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The full text of all cases can be found at <http://www.findlaw.com>.

The full text of all California bills can be found at <http://www.leginfo.ca.gov>.

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ENVIRONMENTAL LAW UPDATE

Diane G. Kindermann Henderson and Leslie Z. Walker

Within this update, abbreviations have the following meanings, unless otherwise noted:

CAA	Clean Air Act
CARB	California Air Resources Board
CESA	California Endangered Species Act
CEQA	California Environmental Quality Act
CWA	Clean Water Act
DFG	California Department of Fish and Game
DWR	California Department of Water Resources
EIS	Environmental Impact Statement
EPA	U.S. Environmental Protection Agency
ESA	Endangered Species Act
GHGs	Greenhouse Gases
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NPDES	National Pollutant Discharge Elimination System
RWQCB	Regional Water Quality Control Board
SWRCB	State Water Resources Control Board
USACE	U.S. Army Corps of Engineers
USFWS	U.S. Fish and Wildlife Service
WDR	Waste Discharge Report

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.)
- Water Code jurisdiction over groundwater is limited to “subterranean streams flowing through known and definite channels.” (Wat. Code, § 1200.)
- The process for acquiring water rights may include 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
 - Search for the names of seller and predecessors-in-interest in 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.
- Visit the 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 water for the project involves pre-1914 rights, check for historical diversions to support the full amount claimed and determine if the right has been abandoned or forfeited.
 - If water for the project involves post-1914 rights, determine whether the place of diversion, purpose, use, season and quantity allowed under the permit and license is 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
 - Groundwater
 - Is there sufficient groundwater?

- Has the basin been adjudicated or is there any other limitation on quantity that can be used (including groundwater management plans)?
- Appropriative Rights
 - Has the basin been 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. *California Energy Commission v. Department of Energy* (9th Cir. 2009) 585 F.3d 1143

To help alleviate the water supply crisis in the state, the California Energy Commission (“CEC”) attempted to adopt regulations that would set water efficiency standards for residential washing machines. Under the federal Energy Policy and Conservation Act (“EPCA”) (42 U.S.C. § 6297), states are preempted from adopting standards that regulate “energy efficiency, energy use, or water use of any product covered by federal energy efficiency standards.” CEC petitioned the Department of Energy (“DOE”) for a waiver from EPCA. DOE denied the waiver and CEC sued. The Ninth Circuit found that all of DOE’s reasons for denying the waiver were either arbitrary and capricious or lacking in supporting evidence. CEC asked the appellate court to order DOE to grant the waiver, but the court declined. Instead, it reversed DOE’s denial of the waiver and remanded for further proceedings. Given the change in political climate and the Obama administration’s previous grant of a waiver to California in the realm of automobile emissions, it is likely that the CEC will get its waiver. Studies show that residential washing machines account for 22% of average household water usage and CEC asserts that the new regulations will result in annual water savings equal to the City of San Diego’s current water usage.

2. *Stockton East Water District v. U.S.* (Fed. Cir. 2009) 583 F.3d 1344

On September 30, 2009, the Court of Appeals for the Federal District held that the United States violated water delivery contracts with two California water districts. The court held that the government must pay damages for its failure to deliver water under the contract terms.

The water districts, Stockton East Water District and Central San Joaquin Water Conservation District, entered into contracts with the U.S. Bureau of Reclamation that guaranteed them a specific amount of water from New Melones Reservoir, part of the Central Valley Project (“CVP”). The contracts were signed in 1983, but the Districts did not receive any water until 1993, due to construction of the necessary facilities. Prior to that date, the Central Valley Project Improvement Act of 1992 (“CVPIA”) was passed, which mandated specific amounts of water from CVP for fish and wildlife purposes. The CVPIA, coupled with drought conditions in California, meant that the Bureau was unable to meet the quantity requirements in the contracts. The Districts sued the government for breach of contract, and the Federal Circuit Court of Appeals agreed with the Districts, in spite of several defenses raised by the United States.

3. ***Morongo Band of Mission Indians v. State Water Resources Control Board (2009) 45 Cal.4th 731***

On February 9, 2009, the California Supreme Court held SWRCB did not violate the due process rights of the recipients of a proposed license revocation by refusing to disqualify the enforcement team because one or more members had advised SWRCB on other, unrelated issues. The Supreme Court held that as long as the rules separating functions and prohibiting ex parte communication are observed by staff attorneys, there is no presumption of impartiality. The Supreme Court further held that the appropriate standard for considering “relationship-bias” claims is a high risk of actual bias, not “appearance of bias.” The presumption of impartiality applies to all types of alleged decision maker bias claims other than those involving claims of personal or financial interest. If an agency properly separates the attorneys who are acting as advocates or prosecutors in an adjudicatory proceeding, the Supreme Court confirmed that it is permissible for those same attorneys to simultaneously advise the decision makers in unrelated cases. The case is an important victory for agencies attempting to extend the capacities of limited budgets and staff. The Supreme Court, however, suggested that having the agency’s sole or primary attorney act as a prosecutor creates a high risk of actual bias.

For more information, see “No Conflict Between Prosecutorial and Advisory Positions” at <http://blog.aklandlaw.com>.

4. ***California Groundwater Association v. Semitropic Water Storage District (2009) 178 Cal.App.4th 1460***

Semitropic Water Storage District, a water storage district established pursuant to the Water Storage District Law (Water Code, §§ 39000 et seq.), used its own employees to drill its water wells. Water Code section 13750.5 requires any person responsible for construction in relation to a water well to obtain a C-57 Water Well Contractor’s License. The District’s employees did not hold a C-57 Water Well Drilling License. California Groundwater Association, a nonprofit group whose members are involved in well drilling, sued. The superior court found for the District, and the Association appealed.

On appeal, the District argued that it was exempted from the requirement of section 13750.5 because it is a public entity. The Contractors’ State License Law (Business & Prof. Code, §§ 7000 et seq.) contains exemptions for public entities from its requirements. (See Business & Prof. Code, §§ 7040, 7044, and 7049.) However, the court disagreed and held that the District was not exempt. Therefore, the District’s employees were required to obtain a license.

5. Central Valley Water Agencies File Multiple Lawsuits Challenging Delta Smelt Pumping Restrictions

The State Water Contractors (“SWC”), an association of 27 public water agencies, filed a lawsuit on March 4, 2009, against the U.S. Department of the Interior and the USFWS, challenging regulatory restrictions placed on the state’s water operations. The restrictions were outlined in a biological opinion for Delta smelt, an endangered fish species that lived in the Sacramento-San Joaquin Delta, in December 2008. The biological opinion set guidelines for State Water Project (“SWP”) and Central Valley Project (“CVP”) pumping operations out of the Delta. The SWC argues that the biological opinion has significantly impaired the ability of the two projects to continue to deliver water to 25 million Californians and 3 million acres of farmland. The SWC requested that the court invalidate the biological opinion and order the defendants to revise it in accordance with the terms of the federal Endangered Species Act. The lawsuit makes the case that in drawing up the Delta smelt biological opinion, federal agencies ignored the best scientific data available and other causes of the species’ decline. See the section on Endangered Species for more information.

For more information, see: <http://www.swc.org/uploadfiles/3.5.09%20swc%20lawsuit.pdf>.

6. Water Bills Passed by California Legislature and Signed by Governor

On November 4, the California Legislature passed a package of five bills designed to address the myriad of problems affecting the Sacramento-San Joaquin Delta, including safe and reliable water supply and environmental protection. The bills are SB7X 1, SB7X 2, SB7X 6, SB7X 7, and SB7X 8. The package of bills have both been lauded as groundbreaking and criticized for being too weak. It remains to be seen whether the sweeping changes that were promised will result. Each of the bills is discussed in more detail below:

SBX7 1 (Chapter 5, Statutes of 2010)

This bill implements the San Joaquin Delta Reform Act of 2009, which establishes the “coequal goals” of environmental protection for the Delta ecosystem and a reliable water supply. Numerous statutory additions and amendments are made. The bill essentially restructures the overall governance of the Delta by doing many things, including:

- Establishes the 11-member Sacramento-San Joaquin Delta Conservancy under the Natural Resources Agency.
- Establishes the seven-member Delta Stewardship Council, which appoints members to the newly created Delta Independent Science Board.
- Imposes certain requirements on the Department of Water Resources in its preparation of the Bay Delta Conservation Plan.
- Requires the SWRCB to establish a data collection and reporting system for the Delta by December 31, 2010.

- Requires the appointment of a Delta Watermaster.

SBX7 2 (Chapter 3, Statutes of 2010)

This bill implements the Safe, Clean, and Reliable Drinking Water Supply Act of 2010. It adds Division 26.7 (commencing with Section 79700) to the Water Code. The bill authorizes the issuance of \$11 million in bonds to finance water supply infrastructure, subject to a vote in November 2010.

SBX7 6 (Chapter 1, Statutes of 2010)

This bill establishes a mandatory groundwater monitoring program which must be implemented by January 1, 2012. All monitoring data must be reported to the Department of Water Resources. The bill adds Part 2.11 (commencing with Section 10920) to Division 6 of the Water Code and amends Water Code section 12924.

SBX7 7 (Chapter 4, Statutes of 2010)

This bill requires the state to achieve a 20% reduction in urban per capita water by 2020. Interim targets are set for urban use, and agricultural water suppliers are required to implement water efficiency practices. Further, the Department of Water Resources is authorized to develop a standardized form for reporting water usage. This bill amends Water Code section 10631.5, amends Water Code sections 10800 et seq., and adds Part 2.55 (commencing with Section 10608) to Division 6 of the Water Code.

SBX7 8 (Chapter 2, Statutes of 2010)

This bill sets out many new requirements for water diversion statements, as filed with the Department of Water Resources. It also deletes many exemptions in the current law, and will require an estimated 1,800 municipal, agricultural, and industrial diverters to file the reports. With this bill's passing, all Delta diverters will be required to record and report their diversions, regardless of method or volume of their diversion, to SWRCB. Historically, Delta diversions were exempt from water diversion reporting requirements, some of which date back to 1965. This bill makes numerous statutory additions, amendments, and deletions.

7. SB 283 (Chapter 178, Statutes of 2009) – Department of Water Resources: Recycled Water

This bill extends the deadline and allows greater flexibility for the Department of Water Resources to recommend changes to plumbing regulations for recycled water piping. Changes to the plumbing regulations will make the installation of recycled water lines easier, thus encouraging the more widespread use of recycled water. The deadline was extended from July 1, 2008 to December 31, 2009. This bill amended Water Code section 13557, and it took effect immediately upon the Governor's signature on October 11, 2009.

8. AB 975 (Chapter 495, Statutes of 2009) – Water Corporations: Water Meters

This bill repeals the existing limits on the authority of the Public Utilities Commission to require a water corporation to install water meters. Under the new law, a water corporation with 500 or more service connections must install a water meter on each new service connection and, by no later than January 1, 2025, install a water meter upon each unmetered service connection. Further, after January 1, 2015, all water corporations that have installed water meters must charge customers for potable water based on the actual volume of deliveries. The bill also requires a water corporation to recover the cost of providing services related to the purchase, installation, operation, and maintenance of water meters in rates, fees, or charges. The bill's sponsor states that this bill merely imposes contemporary requirements for water meters and replaces previous restrictions that date back to the 1970's. These old restrictions allowed some water providers to avoid the installation of water meters.

This bill repeals Public Utilities Code section 781, and adds section 781.5. It also amends section 529.7 of the Water Code.

9. EPA Specifications for WaterSense Labeled New Homes

On December 9, 2009, the EPA released final specifications that must be met for new homes to be labeled under the WaterSense program. The program was developed to label new homes that will consume approximately 20 percent less water than the average home, both indoors and outdoors. The EPA estimates that the reductions will save approximately \$100 per year in utility bills.

The WaterSense specifications include the indoor use of efficient appliances and plumbing fixtures. The specifications also require water-efficient landscaping and limitations on the amount of lawn that can be planted.

For more information, see http://www.epa.gov/watersense/nhspeccs/homes_final.html.

10. Governor Declares Official Drought Emergency for the State

On February 27, 2009, Governor Arnold Schwarzenegger proclaimed a state of emergency and ordered immediate action to manage the drought crisis. In the proclamation, the Governor uses his authority to direct all state government agencies to utilize their resources, implement a state emergency plan and provide assistance for people, communities and businesses impacted by the drought.

The Governor's order directs various state departments to engage in activity to provide assistance to people and communities impacted by the drought. The proclamation:

- Requests that all urban water users immediately increase their water conservation activities in an effort to reduce their individual water use by 20 percent.

- Directs DWR to expedite water transfers and related efforts by water users and suppliers.
- Directs DWR to offer technical assistance to agricultural water suppliers and agricultural water users, including information on managing water supplies to minimize economic impacts and implementing efficient water management practices.
- Directs DWR to implement short-term efforts to protect water quality or water supply, such as the installation of temporary barriers in the Delta or temporary water supply connections.
- Directs the Labor and Workforce Development Agency to assist the labor market, including job training and financial assistance.
- Directs DWR to join with other appropriate agencies to launch a statewide water conservation campaign calling for all Californians to immediately decrease their water use.
- Directs state agencies to immediately implement a water use reduction plan and take immediate water conservation actions and requests that federal and local agencies also implement water use reduction plans for facilities within their control.
- In particular, the order directs that, by March 30, 2009, DWR shall provide an updated report on the state's drought conditions and water availability. Other mandates directed at urban water distributors and state agencies were issued.

For more information, see <http://gov.ca.gov/press-release/11556/>.

11. Release of Draft 20x2020 Water Conservation Plan

In February 2008, Governor Schwarzenegger introduced a seven-part initiative to reduce water use. The first element of the initiative was “a plan to achieve a 20 percent reduction in per capita water use statewide by 2020.” The 20x2020 Plan, as it was coined, only addresses urban potable water use. However, it is anticipated that the Plan could result in a net statewide water savings of 1.74 million acre feet per year. This would free up precious and limited water for environmental and agricultural uses. The Plan also takes climate change into account and will eliminate an estimated 1.4 million metric tons of greenhouse gas emissions per year. The Draft Plan was released on April 30, 2009. Comments were accepted on the Plan until June 5, and a public workshop was held on May 29, 2009. It is likely that the Plan will continue to be modified as a result of comments and agency feedback.

For more information, see http://www.waterboards.ca.gov/water_issues/hot_topics/20x2020/.

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STREAMBED ALTERATION AGREEMENTS

A. Regulatory Framework

Streambed Alteration Agreements or Permits

- California Fish and Game Code sections 1600-1616 authorize 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

- No changes in the last year.

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WETLANDS

A. **Regulatory Framework**

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

- The 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 NPDES permit program.

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

- Section 404 of CWA restricts the “discharge of dredged or fill material into navigable waters at specified disposal sites” without a permit from 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 EPA's Section 404(b)(1); Guidelines (33 C.F.R. § 320.4(a)(1)) and, if involving federal actions, NEPA (42 U.S.C. § 4321 et seq.). *Zabel v. Tabb* (5th Cir. 1970) 430 F.2d 199. For specific EPA guidelines, see 40 C.F.R. § 230.10.
- The NEPA process 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 basis. (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. *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council* (2009) 129 S. Ct. 2458

USACE issued a 404 permit to Coeur Alaska, Inc. for the fill of Lower Slate Lake in Alaska. Coeur proposed to reopen the Kensington Gold Mine, which is located approximately 45 miles north of Juneau, Alaska. The mining technique used by Coeur is known as “froth flotation.” This technique results in a mix of crushed rock and water called “slurry” that needs to be disposed of somewhere. Instead of creating a tailings pond, the standard way to dispose of the slurry, Coeur planned to dispose of the slurry into Lower Slate Lake. Coeur proposed damming the lake, creating an isolated disposal area. For the disposal of the slurry into the lake, USACE issued a 404 permit.

The Southeast Alaska Conservation Council (“SEACC”) challenged the issuance of the 404 permit. Specifically, SEACC argued that the discharge of slurry was governed by Section 402, which regulates point sources, not Section 404. Therefore, SEACC argued that the EPA, and not USACE, should issue a 402 permit. Even if Section 404 applied, SEACC argued that USACE was required to apply the new source performance standards in Section 306, which prohibited any discharge of slurry. The Ninth Circuit Court of Appeals agreed with SEACC, and Coeur petitioned for and was granted review by the United States Supreme Court.

First, the Supreme Court found that both the statute and the regulations forbid the “EPA from exercising permitting authority that is provided to” USACE pursuant to Section 404. Because “slurry” met the definition of “fill” under 404, 404 applied. Second, the Court upheld USACE’s interpretation of 404, which stated that the EPA’s performance standard does not apply to the discharge.” A USACE memorandum made two important points on the limitations of this statement: 1) this applies in cases where the discharge occurs in a closed body of water, and 2) “when a discharge has only an ‘incidental filling effect,’ the EPA’s performance standard continues to govern that discharge.” Third, the Court found that “a two-permit regime is contrary to the statute and the regulations.” Therefore, a discharge of fill material requires a 404 permit only, not an NPDES permit. In light of the Court’s findings, the Court upheld USACE’s issuance of the 404 permit.

For more information, see “Alaska’s Gold Rush Continues: USACE 404 Permit Upheld by the Supreme Court” at <http://blog.aklandlaw.com>.

2. *White Tanks Concerned Citizens, Inc. v. Strock* (9th Cir. 2009) 563 F.3d 1033

In this case, the Ninth Circuit addressed the adequacy of the environmental review process done in conjunction with the issuance of a 404 permit. Specifically, the main issue was the scope of the environmental review. USACE focused only on the wetlands, and not the impacts of the project as a whole. The Ninth Circuit ruled that the scope required depended on whether the project could proceed without the 404 permit. In this case, it could not and therefore, the scope included the entire development. USACE was required to start the environmental review process over using the correct scope.

This case implies that if a Section 404 permit is necessary for any part of a project, and the project is infeasible financially or otherwise without the portion of the project for which the permit is necessary, then the appropriate scope of the environmental analysis for the purposes of NEPA is the entire project.

For more information, see “Geographic Scope of Environmental Study Depends on Feasibility of Project Without Federal Action” at <http://blog.aklandlaw.com>.

3. *U.S. v. Milner* (9th Cir. 2009) 583 F.3d 1174

The Ninth Circuit held that waterfront property owners may be liable for common law trespass and may further violate the Rivers and Harbors Act of 1899 by permanently erecting shore defense structures in area where tidelands and private property intersect. In this case, the upland homeowners erected shore defense structures, including rip rap and bulkheads, to limit erosion and storm damage to their properties located in the Strait of Georgia in Washington (the area lies between Vancouver Island and the British Columbia mainland). The neighboring tidelands are held in trust by the federal government for the Lummi Nation, a Native American tribe.

Under a claim for trespass by USACE, the court held that because both the upland and tideland owners have vested rights in the gains due to the nature of the boundary, the homeowners could not locate their shore defense structures so as to permanently fix the property boundary. To do so would be to deprive the Lummis of the tidelands that they would otherwise gain due to the ambulatory nature of the boundary between the tidelands and the uplands. Therefore, the court held that the homeowners trespassed on the tidelands held by the federal government in trust for the Lummis.

The court held in relation to the claim under the Rivers and Harbors Act of 1899 (“RHA”) that because the homeowners’ shore defense structures were located below the Mean High Water Line, and because those structures altered the course, location, condition, or capacity of the jurisdictional water, they are required to obtain USACE permission pursuant to RHA.

In addressing claims of Clean Water Act violations, the court found that since there was no evidence to show where the high tide line was located when the structures were built, the homeowners did not violate the CWA. This is paradoxical, as the reach of the CWA is usually broader than the RHA, and the court acknowledged it. "...[T]he reversal here is explained by the RHA's concern with preventing obstructions, on the one hand, and the CWA's focus on discharges into water, on the other."

