (Civ. Code, § 1350 et seq.) for failing to produce requested documents.

The declaration of trust provided that the trustee's operations included providing services for corporations that were formed primarily to provide cooperative apartment housing. Pursuant to management agreements, the trustee managed the residential buildings and performed substantially all administrative functions. The trial court found that the trustee was an association as defined in Civil Code section 1351(a), and that the apartments were a common interest development as defined in section 1351(c). The appellate court held that substantial evidence supported the trial court's finding that the trustee was an association created to manage the apartments. The trustee was not a managing agent as defined in Civil Code section 1363.1(b), because it held title to the common facilities and was not compensated for its services. The apartments were a common interest development because the residents owned separate interests as defined in Civil Code section 1351, and were members of the association as contemplated by Civil Code, section 1352. The recorded declaration for the apartments was adequate under Civil Code, section 1353(a)(1) and (b), despite its lack of covenants, conditions, and restrictions. The appellate court affirmed the trial court's judgment.

2. *Treo@Kettner Homeowners Assn. v. Superior Court* (2008) 166 Cal.App.4th 1055

Petitioner homeowners association of a condominium project sued real party in interest developer and others for alleged construction defects. Respondent, the San Diego County Superior Court, California, granted the developer's motion for an order submitting the case to a judicial referee. The association petitioned for a writ of mandate to the appellate court, directing the trial court to set aside its order. A provision of the association's covenants, conditions, and restrictions ("CC&Rs") required that all disputes between the association and the developer be decided by a general judicial reference pursuant to Code Civil Procedure section 638. The court concluded that the CC&Rs did not suffice as a binding contract in relation to the waiver pursuant to section 638 of the constitutional right to a trial by jury. When the legislature stated in section 638 that the right to jury trial could be waived by written contract, it did not mean to include equitable servitudes created by the CC&Rs of common interest communities. Treating CC&Rs as a contract sufficient to waive the right to trial by jury did not comport with the importance of the right waived. While it may have been reasonable under the circumstances to bind the owners and the association concerning the governance of the community and the placement of restrictions on the use of property, the legislature did not intend that CC&Rs be sufficient to effectively and permanently waive the constitutional right to trial by jury. A peremptory writ of mandate was issued directing the superior court to vacate its order granting the motion for general judicial reference and enter an order denying the motion.

3. *Ritter v. The Churchill Condominium Association* (2008) 166 Cal.App.4th 103

The Churchill was constructed from slab, which contained penetrations. The Ritters, owners of two units in the Churchill, complained of smoke odor intruding into their units, both before and after they remodeled. Experts determined the intrusion could partially be stopped by filling the penetrations. After the condominium board determined that filling the holes was the responsibility of the Ritters, the Ritters brought suit against the Churchill and each of its directors individually claiming, among other things, breach of CC&Rs, negligence, and breach of fiduciary duty. At trial, the jury found that the Churchill, but not the individual directors, had breached the CC&Rs, was negligent, and had breached its fiduciary duty.

On appeal, the Churchill claimed that holding the Churchill entity liable, was inconsistent with finding that the individual directors were not. The court held that the liability of the Churchill is separate and distinct from the liability of the directors and it was possible to have one without the other. Although the rule of judicial deference provided protection from personal liability for the individual directors, it does not follow that the same rule of judicial deference also automatically provides cover to the entity itself.

The court upheld the award of attorney fees to the Ritters, finding that they had prevailed on the substance of their claims. Since the directors merely avoided personal liability for the underlying negligence, and lost on the association’s liability, the directors were not the prevailing party as against the plaintiffs.

4. *Harvey v. The Landing Homeowners Association* (2008) 162 Cal.App.4th 809

Plaintiff sued defendants, a homeowners association, certain members of the association's board of directors, and various residents of a condominium project, alleging causes of action for trespass, breach of fiduciary duty, and injunctive relief. The trial court granted defendants' motion for summary judgment. Plaintiff appealed.

