ABBOTT & KINDERMANN, LLP

10th Annual Land Use, Environmental & Real Estate Law Update

January 20, 2011
Modesto, California

February 8, 2011
Redding, California

February 11, 2011
Sacramento, California

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The following are links to the full text of the cases and bills:
U.S. Supreme Court – http://www.supremecourt.gov/opinions/opinions.aspx
Ninth Circuit Court of Appeals - http://www.ca9.uscourts.gov/opinions/
California Courts - http://www.courtinfo.ca.gov/opinions/
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ENVIRONMENTAL LAW UPDATE

Diane G. Kindermann Henderson, Leslie Z. Walker and Cori M. Badgley

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

1. 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.
- 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 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 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 SWRCB.

  - Is there sufficient water in the stream, or are correlative cutbacks likely; and what about 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 American Water v. City of Seaside* (2010) 183 Cal.App.4th 471

Appellant water management district sought review of an order from the Superior Court of Monterey County, California, ordering the district to (1) set aside its denial of a water distribution permit application submitted by respondents, a city, a water company, and a developer; (2) to rehear the matter; and (3) reconsider the application. A prior declaratory action had resulted in the trial court's adoption of a physical solution to provide coordinated management of groundwater resources in a basin pursuant to California Constitution, article X, section 2. This involved creating a collaborative management group. The water company and the developer sought to pump water from the basin to serve a proposed resort site. The district adopted findings denying the application until further environmental review could be obtained. The city, the water company, and the developer filed a motion in the trial court seeking clarification of whether the prior

decision allowed the district to require further environmental review. The court held that the motion was a proper avenue for relief because no ruling on the merits of the underlying application was sought; thus, a petition for administrative mandate under Code of Civil Procedure section 1094.5 was not required. The California Court of Appeal, Sixth District, agreed with the trial court that the district's findings contravened the prior decision and that the order did not violate the separation of powers doctrine because it was consistent with Water Code section 10753, subdivision (a); moreover, it left ample room for the district's exercise of its authority.

2. Final Policy for Maintaining Instream Flows in Northern California Coastal Streams, State Water Resources Control Board

The Policy contains three major regulatory actions:

1) Implementation of a seasonal limit on diversion;
2) Implementation of minimum bypass flow requirements to maintain access for spawning, adequate habitat for incubation of embryos and winter rearing of juveniles, and suitable flows for outmigration; and
3) Implementation of limits on the maximum cumulative diversion rates within a stream. Other elements in the Policy included proposed rules for onsite dams, requirements for fish passage and screening at all diversion sites, and development of a detailed hypothesis testing-based monitoring program to reduce uncertainties and data gaps in knowledge and allow for potential adjustments in the proposed flow rules in the future within an adaptive management framework.

The Policy implements section 1259.4 of the Water Code, which was enacted in 2004. The Policy only applies if the site is within the geographic area and type of action covered by the Policy. The geographic area spans all coastal streams from the Mattole River to San Francisco. This area includes all of Marin and Sonoma counties and portions of Napa, Mendocino and Humboldt counties. There are three types of actions covered by the policy: applications to appropriate water, small domestic use and livestock stockpond registrations, and water right petitions. If the project is covered, it will need to adhere to the principles, requirements and guidelines outlined in the policy. The following are the five principles that the policy seeks to uphold:

1) Water diversions shall be seasonally limited to periods in which instream flows are naturally high to prevent adverse effects to fish and fish habitat;
2) Water shall be diverted only when stream flows are higher than the minimum instream flows needed for fish spawning and passage;
3) The maximum rate at which water is diverted in a watershed shall not adversely affect the natural flow variability needed for maintaining adequate channel structure and habitat for fish;
4) Construction or permitting of new onstream dams shall be restricted. When allowed, onstream dams shall be constructed in a manner that does not adversely affect fish and their habitat; and

5) The cumulative effects of water diversions on instream flows needed for the protection of fish and their habitat shall be considered and minimized.

For the full text of the policy, go to:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/instream_flows/.

3. Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, State Water Resources Control Board

Water Code section 85086 requires SWRCB to develop, within nine months of enactment of the requirement, new flow criteria to protect public trust resources for the Sacramento-San Joaquin Delta ("Delta") ecosystem. The statute further requires SWRCB to submit its flow criteria determinations to the Delta Stewardship Council within 30 days of their development. In accordance with Water Code section 85086, SWRCB conducted a public process in the form of an informational proceeding, held on March 22-24, 2010, to develop the flow criteria.