4. *U.S. v. Bailey* (8th Cir. 2009) 571 F.3d 791

In the continuing post-*Rapanos* confusion, the Eighth Circuit has now weighed in on what test it will use when determining USACE jurisdiction over wetlands. The court will use the either/or test. In other words, in the Eighth Circuit, USACE jurisdiction is proper when the wetland either has a significant nexus to waters of the United States, the test put forth by Justice Kennedy, or when the land meets the plurality's adjacent and continuous surface connection test.

In this case, the court addressed USACE jurisdiction for property in Minnesota, bordering the Lake of the Woods. It is undisputed that the Lake is a navigable water. Gary Bailey wanted to divide his 13 acres into home sites with lake frontage. He proceeded to build a road to provide access to the lots. After he started building the road, he was told to cease construction and apply for a Section 404 permit. He subsequently filed a Local-State-Federal Project Notification Form, which USACE treated as an "after the fact application" under Section 404. However, Bailey did not wait for USACE to make a determination and instead completed his road. USACE notified him that the work was in violation of the CWA and subsequently denied his application. USACE then ordered Bailey to return his property to its original condition. Bailey sued and claimed that USACE did not have jurisdiction over the land and thus could not require him to obtain a Section 404 permit. When summary judgment was granted in favor of USACE, Bailey appealed.

The appellate court applied the either/or test and ultimately held that USACE jurisdiction was proper because Justice Kennedy's test was met.

5. *U.S. v. Cundiff* (6th Cir. 2009) 555 F.3d 200

On February 4, 2009, the Sixth Circuit Court of Appeals published an opinion interpreting *Rapanos v. United States* (2006) 547 U.S. 715. As in *U.S. v. Bailey* (above), the court applied the tests developed in *Rapanos* to determine whether the land in question was subject to USACE jurisdiction.

The case arises from an enforcement action brought under the CWA against George Cundiff and his son. Cundiff owns land in Muhlenberg County, Kentucky. The property is adjacent to Pond and Caney Creeks, tributaries of the Green River, which flows into the Ohio River. Cundiff converted these wetlands into farmland by creating ditches and draining the area. His activities continued even after meetings with the EPA and several letters ordering Cundiff to cease. The United States finally brought a civil action against Cundiff for injunctive relief and civil penalties for discharging pollutants into waters of the United States without a permit. The district court granted summary judgment to the United States on the civil CWA claims and granted the government relief in the form of penalties and a restoration plan. However, while the appeal was pending, the *Rapanos* decision was published. Pursuant to that decision, the appellate court remanded the case on the limited issue of whether the *Rapanos* decision required a different result in the government's summary judgment motion.

The court held that under either *Rapanos* test, Cundiff's property was subject to the CWA, therefore it did not need to address the split in the *Rapanos* opinion. The court then held that Cundiff "actively filled the wetlands with dredged spoil and covered roughly 5.3 acres of wetlands next to about 11,900 feet of ditches," and thus ". . . discharged a pollutant under the Act."

Cundiff argued that no Section 404 permit was necessary because the activities fell into either the farming exception, section 1344(f)(1)(A), or the drainage ditch maintenance exception, section 1344(f)(1)(C). The Sixth Circuit rejected those arguments.

While the Sixth Circuit avoided choosing a specific test from *Rapanos*, the opinion is useful in determining how that court will apply facts to the various tests to determine whether USACE jurisdiction exists.

6. *Alliance to Save the Mattaponi v. U.S. Army Corps of Engineers (D.D.C. 2009) 606 F.Supp.2d 121*

The court issued an opinion that limited EPA discretion to veto Section 404 permits under the CWA. This opinion may have an effect on Section 404 permits for controversial projects and will give traction to those who wish to challenge projects with USACE jurisdiction. CWA authorizes the Administrator of the EPA to veto any Section 404 permits when they will have "an unacceptable adverse effect" on the environment. (33 U.S.C. § 1344(c).) The court determined that if the EPA finds that the action will have an unacceptable adverse effect, it must veto the permit. The EPA does not have discretion to weigh other factors. In addition to this holding, the court also held that USACE's grant of the permit was arbitrary and capricious.

7. EPA Publishes Revised Fallback/Incidental Discharge Rule (73 Fed.Reg. 250)

A new rule that went into effect in early 2009 changes the manner in which USACE will issue permits regulating incidental discharges of dredged and filled materials into waters of the United States. The final rule is the result of years of litigation between mining and development interests, environmental organizations, and EPA/USACE. The new rule invalidates the so-called “Tulloch II” rule and changes the regulatory definition of “discharge of dredged material.” The rule allows field agencies to exercise discretion to differentiate between “discharge of filled materials,” and “incidental fallback on a case-by-case basis.” The definition of “incidental fallback” is now deleted from regulations 33 C.F.R. section 323.2(d)(2) and 40 C.F.R. section 232.2, as is the language indicating that the agencies “regard” the use of mechanized earth-moving equipment as resulting in regulable discharge. This new rule is actually USACE’s 1999 version and is the last one to go unchallenged.

For more information, see <http://www.epa.gov/owow/wetlands/dredgedmat/>.

8. Field Level Agreement between U.S. Army Corps of Engineers and EPA

In April 2009, USACE, South Pacific Division and the EPA, Region IX entered into a Field Level Agreement (“FLA”) regarding enforcement of Section 404 of the CWA. The FLA spells out enforcement responsibilities for each agency in order to reduce overlapping work and conserve resources.

For more information, see http://www.spk.usace.army.mil/organizations/cespk-co/regulatory/pdf/Field_Level_AgreementwithMOA.pdf.

Notes: _____

WATER QUALITY

A. **Regulatory Framework**

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

- 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 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.

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 below.)

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”)

- 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).)
- TMDLs specify 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 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

- 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.) Regulations published on July 14, 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. Permits are typically issued for a five-year term.

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

- The Porter-Cologne Act was used as the basis of the CWA. The Porter-Cologne Act entrusts SWRCB and the nine 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 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.).

B. Update

1. *National Cotton Council v. EPA* (6th Cir. 2009) 553 F.3d 927

The court ruled that the EPA's categorical exemption of chemical and biological pesticides from CWA discharge permits violated the plain language of the CWA. The controversy came about when EPA issued a final rule on November 27, 2007, which concluded that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") labeling requirements were exempt from the CWA's permitting requirements. Federal lawsuits were subsequently filed nationwide by both environmental and industry groups and the cases were consolidated for hearing before the Sixth Circuit.

The environmental petitioners argued that because the definition of "pollutant" had historically been given wide latitude, that residual chemical pesticides were "chemical waste" contained in the definition of "pollutant," and that biological pesticides were "biological materials" contained in the CWA definition of pollutant. The court agreed with the environmental petitioners and held that the plain language of the CWA was unambiguous as to pesticides. The court further held that the discharge of pesticides constituted a point source discharge subject to regulation under the CWA based upon EPA's own inconsistent interpretation of similar discharge pollutants and case law. The court ultimately held that the EPA's final rule was not a reasonable interpretation of the CWA and vacated the final rule.

Although the court found against the EPA, it granted a stay of its ruling for two years to allow state's time to establish a general permit. While the Sixth Circuit court's opinion forces the EPA and some states to take quick action on a general permit, California pesticide users already have such general permit coverage.

2. ***Ohio Valley Environmental Coalition v. Aracoma Coal Mine* (4th Cir. 2009) 556 F.3d 177**

Mountaintop coal mining companies were handed a significant victory when the Fourth Circuit Court of Appeals reversed a lower court ruling that USACE improperly granted Section 404 permits for specific mine projects in violation of the CWA, NEPA, and the Administrative Procedures Act. A divided panel of appellate court judges determined that USACE fulfilled its regulatory burdens by taking a “hard look” at the environmental consequences of granting mountaintop mining permits for the discharge of rock tailings into ephemeral and intermittent streams, and the use of those streams as depositories for mining waste water and debris as “slurry.” USACE issued a mitigated finding of no significant impact so long as the mining companies improved or restored other streams in the area and improved drainage ditches to replicate the original stream characteristics of the streambeds that were converted or buried. The appellate court held that USACE’s mitigation requirements were a reasonable interpretation of existing regulations. The appellate court further held that the impoundment and diversion of streams was not a “discharge into waters of the United States.” Rather, the use of streambeds to hold debris from mining operations was part of a long-standing interpretive activity sanctioned by USACE and authorized by the removal of prior regulation by the EPA.

Under the Obama Administration, EPA temporarily halted USACE permit applications for over 80 mines in the Appalachia until adequate environmental review is undertaken (see Mining section below for updates on this process). EPA has statutory authority to review permits granted by USACE under their Section 404 permitting authority. In this regard, victory for open top coal mining may be pyrrhic.

3. **AB 1366 (Chapter 527, Statutes of 2009) – Residential Self-Regenerating Water Softeners**

This bill gives the authority to a local agency that owns or operates a community sewer system or water recycling facility to control salinity input from residential self-regenerating water softeners by adopting an ordinance or resolution after a public hearing. The appropriate regional board must first make a finding that the control of water softeners would contribute to water quality. The authority is further limited to certain geographical areas of the state, including the hydrologic regions of: Central and South Coast, San Joaquin River, Tulare Lake, and the Counties of Butte, Glenn, Placer, Sacramento, Solano, Sutter, and Yolo. The bill’s sponsor says that increased salinity in rivers and streams is a growing concern in many regions of the state, especially in the Central Valley. Salinity discharges, from both urban and agricultural sources, have received increased attention in recent years. Salinity also arises in the context of recycling, where higher salinity makes recycling more difficult. Water softener industry groups initially opposed the bill, but dropped their opposition when amendments were made. This bill adds Section 13148 to the Water Code.

4. SB 310 (Chapter 577, Statutes of 2009) – Water Quality: Stormwater and Other Runoff

This bill implements the California Watershed Improvement Act of 2009 (Water Code, § 16100 et seq.). The Act authorizes a city, county and special district that is a permittee or co-permittee under an NPDES permit for a municipal stormwater system to develop a watershed improvement plan (“WIP”). The RWQCBs can be involved in the development of WIPs and will be required to review and approve them under specific circumstances. Cities, counties, and special districts are authorized under the bill to charge fees to implement the programs and to build the facilities necessary to improve water quality. The author states that the bill’s goal is to promote cooperative watershed approaches that will reduce urban stormwater volumes, reduce urban runoff pollutants and provide adequate, reliable funding to meet water quality requirements.

5. SB 790 (Chapter 620, Statutes of 2009) – Water Quality: Stormwater Resource

This bill creates the Stormwater Resource Planning Act, which authorizes a local agency to develop a stormwater resource plan, either individually or jointly with other entities. The stormwater resource plan must meet certain requirements, including identification of opportunities for the augmentation of water supply, source control of pollution and stormwater volume, reestablishment of natural drainage systems, and development or enhancement of habitat and open space. The Act further defines “low impact development.” The bill also allows grants from the Watershed, Clean Beaches, and Water Quality Act Clean Beaches Program to be used for low impact development. The author states that this bill is intended to establish a framework for multi-benefit projects. “It changes perspective on stormwater from being a water quality problem to recognizing that stormwater could be a source of water supply for a variety of purposes.”

This bill amends section 30916 of the Public Resources Code, amends Water Code section 10540, and adds the Stormwater Resource Planning Act (Water Code, § 10560 et seq.).

6. EPA’s Technical Guidance on Implementing the Stormwater Runoff Requirements for Federal Projects under Section 438 of the Energy Independence and Security Act

In an effort to lead by example pursuant to an executive order signed by President Obama, the EPA issued these guidelines to assist federal agencies in minimizing the impacts of stormwater runoff from federal projects. The guidelines are designed to comply with the new requirements under the Energy Independence and Security Act of 2007, which include maintaining or restoring hydrology to pre-development levels. The guidance explains the new requirements for stormwater runoff and provides information on various stormwater management practices, also referred to as green infrastructure or low impact development practices, which can be implemented to achieve pre-development levels.

For more information, see <http://www.epa.gov/owow/nps/lid/section438/>.

7. Proposed National Rulemaking to Strengthen the Stormwater Program

EPA plans to establish a program to reduce stormwater discharges from new development and redevelopment and make other regulatory improvements to its stormwater program. The EPA has issued a federal register notice to solicit stakeholder input to help EPA shape a program to reduce stormwater impacts.

For more information, see 74 Fed.Reg. 68617 (Dec. 28, 2009).

8. State Water Resources Control Board Publishes Proposed Final Policy for Use of Recycled Wastewater

On February 15, 2008, SWRCB staff circulated a draft Staff Report and the proposed Recycled Wastewater 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 new draft policy was released on September 21, and was adopted on February 3, 2009. The policy adopts the following recycled water goals:

- 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, see http://www.waterboards.ca.gov/water_issues/programs/water_recycling_policy/.

9. State Water Resources Control Board Issues Draft Construction General Permit for Stormwater

On September 2, 2009, SWRCB adopted a new NPDES General Permit for stormwater discharges associated with construction and land disturbance activities (the "Permit"). The Permit updates the previous general permit adopted in August 1999, which expired on August 19, 2004, but it remains in effect until a new one becomes effective. The Permit will become effective on July 1, 2010.

The Permit represents a large shift in stormwater management practices. Rather than relying upon a builder-developed Storm Water Pollution Prevention Plan (“SWPPP”) or Best Management Practices (“BMPs”), the Permit uses quantitative standards to ensure compliance with CWA.

The Permit, once effective, will significantly change the way that developers operate in California. SWRCB maintains that the changes are justified by the water quality benefits that will occur with implementation of the Permit.

For more information, see
http://www.swrcb.ca.gov/water_issues/programs/stormwater/constpermits.shtml.

10. State Water Resources Control Board Proposes Revisions to Water Quality Enforcement Policy

SWRCB proposes to revise its Water Quality Enforcement Policy. The final draft Policy was released on July 14, and written comments were accepted until September 21, 2009. SWRCB heard comments at the meetings of October 20 and November 17, 2009.

The current enforcement policy has not been updated since 2002, and the Policy includes several changes. Among these changes, the Policy contains a ranking system for enforcement actions. The ranking system was designed to ensure that the state’s sometimes scarce resources are being used most efficiently. The system establishes three classes of violations based upon the threat to water quality and the possible harm to human health and the environment. Other factors, including the violator’s past enforcement record and the impacts of past violations, will be used to determine the appropriate enforcement response.

The new Policy also requires the regional water boards to issue mandatory minimum penalties (“MMPs”) for certain violations of NPDES permits. These MMPs must be issued “within 18 months of the time that the violations qualify as mandatory minimum penalty violations.” Further, the Policy clarifies MMPs for the failure to file discharge monitoring reports, as required under the Water Code.

For more information, see
http://www.swrcb.ca.gov/water_issues/programs/enforcement/.

11. Conditional Waiver of Waste Discharge Requirement for Small Food Processors and Small Wineries within the Central Valley Region

The Central Valley Regional Water Quality Control Board approved a Conditional Waiver of WDRs for Food Processors and Small Wineries, pursuant to Water Code section 13269. A similar order, approved in 2005, expired in July of 2008. That order provided a waiver to 97 facilities in the Central Valley Region. The new order is similar to the expired one and waives WDRs for three categories of activities: 1) Land application of a limited volume of food processing wastewater to irrigate crops or landscaping; 2) Land application of a limited volume of residual solids to amend soil in cropped or landscaped areas; and 3) Storage of any volume of process wastewater in a tank on-site prior to transporting it off-site. The order imposes conditions that require dischargers to minimize or eliminate discharges of pollutants that could affect beneficial uses and manage the discharges to prevent and minimize water quality degradation.

For more information, see

http://www.swrcb.ca.gov/centralvalley/board_decisions/adopted_orders/index.shtml.

12. Stakeholder Meetings Held for Groundwater Quality Strategy for the Central Valley Region

In December 2008, the Regional Water Quality Control Board, Central Valley Region adopted Resolution R5-2008-0181, which directed staff to develop a long-term groundwater quality strategy. This strategy, which is not a new regulatory program, will describe existing commitments and programs. It is intended that this strategy will serve as a road map for the Board and other local and state agencies, to allow coordination of future efforts and policies. The strategy will not address groundwater rights or supply, but will instead focus on water quality.

Four stakeholder workshops were held in August 2009 throughout the Central Valley. Following those workshops, a draft strategy document will be circulated for stakeholder review and comment. Further workshops will be held once that draft strategy is complete. A final draft strategy is planned for presentation to the RWQCB at the first meeting in 2010.

For more information, see

http://www.waterboards.ca.gov/centralvalley/water_issues/groundwater_quality/index.shtml#gwstrategy.

13. Washington State Makes Low-Impact Development Mandatory Where Feasible

Low-impact development recently became mandatory in certain areas of the state of Washington, due to a recent decision. Low-impact development is defined as “stormwater management and land development strategy applied at the parcel and subdivision scale that emphasizes conservation and use of onsite natural features integrated with engineered, small-scale hydrologic controls to more closely mimic pre-development hydrologic functions.” The requirement was ordered by the Washington Pollution Control Hearings Board, after a challenge to the state’s Phase I Municipal Stormwater General Permit. The decision only affects those Phase I permits, which apply to the cities of Seattle and Tacoma, as well as Clark, King, Pierce, and Snohomish Counties, the most populous areas of the state.

For more information, see
<http://www.ecy.wa.gov/programs/wq/stormwater/municipal/PermitsPermittees.html>.

Notes: _____

OAK WOODLANDS LAW AND POLICY

A. Regulatory Framework

1. State Statutes

Oak Woodlands Mitigation Under CEQA (Pub. Resources 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. Resources Code, § 21083.4(b).)
- The statute defines oak as: i) a native tree species in the genus *Quercus*; ii) 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 iii) five inches or more in diameter at breast height. (Pub. Resources Code, § 21083.4(a).) However, “oak woodlands” is not defined in the statute or in any 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.
- 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. Resources 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. Resources 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. Resources 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. Resources 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. Resources 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. Resources 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. (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. (For more information, see <http://www.co.contra-costa.ca.us/>.)

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 and 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 Fish and Game 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 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 and 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. *California Oak Foundation v. County of Tehama* (2009) 174 Cal.App.4th 1217

In the unpublished portion of this opinion, the California Court of Appeal, Third Appellate District addressed impacts resulting from the loss of oak woodlands and CEQA. While the court’s opinion is unpublished and therefore cannot be used as precedent, it is illustrative of this court’s approach to oak woodlands impacts.

The EIR for the large residential development project in Tehama County stated that even after implementation of all feasible mitigation measures, the impacts to blue oak woodlands would be significant and unavoidable, resulting in a net loss of 774 acres.

The court upheld the County’s approach to oak woodlands under CEQA. The court said:

...the reasoning in the FEIR is that the mitigation by creation of a conservation easement is “proportional to the impact” but the loss of habitat “remains a significant unavoidable impact” because “there will still be a net loss of oak woodland habitat.” That is to say, because there was no mitigation measure that could avoid a net loss of habitat, there was no feasible mitigation that could reduce the impact to a less than significant level.

The court further held that the County’s approach, defining the impact to the specific oak woodlands as significant and unavoidable, was appropriate because it “may be more true to the spirit of CEQA that environmental impacts should be admitted.”

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CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

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

- The NHPA 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 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.

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 C.C.R. § 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 C.C.R. § 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 C.C.R. § 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. Resources 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 C.C.R. § 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. *Carcieri v. Salazar* (2009) 129 S.Ct. 1058

In this case, the Supreme Court limited the Secretary of Interior's power to accept land into trust for the benefit of Indian tribes, concluding that the authority only applies to tribes that were under federal jurisdiction in 1934, according to Section 479 of the Indian Reorganization Act ("IRA"). The Court rejected the Department of the Interior's decision to take a 31-acre parcel of land in Rhode Island into trust for the Narragansett Indians.