Plaintiff claimed that the board acted outside the scope of its authority under the project's CC&Rs when it determined fourth floor homeowners could exclusively use up to 120 square feet of inaccessible common area attic space, appurtenant to their condominium units, for rough storage. The court concluded that the board acted within its authority under the CC&Rs, which gave the board authority to allow an owner to use common area exclusively, provided such use was nominal in area and adjacent to the owner's exclusive use area or living unit, and provided further, that such use did not unreasonably interfere with any other owner's use or enjoyment of the condominium. Under the rule of judicial deference, the court deferred to the board's authority and presumed expertise. The board's action was not invalid merely because directors who owned fourth floor units voted in favor of allowing limited exclusive use of the attic space common area. Under Corporations Code section 7233(a)(2), because a disinterested majority of the board approved the transaction and there was full disclosure, the board's action was valid. The trial court judgment was affirmed.

5. *Fourth La Costa Condominium Owner's Association v. Seith* (2008) 159 Cal.App.4th 593

This case involved a broad range of challenges to a condominium HOA's actions, including its alleged violations of the First Amendment, and the Contracts Clauses of the federal and state constitutions. The trial court granted petitions filed by a condominium owners' association under Civil Code section 1356, to reduce the percentage of affirmative votes needed to amend the declaration of covenants, conditions, and restrictions and under Corporations Code section 7515, to reduce the percentage of affirmative votes needed to amend the bylaws. The governing documents required an affirmative vote of 75 percent of the owners for amendment. After a simple majority of the owners voted for amendment, the association sought to reduce the necessary percentage. The underlying vote was conducted by mail ballot and was not secret.

Ms. Seith objected to a variety of election issues, ranging from written ballots, the validity of a petition to reduce the requirements of a super-majority to make substantive changes to the association's governing documents, and violations of due process. The appellate court upheld trial court determinations establishing that the actions taken by the condominium association were all valid.

6. *Robert Ekstrom v. Marquesa at Monarch Beach Homeowners Association* (2008) 168 Cal.App.4th 1111

The Court of Appeal emphasized that boards of directors of homeowners associations do not have the discretion to ignore the express requirements of the CC&Rs for the development, despite the "judicial deference rule" adopted by the California Supreme Court. (*Lamden v. La Jolla Shores Clubdominium Homeowner's Assn.* (1999) 21 Cal.4th 249.)

In *Ekstrom*, homeowners in a common interest development with beach and golf course views complained to the Board of Directors ("Board") of the development's homeowners association ("Association") about palm trees that were growing higher than the rooftops and blocking those views. The homeowners had paid premium prices for those views. The CC&Rs expressly provided that "*all* trees, hedges and other plant materials shall be trimmed by the Owner of the Lot upon which they are located so that they shall not exceed the height of the house on the Lot." (Emphasis added.) The Board decided that the aesthetic benefit to the entire community from the maturing and now very lush looking palm trees outweighed the value of preserving views of just a few homeowners, and therefore it would be unreasonable to require any homeowner to top or remove any palm tree in the community.

On appeal, the HOA argued, among other things, that the "judicial deference rule" precluded judicial review of the HOA's decisions concerning the enforcement of that provision of the CC&Rs. In *Lamden*, the Supreme Court adapted the "judicial deference

rule" from the business judgment rule that is applicable to directors of corporations. Under the judicial deference rule:

> [w]here a duly constituted community association board, upon reasonable investigation, in good faith and with regard for the best interests of the community association and its members, exercises discretion within the scope of its authority under relevant statutes, covenants and restrictions to select among means for discharging an obligation to maintain and repair a development's common areas, courts should defer to the board's authority and presumed expertise.