On August 25, 2010, the Executive Director of SWRCB submitted the final report to the Delta Stewardship Council. This report provides summary determinations for Delta outflows, Sacramento inflows, San Joaquin River inflows, and hydrodynamics. SWRCB concurs with this cautionary note and recommends the flow criteria and other conclusions advanced in this report be used to inform the planning efforts for the Delta Plan and Bay Delta Conservation Plan ("BDCP") and as a report that can be used to guide needed research.

For more information, see http://waterboards.ca.gov/waterrights/water-issues/programs/bay_delta/deltaflow/final_rpt.shtml.

4. 20x2020 Water Conservation Plan, Governor Schwarzenegger

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 final 20x2020 Plan, as it was coined, was issued in February 2010. The plan 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. The Plan also takes climate change into account and will eliminate an estimated 1.4 million metric tons of GHGs per year. The final plan includes several recommendations and a guide to implementation.

A. Recommendations

Recommended actions to contribute toward a statewide strategy fall into the following categories:

1. Establish a foundation for a statewide conservation strategy.
2. Reduce landscape irrigation demand.

3. Reduce water waste.
4. Reinforce efficiency codes and related BMPs.
5. Provide financial incentives.
6. Implement statewide conservation public information and outreach campaign.
7. Provide new or exercise existing enforcement mechanisms to facilitate water conservation.
8. Investigate potential flexible implementation measures.
9. Increase the use of recycled water and non-traditional sources of water.

B. Implementation

The 20x2020 Plan will be implemented in three phases:

1. Plan implementation, monitoring, evaluation, adjustments (2011-2020)
   a. Establish interim and long-term data collection and management;
   b. Implement conservation actions;
   c. Monitor implementation progress;
   d. Assess and design additional measures such as a conservation offset and a conservation credits trading program as needed; and
   e. Conduct an Interim Target Assessment and Performance Evaluation in 2015.
2. Conclusion: target assessment and evaluation (2020).

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

Notes:

2. WATER QUALITY

A. Regulatory Framework

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

- The purpose of 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. (Section 404 is discussed in the Wetlands section of these materials.)

- The term "waters of the United States" includes navigable waters, interstate waters and wetlands, impoundments, tributaries, adjacent wetlands, waters from which fish and shellfish are or could be taken, 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.)

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

- Section 402 of CWA authorizes states to develop a 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 certain acreage. (33 U.S.C. § 1342(p).)

- 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, SWRCB and its RWQCBs are responsible for administering the NPDES permit process. Permits are typically issued for a five-year term.

- 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.) (See Construction General Permit Order 2009-0009-DWQ.)

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, 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 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")

- CWA section 303(d) requires states to identify waters that do not meet, or are not expected to meet by the next listing cycle, applicable water quality standards after the application of certain technology-based controls, and schedule such waters for development of Total Maximum Daily Loads ("TMDLs"). (40 C.F.R § 130.7(c) and (d).)

- The states are required to assemble and evaluate all existing and readily available water quality-related data and information to develop the list (40 C.F.R § 130.7(b)(5)) and to provide documentation for listing or not listing a state's waters (40 C.F.R § 130.7(b)(6).).

- Waters shall be placed in this category of the section 303(d) list if it is determined, in accordance with the California Listing Factors that the water quality standard is not attained; the standards nonattainment is due to toxicity, a pollutant, or pollutants; and remediation of the standards attainment problem requires one or more TMDLs.

- At a minimum, California's section 303(d) list shall identify waters where standards are not met, pollutants or toxicity contributing to standards exceedance, and the TMDLs completion schedule.

- The water segment listed shall remain in this category of the section 303(d) list until TMDLs for all pollutants have been completed, EPA has approved the TMDLs, and implementation plans have been adopted.

- RWQCBs and SWRCB use several factors to develop the California section 303(d). Among the factors is toxicity.

- Under section 303(c)(2)(B) of CWA, California must adopt numeric criteria for the priority toxic pollutants listed under section 307(a) if those pollutants could be reasonably expected to interfere with the designated uses of state's waters. Priority toxic pollutants are identified in 40 Code of Federal Regulations section 131.36.