The Supreme Court analyzed the case under settled rules of statutory construction. The IRA, passed in 1934, permits the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians...now under Federal jurisdiction." (25 U.S.C §§ 465, 479.) The Court then explained that the IRA defines "Indian" to "include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction." The Court's analysis turned on the proper interpretation of "now under federal jurisdiction." The Court held that the Secretary's trust power only extends to those tribes that were under federal jurisdiction in June 1934, when the IRA was passed into law. Ultimately, because the Narragansett Indian Tribe was not under federal jurisdiction until 1983, the Court reversed the lower court decisions permitting the parcel to be held in trust.

2. SB 833 (Chapter 208, Statutes of 2009) – Natural Resources: Native American Remains

The law governing the discovery of Native American remains specifies that, in certain circumstances, the remains will be reinterred and the landowner must protect the site, including record a document with the county in which the property is located. This bill would require that the document be titled "Notice of Reinterment of Native American Remains" and include a legal description of the property, the name of the owner of the property, and the owner's acknowledged signature. The statutory change is necessary to insure consistency across the state. This bill amends Public Resources Code section 5097.98.

3. Development of New Federal Tribal Consultation Policy

On November 5, 2009, President Obama issued an executive memorandum regarding consultation with Native American tribes. His memo directed all departments and agencies to develop a “plan of actions” to implement Executive Order 13175. That order was issued by President Clinton on November 6, 2000, and its purpose was to:

...establish regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications, to strengthen the United States government-to-government relationships with Indian tribes, and to reduce the imposition of unfunded mandates upon Indian tribes...

The Department of the Interior will begin to hold consultation meetings with Native American tribes in order to develop a policy to meet President Obama’s deadline for submission within 90 days. These meetings will be held in various parts of the country, including in Sacramento.

For more information, see http://www.doi.gov/news/09_News_Releases/112509.html.

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ENDANGERED SPECIES

A. **Regulatory Framework**

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

- The purpose of the 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 USFWS and 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, § 2050 et seq.)

- Section 2080 of CESA prohibits the unauthorized take of state endangered or threatened species. (Fish & G. Code, § 2080.)
- “Take” 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 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 Planning 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. *Trout Unlimited v. Lohn* (9th Cir. 2009) 559 F.3d 946

Both Trout Unlimited and the Building Industry Association of Washington (“BIA”) challenged regulations promulgated under the ESA by NMFS. The disputed regulations involved how the NMFS determines the status of evolutionarily significant units of anadromous fish species. One of the factors listed in the regulations is a scientific balancing of conflicting evidence relating to the inclusion or exclusion of hatchery fish in the population count. In relation to Columbia River Steelhead, NMFS decided to include hatchery fish.

The Ninth Circuit upheld the regulations and NMFS’ inclusion of hatchery fish in determining the status of Upper Columbia River Steelhead. The court stated, “We defer to the informed exercise of agency discretion, especially where that discretion is exercised in an area where the agency has special technical expertise.”

2. *Tucson Herpetological Society v. Salazar* (9th Cir. 2009) 566 F.3d 870

The saga of the flat-tailed horned lizard, native to the desert areas of southern California, has been going on for over a decade. It was first proposed for listing under the ESA in 1993; however, the proposal for listing was withdrawn in 1997. Litigation ensued and this case dealt with the Secretary of the Interior’s decision to withdraw the proposed listing of the lizard.

Pursuant to a previous opinion issued regarding the listing of the lizard, the Secretary was required to determine the lizard’s historical range, then determine whether the lost habitat was a significant portion of the lizard’s overall range. This would provide evidence to show whether the lizard was threatened with extinction throughout all or a significant portion of its range, the standard for listing under the ESA. (16 U.S.C. § 1532(6).)

The Secretary determined that approximately 23% of the lizard's historical range had been lost, but still declined to list it because he asserted that the lizard persisted across most of its current range. However, the Secretary relied upon population studies that were admittedly uncertain and inconclusive. The court held that because of that uncertainty, the Secretary could not rely upon them to find that the lizard populations remained viable. The court remanded the case back to the district court and then the Secretary to further consider whether the proposed listing of the lizard should be withdrawn.

3. *Natural Resources Defense Council v. Kempthorne* (E.D. Cal. 2009) 621 F.Supp.2d 954

The Natural Resources Defense Council ("NRDC") sued the Secretary of the Interior and various local water agencies regarding the Sacramento River Settlement contracts ("Contracts") and their effect on Delta smelt. The Contracts, entered into in 1964 by a collection of water agencies and the U.S. Bureau of Reclamation, guaranteed that the initial water allocations to the water agencies would be preserved in any future agreements. NRDC claimed that the renewal of the Contracts must be subject to Section 7(a)(2) of the ESA.

The district court disagreed, and held that the renewal of the Contracts was not subject to Section 7(a)(2). The United States Supreme Court held in *National Association of Home Builders v. Defenders of Wildlife* (2007) 127 S.Ct. 2518, that the action of a federal agency without discretion does not trigger the Section 7 consultation requirements. The district court here found that the contracts did not give the Department of the Interior any discretion to renegotiate the terms of the Contracts. Since there was no discretion, the failure to perform consultation under Section 7 did not render the Contracts invalid.

4. **Changes to Section 7 Consultation Rule Revoked**

On April 28, 2009, the Secretaries of Commerce and Interior announced that their departments are revoking the 2008 regulation that changed Section 7 consultation under the ESA.

The ESA requires federal agencies to engage in consultation with the USFWS or the NMFS to ensure that "any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered...or threatened species or result in the destruction or adverse modification of habitat..." (16 U.S.C. § 1536(a)(2).) Under previous rules, this meant that a federal agency taking action was required to consult with either NMFS or USFWS to ensure that the action would not jeopardize the species or its habitat. However, on December 16, 2008, a new rule was published which changed the consultation requirement. That new rule allowed a federal agency taking action to determine on its own whether the proposed action would have a significant effect on threatened or endangered species, without consultation with the appropriate resource agency. Several lawsuits were filed and California Attorney General Edmund Brown sued for an injunction and declaratory relief.

President Obama authorized the Secretaries to withdraw the new consultation rule in the budget bill for 2009. (See H.R. 1105 at <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:H.R.1105>.) The Secretaries' revocation of the new consultation rule effectively returns the Section 7 process to previous practice.

5. Central Valley Water Agencies File Multiple Lawsuits Challenging Water Restrictions for Smelt and Salmon

Several lawsuits have been filed in federal court challenging the USFWS biological opinions issued on the Delta and longfin smelt and the revised biological opinion on salmon (the "opinions"), which have had the effect of reducing federal Bureau of Reclamation water withdrawals from the Sacramento-San Joaquin River delta. The lawsuits were filed by various water agencies, including the San Luis and Delta-Mendota Water Authorities, Kern County Water Agency, Westlands Water District, and the Coalition for a Sustainable Delta.

In the complaints regarding the smelt, the lawsuits charge that federal agencies have ignored or overlooked scientific evidence that points to multiple causes for the decline in smelt populations. Instead, the lawsuits say, federal agencies have focused solely on the pumps that deliver water from the Sacramento-San Joaquin Delta to farms, homes and businesses in the San Joaquin Valley and Southern California. The complaints concerning the salmon also challenge the science behind the pumping restrictions.

The biological opinions have been the subject of continuing litigation for years and this litigation will likely continue in the future.

Press releases, as well as the complaints from the Coalition for a Sustainable Delta can be found at <http://www.sustainabledelta.com/legal.html>. Documents regarding the delta smelt, including the biological opinion, can be found at the USFWS website at http://www.fws.gov/sacramento/delta_update.htm. The biological opinion for salmon is located at <http://swr.nmfs.noaa.gov/ocap.htm>. A press release from Westlands Water District regarding its lawsuit over the salmon biological opinion can be found at <http://www.westlandswater.org/wwd/pages/general.asp?title=News%20Releases%20and%20Statements&page=newsrel&cwide=1024>.

6. Lawsuit Challenges Delisting of Sacramento Splittail

On August 13, 2009, the Center for Biological Diversity (“CBD”) filed a lawsuit against the USFWS to challenge the delisting of the Sacramento splittail under the ESA. The splittail is a minnow native to the San Francisco estuary and the Central Valley. Environmental groups first petitioned for its protection in 1992 and the fish was listed as threatened in 1999. Then, in 2003, the fish was delisted. In its complaint, CBD argues that the delisting was improper because USFWS did not rely on the best available science, did not comply with the notice requirements of the ESA, did not consider the loss of the splittail’s historic range, and improperly relied upon speculative conservation programs. CBD also asserts that the former Deputy Assistant Secretary of the Interior, Julie MacDonald, improperly interfered in the decision. Ms. MacDonald resigned from her position in 2007 following an internal investigation by USFWS and a report issued by the Department of the Interior Office of Inspector General.

CBD’s suit requests that the decision by the USFWS to delist the splittail be set aside and reopen the listing decision. This fate of the splittail will almost certainly affect, and in turn be affected by, the ongoing controversy surrounding endangered species and water in the Delta.

For more information, see
https://www.biologicaldiversity.org/species/fish/Sacramento_splittail/index.html.

7. SB 448 (Chapter 184, Statutes of 2009) – California State Safe Harbor Agreement Program

This bill establishes the California State Safe Harbor Agreement Program Act (Fish & G. Code, §§ 2089.2 et seq.). The purpose of the Act is to establish a program that encourages landowners to manage their lands voluntarily in order to conserve, protect, restore and enhance endangered, threatened and candidate species on privately held lands, while relieving the landowners of additional regulatory requirements. A landowner whose land has habitat or species value may submit an application to DFG to enter into a safe harbor agreement. Landowners must submit information pertaining to the area and species to be protected or enhanced, the management actions to be undertaken and the timeframe in which they will be implemented, a detailed monitoring program, and any incidental take that may occur as a result of the agreement, among other things. Baseline conditions will be established for the properties in question by the DFG or other approved party. A program administrator ensures that the land is managed to provide a net conservation benefit (e.g., reduce habitat fragmentations, maintain or increase species’ populations, enhance/restore habitat and buffer protected areas) to those protected or candidate species ascertain to live or have habitat on a landowner’s property.

In exchange for entering into the agreements, landowners will receive benefits and protections such as the permission to “take” a protected species subject to certain standard conditions, protection against the disclosure of proprietary information submitted for the purposes of the Act, and protection against liability for access to their property for Act purposes.

This bill became effective on January 1, 2010, and a sunset provision will end the program on January 1, 2020.

8. SB 286 (Chapter 346, Statutes of 2009) – Department of Fish and Game: Scientific Collector’s Permits

Under CESA, DFG has the authority to issue permits to take or possess protected species. This bill authorizes the issuance of a permit for scientific purposes to a California-certified small business, an aquarium accredited by the Association of Zoos and Aquariums, or other appropriate institution. The bill authorizes DFG to approve individual temporary employees or volunteers to work under the permit, after receiving notification from the permittee. Further, DFG has the authority to charge a fee for these scientific permits. This bill adds section 1002.5 to the Fish and Game Code.

9. SB 481 (Chapter 186, Statutes of 2009) – Airports: Wildlife

This bill would provide that the taking of birds by a public use airport certificated by the Federal Aviation Administration is not a violation of the Fish and Game Code, as long as the airport meets certain requirements. Among those are: the airport is in compliance with its federal depredation permit; the taking occurs on land owned or leased by the airport; the land is not habitat mitigation or conservation land; and there is no taking of a fully protected, candidate, threatened, or endangered species. The bill further specifies that a taking is only authorized to further public safety and can only be performed as part of an integrated wildlife management program. This bill adds section 3470 et seq. to the Fish and Game Code.

10. Protection of Delta Smelt and Longfin Smelt

On January 6, 2009, the California Fish and Game Commission issued findings declaring that uplisting the Delta smelt from threatened to endangered was warranted under CESA. The Commission’s implementation of the uplisting reflects the decline in the Delta smelt population in California since its listing as threatened. Labeling the delta smelt as endangered increases state-level regulation of critical habitat areas and may further affect commercial and recreational activities arising from the Sacramento-San Joaquin Delta.

For more information, see
<http://www.fgc.ca.gov/regulations/new/2009/dsntcfindingsiswarranted.pdf>.

On April 8, 2009, the USFWS announced that the Bay-Delta population of longfin smelt does not meet the criteria for protection under the ESA. This determination was made after the USFWS found that some Bay-Delta longfin smelt migrate into the Pacific Ocean and travel up the coast to mate with their northern relatives. The agency determined that the Bay-Delta smelt therefore did not meet the criteria for designation as a distinct population segment (“DPS”). However, the USFWS did announce that it would conduct an assessment of the entire longfin smelt population, which is currently not listed under the federal ESA.

For more information, see <http://edocket.access.gpo.gov/2009/pdf/E9-8087.pdf>.

11. California Fish and Game Commission Designates New Marine Sanctuary Zones

On August 5, 2009, the California Fish and Game Commission voted 3-2 to create 30 new marine sanctuary zones pursuant to the Marine Life Protection Act. This doubles the number of marine sanctuaries in existence under the 1999 law. The Commission’s decision came after nearly 6 hours of public testimony from over 100 people.

The new sanctuaries extend from Point Arena in the north to Pigeon Point in the south. An area around the Farallon Islands is also included. The entire area is known as the North Central Coast Study Region.

For more information, see <http://www.dfg.ca.gov/mlpa/>.

12. California Tiger Salamander

Last year’s case of *Center for Biological Diversity v. California Fish and Game Commission* (2008) 166 Cal.App.4th 597, forced the Fish and Game Commission to reconsider its rejection of a 2003 petition filed by the Center for Biological Diversity for the California tiger salamander. At its meeting of February 5, 2009, the Commission accepted the petition for consideration. Under the CESA, the Commission’s acceptance of a petition initiates a 12-month review of the species’ status by the DFG. For the tiger salamander, the Commission specifically found that it would not be requiring individual project take permits from project applicants while it is undertaking the 12-month review.

For more information about the Commission’s action, see <http://www.fgc.ca.gov/regulations/new/2009/ctsntccandidacy.pdf>.

The USFWS also took action on the tiger salamander, which is listed as endangered under the federal ESA. On August 18, 2009, the USFWS proposed to designate over 70,000 acres of critical habitat for the tiger salamander in Sonoma County. This action was taken as part of a settlement with the Center for Biological Diversity, which sued the agency when USFWS designated zero acres as critical habitat in Sonoma County. Once land is designated as critical habitat, Section 7 of the ESA prohibits federal agencies from carrying out, funding, or authorizing the destruction or adverse modification of critical habitat. There are further requirements for consultation on any federal action which may affect critical habitat. The area proposed for designation is in the Santa Rosa Plain region. The proposed rule can be found at <http://edocket.access.gpo.gov/2009/pdf/E9-18885.pdf>.

13. Comment Period Re-opened on Proposed Revised Red-legged Frog Critical Habitat

On April 29, 2009, the USFWS re-opened the comment period on its proposed revised designation of critical habitat for the red-legged frog. At the same time, the USFWS released a draft economic analysis for the designation, which explored the possible economic impacts that could result from the designation. The comment period ended on May 28, 2009. Subsequently, on October 7, 2009, the USFWS revised the draft economic analysis and again re-opened the comment period on the entire critical habitat designation proposal, including the economic analysis. The comment period closed on November 10, 2009.

The proposal will designate approximately 1.8 million acres of critical habitat in 28 counties. This is a 400 percent increase over the 2006 final rule, which was challenged in court by the Center for Biological Diversity. The revised economic analysis projects that the designation could cost between \$183 million to \$556 million over 20 years, with the vast majority of these costs resulting from development in the counties of San Luis Obispo, Alameda, San Mateo, Contra Costa, and Santa Clara. While this number is high, the report also estimates that development will occur on only one-half of one percent of the privately owned critical habitat. Further, the economic report finds that the designation would not affect ranchers, since it maintains the so-called 4(d) exemption for compatible ranching operations.

The opening of the comment period twice in the year likely means that a final rule on the revised critical habitat designation for the red-legged frog is forthcoming.

For more information, see
<http://ecos.fws.gov/speciesProfile/profile/speciesProfile.action?scode=D02D>.

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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 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. *Strother v. California Coastal Commission* (2009) 173 Cal.App.4th 873

See the California Environmental Quality Act section for a summary.

2. *Reddell v. California Coastal Commission* (2009) ___ Cal.App.4th ___

Development in the coastal zone can be difficult considering that even if a project is approved by the city or county, it may still be denied by the Coastal Commission under the Coastal Act. In this case, the City approved the project, making all the necessary findings, including consistency with the zoning code and general plan. The Coastal Commission disagreed with the City and denied the project on various grounds, including inconsistency with various zoning provisions. The court emphasized the great amount of discretion held by the Commission in denying or granting coastal development permits. As long as the Commission’s findings were reasonable, the court must uphold the Commission’s decision. Because the Commission acted reasonably in denying the permit, the Commission’s denial was proper.

MINING

A. SMARA

- 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. *Center for Biological Diversity v. U.S. Dept. of the Interior* (9th Cir. 2009) 581 F.3d 1063

The U.S. Department of the Interior, Bureau of Land Management (“BLM”) proposed to exchange land with Asarco LLC (“Asarco”) in Arizona. Asarco is a mining company that owns and operates the Ray Mine complex, which is the third most productive copper mine in the United States. In conjunction with the exchange, BLM published an EIS as required under NEPA. Subsequently, BLM approved the exchange over protests from other federal agencies and environmental groups. The Center for Biological Diversity, the Sierra Club, and the Western Land Exchange Project (collectively, “CBD”) sued. The district court approved BLM’s actions, and CBD appealed to the Ninth Circuit Court of Appeals.

First, CBD alleged that BLM violated NEPA because the EIS assumed that the environmental consequences of the proposed action and the No Action Alternative would be the same. This assumption was made because Asarco had the right to engage in mining on the exchange land under the Mining Law of 1872. (30 U.S.C. §§ 21-54.) The appellate court agreed with CBD, finding that the different regulations and requirements under the Mining Law of 1872 would likely change the environmental impacts. Therefore, the EIS failed to properly evaluate the No Action Alternative and establish the correct baseline.

CBD also claimed that the land exchange violated the Federal Land Policy and Management Act (“FLPMA”). (43 U.S.C. §§ 1701-87.) FLPMA forbids land exchanges unless “the public interest will be well served by making that exchange.” In its record of decision for the land exchange, BLM emphasized the advantages of the exchange, but listed no disadvantages. BLM again assumed that mining would occur similarly whether the land was publicly or privately held. The court, for the same reasons as in the NEPA discussion, held that this was an unreasonable assumption. Therefore, the appellate court held that the approval of the exchange was arbitrary and capricious.

2. *South Fork Band Council of Western Shoshone of Nevada v. United States Department of the Interior* (9th Cir. 2009) 588 F.3d 718

A mining company (“Cortez”) proposed to expand the existing gold mining operations at Cortez Mine. The mine is located in Nevada near a sacred Shoshone site. The mine existed since 1968, but the expansion would involve another ten years of active mining and reclamation activities, including an 850-acre pit mine and over 6,700 acres of disturbance. The U.S. Department of the Interior, Bureau of Land Management (“BLM”) prepared an EIS and subsequently published a Record of Decision adopting the project. The South Fork Band Council of Western Shoshone of Nevada and other local Native American tribes (“Tribes”) sued BLM and moved for preliminary injunction.