That rule applies where owners "seek to litigate ordinary maintenance decisions entrusted to the discretion of their associations' boards of directors." Here, however, since there was express language in the CC&Rs that provided for premium views from the objector's condominiums, the board's actions were overturned. This case demonstrates that the governing board of a HOA cannot alter or ignore the express terms of the CC&Rs, without a duly approved amendment, even if the board believes that such alteration is in the best interests of the community.

7. AB 1892 (Chapter 40) Common Interest Development - Solar Energy

Under existing law, the governing documents of a common interest development include the recorded declaration and any other document governing the operation of the common interest development. Existing law provides that any covenant, restriction or condition contained in any deed, contract, security instrument, or other instrument affecting the transfer or sale of, or any interest in, real property that effectively prohibits or restricts the installation or use of a solar energy system is void and unenforceable, except as specified. The bill applies the above provisions regarding the unenforceability of prohibitions or restrictions relating to solar energy systems, in addition, to the governing documents of a common interest development as well as in the CC&Rs.

8. AB 2846 (Chapter 502) Common Interest Developments - Assessments

Common interest development law provides for special provisions that must be followed before a new assessment can be levied on owners, including submission of the matter to arbitration before a civil action can be filed.

This bill provides that, if a dispute exists between the owner of a separate interest and the homeowners' association regarding any disputed charge or sum levied by the association, and the amount in dispute does not exceed the jurisdictional limits of the small claims court (presently $7,500), the owner may pay under protest and commence an action in small claims court. The bill makes other related changes.

9. SB 1511 (Chapter 527) Common Interest Developments - Mortgages: Successors in Interest

This measure allows an association of a common interest development to file a request with the county recorder that would require the mortgagee, trustee, or other person authorized to file a notice of default to mail a copy of the trustee's deed to the association. This would allow an association to have prior notice in the event of a foreclosure to predict the possibility of lost revenue from unpaid assessment and association fees.

10. AB 2280 (Chapter 454) Density Bonus

Planning and Zoning law requires that when a developer proposes a housing development that meets a certain density, the local government provide the developer with a density bonus and other incentives or concessions for the production of lower income housing units or the donation of land within the development, among other things, agrees to construct low or moderate income housing for qualifying residents. This bill imposes certain procedures on the application for a density bonus and other incentives or concessions. The bill requires a local government agency to grant the bonus and concession unless the agency determines in writing based upon substantial evidence that the concession or incentive is in violation of state or federal law. The bill also deleted a requirement that an applicant for a waiver or reduction in a development standard show that the waiver or modification is necessary to make proposed housing units economically feasible. The bill also requires, that as a condition for granting bonuses in exchange for donating land to a government agency for very low income housing, that a responsible agency identify a source of funding for the units.

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TRAIL MIX

A. Update

1. *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263

The City of Rancho Palos Verdes sits upon ancient landslide formations that are slowly moving towards the sea. In 1978, the threat of continued landslides motivated the City to pass a temporary moratorium on the construction of single-family homes in Zone 2, a landslide area which contained the plaintiffs' properties. Zone 2 is approximately 80 acres and contains a patchwork of pre-existing homes and the plaintiffs' undeveloped properties. The slide occurring in Zone 2 is considered a "block" slide, in which the entire zone is moving at approximately the same speed, albeit very slowly. Rainy years exacerbate the speed of the slide. All experts throughout the litigation agreed that the slide did not pose a serious risk of catastrophic injury.

Following the passage of the temporary moratorium in 1978, 18 lot owners attempted to develop their lots through a moratorium exclusion process the City developed. None of the lots were approved for construction. Simultaneously, the City passed a series of ordinance exemptions allowing existing homeowners located in Zone 2 to make significant improvements and additions to their properties. No new homes were permitted to be built.

After another nearby slide occurred in 2002, the City passed a more burdensome ordinance that effectively banned new residential construction in Zone 2. Under the original 1978 ordinance, lot owners were required to show that their individual home construction or improvements would not increase the chance of unacceptable slide risk in Zone 2 for their own home sites. After the 2002 ordinance, lot owners were required to show that their individual homes would not increase the risk of slide occurrence to the entire Zone 2 area. The approximate cost to each landowner was estimated to be in the range of $500,000 to $1 million dollars for individual geologic studies required.