The Tribes first sued under the Federal Land Policy Management Act (43 U.S.C. §§ 1701 et seq.) (“FLPMA”). Under FLPMA, BLM is required to take action to prevent “unnecessary and undue degradation of the lands.” The Tribes argued that Executive Order 13007, which obligates the federal government to accommodate access to Native American sacred sites, prevents the mine expansion because it would result in degradation prohibited by FLPMA. The court disagreed and found that the EIS not only discussed the sacred sites but committed BLM to continuing consultation to prevent impacts on the Tribes’ religious practices.

The Tribes next claimed that BLM violated NEPA because it failed to properly analyze air quality impacts. Specifically, BLM did not analyze the air quality impacts of the ore transport because it claimed that there would be no increase in the rate of ore shipments, as compared to the current level, and because the processing facility is permitted by the state under the CAA. The appellate court disagreed with BLM’s approach, and held that the EIS was insufficient because of the omission of air quality analysis on ore transport. The court disregarded the CAA argument, and said that a non-NEPA analysis (done for the purposes of the state CAA permit) cannot satisfy a federal agency’s NEPA obligations.

The Tribes also claimed that BLM failed to adequately analyze the impacts from mine dewatering. BLM argued that it would be impossible to predict the location or extent of the impacts, but the court said that the analysis in the EIS was inadequate because it did not give the requisite “hard look” prior to taking action. “Even if the discussion must necessarily be tentative or contingent, NEPA requires that the agency give some sense of whether the drying up of these water resources could be avoided.”

Finally, the Tribes claimed that the analysis of particulate emissions in the EIS was insufficient. The Tribes argued that a new type of modeling not commonly used when the EIR was completed, should have been used. The court disagreed but also held that since BLM was required to revise its study as a result of the litigation, it should perform separate PM_{2.5} modeling as currently required.

3. **Mountaintop Mining Gets New Regulations and New Scrutiny from EPA and Army Corps of Engineers**

SMARA Regulation

Effective January 12, 2009, the federal Office of Surface Mining Reclamation and Enforcement enacted a regulation that places new restrictions on coal mine operators. The new regulation requires operators to minimize the size of the excess spoil fills constructed in stream valleys. Also, it provides that mining operations must return as much of the overburden as possible to the excavation created by the mine. Operators must avoid constructing fills in streams to the extent possible. When avoidance is not possible, the operator must identify a range of reasonable alternatives for disposing of the remaining overburden and select the alternative with the least overall adverse environmental impact. Operators must avoid disturbing land within 100 feet of a perennial or intermittent stream unless it can be demonstrated that it is not reasonably possible to avoid disturbance, or that avoidance is not necessary to meet environmental requirements. CWA compliance is mandatory before conducting any regulated activities.

For more information, see <http://edocket.access.gpo.gov/2008/pdf/E8-29150.pdf>.

EPA, USACE, Department of Interior Agreement

Subsequently, EPA, USACE, and the Department of the Interior entered into an agreement to coordinate review and policy with regard to mountaintop mining. EPA and USACE also stated that they would be jointly reviewing Section 404 permits for these activities. EPA, under this new review procedure, will have the ability to hold permit applications for further review if deemed necessary. While early reviews allowed most permit applications to proceed, EPA recently held 79 pending applications for coal mining projects in Appalachia for review. While the increased number of reviews means that EPA is using its authority under the new review procedures, it remains to be seen whether the agency will require substantive changes.

For more information, see <http://www.epa.gov/owow/wetlands/guidance/mining-screening.html>.

USACE's Proposed Prohibition of NWP 21 in Appalachian Region

On September 10, USACE announced that it would hold two public hearings in October on the use of Nationwide Permit 21 ("NWP 21") in the Appalachian region. NWP 21 authorizes discharges of dredged or fill material into waters of the United States for surface coal mining activities. USACE proposed to both prohibit the use of NWP 21 in the Appalachian region and to temporarily suspend NWP 21 in the region while it studied whether the prohibition was necessary. During the interim period, an individual permit would be necessary to engage in surface coal mining.

After completion of the hearings, EPA announced that it would further review all 79 applications based upon public and agency concerns that the projects would harm the environment. Subsequently, EPA Acting Regional Administrator, William Early, formally notified the USACE that he was contemplating a veto of one application for a project in West Virginia. A copy of his letter can be found at <http://wvgazette.com/static/coal%20tattoo/sprucepaletter.pdf>.

4. SB 670 (Chapter 62, Statutes 2009) – Suction Dredge Mining Moratorium

On August 6, 2009, the Governor signed a bill enacting a moratorium on instream suction dredge mining. The new law, SB 670, went into effect immediately and will be valid until the California Department of Fish and Game completes court-ordered CEQA review of the mining’s impacts on the environment. (*Karuk Tribe of California v. California Department of Fish and Game*, Alameda County Superior Court Case No. RG 05211597.) Opponents of the mining practice argue that it harms fragile salmon and amphibian habitat, as well as degrades water quality by exacerbating mercury contamination from historic hard-rock mining. The bill adds section 5653.1 to the Fish and Game Code.

For more information, see <http://www.dfg.ca.gov/licensing/specialpermits/suctiondredge/>.

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AIR QUALITY

A. **Regulatory Framework**

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

- The CAA, enacted in 1970, regulates air emissions from area, stationary and mobile sources. This law authorizes the 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.)
- 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. *Latino Issues Forum v. EPA* (9th Cir. 2009) 558 F.3d 936

Petitioners, environmental and social justice organizations, challenged the EPA's revised approval of the San Joaquin Valley Regional Air Quality District's portion of the State Implementation Plan ("SIP") regulating agricultural emissions of small particulate matter from large farms and concentrated livestock operations ("PM₁₀"). The organizations challenged EPA's approval of a revision to the SIP for San Joaquin Valley. The revision, known as Rule 4550, was enacted to impose emission controls for severe non-attainment areas because of air pollution from small particulate matter caused by agricultural activity. The rule required covered agricultural operations to choose one control practice from seven control categories for cropland and livestock operations. Each category presents a menu of as many as 24 different control operations from which the source can choose to comply. The district submitted Rule 4550 to EPA for approval on September 23, 2005. EPA approved and published the Rule on February 14, 2006.

The appellate court reviewed the Rule approval under an abuse of discretion standard for agency actions under the federal Administrative Procedures Act. Two main contentions were addressed. First, it was disputed whether the Rule complied with the definition of “all feasible measures” required for best available control measures (“BACM”) technology under 42 U.S.C. § 7509(d)(2). Second, petitioners asserted that Rule 4550’s menu of options did not constitute BACM under the CAA. The appellate court held that EPA’s interpretation of an ambiguous statutory statement was reasonable and denied the petition.

2. *South Coast Air Quality Management District v. EPA (9th Cir. 2009) 554 F.3d 1076*

The Ninth Circuit Court of Appeals held that the EPA was not required to promulgate secondary regulations controlling large-displacement marine engines when it established initial regulations pursuant to the CAA. The appellate court said that EPA acted reasonably because it had the discretionary authority to defer its determination of appropriate control technologies.

Section 213(a)(3) of the CAA directs EPA to establish emissions standards for new non-road engines, including marine engines that contribute to certain types of pollution. Pursuant to that mandate, EPA determined that large marine engines contributed significantly to ozone pollution and established an interim standard in 1994 (“Tier 1”). EPA further set a date for a more definitive standard to be determined by a deadline of April 27, 2007 (“Tier 2”). EPA failed to meet this deadline and proposed to delay adoption of Tier 2 standards even longer. Petitioners challenged EPA’s ability to continue to defer adoption of Tier 2 standards.

The appellate court disagreed with the petitioners and gave “particular deference to the EPA when it acts under unwieldy and science-driven statutory schemes like the Clean Air Act.” The court held that CAA section 213(a)(3) was ambiguous with regard to time implementation and determined that the two year delay in implementation was not unlawful.

3. *American Farm Bureau Federation v. EPA (D.C. Cir. 2009) 559 F.3d 512*

In this consolidated case brought under the CAA, the D.C. Circuit Court of Appeals rejected EPA’s recently enacted air quality standards for small particulate matter based upon EPA’s failure to reasonably support exposure analysis for certain types of particulate matter (PM₁₀ and PM_{2.5}). EPA promulgated national ambient air quality standards (“NAAQS”) for particulate matter in 2003. Subject to a consent decree, EPA agreed to revise daily, short term, and long term exposure limits for PM. Environmental organizations challenged the revised NAAQS published in 2006.

The appellate court held that EPA failed to fully justify its annual fine PM standards and answer why the standard was “requisite to protect the public health,” including the health of vulnerable subpopulations, while providing “an adequate margin of safety.” The appellate court similarly struck down EPA’s NAAQS for fine particulate matter; EPA failed to explain why the NAAQS were adequate to protect the public welfare from adverse effects on visibility. The court upheld daily exposure standards for coarse particulate matter that had been set by the EPA. The court remanded the stricken standards to EPA for reconsideration and publication.

4. *Natural Resources Defense Council v. U.S. Environmental Protection Agency* (D.C. Cir. 2009) 559 F.3d 561

Delegated state air quality authorities, like CARB, submit air pollution emissions data to the EPA. EPA monitors the data in order to evaluate regional compliance with national air pollution standards. In 2007, EPA promulgated a regulation governing the exclusion of emissions data during “exceptional events,” where, because of natural disasters or other unforeseeable circumstances, state authorities could not regularly monitor air quality. The Natural Resources Defense Council (“NRDC”) filed several petitions for review, seeking to set aside the rule’s definition of “natural events” and to vacate statements in EPA’s preamble to the rule concerning types of events that may qualify as “exceptional.”

In a split decision, a panel majority of the D.C. Circuit Court ruled that “Even if the statements in the preamble were reviewable under the Clean Air Act, they are not ripe for review at this time. The statements about exceptional events are hypothetical and non-specific.” Furthermore, the panel dismissed NRDC’s argument relating to the preamble because the preamble was not a binding agency decision and therefore not subject to judicial review.

5. *California Building Industry Association v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal.App.4th 120

See the Fees section for a summary.

6. *National Paint and Coatings Association, Inc. v. South Coast Air Quality Management District* (2009) 177 Cal.App.4th 1494

The South Coast Air Quality Management District (“District”) adopted rules that limited the amount of volatile organic compounds (“VOCs”) allowed in several different kinds of paints and coatings in Southern California. The National Paint and Coatings Association sued, claiming that the District exceeded its authority because the levels of VOCs are not available and achievable. The appellate court held that the District had the authority to make the rules with respect to all categories of paint and coatings, except two. The exceptions, quick-dry enamels and rust preventative coatings, were made by the court because there was no available existing technology to meet the rules when they were promulgated.

The court did not want to limit the District's authority to only existing technology. It said:

...the fact that there are no existing compliant coatings at, say 'time one,' does not necessarily mean such coatings could not be 'achieved' at, say, 'time one plus almost immediately thereafter.' That is, even if something does not currently exist, it is 'achievable' in the sense that it can be readily assembled out of things that currently do exist... This opinion should therefore not be read as restricting the [D]istrict's authority to promulgate a rule requiring what is 'achievable' when based on existing technology.

Thus, the court remanded the matter back to the trial court to determine whether there is now technology available to comply with the rules. If not, then the rule must be overturned with regard to those specific types of coatings.

7. AB 1085 (Chapter 384, Statutes of 2009) – State Air Resources Board: Regulations

This bill adds section 39601.5 to the Health and Safety Code, which requires CARB to make specific documents available to the public. These documents include technical, theoretical, and empirical studies, reports, or similar documents upon which CARB relies upon when making regulations. These documents must be made available before the comment period for any regulation proposed for adoption by CARB. The bill was necessary, according to its sponsor, because of a situation that arose during the development of the Private Fleet Rule and the On-Road Green House Gas reduction measures. CARB staff was asked to provide the data used for the benefit assumptions associated with those regulations and the information was not disclosed until one day before the hearing. The data received was on a DVR and totaled over 300mb. Stakeholders complained that there was insufficient time for review.

8. CARB Delays Implementation of Off-Road Diesel Exhaust Regulations

Regulations written by CARB in 2007, affecting an estimated 180,000 off-road, unregistered diesel machines, including loaders, graders, tractors, backhoes and scrapers, will be delayed as a concession contained in the 2009 state budget. The regulations target soot and particulate matter from diesel engines as well as oxides of nitrogen, a key ingredient in the formulation of smog. Under the 2007 rule, off-road diesel engines must be retrofitted or replaced to meet anti-pollution rules beginning in 2010 and phased in over time. The new budget language keeps that overall time frame, but changes the phase-in sequence to ease the limits during the first years of the program.

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

9. CARB Directs Staff to Develop New Rules for Diesel Emissions

On December 9, 2009, CARB directed its staff to develop more flexible methods for the implementation of the state’s Truck and Bus Rule. The Truck and Bus Rule, which was adopted in 2008, requires fleet owners to install diesel exhaust filters on their rigs by January 1, 2011. The filters will help the state to comply with CAA’s requirement of specific levels of PM_{2.5} reduction by 2014.

CARB’s direction to staff was brought on by numerous comments from the public and industry groups. They complained that the economic downturn made it prohibitively expensive to retrofit existing vehicles or replace them altogether. CARB found that the economy reduced the amount of time trucks operated, thereby reducing harmful diesel emissions that would have occurred during normal economic times. CARB directed its staff to return in April 2010 with a new provision that would provide truck fleets more flexibility in cleaning up their diesel emissions.

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

10. CARB Adopts Forest Protocol

In September 2009, CARB adopted a revised Forest Project Protocol (“Protocol”). The Protocol allows private landowners and public entities to participate in the voluntary carbon offset market by managing forest land to sequester carbon. The Protocol was developed by the Climate Action Reserve with public and expert input.

The Protocol adopts approaches to measure the amount of carbon captured by the forest, also called forest carbon sequestration. Forests remove GHGs from the air by absorbing carbon dioxide during photosynthesis. This carbon is then stored as wood. The Protocol, as adopted, allows both private and public landowners to participate.

For more information about the Protocol and forest carbon sequestration, see the CARB website at <http://www.arb.ca.gov/newsrel/nr092409b.htm> or the Climate Action Reserve at <http://www.climateactionreserve.org/how/protocols/adopted-protocols/forest/current/>.

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HAZARDOUS SUBSTANCE CONTROL AND CLEANUP

A. Regulatory Framework

Carpenter-Presley-Tanner Hazardous Substance 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 are similar to CERCLA for contribution and indemnity.
- 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, 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.
- CERCLA also creates a Superfund, financed through a combination of appropriations, industry taxes and judgments, to pay for cleanup costs.
- Empowers state and federal governments to clean up hazardous substance releases, recover costs of cleanup from responsible parties (i.e., owners and operators), and order abatement actions there is if imminent and substantial endangerment to the public health, welfare or the environment.
- Under CERCLA, any other person may clean up the hazardous substance release and recover costs of the cleanup from responsible parties.

- CERCLA provides for strict liability, meaning that a responsible party is liable even if no fault is involved.
- Responsible party or owner and operator are broadly defined. This includes a lender who acquired property from its mortgagee at a foreclosure sale.
- Secured Creditor's Exemption:
 - When a secured creditor holds indicia of ownership primarily to protect security interest in property and does not participate in the management of the property, then it is not liable under the exemption.
 - A secured creditor may be an owner and operator. There is 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. *U.S. v. Fleet Factors* (11th Cir. 1990) 901 F.2d 1550.
 - To be held liable, a secured creditor must actually manage the facility. *In re Bergsoe Metal Corporation* (9th Cir. 1990) 910 F.2d 668.
 - There is a "safe harbor" rule for lenders in flux.

B. Update

1. *Burlington Northern and Santa Fe Railway Co. v. United States* (2009) 129 S. Ct. 1870

Brown and Bryant ("B&B"), an agricultural chemical distributor, purchased chemicals from Shell Oil Company ("Shell"). B&B was a "sloppy operator" and spills occurred which resulted in groundwater contamination. Two railway companies also owned portions of the property on which B&B operated. After many years, the EPA became aware of the contamination and designated the area a Superfund site. By that time, however, B&B had become insolvent and ceased all operations. The EPA and the California Department of Toxic Substances (collectively, the "Agencies") sued both the railway companies and Shell under CERCLA. The EPA claimed that they were potentially responsible parties ("PRPs") and therefore should pay for the cleanup efforts.

The Supreme Court said that it was undisputed that the railway companies were liable under sections (1) and (2) of CERCLA because they owned part of the property on which the discharges took place. The only question before the Court, then, was whether Shell was liable under section (3) for its sale of the chemicals to B&B. The court held that Shell's mere knowledge that a customer sometimes spilled chemicals was not enough to impose liability. Therefore, the Court held that Shell was not liable under section (3) of CERCLA as an arranger.

On the question of apportionment, the Court held that it is appropriate when “there is a reasonable basis for determining the contribution of each cause to a single harm.” Here, the Court said that the facts supported the district court’s determination of nine percent liability for the railroad companies and thus it was a reasonable basis for determining the apportionment of liability.

The Court’s opinion in this case helps to clarify the ambiguities of CERCLA, especially in the areas of liability of potentially responsible parties (“PRPs”) and apportionment. The practical result of the Court’s opinion will be to allow evidence regarding the amount of responsibility. This may change litigation strategies, because PRPs may choose to put forth evidence showing limited fault rather than attempting to prove that they were not at fault at all and risking joint and several liability.

2. *Friedland v. TIC-The Industrial Co.* (10th Cir. 2009) 566 F.3d 1203

Friedland was the president, and a director, of Summitville Consolidated Mining Company, which used cyanide to leach gold and silver from ore extracted from large open pits. The company abandoned the mine in 1992 when it went bankrupt. The EPA cleaned the site and sued Friedland for the cleanup costs under CERCLA. After lengthy legal proceedings which cost Friedland in excess of \$28 million to defend, he settled with the EPA and agreed to pay approximately \$21 million for the cleanup. Friedland then sued insurers for indemnification and the settlement resulted in his recovery of more than the \$21 million in cleanup costs. Subsequently, Friedland sued TIC and Geosyntec Consultants, Inc. (“TIC”) for contribution as potentially responsible parties under CERCLA. Friedland argued that they should be responsible for part of the cleanup costs under the collateral source rule.

The collateral source rule is a common law rule which says “payments made to or benefits conferred on the injured party from other sources are not credited against the tortfeasor’s liability, although they cover all or part of the harm for which the tortfeasor is liable.” In essence, the rule allows an injured plaintiff to recover more than the amount of his damages.

The appellate court held that Friedland could not recover from TIC. The court explained that the collateral source rule is inapplicable in this type of CERCLA matter.

3. *Adobe Lumber, Inc. v. Hellman* (E.D. Cal. 2009) __ F.Supp.2d __

The Court held that the City of Woodland could be held liable under CERCLA due to its operation of a municipal sewer system. While the case will likely be appealed, it illustrates the risks to uninvolved third parties from hazardous materials contamination.

Between 1974 and 1991, the owners of a dry-cleaning business dumped water contaminated with perchloroethylene (“PCE”), a dry cleaning solvent, down the floor drain of a building owned by Adobe Lumber, Inc. The drain connected to the City’s municipal sewer system. That system leaked and caused the PCE to contaminate surrounding soil and groundwater.

The court held that City’s sewer system is a “facility” under CERCLA (42 U.S.C. § 9601(9)), due to the expansive definition of the term. The court’s holding is contrary to authority from the Ninth Circuit Court of Appeals and another opinion from the Eastern District of California.

4. *Pakootas v. Teck Cominco Metals, Ltd.* (E.D. Wash. 2009) __ F.Supp.2d __

Plaintiffs, members of the Confederated Tribes of the Colville Reservation (“Tribes”), sued Teck Cominco Metals, Ltd. (“Teck”) under CERCLA. The Tribes alleged that Teck polluted the Columbia River watershed with byproducts from its lead-zinc smelting operation. Eventually, Teck counterclaimed against the Tribes for costs, alleging that the Tribes are covered persons within the meaning of that term as it is used in CERCLA. (42 U.S.C. § 9601(21).)

The District Court agreed with the Tribes and held that they were not liable. The court said that the language of the statute was plain and unambiguous. A Native American tribe is not listed in the definition of a person. Therefore, the court granted summary judgment to the Tribes because they were not defined as “persons” under CERCLA.

5. *San Diego Unified School District v. County of San Diego* (2009) 170 Cal.App.4th 288

See the Litigation section for a summary.

6. *State of California v. Allstate Insurance Co.* (2009) 45 Cal.4th 1008

This case involved the Stringfellow Acid Pits in Riverside County and insurance coverage for remediation of two environmental accidents. The Stringfellow facility was opened in 1956 and was touted as a safe repository for toxic substances being produced by industry in Southern California. In 1998, EPA brought a CERCLA enforcement action against the State and won a money judgment for remediation. The State filed a coverage dispute with a number of comprehensive general liability (“CGL”) insurance carriers.

The appellate court held that: (1) Because the State's liability for property damage was founded on its negligence in allowing pollutants to escape from the Stringfellow pits into the surrounding groundwater and land, the trial court should have focused on discharges from the pits, and not from the deposit into them as the focus of the "discharge" exceptions in the insurance policies; (2) A triable issue of fact existed as to whether the entirety of the 1969 overflow was limited to a watercourse because contrary evidence had been presented by the state showing that the accidental discharge had not been confined to the watercourse; (3) A triable issue of fact exists whether the 1978 release was "accidental"; and (4) Because there is a disputed triable issue of fact in determining the source of the present pollutant release, summary judgment is not appropriate. Three very important decisions were made regarding interpretation clauses in standard CGL policies.

First, within the limits of this case, "discharge" in CGL policies should be construed to apply not to the deposit of the waste in storage, but their escape from storage facilities to determine when the discharge was "sudden and accidental" due to the State's own negligence. Second, the insurance policies contained a provision that eliminated coverage for discharges "into or upon any watercourse." To eliminate coverage under this restriction, insurers must show by undisputed evidence that 1969 overflow was confined to a regular channel of the stream draining the canyon, though they need not show the creek was flowing at the time. Third, the meaning in CGL policies of "sudden and accidental" discharge was explained as "one the insured neither intended nor expected to happen."

7. AB 305 (Chapter 429, Statutes of 2009) – Hazardous Materials: Statute of Limitations

This bill amends Code of Civil Procedure section 338.1 to include hazardous materials release response plans and inventory within the five-year statute of limitations. This change was necessary to standardize the statute of limitations for taking a civil action for hazardous materials business plan violations with other hazardous waste and material violations.

The bill also amends Health and Safety Code section 25515 to make a knowing failure to report an oil spill occurring in waters of the state punishable, upon conviction, by a \$50,000 fine, imprisonment in the county jail, or both the fine and imprisonment. Further, knowingly making a false or misleading report on an oil spill is also punishable by the fine and/or imprisonment. The sponsor asserted that this change puts pressure on polluters to immediately and accurately report oil spills.

8. SB 143 (Chapter 167, Statutes of 2009) – California Land Reuse and Revitalization Act of 2004

The California Land Reuse and Revitalization Act of 2004 (“CLRRA”) (Health & Saf. Code, §§ 25395.60 et seq.) provides innocent landowners, bona fide purchasers, and contiguous property owners who did not cause or contribute to a hazardous materials release with immunities from claims and agency action. This bill extends the date of repeal from January 1, 2010 to January 1, 2017. This bill amends Health and Safety Code sections 25395.91, 25395.109, and 25395.110.

9. \$1.79 Billion for Environmental Cleanup from Mining Activities

American Smelting and Refining Company LLC (“ASARCO”) has operated for nearly 110 years and is a leading producer of copper in the country. It filed for bankruptcy in 2005 and was subject to claims for cleanup at over 80 sites across 19 states. In November 2009, the U.S. Bankruptcy Court approved a plan whereby ASARCO would be purchased out of bankruptcy and ASARCO’s parent company would pay \$1.79 million for cleanup costs. The plan was completed in December. This is the largest environmental bankruptcy in U.S. history. The funds will be directed to multiple individual states and trusts to implement cleanup and restoration of the contaminated sites.

For more information, see
<http://yosemite.epa.gov/opa/admpress.nsf/0/C40DD49B8EEBE5FF85257688006C9C7F>.

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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. EPA Asks for Comments on Enforcement Priorities

The EPA is requesting comments on its environmental enforcement priorities for 2011-2013 fiscal years. The agency generally sets enforcement and compliance priorities every three years, and these priorities are directed at nationwide problems that result in violations of federal laws.

The current 2008-2010 enforcement priorities include air toxics, concentrated animal feeding operations, mineral processing, sanitary sewer overflows, and stormwater. The first round of commenting closed on September 30, and the second closed on December 1. Comments are accepted directly through the EPA’s blog.

For more information, see <http://blog.epa.gov/enforcementnationalpriority/>.

2. Cement and Ready Mix Companies Fined for Emissions Violations

CARB fined two companies for emissions violations in 2009. Robertson’s Ready Mix was fined \$65,700 for failing to inspect its diesel truck fleet during 2007 and 2008. Diesel trucks are required to be inspected annually to ensure that they are not emitting excessive smoke. Wayne E. Swisher Cement also failed to conduct diesel truck smoke tests in 2007, and was fined \$10,875.

For more information, see <http://www.arb.ca.gov/enf/hdvp/hdvp.htm>.

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POTPOURRI

A. 2009 Update

1. *National Parks and Conservation Association v. Bureau of Land Management* (9th Cir. 2009) 586 F.3d 735

Kaiser Eagle Mountain, Inc. (“Kaiser”) sought to build a large landfill on its former mining site near Joshua Tree National Park. The area is home to several sensitive plant and animal species including desert tortoise and Bighorn sheep. Kaiser proposed a land exchange with the Bureau of Land Management (“BLM”) to swap 2,846 acres of land it owned for 3,481 acres of BLM land around the landfill site (the “exchange”). BLM produced an EIS as required by NEPA and then subsequently approved the exchange. Opponents of the landfill challenged the action based upon NEPA and Federal Land and Policy Management Act (“FLPMA”) (43 U.S.C. 1701 et seq.). The Ninth Circuit held that BLM violated both NEPA and FLPMA in approving the exchange.

First, the court reviewed the argument that BLM violated FLPMA via the appraisal process. Under FLPMA, a federal agency must appraise lands before agreeing to an exchange. The appellate court held that the appraisal for the Kaiser exchange was insufficient because it did not take into account the landfill proposal.

The appellate court also held that the EIS prepared by BLM for the Kaiser exchange was insufficient. Under NEPA, a federal agency must describe the underlying purpose and need for the proposed action. While an agency has discretion to define that purpose, it “cannot define its objectives in unreasonably narrow terms” because to do so limits the range of alternatives that can achieve that purpose. The purpose statement, in total, listed one goal that was a valid BLM purpose and three goals that were for Kaiser’s private purpose. It is permissible to consider private goals, but the court said, “The BLM may not circumvent this proscription by adopting private interests to draft a narrow purpose and need statement that excludes alternatives that fail to meet specific private objectives...” Therefore, the appellate court held that the BLM did not prepare a valid statement of purpose and did not consider a reasonable range of alternatives, such to satisfy NEPA. The case was remanded back to BLM for further proceedings.

2. *California v. U.S. Department of Agriculture* (9th Cir. 2009) __ F.3d __

President Clinton directed the U.S. Forest Service (“USFS”) to promulgate rules to protect the roadless areas of national forests. The resulting Roadless Area Conservation Rule (“Roadless Rule”) was adopted in the waning days of the Clinton administration, on January 5, 2001. It implemented a nation-wide policy to be set by USFS officials for roadless areas, and was immediately challenged in court. USFS began to work on substitute regulations (“State Petitions Rule”). The State Petitions Rule was issued on May 13, 2005. This rule enacted a state petitioning process, which allowed the individual states to devise a statewide roadless area plan or alternatively, leave the roadless areas for individual forest supervisors to manage. The State Petitions Rule was itself challenged.

The Ninth Circuit held that the State Petitions Rule could not stand because it violated NEPA and the ESA. The USFS used a categorical exclusion under NEPA, asserting that the State Petitions Rule was a mere administrative change that would have no direct, indirect, or cumulative impacts on the environment. However, the court held that the categorical exclusion could not be used because the State Petition Rule removed any of the protections of the previous rule.

The court also held that the adoption State Petitions Rule violated the ESA. Under the ESA, consultation with the USFWS and NMFS is required whenever a federal action “may affect listed species or critical habitat.” Since the USFS did not engage in consultation prior to enacting the State Petitions Rule, the court held that it violated the ESA.

The court’s action to strike down the State Petitions Rule has the effect of reviving the Roadless Rule. It remains to be seen whether the USDA and the Obama administration will embrace the old rule or formulate a new one that will give states and regions more flexibility over forest protections.

3. *United States v. Park* (D. Idaho 2009) __ F.Supp.2d __

The Court held that dogs may qualify as livestock under the Wild and Scenic Rivers Act (“Act”) (16 U.S.C. §§ 1271-1287). Ron and Mary Park (the “Parks”) own land adjacent to the Clearwater River in Idaho. Their land is burdened by an easement pursuant to the Act, obtained by the U.S. prior to the Parks’ ownership of the property. The easement prohibits commercial development but allows for “general crop and livestock farming.” The Parks subsequently purchased the property and began to operate a dog kennel, advertised as a “doggie bed & breakfast.” The Parks claimed that dogs could be considered livestock under the Act. The court agreed, holding that the easement was not specific and that dogs could be livestock depending on their usage and the situation.

4. *AB 1066* (Chapter 269, Statutes of 2009) – Forest Practices: Timber Harvesting Plans

This bill amends Public Resources Code section 4590 regarding Timber Harvest Plans (“THPs”). Under the Forest Practices Act (Pub. Resources Code, §§ 4511 et seq.), timber operations may only be conducted once a THP has been prepared by a registered professional forester and approved by the Department of Forestry and Fire Protection. THPs have a life of three years. This bill provides for four one-year extensions if specific conditions have been met. The bill sunsets on January 1, 2012, after which the life of a THP may be extended for up to two years pursuant to existing law. The bill’s sponsors hope that extending the duration of THPs will allow timberland owners to wait for improved market conditions before harvesting. Dropping timber prices are linked in part to the housing crisis and the slow sale of lumber products.

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CLIMATE CHANGE

A. Regulatory Framework

1. Federal

NEPA

- Must analyze impact of GHG emissions on Climate Change. “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.” *Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508.

Clean Air Act

- 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. *Massachusetts v. EPA* (2007) 127 S.Ct. 1438.
- All new and proposed coal-fired power plants must have their carbon dioxide emissions evaluated for possible regulation. In re *Deseret Power Electric Cooperative* (PSD Appeal No. 07-03, Issued Nov. 13, 2008 Environmental Appeals Board, United States Environmental Protection Agency).

Common Law Nuisance Litigation

- ***Connecticut v. American Electrical Power Co. et al.* (S.D.N.Y 2005) 406 F. Supp.3d 265**

U.S. District Court for Southern District of New York dismissed claims of 11 states and various environmental groups asserting the carbon dioxide emissions from major electric utilities constituted a nuisance on the grounds that the case presented a non-justiciable political question.

- ***Comer v. Murphy Oil* (S.D. Miss. 2007) No. 05-CV-436LG**

U.S. District Court for Southern District of Mississippi dismissed a class action nuisance lawsuit alleging that GHG emissions exacerbated the severity of, and damages caused by, Hurricane Katrina on the grounds that it presented a non-justiciable political question.

- *California v. General Motors* (N.D. Cal. 2007) ___ F.Supp.3d ___

U.S. District Court for the Northern District for California dismissed claims seeking damages from six automobile manufacturers on the grounds that GHG emissions from vehicles manufactured by defendants constituted a public nuisance. Court found the claim not justiciable and dismissed.

2. State

Executive Order S-3-05

- In June 2005, Governor Schwarzenegger issued Executive Order S-3-05 calling for statewide reductions in GHG emissions and creating the Climate Action Team. For more information, see <http://gov.ca.gov/executive-order/1861>.

Global Warming Solutions Act of 2006 (AB 32, Health & Saf. Code, § 38500 et seq.)

- Codifies the state's goal by requiring that the state's global warming emissions be reduced to 1990 levels by 2020. Sets a number of other deadlines for GHG reporting.
- Pursuant to AB 32, CARB developed a Scoping Plan that contains strategies to reduce GHG, including regulations, alternative compliance mechanisms, monetary and non-monetary incentives, and voluntary actions. For more information see <http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm>.

Protocols

CARB is developing protocols to achieve the GHG reductions. Two kinds of protocols exist: reporting and project protocol. Reporting protocol is a set of common standards and tools for reporting GHG emissions for a facility. Currently, CARB has developed a forestry protocol and a local government operations protocol. Project protocol is a set of standards and guidance to define GHG reduction projects and quantify and report the reductions. Currently, CARB has a Manure Management Digesters and Urban Forests Protocol.

For more information, see <http://www.arb.ca.gov/cc/protocols.htm>.

CEQA

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

Settlement between the California Attorney General and the County of San Bernardino requires the County to amend its General Plan within 30 months to include an inventory of all known, or reasonably discoverable, sources of GHG in the County. Because definitive data sources for this inventory did 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.

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

SB 97 required 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. See Guidelines in Update Section.

SB 375 (Chapter 728, Statutes 2008) – Transportation Planning: Travel Demand Models: Sustainable Communities Strategy

Regional Transportation Plans ("RTP") are expanded to include a sustainable communities' strategy ("Strategy"), for the purposes of reducing 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 number of requirements.

B. Update

1. Endangerment Finding Under CAA

The EPA issued its final Endangerment Finding under Section 202(a) of the CAA on December 7, 2009. The Finding is EPA's determination that greenhouse gases pose a danger to human health and the environment, and it could pave the way for regulation of carbon dioxide and other greenhouse gas emissions from vehicles, power plants, factories, refineries and other major sources under the Clean Air Act. The final rule will be effective January 14, 2010. (74 Fed. Reg. 66495 (Dec. 15, 2009).)

2. Federal Mandatory Reporting for GHG Emissions

On September 22, 2009, the EPA Administrator signed a final rule requiring suppliers of fossil fuels or industrial greenhouse gases, manufacturers of vehicles and engines, and facilities that emit 25,000 metric tons or more per year of GHG emissions to submit annual reports to EPA.

The first annual reports for the largest emitting facilities, covering calendar year 2010, will be submitted to EPA in 2011. Vehicle and engine manufacturers outside of the light-duty sector will begin phasing in GHG reporting with model year 2011. Some source categories included in the proposed rule are still under review. (74 Fed. Reg. 56260 (September 22, 2009).)

3. H.R. 2454: American Clean Energy and Security Act of 2009

This bill sets a goal of reducing GHG emissions from covered sources by 83% of 2005 levels by 2050. It requires retail electricity supplies to meet 20 % of their demand through renewable electricity by 2020 and sets a goal of improving U.S. energy productivity by at least 2.5% per year by 2012. The bill also establishes a cap and trade system for GHG emissions, allocating some GHG emission allowances to certain energy sectors. The bill has not yet passed the Senate.

4. CEQA Guidelines

The Natural Resources Agency adopted the CEQA Guidelines Amendments for the quantification and mitigation of GHG emissions on December 30, 2009. The Amendments, however, are still not effective and will not be until 30 days after the Office of Administrative Law transmits them to the Secretary of State. The guidelines require that local agencies determine the significance of GHG emissions based on scientific and factual data. The lead agency has discretion to determine whether to use a model or a quantitative analysis. The guidelines do not provide a threshold of significance, but allow lead agencies to consider previously adopted thresholds adopted or recommended by other agencies, so long as the threshold is supported by substantial evidence. The guidelines encourage the use of programmatic documents and explain how the programmatic documents can be used to analyze cumulative impacts. (Proposed Guidelines § 15064 et seq.)

5. Updated ARB Forestry Protocol

CARB has released an updated protocol for accounting for greenhouse gases credits in the forestry sector for voluntary forestry projects. Projects initiated prior to July 31, 2009, must register by February 2010.

For more information, see <http://arb.ca.gov/cc/forestry>.

6. SB 375 – Regional Targets Advisory Committee Final Report

Senate Bill 375 requires CARB to set regional GHG emission targets for passenger vehicles and light trucks for 2020 and 2035 for the 18 metropolitan planning organizations. The law required ARB to establish a Regional Targets Advisory Committee (“RTAC”) to recommend factors to be considered and methodologies to be used in setting the targets. The RTAC submitted its recommendations to the board on September 29, 2009, and recommended that targets be set on a per capita basis.

For more information, see <http://www.arb.ca.gov/cc/sb375/rtac/report/092909/finalreport.pdf>.

7. Air District Guidelines

The San Joaquin Valley and Bay Area air quality management districts have adopted guidelines to help local agencies in the quantification and mitigation of GHG emissions. The Bay Area Guidelines provide numeric thresholds for land use, stationary sources, and general plans. The San Joaquin Guidelines use a GHG Best Performance Standards rather than a numeric threshold. The Attorney General has indicated it finds the San Joaquin Air District approach inadequate.

For more information, see valleyair.org, baaqmd.gov, and <http://ag.ca.gov/globalwarming/ceqa.php>.

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. *Venturi & Company LLC v. Pacific Malibu Development Corporation* (2009) 172 Cal.App.4th 1417

In this case, the court held that a trial court should not have entirely dismissed a plaintiff's claim for payment for services rendered to a development company because the plaintiff was not licensed as a real estate broker. Plaintiff may be able to recover some payment since a portion of the services provided by plaintiff were not exclusively those of a real estate broker. Business and Professions Code section 10131 determines what services were those of a real estate broker, and what were not. Plaintiff was not entitled to compensation for all services it provided the development company even though one of Plaintiff's managers obtained a real estate *sales* license eight months after the contract was entered into, but before the development company allegedly breached the contract. plaintiff's manager only had a "sales" license and not the required "broker" license.

For more information, see "If You Want to Act Like a Real Estate Broker, and Want to Be Paid Like One, Then You Better Be One" at <http://blog.aklandlaw.com>.

2. *RC Royal Development v. Standard Pacific Corporation* (2009) 177 Cal.App.4th 1410

In this case, the court held that a real estate broker commission was earned when the buyer and seller executed a binding buy-sell contract, even though the contract provided that the commission was to be paid out of escrow. The buyer obtained equitable title upon entering into the buy-sell contract, which gave it a beneficial interest within the meaning of the brokerage agreement. The language in the brokerage agreement did not make escrow a condition precedent to earning commission, but instead only established the timing and manner of payment of the commission to the broker.

3. Home Equity Sales Contract Act (Civ. Code, §§1695 *et. seq.*)

In light of the ongoing mortgage crises in California, it is important to note that several courts strictly applied the Home Equity Sales Contract Act ("HESCA") in 2009. HESCA was designed to closely regulate transactions between an equity purchaser and an equity seller resulting in the sale of residential property in foreclosure. HESCA contains specific, detailed regulations concerning the content and form of contracts for the sale of a home in foreclosure.