The court noted that in regulatory taking cases the California Constitution has been analyzed under the same standards used by the U.S. Supreme Court.

After independently reviewing the evidence presented at the trial court, the court reached two ultimate conclusions: that the 2002 moratorium made it effectively impossible to build, and that the City could not have prohibited the owners from building under state nuisance law. After ruling that a taking had occurred, the appellate court remanded the case back to the trial court.

2. *Skoumbas v. City of Orinda* (2008) 165 Cal.App.4th 783

Konstantine and Alexandra Skoumbas claimed that damage caused by a storm drain, a portion of which was owned by the City of Orinda, amounted to a physical taking of their property.

The City owned a catch basin and the first 40 feet of drain pipe attached to the catch basin. However, according to the City, it did not own any of the drain pipe below the first 40 feet. This drain pipe discharged surface water near the uphill border of the Skoumbas property, and according to plaintiffs, the discharge caused substantial erosion and damage to the property. Plaintiffs brought suit against the City on the grounds of trespass, nuisance, and physical takings.

Since this involved a summary judgment motion brought by the City, the court was merely concerned with whether there were any triable issues of fact remaining in the case. According to the City, a physical taking could only occur if the City owned the entire pipe, and therefore, since the City owned merely a portion of the pipe, there were no factual issues left to dispute and the City wins.

The court of appeal denied the City's motion, finding that there were triable issues of fact still left to be decided. The court held that "the City's ownership and control of a portion of the drainage system makes the City potentially liable for damage substantially caused by the City's unreasonable diversion of water through the City-owned portions of the system."

Takings cases alleging that water flowing onto plaintiff's property constitutes a physical taking differ from other physical takings cases. When the plaintiff has alleged a physical taking due to water flow, the plaintiff must show that the public agencies:

> . . . conduct posed an unreasonable risk of harm to the plaintiffs, and that unreasonable conduct is a substantial cause of the damage to plaintiff's property. The rule of strict liability generally followed in inverse condemnation is not applicable in this context. (*Locklin v. City of Lafayette* (1994) 7 Cal.4th 327.)

In applying this rule, the court found that "it is immaterial that the City may not own the entire section of drain . . ." The court ruled that partial ownership is not a complete defense to a taking caused by surface water. Instead, this case must go through a factual evaluation related to the reasonableness of the City's conduct. Since that issue could not be decided on summary judgment, the court denied the motion.

3. *Seven Up Pete Venture v. Schweitzer* (9th Cir. 2008) 523 F.3d 948

The substantive issues presented in this case involved a ballot initiative prohibiting open-pit mining using cyanide heap leaching, which precluded Seven Up Pete from using its property to mine gold and silver. Seven Up Pete claimed that Montana had committed a taking under both state and federal law by passing the initiative.

Seven Up Pete divided its claims by bringing the state takings claim before state court and the federal takings claim before federal court. Initially, the federal district court dismissed the case on the grounds that the federal claim would not be ripe until the state claim had been adjudicated. However, the district court stated that Seven Up Pete had properly preserved its right to return to federal court once a decision was issued at the state level. Seven Up Pete's state case went to the Montana Supreme Court, where the court held that the initiative was not a taking under the state constitution. After losing in state court, Seven Up Pete returned to federal district court as the district court had instructed.

The federal district court dismissed Seven Up Pete's federal takings claim on two procedural grounds: 1) "the Eleventh Amendment barred [Seven Up Pete's] takings claim because they [sought] monetary relief against state officials in their official capacity;" and 2) the court was "required to accord issue-preclusive effect to the Montana Supreme Court's decision." Although Seven Up Pete appealed both grounds for dismissal, the Ninth Circuit Court of Appeals focused only on the Eleventh Amendment defense.