In *Hoffman v. Blum* (9th Cir. 2009) 572 F.3d 999, a buyer and seller entered into a settlement agreement in an unlawful detainer action following a purchase and leaseback transaction between the buyer and seller that did not comply with HESCA requirements. In the seller's subsequent bankruptcy proceeding, the Court allowed the transaction to be rescinded and held that the settlement agreement did not extinguish HESCA rights because the settlement agreement did not state that HESCA was complied with, or that the seller knew about HESCA rights being waived.

In *Silva v. Chadwick* (Bankr. N.D.Cal. 2009) 2009 Bankr. LEXIS 697, the court held that civil liability under HESCA does not require the equity seller to prove fraudulent conduct on the part of the equity purchaser.

In *People v. Shetty* (2009) 174 Cal.App.4th 1488, the Court readily applied criminal penalties to the equity purchaser under HESCA where the purchaser (1) defrauded an 80-year-old seller into signing documents that caused the home to be sold; (2) failed to include the disclosure requirements of HESCA; and (3) led the seller to falsely believe that the home was merely being refinanced.

For more information, see “Case Law in 2009 Underscores the Strict Requirements of California’s Home Equity Sales Contract Act” at <http://blog.aklandlaw.com>.

4. *Standard Pacific Corp. v. Superior Court of San Bernardino County* (2009) 176 Cal.App.4th 828

Civil Code section 895 *et seq.* (i.e., the “Fix-it Law”) establishes procedures and requirements with respect to construction defect cases involving homes and homeowners. Section 910 sets out procedures for “notice and opportunity to repair” that must be followed by plaintiffs before a suit can be filed. Section 912, in turn, sets out certain requirements for builders with respect to documentation and information to be provided to homeowners. As a sanction, or incentive to comply, section 912 also provides in subdivision (i) that “any builder who fails to comply with any of these requirements within the specified time is not entitled to the protection of this chapter, and the homeowner is released from the requirements of this chapter and may proceed with the filing of an action, in which case the remaining chapters of this part shall continue to apply to the action.” In *Standard Pacific*, the court held that the burden was upon the *plaintiff homeowner* to either comply with section 910 or to establish that the plaintiff did not have to follow those procedures; that burden does not depend upon the builder first establishing that it has complied with its obligations.

For more information, see “Homeowners Have the Burden of Proving Builder Failed to Comply with ‘Fix-It Law’ Before Filing Construction Defects Claim” at <http://blog.aklandlaw.com>.

5. ***San Diego Unified School Dist. v. County of San Diego* (2009) 170 Cal.App.4th 288**

When governmental agencies force owners of real property to remediate contaminated soil and groundwater, the owners will invariably attempt to recover the remediation costs from those persons or entities responsible for the contamination. That may include former owners of the property or former operators of facilities on the property. If the contamination has been present in the soil and groundwater for many years, a lawsuit to recover remediation costs from the responsible parties may be barred by the 3-year statute of limitations in Code of Civil Procedure section 338, subdivision (b). However, if the contamination is still migrating through the soil or groundwater, the plaintiff may be able to avoid the bar of the 3-year statute of limitations by alleging a continuing nuisance or trespass. But in *San Diego Unified*, the Court of Appeal recognized that an action based on a continuing trespass or nuisance could still be time-barred under the 10-year statute in Code of Civil Procedure section 337.15 if the contamination was caused solely by a defect in construction of an improvement on the property. In this case, Section 337.15 did not bar an action for property damage filed more than 10 years after the improvement was completed, because recovery was sought on a legal basis other than construction or latent defects. Here, the Plaintiff alleged that its injury was proximately caused by breaches of arrangements reached by the parties in dealing with the property, regardless of how the contamination was originally created.

For more information, see “Claims to Recover Remediation Costs May be Barred after 10 Years” at <http://blog.aklandlaw.com>.

6. *White v. Cridlebaugh* (2009) 178 Cal.App.4th 506.

Robert and Carole White entered into a contract to build the Whites' retirement home with JC Master Builders, Inc., and Terry E. Harper Cridlebaugh. When the project ran over budget, and when concerns arose over the convoluted billing practices and manner of construction, the Whites ordered the construction to stop. JC Master Builders filed a mechanics' lien and sued the Whites to foreclose that lien. The Whites filed an action against JC Master Builders, Cridlebaugh and his wife, a materials supplier that was owned by Cridlebaugh and his wife, the surety of JC Master Builders, and Robert Paul Diani, who was the responsible managing officer of JC Master Builders listed on the records of the Contractors' State License Board ("CSLB"). The court held that the Whites were entitled under Business and Professions Code section 7031, subdivision (b), to recover all compensation paid to JC Master Builders and Cridlebaugh because (1) Cridlebaugh never held a California contractor's license; and (2) JC Master Builders, Inc.'s contractor's license was suspended by operation of law pursuant to section 7068.2 because Diani was not actively engaged in its construction business after August 2004, and no replacement was ever qualified in Diani's place. Even though CSLB records showed that Diani certified that he owned 10 percent or more of the voting stock of the corporation, Diani testified that he gave the stock to Cridlebaugh. Diani also testified that he did not receive any profits from the company, that Diani had turned over any dealings, management, supervision, daily work and income of JC Master Builders to Cridlebaugh, that Diani was primarily out of the country for several years before the lawsuit, and that Diani had not been aware that Cridlebaugh had used JC Master Builders to sue the Whites and place a mechanic's lien on their property. Cridlebaugh testified that he was the chief financial officer, secretary, and employee of JC Master Builders. For those reasons, the work that was performed for the Whites was unlicensed and therefore (1) the Whites could recover the monies they paid JC Master Builders and Cridlebaugh; and (2) JC Master builder and Cridlebaugh were not entitled to an offset for the materials and services they provided to the Whites.

For more information, see "If the Responsible Managing Officer Abandons the Licensed Contractor, the Contractor Will Be Working for Free" at <http://blog.aklandlaw.com>.

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EASEMENTS

A. Framework

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.)

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 - implied easements that give the easement holder a right to use another person's property for the purpose the easement holder have previously used the property. Prescriptive easements must be hostile to the underlying property owner's right of ownership and the use by the easement holder must be continuous for the five year statutory period. 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 dedicates a parcel to the local responsible agency, usually the county or 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.

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.

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.

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. *Murphy v. Burch* (2009) 46 Cal.4th 157

In *Murphy*, plaintiff's real property was located next to defendant's property in Mendocino County. The only public road that ever existed in the vicinity of the properties is California State Highway 162. The sole means of vehicle access between Highway 162 and the plaintiff's property is a private road (the "Access Road") that extends from the highway and crosses over the defendant's property and other privately owned land before entering the plaintiff's property. Prior to 1876, the federal government owned both of the properties. From 1876 until 1929, the federal government deeded by patent the parcels that now made up the defendant's property to various private owners (which eventually were acquired by defendant). The federal government conveyed these parcels *without* expressly reserving an easement over the Access Road to Highway 162 for the benefit of the parcels it retained, including plaintiff's property. In 1932, the federal government conveyed to plaintiff's predecessor in interest plaintiff's landlocked property by patent. That conveyance did not include any express grant of an easement over the Access Road. The common law elements of an easement by necessity existed in this case. However, the California Supreme Court held that the common law elements of strict necessity and common ownership are only part of the showing that is required to establish an easement by necessity, where the common ownership is traced to the federal government. In this context, a claimant must also prove congressional intent to reserve an access right-of-way, as well as the inability of the government to condemn an access easement. Here, the plaintiff failed to satisfy those two additional elements.

For more information, see "Where Property Ownership Originates from a Federal Patent, the Rules for an Easement by Necessity Are Different" at <http://blog.aklandlaw.com>.

2. *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259

In this case, the court affirmed a trial court’s creation of an equitable easement in favor of Plaintiffs who bought a parcel of land in a mountainous area with a 60-year old roadway existing over the parcel. Defendant owners of neighboring parcels used that roadway as the only access to their land. Plaintiffs sought an injunction to prevent defendants from using the roadway. The court held that the trial court did not abuse its discretion in creating an “equitable easement” over the roadway in favor of the defendants. The court examined the criteria under which a trial court may create an easement by refusing to enjoin an encroachment:

- (1) Defendant must be innocent - the encroachment must not be the result of defendant's willful act, and perhaps not the result of defendant's negligence. In this same connection the court should weigh plaintiff's conduct to ascertain if plaintiff is in any way responsible for the situation.
- (2) If plaintiff will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to defendant, except, perhaps, where the rights of the public will be adversely affected.
- (3) The hardship to defendant by the granting of the injunction must be greatly disproportionate to the hardship caused to the plaintiff by the continuance of the encroachment and this fact must clearly appear in the evidence and must be proved by the defendant.

For more information, see “Through Equity, a Court Can Create a Roadway Easement” at <http://blog.aklandlaw.com>.

3. *Nielsen v. Gibson* (2009) 178 Cal.App.4th 318

In this case, the court held that a couple who bought property from the record owner’s parents while the owner was permanently out of the country was entitled to a judgment for quiet title because they met the requirements for adverse possession. The couple fenced the property, irrigated it, built a go-cart course on it, and paid the property taxes for almost ten years before filing their quiet title action. The court held that when an adverse claimant is in open possession and the true owner fails to protect his or her interests and remains in ignorance, it is the owner's fault. Therefore, the fact that the record owner was out of the country and lacked actual notice is immaterial.

For more information, see “Leaving the Country? You’re Still on Notice of the Adverse Possessors on Your Property” at <http://blog.aklandlaw.com>.

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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. *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135

The court addressed whether the approval of a Design Plan Application was ministerial or discretionary. If the agency’s action is ministerial, CEQA does not apply. Because the application had to be approved as long as it conformed to the Design Guidelines, the court held that the action was ministerial and no CEQA review was required. The underlying project for which the application was submitted involved a business center located in the March Business Center Specific Plan Area, which was consistent with the General Plan for the former March Air Force Base. The Base General Plan conformed to the redevelopment plan. The court emphasized that at all of these steps in the planning process environmental review and receipt of public comment occurred, and if the plaintiffs wanted to challenge the projects on CEQA grounds, it needed to do so at any or all of those stages.

For more information, see “Approval of Design Plan Application Deemed Ministerial Under CEQA” at <http://blog.aklandlaw.com>.

2. ***Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara County Association of Governments* (2009) 179 Cal.App.4th 113**

Life is largely about timing, and CEQA practice is no exception. Lead agencies have to find the balance of conducting meaningful environmental review, such that, it is neither too early to be meaningful, nor too late such that the project gains momentum to the preclusion of effective consideration of alternatives and mitigation measures. In 2008, the California Supreme Court addressed this issue in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. The court enunciated the general principle that prior to conducting CEQA review, “agencies must not take any action that significantly furthers a project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project.” Applying this principle to a measure imposing a retail sales and use tax submitted to the voters to fund transportation projects, the court in *Sustainable Transportation Advocates* held that the measure and its Transportation Investment Plan did not constitute a project under CEQA because there lacked binding commitments to a specific project.

For more information, see “Measure Including Transportation Investment Plan held Not to be a Project Under CEQA” at <http://blog.aklandlaw.com>.

3. ***Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186**

The decision in this case applies CEQA’s early timing requirements in a different setting. A developer, having lost one CEQA case on the basis of the water supply analysis, entered into a long term agreement with a district to purchase recycled water, intending to use this agreement to remedy the deficiencies in its water supply analysis. Project opponents then challenged the recycled water agreement on the basis that the District had failed to conduct CEQA review on the agreement before entering into it. The appellate court agreed with the opponents, underscoring the need for agencies to closely consider CEQA ramifications on all agreements, no matter how worthy the purpose. As the saying goes, no good deed goes unpunished.

For more information, see “Appellate Court Directs Developer-District Recycled Water Agreement to be Set Aside Based Upon CEQA Violation” at <http://blog.aklandlaw.com>.

4. ***Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) ___ Cal.3d ___**

The Supreme Court held that the County’s refusal to issue a renewed CUP fell squarely within the CEQA exemption for a “project which a public agency rejects or disapproves.” (Pub. Resources Code § 21080(b)(5).) The Supreme Court stated: “The Court of Appeal erred by deeming the consequences of a project denial to be part of the project itself.” The only project at issue here was the denial of a permit. Whether or not the airport already existed had no bearing on the scope of the project. Since the project involved the County’s denial of a permit, the CEQA exemption applied, and no environmental review was required.

For more information, see “Project Denial Means Project Denial, Regardless of the Consequences” at <http://blog.aklandlaw.com>.

5. *Great Oaks Water Co. v. Santa Clara Valley Water Dist. (2009) 170 Cal.App.4th 956*

Generally, exemptions from CEQA must be justified and are narrowly construed. In March 2009, the court addressed the use of an exemption (Public Resources Code section 21080(b)) involving rate setting for groundwater extraction charges. In upholding the use of the exemption, the appellate court first ruled that highly detailed findings justifying the use of the exemption were not mandated, as long as the court could understand the analytic route the “agency travelled from evidence to action.” While more detail is preferable to less detail, the ultimate question is whether the court, from reviewing the record, findings and decision, can understand the agency’s action. Second, the exemption for rate setting cannot be used for system expansion. On this issue, the record was very clear that the rates were used for delivery reliability improvements and were not for funding system expansion. The key here, as always, is the staff report.

For more information, see “District Offered Sufficient Justification to Apply CEQA Exemption to Rate Setting for Groundwater Extraction Charges” at <http://blog.aklandlaw.com>.

6. *Las Lomas Land Co., LLC v. City of Los Angeles (2009) 177 Cal.App.4th 837*

In this case, the court made clear that a city may stop environmental review mid-stream and reject a project without awaiting the completion of a final EIR. While this holding may avoid wasting time and money on an EIR for a dead-on-arrival project, it will also make it harder for projects to stay in play until the entire environmental document is complete.

For more information, see “CEQA Does not Apply to Project Approval, Even if the EIR is Underway” at <http://blog.aklandlaw.com>.

7. *California Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. District (2009) 178 Cal.App.4th 1225*

An air district’s adoption of a rule addressing offsets for road paving against new particulate emissions is not exempt from CEQA. As the application of the rule would result in some paving, there was insufficient evidence to support a finding that the rule would “assure the variance, restoration, enhancement or protection of the environment.” (CEQA Guidelines, § 15308.) The court also held that in writ proceedings, the use of judicial notice to bring evidence before the court not included within the administrative record is disfavored.

8. ***Inyo Citizens for Better Planning v. Inyo County Board of Supervisors (2009) ___ Cal.App.4th ___***

The fair argument test for EIRs is alive and well, even for “clarifying” amendments to previously adopted general plan policy. Of course, one person’s clarification is another person’s amendment. It is all in the eye of the beholder. In this case, the County adopted a Negative Declaration for a general plan amendment, which altered the definition of “net acreage.” In spite of the County’s insistence that the amendment merely clarified the term, the court held that there was substantial evidence supporting a fair argument that the amendment could have potentially significantly impacts on the environment.

9. ***California Native Plant Society v. County of El Dorado (2009) 170 Cal.App.4th 1026***

The California Native Plant Society filed a CEQA lawsuit against El Dorado County after the County approved a Mitigated Negative Declaration and Congregate Care Project. The project consisted of two care units, cottages, and a clubhouse on 20 acres, and was part of a larger development area including a local medical center, a senior assisted living facility, medical office buildings and a local retail shopping center. Mitigation for project impacts to sensitive plant species included paying a \$135,000 mitigation fee established by a County ordinance in 1998. The court held that the fee ordinance did not presumptively establish full mitigation for any specific project given that the ordinance did not undergo any independent environmental review, and the County violated its own mitigation strategy by failing to conduct annual reviews of the fee amount and efficacy of the Fee Program.

For more information, see “Are the days of Mitigating a Project’s Significant Impacts with Impact Fees Gone?” at <http://blog.aklandlaw.com>.

10. ***California Native Plant Society v. City of Rancho Cordova (2009) 172 Cal.App.4th 603***

In this case, the Court reviewed an EIR for a project named The Preserve at Sunridge. The Preserve involved the development of approximately 530 acres in Rancho Cordova, California as single and multi-family housing, commercial and office uses, a neighborhood park, an elementary school, detention basins, an open space and wetland preserve, bikeways and pedestrian and drainage corridors. The Court of Appeal addressed the following issues presented by the plaintiffs: 1) offsite mitigation measures; 2) deferral of mitigation for loss of vernal pools and wetlands; 3) sufficiency of the evidence regarding proposed mitigation for vernal pools and wetlands; 4) the sufficiency of the water supply analysis; 5) a post-project approval amendment of mitigation measures; and 6) general plan consistency. The City prevailed on all issues but the general plan consistency issue pertaining to whether or not the City properly “coordinated” with the United States Fish and Wildlife Service as called for in the planning document. The lesson to be learned is to watch the choice of verbs in planning documents. The court also required project opponents to present relatively specific objections to CEQA documents during the approval process in order to later litigate those issues.

For more information, see “Exhaustion of Administrative Remedies; Deferral of Mitigation Measures; and General Plan Interpretation” at <http://blog.aklandlaw.com>.

11. *Tracy First v. City of Tracy* (2009) 141 Cal.App.4th 1336

This case includes several noteworthy CEQA determinations. An EIR for a grocery superstore was upheld against attacks based upon alleged inadequacy of alternatives, project segmentation, energy impacts, and failure to mitigate traffic impacts in an adjacent jurisdiction. A lead agency can reasonably conclude that a project which exceeds state energy efficiency standards has a less than significant impact. Moreover, a city is not required to demand mitigation for extraterritorial traffic impacts where the lead agency lacks control over the intersection and the affected jurisdiction lacks a program for expenditure of traffic impact fees for the necessary improvement. Finally, the lead agency was not required to examine a smaller grocery store as an alternative when the record does not establish that a smaller store would reduce impacts. Under exhaustion of administrative remedies, the project opponents were required to present evidence showing relatively specific objections to CEQA documents to satisfy their exhaustion requirement.

For more information, see “A CEQA Issue of First Impression: Energy Conservation Impacts Analysis in EIRs” at <http://blog.aklandlaw.com>.

12. *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957

An EIR is not invalid because project alternatives selected to be studied as part of the EIR prove to be infeasible. At the time the DEIR is released, the CEQA documentation focuses on potentially feasible alternatives. This does not preclude the decision makers from adopting appropriate findings, based upon substantial evidence, as to the infeasibility of the studied alternatives. From a practical perspective, good findings are the first line of defense. Additionally, statements of overriding considerations are entitled to substantial deference by a reviewing court. CEQA permits the lead agency extensive discretion in identifying the relevant considerations which enter into the “overriding considerations.”

For more information, see “Petitioners Fail to Demonstrate that the City Failed at the Two-Step” at <http://blog.aklandlaw.com>.

13. *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889

The court addressed various issues in this case, including alternatives, cumulative impacts and responses to comments. In relation to alternatives, the court ruled that to the extent that a lead agency considers but rejects early on various onsite and offsite alternatives, it is essential to include that information in the record. The use of a matrix to compare alternatives is acceptable practice. On the topic of cumulative impacts, the court held that the geographic area applied to a cumulative impact analysis falls to the agency’s discretion. Absent an arbitrary decision, the agency’s decision should not be set aside.

This case reflects a thoughtful, well considered approach to cumulative effects analysis in an urban setting. In addressing the responses to comments, the court emphasized that on one hand, the public cannot be expected to sift through numerous obscure documents (the proverbial “scavenger hunt”) to understand the response to comment. On the other hand, the use of master responses or referrals to other responses to comments, which are on point, is acceptable practice.

For more information, see “Appellate Court Emphasizes CEQA’s Focus on Reasonableness” at <http://blog.aklandlaw.com>.

14. *Planning and Conservation League v. Castaic Lake Water Agency* (2009) ____ Cal.App.4th ____

This case involved the water transfer agreement between Wheeler Ridge, which receives water from Kern County Water Agency, and Castaic Lake Water Agency (“Kern-Castaic Agreement”). Like most water agencies, Kern County Water Agency receives most of its water through the State Water Project, which is managed by the DWR. In 1994, the DWR made changes to the basic contract provisions for State Water Project water agreements (“Monterey Agreement”). The EIR for the Monterey Agreement was decertified. The main issue in this case was whether the Kern-Castaic Agreement was part of the Monterey Agreement. The court held that these were two separate and distinct projects, and by adequately evaluating the impacts of the Kern-Castaic Agreement and its various alternatives, the Castaic Lake Water Agency complied with CEQA.

15. *Strother v. California Coastal Commission* (2009) 173 Cal.App.4th 873

This case involved challenges to the approval of coastal development permits by the California Coastal Commission. The only issue before the court was whether the statute of limitations under the California Coastal Act of 1976 or CEQA applied. If the Coastal Act statute of limitations applied, plaintiffs were barred from bringing suit. The court held that the statute of limitations under CEQA applied to any challenges brought under that act, and the remaining claims were dismissed for failure to bring suit within the statutory period prescribed by the Coastal Act.

For more information, see “CEQA Statute of Limitations Still Applies in Challenge to Coastal Development Permit” at <http://blog.aklandlaw.com>.

16. *County of Sacramento v. Superior Court* (2009) ____ Cal.App.4th ____

CEQA contains many detailed procedural requirements that can end a case before it has begun. One such requirement is the request for hearing contained in Section 21167.4 of the Public Resources Code. In this case, the court ruled that a request for hearing must be submitted in writing to the court within 90 days of filing the petition for writ of mandate, or the case must be dismissed. Although petitioner had orally requested a hearing date by calling the court clerk, petitioner had not filed a request for hearing with the court or served notice on the other parties within 90 days, and therefore, the case had to be dismissed.

17. *California Oak Foundation v. County of Tehama et al.* (2009) 174 Cal.App.4th 1217

When defending challenges to projects, cities and counties often coordinate the defense with the applicant. The court in this case made that process a little easier by holding that the disclosure of documents to the real party in interest, when necessary to accomplish the purpose for which the lawyer was hired (defense of the CEQA lawsuit), does not waive the attorney-client privilege. The court found that disclosure to a codefendant in a joint endeavor to defend an EIR in litigation can reasonably be said to constitute the involvement of a third person to whom disclosure is reasonably necessary to further the purpose of the original legal consultation and thus the communications remained protected. Additionally, the court rejected petitioner's contention that Public Resources Code section 21167.6 overrode claims of privilege, holding that a new statute (Section 21167.6) is not an abrogation of an existing statute (e.g., Evidence Code section 954) unless it is clear that the later enactment is intended to supersede the existing law.

For more information, see "Common Interest Doctrine Applies to County's Disclosure to Real Parties in Interest" at <http://blog.aklandlaw.com>.

18. *Riverwatch v. County of San Diego* (2009) 175 Cal.App.4th 768

In November 1994, voters approved Proposition C, which amended the County's general plan and zoning ordinance to designate Gregory Canyon for use as a landfill and recycling center. In February 2003, the County's Department of Environmental Health ("DEH") certified an FEIR for the landfill project. In June 2004, the DEH issued a solid waste facilities permit ("SWFP") approving the landfill project. Petitioners Riverwatch, the Pala Band of Indians, and the City of Oceanside sued the County and Real Parties in Interest for declaratory and injunctive relief on the grounds that the County violated CEQA, Proposition C, and its general plan and regulations pertaining to solid waste facilities in approving the landfill project.

In June 2006, the real party in interest, Gregory Canyon, Ltd., challenged the judgment awarding Riverwatch and the Pala Band attorney fees in the amount of \$239,620.00 under Code of Civil Procedure section 1021.5. (Originally, Petitioners had requested \$27,340.90 in costs and \$455,138.12 in attorney fees.) The appellate court upheld the award of attorney fees holding that the litigation satisfied the requirements of Section 1021.5, the fee award was consistent with the purpose of the private attorney general doctrine, and the trial court had already reduced the requested award.

19. *Lake Almanor Associates, LP v. Huffman Broadway Group, Inc.* (2009) 178 Cal.App.4th 1194

The court found that an EIR consultant to a county which fails to timely complete an EIR on a private project is not subject to a lawsuit for damages under theories of third party beneficiary, negligence and negligent interference with prospective economic advantage. The court held that not only was the plaintiff not a creditor beneficiary under the contract between the consultant and the county, but holding a consultant liable was not consistent with CEQA.

20. *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245

Developer sought to compel the city to certify the EIR for a twenty-acre development project and take final action on the project approvals, whose project application had been completed more than four years earlier. The developer claimed the city's failure to timely certify the EIR and approve the project violated CEQA's Public Resources Code section 21151.5 and the Housing Accountability Act's Government Codes section 65589.5. The court upheld the trial court's denial of the writ, explaining that neither CEQA nor the Housing Accountability Act have "deemed approved" provisions.

21. *New Rules of Court 3.1365-3.1368: Preparation of Administrative Records*

Effective January 1, 2010, new Rules of Court govern the preparation of the record in CEQA lawsuits. The new rules include provisions for preparation of the index, the order of documents, double sided printing, and length of volumes.

22. *CEQA Guidelines for the Mitigation of GHGs*

See the Climate Change section for a summary.

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. *City of Irvine v. Southern California Association of Governments* (2009) 175 Cal.App.4th 506

In this case, the City sued the association of governments for allocating almost 43 percent of Orange County's regional housing needs to the City. The SCAG is charged with developing a regional housing needs assessment for cities within its jurisdiction. SCAG delegated to the Orange County Council of Governments the responsibility for providing the data to be used by SCAG in applying the methodology used to determine the allocation of housing units to jurisdictions within Orange County. The trial court denied the City's claims on grounds that judicial review is precluded by the regional housing needs assessment process. The Court of Appeal affirmed.

For more information, see "California Appeals Court Says No Judicial Review of COG RHNA Allocations" at <http://blog.aklandlaw.com>.

2. ***Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396**

The City adopted a Specific Plan containing a provision which imposes affordable housing requirements on residential and mixed use projects of more than ten dwelling units ("DUs") per lot. At issue in this case was whether the Costa-Hawkins Act preempts the City's affordable housing requirements. The superior court held that the Costa-Hawkins Act does preempt the affordable housing requirements in the City's Plan. The court of appeal affirmed. The California Supreme court denied review in mid-October. Only the future will tell how broadly this case will apply. It may be confined to its facts, but it also could have a greater impact.

For more information, see "Another Developer Win on Affordable Housing Regs" at <http://blog.aklandlaw.com>.

3. **Attorney General Sues Pleasanton Over Allegedly Illegal Housing Cap**

For over 30 years, growth interests have attempted various challenges to growth caps and other growth liability measures, but these cases are difficult to win. The California Attorney General has intervened in litigation challenging the City of Pleasanton's pro-employment/limited housing growth strategy on the basis of conflict with state housing element law and the potential impacts (transportation, air quality, greenhouse gases) which result from a serious jobs/housing imbalance.

For more information, see "Attorney General Sues Pleasanton Over Illegal Housing Cap" at <http://blog.aklandlaw.com>.

4. ***Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933**

Following the amendments made to the Density Bonus Law in 2004, there has only been one other case, *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, interpreting the law until *Wollmer* was decided this year. *Wollmer* and *Friends of Lagoon Valley* both addressed the question of whether an agency could grant a greater density bonus than required by Section 65915 of the Government Code. Both courts answered "Yes." Subdivision (n), as written in the 2004 amendments, permitted an agency to go over and above what the statute requires, and no ordinance need be passed by the agency permitting a greater bonus. As of January 1, 2009, subdivision (n) now requires that the agency pass an ordinance permitting the increase of the density bonus above what is required by Section 65915.

For more information, see "Density Bonus Law Update: Statutory Refinements and Recent Cases" at <http://blog.aklandlaw.com>.

5. ***Building Industry Association of Central California v. City of Patterson (2009) 171 Cal.App.4th 886***

In interpreting terms of a development agreement which governed the application of new impact fees, a reviewing court applies principles of contract law. In interpreting a standard that a future fee be “reasonably justified”, a court applies the nexus tests of Nolan and Dollan. According to the court, a fee based upon a city formula, which took the RNHA numbers and divided by the number of future units, failed this test.

For more information, see “Simple Math Does Not Amount to Reasonable Justification for Fee Amount” at <http://blog.aklandlaw.com>.

6. ***The California-Nevada Annual Conference of the United Methodist Church v. City and County of San Francisco (2009) 173 Cal. App. 4th 1559***

The city and county of San Francisco initiated the process of designating a church as a historical landmark. The religious group that sought to sell the church filed suit. The court held that a church which ceases to use a building for active religious purposes and which intends to sell the property and use the proceeds to continue religious activities elsewhere is still entitled to claim an exemption from designation as a historical structure. (Government Code sections 25373 (counties); 37361 (cities).)

7. ***SP Star Enterprises v. City of Los Angeles (2009) 173 Cal.App.4th 459***

In this case, the court found that a denial of a use permit to allow alcohol sales in conjunction with live adult entertainment is not reviewed under the independent judgment test, but under the substantial evidence test. Additionally, denial of a use permit is not an improper restriction on First Amendment protected activities. In this case, the court held that substantial evidence supported the city’s denial of the permit.

8. ***Sequoia Park Associates v. County of Sonoma (2009) 176 Cal.App. 1270***

The court ruled the legislature pre-empted the field of mobilehome park conversions to the exclusion of local government regulation. In this case, the county passed an ordinance that included additional obligations for a conversion beyond those requirements outlined in section 66427.5 of the Government Code. Therefore, the court held the ordinance was invalid.

9. ***Citizens for Planning Responsibly v. County of San Luis Obispo (2009) 176 Cal.App.4th 357***

The voters of the County of San Luis Obispo approved Measure J, an initiative measure amending the County's general plan and zoning ordinance, providing for mixed use development on a 131-acre site near the San Luis Obispo County airport. A citizens' group challenged the validity of the initiative, alleging it is preempted by state law because the subject property is within the airport land use plan adopted by the local airport land use commission pursuant to the State Aeronautics Act. The appellate court found the Measure was not preempted. The party claiming state law preempts a local ordinance has the burden of demonstrating the presumption and the courts presume, absent a clear indication of preemptive intent, that a regulation is not preempted by state statute. The court found that the SAA does not expressly or impliedly preempt local land use regulations, but rather expressly permits it.

10. ***City of Claremont v. Kruse (2009) 177 Cal.App.4th 1153***

The Compassionate Use Act (Health and Saf. Code, § 11362.5) and the Medical Marijuana Program (Health and Saf. Code, § 11362.5) legalized the use and distribution of medical marijuana subject to specific restrictions outlined in the statutes. Many cities, such as the City of Claremont, do not have areas zoned to permit medical marijuana dispensaries. In this case, the court decided that the ability to sell medical "doobies" is not protected by either of the state laws legalizing medical marijuana and can still be regulated by local agencies through their police power. Additionally, state law does not require cities and counties to zone for medical marijuana dispensaries.

For more information, see "City Not Required to Zone for Medical Marijuana" at <http://blog.aklandlaw.com>.

11. ***Ste. Marie v. Riverside County Regional Park and Open Space District (2009) 46 Cal.4th 282***

The Riverside District, a regional park district formed under Section 5541.2, acquired 161 acres of land in 1995. In 2003, the District entered into an option agreement with the Community College District to convey half of the property for the construction of a new community college campus. The District had not adopted a resolution formally dedicating the property as a park or open space and plaintiff argued that the failure to do so violated Section 5540, which requires approval by a majority of the voters in the district or an act of the Legislature. The Supreme Court held that land formally dedicated to a park district is subject to voter approval before the district can disprove of the property. On the other hand, land owned by the district that has not been dedicated for park purposes is not subject to such a restriction.

For more information, see "Land Held by Park District Not Automatically Dedicated" at <http://blog.aklandlaw.com>.

12. *Reddell v. California Coastal Commission* (2009) ___ Cal.App.4th ___

See the California Coastal Commission section for a summary.

13. **AB 1441 (Chapter 148, Statutes 2009) - Williamson Act: Lot Lines**

This bill provides a one-year extension of the statute permitting rescission of a contract with the simultaneous creation of a new contract in order to facilitate lot line adjustments. The law will now terminate on January 1, 2011, instead of January 1, 2010.

14. **AB 1165 (Chapter 275, Statutes 2009) - Flood Protection**

For the most part, this bill makes many technical changes to the Water Code relating to the Central Valley Flood Protection Board and permits required in relation to flood areas. The amendments worth noting are the following: 1) Under existing law, in order to approve a discretionary entitlement, a ministerial permit, or a tentative or parcel map, the legislative body must make one of several determinations. One of these determinations requires a finding of adequate progress on the construction of a flood protection system, which includes evidence that at least 90 percent of the revenues scheduled to be received for the project in that year have been provided and expended. AB 1165 carves out an exception to the 90 percent requirement in cases where “state funding is not appropriated consistent with an agreement between a state agency and a local management agency.” 2) The Water Code currently requires that “The board shall hold an evidentiary hearing for any matter that requires the issuance of a permit *if the proposed work may significantly affect* any element of the State Plan of Flood Control.” This bill allows the board to establish regulations defining the types of encroachments that will not significantly affect any element of the State Plan of Flood Control and, therefore, do not require an evidentiary hearing, unless contested. 3) AB 1165 provides enforcement mechanisms for encroaching on flood protection systems or failing to get a permit when one is required. These enforcement mechanisms include the imposition of civil liability.

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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. *Abernathy Valley, Inc. v. County of Solano* (2009) 173 Cal.App.4th 42

A 1907 Board of Supervisors approved tentative map, recorded in 1909, was not a map subject to “design and improvement.” (Government Code section 66499.35.) Recordation of the map, by itself, did not create individual parcels recognized today. Additionally, the property owner of multiple contiguous parcels is not entitled to a certificate of compliance on each unit of land shown on the 1909 map.

For more information, see “Revisiting History Part II: When is a Recorded 1909 Map Not a Subdivision Map?” at <http://blog.aklandlaw.com>.

2. **AB 333 (Chapter 18, Statutes 2009) – Subdivision Map Extension**

Tentative subdivision maps are subject to the following basic provisions for extensions:

- Government Code section 66452.6: Complete improvement rule, development agreement.
- Government Code section 66452.11: The 1993 two year extension.
- Government Code section 66452.13: The 1995 one year extension.

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. ***Fashion Valley Mall, LLC v. County of San Diego (2009) 176 Cal.App.4th 871***

Ownership of a mall transferred from Equitable Life Assurance Company of the United States (“Equitable”) to Mallco. Mallco was a wholly owned subsidiary of Fashion Valley Mall, Inc. (“FVM”), and 50 percent of FVM’s shares belonged to Equitable. Although Equitable owned 50 percent of FVM and Mallco was a subsidiary of FVM, the County of San Diego, upon transfer of the property, reassessed 100 percent of the property value. Taking the County to court, Equitable argued that the County could only reassess 50 percent of the value because only 50 percent of the ownership and beneficial interest in the property was transferred. The issue in this case was “whether Equitable retained a 50 percent beneficial interest in the Mall due its status as a member in FVM.” The court held that Mallco held 100 percent of the beneficial interest, in spite of Equitable’s 50 percent share as a member of FVM. Therefore, the County properly reassessed 100 percent of the property value.

For more information, see “The Battle Over Property Taxes Continues” at <http://blog.aklandlaw.com>.

2. ***Schoenberg v. County of Los Angeles (2009) ___ Cal.App.4th ___***

This case involved a writ of mandate challenging a property tax reassessment upon change of ownership. The court held that petitioner could not challenge a property tax reassessment through a writ of mandate, but must instead file an action for a tax refund. Because petitioner amended his complaint to include an action for a tax refund too late, petitioner was barred from challenging the reassessment. Even if he had filed the proper action, the reassessment amount was reasonable, and the court upheld the agency’s action.

3. ***San Bernardino Valley Water Conservation District v. San Bernardino Local Agency Formation Commission (2009) 173 Cal.App.4th 190***

Prior to establishment of the predecessor statutes to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (“CKH Act”), there were specific statutes detailing the process for consolidating water districts. Petitioner in this case argued that because these consolidation statutes were repealed, the local agency formation commission had no authority to consolidate water districts. The court held that the prior consolidation statutes were repealed by the legislature when the predecessor to the CKH Act was enacted. Therefore, the CKH Act’s consolidation provisions applied to water districts, even if there was no specific reference in the CKH Act to water districts.

For more information, see “Are Small, Special Purpose Districts an Endangered Species?” at <http://blog.aklandlaw.com>.

4. ***Hofman Ranch v. Yuba County Local Agency Formation Commission (2009) 172 Cal.App.4th 805***

In this case, the court held that an independent contractor hired by the Local Agency Formation Commission (“LAFCo”) acting as LAFCo’s executive officer, was, for the purpose of the Brown Act, an employee of LAFCo. Because the independent contractor was an employee, LAFCo lawfully held a closed session to discuss the contractor’s employment terms pursuant to the Ralph M. Brown Act.

For more information, see “Independent Contractor Still Considered Public Employee Under the Brown Act” at <http://blog.aklandlaw.com>.

5. ***Costco Wholesale v. Superior Court of Los Angeles (2009) 47 Cal.4th 725***

Outside counsel hired by Costco to advise it on the issue of whether certain managers were exempt from wage and overtime laws prepared a letter to Costco on the issue. The letter included some conversations between the attorney and Costco warehouse managers. The attorney, the managers interviewed, and Costco believed the interviews and letter were confidential. In a later litigation, plaintiffs sought to compel the discovery of the letter. The trial court ordered an in camera review of the letter and the referee produced a heavily redacted version of the letter, claiming the factual information about various employees’ job responsibilities were not protected. The appellate court denied Costco’s petition for writ of mandate on the issue. The California Supreme Court held that the attorney-client privilege attached to the letter irrespective of its content, and that Evidence Code section 915 prohibits disclosure of the information claimed to be privileged as confidential communication between attorney and client, even when the purpose of the disclosure is to rule on the claim of privilege.

6. ***County of Santa Clara et al. v. Superior Court of Santa Clara (2009) 171 Cal.App.4th 119***

Plaintiffs/Respondents filed an action seeking declaratory and injunctive relief against local and state public agencies claiming the agencies implemented and enforced a number of illegal policies and practices with respect to the California Public Records Act (“CPRA”) and other state laws. Defendants/Petitioners demurred claiming, among other things, that Government Code sections 6258 and 6259 were the exclusive remedies for violation of the Public Records Act. The superior court overruled the demurrers.

Defendants/Petitioners filed a writ petition, which the appellate court heard because the petition raised a “significant legal issue.” The court ruled that the “CPRA provides the exclusive remedy for resolving whether a public entity has erroneously refused to disclose a particular record or class of records,” but nowhere in the CPRA is there any language that “restricts, permits, or precludes any type of legal action ‘concerning’ public records other than whether a particular record or class of records must be disclosed. The CPRA’s judicial remedy is limited to a requestor’s action to determine whether . . . records must be disclosed. The purpose of the CPRA is *furthered*, not obstructed, by citizens suits . . .to enforce the CPRA’s provisions.”