The Eleventh Amendment provides that private parties cannot bring lawsuits in federal court against states or state officials unless the state consents to the lawsuit. This is known as sovereign immunity, and it only applies if the private party requests retrospective relief, such as money damages, instead of prospective relief, such as an injunction or declaratory relief. Additionally, the Eleventh Amendment only applies to state entities and does not cover local jurisdictions, such as counties and cities.

This case provided the first opportunity for the Ninth Circuit to address the issue of whether the Eleventh Amendment applied to claims brought under the Takings Clause. The few federal circuit courts that had faced this issue ruled that sovereign immunity applied and dismissed the cases. The Ninth Circuit agreed with the circuit courts and held that the Eleventh Amendment applies.

Because relief requested was money damages and the Eleventh Amendment covers the Takings Clause, the Ninth Circuit Court of Appeals dismissed Seven Up Pete's case against the governor of Montana.

4. ***Action Apartment Association v. City of Santa Monica*** **(2008) 166 Cal.App.4th 456**

In response to low production of affordable housing units, the City of Santa Monica adopted new and amended ordinances to increase the supply of affordable housing in June 2006. These enactments were challenged by a coalition of multifamily residential developers on multiple grounds, with two issues going to the Court of Appeals: do the holdings of Nollan and Dolan apply to the ordinance enactment (as compared to the application of an ordinance to a given individual), and were the enactments subject to approval by the Department of Housing and Community Development ("HCD") pursuant to its review powers of Housing Elements? As to both issues, the appellate court ruled in the negative.

Attempting to build on language in *Lingle v. Chevron U.S.A. Inc*, (2005) 544 U.S. 528, the Action Apartment Association ("Association") argued that the same rough proportionality requirement of Nollan/Dolan applied to facial changes to ordinances. Both the trial and appellate courts disagreed.

The Association's second challenge asserted that these enactments were subject to review and approval by the Department of Housing and Community Development. Here, the court ruled that the HCD's review was limited to the housing element adopted as part of the general plan. The state agency had certified the City's housing element, and this certification remained in effect. The appellate court determined that no statute granted HCD review and approval authority over affordable housing ordinances, and as a result, the plaintiff failed to state a claim.

5. ***McFarland v. Kempthorne*** **(9th Cir. 2008) 545 F.3d 1106**

McFarland is a landowner who owns property within the park boundaries of Glacier National Park. McFarland appealed the decision entered by the district court that granted defendants' motion for summary judgment in the landowner's action where he asserted that he was entitled to an easement over a glacier route to access his property. For a number of years, McFarland had been permitted to access his property by a specific glacier route, via vehicle, at any time during the year, including winter. However, the Park Service announced that it would close that route to inholders, such as the landowner. The landowner filed an application for a special use permit, which was denied. The Park Service explained its denial based on the decision to protect wildlife concerns and public recreation values.

McFarland brought his action in federal court, claiming an easement by necessity, an easement implied from the Homestead Act, and express easement under the terms a land patent. On appeal, the court held against the landowner on all his claims. First, the landowner could not claim a common-law easement over federal land. Second, the Park Service's denial of his permit request was neither arbitrary nor capricious, and was in accordance with governing law. Third, the landowner was not entitled to an easement by necessity because he could still get to his property through pedestrian access. An easement by necessity does not exist if the claimant has another mode of access to his property. In fact, necessity may be defeated by alternative routes or modes of access--no matter how inconvenient. Finally, there was no easement expressly granted in the original land patent or implied through language of the Homestead Act or through the landowner's use of the glacier route. The Homestead Act did not grant settlers a vested property right of access over public lands to their homesteads, but instead merely sanctioned the longstanding customary use of public lands by a settler. In a public grant nothing passes by implication, and unless the grant is explicit with regard to the property conveyed, a construction will be adopted which favors the sovereign. Although the government has historically provided for access across federal land to reach privately owned inholdings, access was granted only in the form of a license and revocable.

6. *Casitas Municipal Water District v. U.S.* (Fed. Cir. 2008) 543 F.3d 1276

Casitas Municipal Water District ("Casitas") appealed the grant of summary judgment in favor of the federal government holding that there was no governmental breach of contract and no compensable taking under the Fifth Amendment. The appellate court affirmed the dismissal of the breach of contract claim, but remanded the case to the court of federal claims with respect to the takings claim.

Casitas was under contract to administer dam and irrigation activities on the Ventura River with the U.S. Bureau of Reclamation ("Bureau") since the early 1960's. The contract, which required repayment of construction costs to the government over 40 years, also granted Casitas the exclusive right to use water flowing into the reservoir system, subject to prior water rights, and granted by the state of California. In 1993, the west coast steelhead was designated an endangered species in the Ventura River by the National Marine Fisheries Service. In response to the designation, the Bureau notified Casitas that it would be required to construct a fish ladder at the Casitas Dam site, and that water would be required to flow into the ladder around the reservoir and dam. The government acknowledged throughout the proceedings that Casitas had a usufructary right to the water.

The appellate court found that because water had been physically taken out of the reservoir to service the fish ladder, a physical taking had occurred. The government claimed that since it was taking the water for a public use under the ESA, it was not taking the water: "Although Casitas' right was only partially impaired, in the physical taking jurisprudence, any impairment is sufficient." Importantly, the appellate court held that the preservation of habitat, here through diversion of water in the fish ladder, of an endangered species is for government and third party use-the public use-which serves a public purpose. The court, in juxtaposing its decision to a recent case involving the ESA and in-stream diversions for fish species, found that the difference between the two cases was that the in-stream diversion did not require physical removal of the water from a channel, whereas here the Bureau required the maintenance of out-of-stream water flows to the fish ladder.

7. *Widders v. Furchtenicht* (2008) 167 Cal.App.4th 769

On October 20, 2008, the Second Appellate Court ruled that a local government can petition for declaratory relief to relieve itself of the statutory duty to prepare ballot titles and summaries if it believes that the proposed initiative measures are plainly unconstitutional on their face.

Furchtenicht submitted two ballot initiatives to the Ojai City Clerk's office along with notices of intent to circulate petitions and requests for ballot titles and summaries. The proposed measure urges the City Council to "urgently consider and take measure to…prohibit or deter, to the extent possible, further encroachment of national chains and franchise operations within city limits and address affordability of housing with the City of Ojai." Rather than proposing local legislation, the petitions merely directed the City Council to enact laws that will accomplish the stated goals. Additionally, the ordinances directed that if they are not passed, then they should be submitted to a vote in the general election. The ordinances were passed to the City Attorney, Charles Widders.

Widders refused to process the applications, claiming that the ordinances were an invalid attempt to exercise the initiative power pursuant to California Constitution, Article 11, Section 8 because they do not directly enact an ordinance or statute. Under existing law, "indirect" legislation proposed via initiative is prohibited. (*Marblehead v. City of San Clemente* (1991) 226 Cal.App.3d 1504.) Furchtenicht refused to withdraw the applications. Widders then filed for declaratory relief, claiming that he should be relieved of the obligation to prepare the initiative information, and that the proposed measure were unconstitutional. The trial court sustained Furchtenicht's demurrer to the action, on the narrow issue that Widders was required to file an action within 15 days of receipt of the petition requests. (Gov. Code, § 9203)

The appellate court held that the 15-day deadline was a ministerial action only, and not a procedural bar. The court further held that Widders' lawsuit was sufficiently ripe to bring a declaratory relief action, finding the mandatory duties under the election code binding and enforceable, and that significant consequences attach to local governments being required to publish potentially unconstitutional initiatives. The appellate court overturned the demurrer, and permitted the declaratory relief action to continue.

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