7. ***County of Santa Clara v. Superior Court (2009) 170 Cal.App.4th 1301***

The County of Santa Clara denied the California First Amendment Coalition’s request for the county’s geographic information system basemap on the grounds that it was exempt and copyrighted. The trial court ordered the county to produce the data, rejecting the exemption and copyright arguments. The County filed a writ claiming the superior court order was error on the grounds that: 1) disclosure of the information is prohibited under the Critical Infrastructure Information Act of 2002 (U.S.C. §§ 131-143)(“CII”) which preempts the California Public Records Act (“CPRA”) ; 2) the CPRA “catchall” exemption (Gov. Code, § 6255) shields the GIS basemap from disclosure; and 3) even if neither of the above arguments applies, the County should be allowed to demand end user agreements and to recover more than its direct cost of providing the information. The Court determined that CII did not apply because the law only applies to recipients of critical information, not submitters of critical information, and thus the court did not have to decide the question of whether CII preempts the CPRA. With respect to the CPRA catchall exemption, the court agreed with the trial court’s conclusion that the public interest served by withholding the information did not clearly outweigh the public interest served by disclosure. With respect to the County’s request for an end user agreement, the Court concluded that no provision of the CPRA required such an agreement. Finally, the Court remanded to the superior court for determination of whether and in what amount the County may demand fees in excess of the direct costs of reproduction.

8. SB 224 (Chapter 172, Statutes 2009) - Housing Assistance: Mobile Homes

This bill amends the CalHOME program by permitting the use of grant funds for installation or retrofit of ignition resistant exterior components on existing manufactured homes, mobilehomes, and accessory structures. (Pub. Resources Code, § 50650.3(b).) Grants or loans cannot be denied or subjected to different underwriting guidelines solely on the grounds that the home is manufactured, a mobilehome or is located in a mobilehome park. Down-payment assistance may, in the discretion of the administering agency, be subordinated to refinancing.

9. SB 93 (Chapter 555, Statutes 2009) - Redevelopment: Payment for Land or Buildings

Existing law authorizes a redevelopment agency to pay for the installation and construction of any building, facility, structure, or other improvement that is publicly owned, including the land value, either within or without the project area if the legislative body determines that: 1) The public works benefit the project area or the immediate neighborhood; 2) No other reasonable means of financing is available; 3) Paying for the public works helps eliminate blight inside the project area or provides for affordable housing and is consistent with the agency's implementation plan. Existing law also provides that a county with four million people or more that is financing the acquisition or construction of a transportation, collection, or distribution system and related parking facilities, must enter into an agreement with the rapid transit district. This bill does away with this requirement. This bill also distinguishes between the legislative findings required for the agency to pay for the land or the cost of installation and construction of a building, facility or structure located *inside or contiguous to* the project area, as compared to an improvement located *outside and not contiguous to* the project area. (Health & Saf. Code, §§ 33445 & 33445.1) Furthermore, for land and facilities not contiguous to the project area, the acquisition must be provided for in the redevelopment plan. Finally, this bill prohibits a redevelopment agency and legislative body from authorizing or approving the settlement of any judicial action that contests the validity of the adoption or amendment of a redevelopment plan if the settlement requires the expenditure of funds outside the project area unless the agency and legislative body have first held a public hearing on the proposed settlement. (Health & Saf. Code, §§ 33505 & 33679.)

10. SB 359 (Chapter 584, Statutes 2009) - Public Records Act: Disclosure Exemptions

The Public Records Act requires state and local agencies to make their records open to public inspection, except those records exempted from disclosure by law. Existing law lists numerous documents exempt from disclosure. This bill provides that the documents exempted in Government Code sections 6276.02 et seq. will be revised by a standing committee of the Legislature each year. This bill revises the list of exempt documents enumerated in Government code sections 6276.02, 6276.04, 6276.08, 6276.10, 6276.12, 6276.16, 6276.18, 6276.22, 6276.26, 6276.28, 6276.30, 6276.38, 6276.40, and 6276.48.

11. SB 99 (Chapter 557, Statutes 2009) - Joint Exercise of Powers: Reporting and Disclosures

This bill adds a chapter to Division 6 of the Government Code requiring additional reporting and public disclosures by conduit financing providers as well as joint powers authorities. Conduit financing providers are defined as “any county, city, city and county, public district, public authority, public corporation, nonprofit corporation, joint powers authority, or other statutorily constituted public entity that issues one or more conduit revenue bonds.” Conduit revenue bonds are “any municipal security the proceeds of which are loaned to any nongovernmental borrower.”

12. SB 716 (Chapter 609, Statutes 2009) - Local Transportation Funds

Counties must transfer one-quarter percent of the local sales and use tax to the local transportation fund. These funds are restricted to transit purposes only, unless the county had a population under 500,000 as of the 1970 census. These non-urban counties could use the funds for local streets and roads, if the agency found that there are no unmet transit needs that are reasonable to meet. SB 716 requires that those non-urban counties that have a population of 500,000 or more as of the 2000 census are restricted to using the funds for transit purposes only in their urban areas. There are no changes to the non-urban areas, which include cities with a population of 100,000 or fewer. This bill also permits allocation of the funds in non-urban areas for specified farmworker vanpool purposes, if certain findings can be made. For reasons not explained in the bill, Ventura County is exempt from the new provisions, but must, over the course of the following two years, draft a report and provide a legislative proposal for how the county will allocate its funds. If within the two year period, Ventura County is unable to meet these requirements, the funds must be used for transit purposes only within the county. This bill will not go into effect until July 1, 2014.

13. SB 215 (Chapter 570, Statutes 2009) - Local Government: Organization

When reviewing a proposal for a change of organization or reorganization, local agency formation commissions have to look at several factors listed in Section 56668 of the Government Code. This bill requires that in addition to looking at the proposal’s consistency with city or county general and specific plans, the local agency formation commission must also evaluate the proposal’s consistency with any regional transportation plan adopted pursuant to Section 65080 of the Government Code.

14. AB 1582 (Chapter 155, Statutes 2009) - Local Agencies: Sphere of Influence

Under this bill, local agency formation commissions are authorized to determine the sphere of influence for a proposed new district, when formation or reorganization that includes formation of the district is approved. This mirrors the provision relating to incorporation of cities and determining their spheres of influence. Additionally, this bill eliminates the requirement that written protests relating to annexations or detachments identify the name and address of the person protesting. Those protesting must now include the same information that those filing a petition for change of organization or reorganization are required to provide. Other minor changes are made by this bill that are not discussed here.

15. AB 1388 (Chapter 529, Statutes 2009) - Local Agencies: General Obligation Bonds

This bill adds Sections 53508.9 and 53509.5 to the Government Code relating to general obligation bonds issued and refunded by local agencies. The new statutes allow local agencies to sell bonds at a negotiated sale, without further approval, if the local agency adopts a resolution before the sale that includes certain items. The new statutes also provide for certain disclosures and require the local agency to send information regarding issuance of the bonds to the California Debt and Investment Advisory Commission.

16. SB 27 (Chapter 4, Statutes 2009) - Local Agencies: Sales and Use Tax Reallocation

Existing law prohibits a redevelopment agency or a local agency from providing any form of financial assistance to a vehicle dealer or big box retailer, or a business that sells or leases land to a vehicle dealer or big box retailer to relocate from one jurisdiction to another. This urgency legislation prohibits a redevelopment agency or local agency from entering into any form of agreement with a vehicle dealer or big box retailer that would result in the diversion of Bradley-Burns local tax proceeds if the agreement results in a reduction in the tax proceeds received by another local agency and the retailer continues to maintain a physical presence in the jurisdiction of that other local agency. Exceptions apply for the construction of public work improvements that serve all or a portion of the jurisdiction of the local agency.

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. ***California Building Industry Association v. San Joaquin Valley Air Pollution Control District* (2009) 178 Cal.App.4th 120**

This case involved a challenge to indirect source review fees imposed on new development by an air pollution control district. In its opinion, the appellate court held that the fees were valid regulatory fees, not development fees, and that the APCD had the authority to impose the fees. Among other findings, the court emphasized that in relation to disputes among experts, the APCD could reasonably choose one expert over another. Additionally, the court continually pointed to the detailed evidence contained in the record supporting APCD's adoption of the fees.

2. ***Weisblat v. City of San Diego* (2009) 176 Cal.App.4th 1022**

An administration fee, enacted for the purpose of recovering the administrative costs of levying a rental housing tax was invalid as a tax levied on the ownership of property, enacted without voter approval. The fee was therefore invalid, and on the facts of the case, could not be salvaged as a fee for a regulatory activity.

3. ***Dahms v. Downtown Pomona Property (2009) 173 Cal.App.4th 1201***

In 2008, the California Supreme Court held that the proper standard of review in Proposition 218 cases was de novo and not substantial evidence, and that the local agency has the burden of proof. (*Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431.) After the Supreme Court's decision, the appellate court in this case reevaluated its decision in light of the Supreme Court's holding. In the end, the appellate court came to the same conclusion as it had previously, namely that assessments levied through the Downtown Pomona Property and Business Improvement District did not exceed the reasonable cost of the proportional special benefit conferred. One of the more important rulings of the court was that the agency could discount the assessment imposed on certain properties, as long as other properties were not then required to make up the difference between the discounted and regular assessment.

For more information, see "What is the Difference Between a Taxidermist and a Tax Collector? The Taxidermist Takes Only Your Skin" at <http://blog.akandlaw.com>.

4. ***Town of Tiburon v. Bonander (2009) ___ Cal.App.4th ___***

In this case, the court addressed the validity of a special assessment imposed for the purposes of undergrounding utilities. Although the court found that the Town of Tiburon identified valid special benefits, the court held that special assessment was invalid because the assessment failed to meet the proportionality requirement of Article XIII D of the California Constitution. Specifically, the court stated, "Properties that receive the same proportionate special benefit pay the same assessment, without regard to variations in the cost of construction among the properties." The town's division of the district into three sections, depending on the costs associated with undergrounding the utilities, was improper. However, the court pointed out that, like the improvement district in *Dahms*, an agency may apportion the benefits by taking lot size, street frontage or building size into account. Because the town only used the benefits of aesthetics, safety and reliability, the town could not then apportion the costs associated with those benefits differently.

5. ***Paland v. Brooktrails Township Community Services District (2009) 176 Cal.App.4th 158***

A property owner who periodically discontinues water service (either because of an absence or non-payment of bill) may be charged. Ongoing charges by the water provider did not violate Proposition 218 prohibiting charges unless the services were immediately available to the owner. Proposition 218 does not extend protection to a voluntary decision by the owner to not take service. The Supreme Court granted review of this case on October 14, 2009.

For more information, see "Proposition 218, Water Charges and Voter Approval" at <http://blog.akandlaw.com>.

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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. ***Carolyn v. Orange Park Community Association (2009) 177 Cal.App.4th 1090***

Orange Park Community Association (“OPCA”), a common interest development under the Davis-Stirling Common Interest Development Act (“Act”) (Civ. Code, § 1350 et seq.), maintains trails on its common area. These trails connect to a larger regional trails system and users cross the OPCA-owned trails while hiking the trail system. After complaints and damage to its trail fencing occurred, OPCA installed barriers on the trail entry points to prevent vehicle access. Evan Carolyn subsequently sued because the barriers prevented him from accessing the trails using a horse drawn carriage. He claimed that the barriers violated the Americans with Disabilities Act of 1990 (“ADA”) (42 U.S.C. § 12181 et seq.).

The question addressed by the court here was whether recreational common space within a common interest development is a public accommodation. The court looked to previous cases and advice from the Department of Justice, which noted factors to consider when determining whether a facility is a public accommodation. The appellate court held that the OPCA trails were not a public accommodation under the ADA and state law. The trails were not like zoos, golf courses, or convention centers, which are specifically listed as public accommodations under the ADA and state law. Further, the court said that the use of OPCA's trails by the public did not transform them into public accommodations "merely because OPCA does not actively exclude members of the public from using the trails." The court was careful to note, though, that homeowners associations cannot escape laws designed to protect the disabled, as state and federal fair housing laws do not depend upon the existence of a public accommodation. However, since Carolyn was not a member of OPCA, he could not rely upon those laws and the appellate court affirmed the trial court's decision.

2. *Starlight Ridge South Homeowners Association v. Hunter-Bloor* (2009) 177 Cal.App.4th 440

Stephanie Hunter-Bloor was sued by the Starlight Ridge South Homeowners Association, a homeowners association for the common interest development where she lived in Temecula. Starlight sought to compel Bloor to maintain a ditch that ran across her property, which was contained within a landscape maintenance area ("LMA") designated in the CC&Rs. Starlight was required to maintain the LMA. Bloor argued that Starlight was required to maintain the ditch. Starlight refused, citing Section 7 of the CC&Rs, which stated in part, "Each Owner shall maintain, repair, and replace and keep free from debris or obstructions the drainage system and devices, if any, located on his Lot."

The appellate court said that both interpretations were consistent with the plain meaning of the words of the CC&Rs. Starlight offered evidence to show that it previously required homeowners to maintain other drainage devices, like the ditch, where they crossed those individuals' property. Further, the ditch in question had always been maintained by the individual property owners whose land was crossed. The court also noted that the LMAs for the development were small and used for the purpose of aesthetics, while the drainage devices affected the integrity of the property. The court concluded, therefore, that Bloor was responsible for the ditch.

3. *Martin v. Bridgeport Community Association, Inc.* (2009) 173 Cal.App.4th 1024

Richard and Rachel Peterson purchased a home in a planned development community in Santa Clarita. Bridgeport Community Association, Inc. was responsible for managing the common areas and enforcing the CC&Rs. The Petersons agreed to let James and RaeAnn Martin live at the property (the Petersons are RaeAnn Martin's parents). During construction, the Petersons and the Martins noticed that the size of their lot was smaller than it should be, and they negotiated an agreement with Bridgeport whereby a lot line adjustment would be performed. Despite the agreement, Bridgeport did not make the adjustment and the Martins sued.

The appellate court held that the Martins did not have standing to bring the suit. The Martins claimed that the Petersons assigned all rights to any causes of action against Bridgeport to the Martins pursuant to Civil Code section 954. However, the court pointed out that assignability under that code section is limited to money or personal property. Since the Petersons could not transfer their interest in the cause of action and the Martins had no property interest, they lacked standing to bring the suit.

4. AB 313 (Chapter 431, Statutes of 2009) – Common Interest Developments: Assessments

This bill prohibits a homeowners association from levying assessments based upon the taxable value of the owner's separate interest. The bill does contain an exception, however, for any association that levied assessments pursuant to its governing documents prior to December 31, 2009. This bill adds section 1366.4 to the Civil Code.

5. AB 899 (Chapter 484, Statutes of 2009) – Common Interest Developments: Disclosures

The Davis-Stirling Common Interest Development Act requires several disclosures of information to owners. This bill creates an index of 14 different documents that must be provided by the homeowners association to the owner of the separate interest upon request. This bill also specifies that the requester can receive those documents by fax or email, if he or she agrees. Finally, the bill requires a homeowners association to include the assumed interest rate on the reserves and the assumed rate of inflation for repair and replacement of major components in those disclosures. The bill's sponsor states that "the intent of this bill is to provide clarity and transparency to both [common interest development] board members and owners relative to the many disclosures required within the Davis-Stirling Act..." This bill amends Civil Code sections 1350.7 and 1365.2.5 and adds section 1363.005.

6. AB 927 (Chapter 7, Statutes of 2009) – Common Interest Developments: Construction Defects

The Davis-Stirling Common Interest Development Act provides that a homeowners association must follow specific procedures prior to filing a design or construction defect action against a builder, developer, or general contractor. These requirements include giving notice and participating in a dispute resolution process. The existing law includes a sunset date of July 1, 2010. This bill amends Civil Code section 1375 to extend the requirements until July 1, 2017. The bill was supported by the California Building Industry Association, among others.

7. AB 1061 (Chapter 503, Statutes of 2009) – Common Interest Developments: Water-Efficient Landscapes

The Davis-Stirling Common Interest Development Act provides that a homeowners association may make rules regarding landscaping and aesthetics. This bill amends Civil Code section 1353.8 to make void and unenforceable any provision of a common interest development’s governing documents that prevents water efficient landscaping. Specifically, the bill ensures compliance with Government Code section 65595(c) regarding water-efficient landscape ordinances and water efficiency programs adopted pursuant to Water Code sections 353 or 375. The bill’s author notes the importance of this amendment, because nearly one-third of Californians live in a common interest development and there have been instances where governing documents conflicted with attempts to conserve water via water efficient landscaping and local conservation programs.

Notes: _____

TAKINGS

A. Regulatory Framework

- Government's police power is limited by federal and state constitutional provisions prohibiting the taking of property without just compensation. (U.S. Constitution, 5th Amendment; Cal. Constitution, art. I, § 19.)
- Regulatory takings analysis:
 - *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104: The court considers the following three factors: 1) the economic impact of the regulation on the claimant, 2) the extent to which regulation has interfered with distinct investment-backed expectations, and 3) the nature of the governmental action.
 - *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003: A taking occurs when the government deprives the owner of all economically viable use of the property.
- Physical takings analysis: Where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. *Loretto v. Teleprompter Manhattan CATV Corporation* (1982) 458 U.S. 419.
- Exactions: For information on takings in the context of exactions, see the Fees section.

B. Update

1. *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229

An improper, but temporary, delay in granting an electrical permit (ministerial permit) does not give rise to a claim for compensation. Although a temporary taking is eligible for compensation, courts are reluctant to find compensation required when the temporary taking resulted from agency error as long as there was some reasonable, albeit erroneous, basis for the agency's action (or inaction).

For more information, see "Delay in Granting Ministerial Electrical Permit is Not a Regulatory Taking" at <http://blog.aklandlaw.com>.

2. ***Hauselt v. County of Butte* (2009) 172 Cal.App.4th 550**

Public improvements and actions affecting drainage indirectly which lead to physical flooding do not create automatic liability for public agencies. The plaintiff must show that the agency created unreasonable risk to the plaintiff, that the unreasonable action of the agency causes substantial harm, and the plaintiff must take reasonable actions to avoid damages.

For more information, see “The Rule of Reasonableness Applies to Public Agency Liability for Flood Control Projects, Even if the Watercourse has been Converted into a Public Work” at <http://blog.aklandlaw.com>.

3. ***City of Stockton v. Marina Towers, LLC* (2009) 171 Cal.App.4th 93**

California's eminent domain law permits acquisition of property only for a “proposed project” that is intended for public use. In this case, the court held that the City of Stockton was unable to satisfy its burden of proving that it had the right to condemn property on its waterfront because the City’s resolution of necessity did not contain a sufficient project description. The Court explained that it is “a physical and legal impossibility” for legislators to make the determinations required under section 1240.030 of the Code of Civil Procedure if the resolution contains no intelligible description of what the project is. Also, by deliberately failing to define the project and couching the resolution in such vague language that no one could definitively determine what use the legislative body had in mind for the property, the City could both evade all of the environmental protections under CEQA and preclude judicial resolution of several right-to-take defenses authorized by eminent domain law.

For more information, see “Don’t Condemn First, Decide What to Do With the Property later” at <http://blog.aklandlaw.com>.

4. ***Guggenheim v. City of Goleta* (2009) 582 F.3d 996**

In this case, owners of a mobile home park challenged a rent control ordinance imposed only on mobile home parks. The court made two important rulings: a challenge to an ordinance on its face, instead of as applied to plaintiffs, could be brought as a regulatory takings claim and the rent control ordinance constituted a regulatory taking under *Penn Central*. Courts have rarely upheld regulatory takings claims, and for a rent control ordinance to be found a taking would appear to greatly expand the possible situations in which a regulatory taking has occurred. Although the court found a regulatory taking in this case, it is unclear how this will be applied in future cases because the court failed to address two other important questions: what types of evidence are permissible in a facial challenge under *Penn Central*, and how are investment-backed expectations evaluated when the property owners purchased the property after the ordinance was enacted.

For more information, see “Take This! Wealth-Transfer under Rent Control Ordinance Constitutes a Regulatory Taking” at <http://blog.aklandlaw.com>.

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