- In 1994, a California state court found that the numeric criteria adopted by SWRCB were invalid. As a result, no numeric criteria for priority toxic pollutants existed for California.

- To fill the gap, the EPA promulgated the California Toxics Rule ("CTR") on May 18, 2000. The CTR regulations, codified in 40 Code of Federal Regulations section 131.38, establish numeric criteria for water quality standards for priority toxic pollutants for the State of California. To be able to implement the CTR, SWRCB adopted the State Implementation Plan in 2000.

- The CTR sets the following regulations in California:

    1) Ambient aquatic life criteria for 23 priority toxics;
    2) Ambient human health criteria for 57 priority toxics; and
    3) A compliance schedule provision which authorizes the state to issue schedules of compliance for new or revised NPDES permit limits based on the federal criteria when certain conditions are met.

- Numeric water quality objectives for toxic pollutants, including CTR/National Toxics Rule ("NTR") water quality criteria, are exceeded when the thresholds for toxicity of a pollutant, or pollutants is not met. When this happens waters shall be placed on the section 303(d) list. Remediation of the standards requires one or more TMDLs.

- The State must use the criteria together with the state's existing water quality standards when controlling pollution in inland waters and enclosed bays and estuaries. The numeric water quality criteria contained in CTR are identical to EPA's recommended CWA section 304(a) criteria for these pollutants published in December 1998. (See 63 C.F.R § 68353). For more information, see http://water.epa.gov/lawsregs/rulesregs/ctr/index.cfm.

- In March 2000, SWRCB adopted the state implementation plans ("SIP") for priority toxic pollutant water quality criteria contained in the CTR. The CTR was promulgated by EPA in May 2000. The SIP also implements NTR criteria and applicable priority pollutant objectives in RWQCB's Basin Plans. Together, the CTR and NTR and applicable Basin Plan objectives, existing RWQCB beneficial use designations, and the SIP comprise water quality standards and implementation procedures for priority toxic pollutants in non-ocean surface waters in California.

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

- The Porter-Cologne Act was used as the basis of CWA. The Porter-Cologne Act entrusts SWRCB and the nine RWQCBs with protecting California's waters. (Wat. Code, § 13001.)

- 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 wastewater 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, and discharge of process wastewater not discharging to a sewer (factories, cooling water, etc.).

B. Update

1. *Northwest Environmental Defense Center v. Marvin Brown* (2010) 617 F.3d 1176

An environmental group sued various timber companies along with the Oregon State Forester and the individual members of the Oregon Board of Forestry for violations of CWA on the grounds they did not obtain permits from the EPA for stormwater runoff that flows from logging roads into systems of ditches, culverts, and channels, which is eventually discharged into forest streams and rivers. The Ninth Circuit Court of Appeals concluded that such runoff from logging roads is a point source discharge and thus, an NPDES permit is required. The court all but directed the EPA to prepare a general NPDES permit for stormwater runoff from logging roads which is discharged to navigable waters via ditches, culvert, and channels, and further indicated its confidence that the EPA would be able to do so in an expeditious manner. In California, SWRCB will be tasked with preparing and adopting such a general permit.

2. *Sackett v. EPA* (2010) 622 F.3d 1139

Plaintiff filled a portion of their property in Idaho, in order to build a house. The EPA determined the property contained waters of the United States and thus, the fill violated CWA. EPA issued an administrative compliance order requiring the Sacketts0. to remove the fill and restore the land to its original conditions. The Sacketts petitioned the EPA for a hearing to challenge the EPA's jurisdictional determination. The EPA refused and the Sacketts filed a petition in the district court, which granted the EPA's motion to dismiss. The Sacketts appealed, and the Ninth circuit found that CWA's structure, objectives, and legislative history indicated that the pre-enforcement review was not available for EPA administrative compliance orders and such an interpretation did not violate the Sackett's due process rights.

3. *Delta Smelt Consolidated Cases v. Salazar* (December 14, 2010, Case No. 1:09-cv-407-OWW-DLB,1:09-cv-422-OWW-DLB,1:09-cv-631-OWW-DLB,1:09-cv-892-OWW-GSAPARTIALLY CONSOLIDATED WITH:1:09-cv-480-OWW-GSA,1:09-cv-1201-OWW-DLB) __ F.Supp.2d ___

See the Endangered Species section for a summary.

4. *San Joaquin River Exchange Contractors Water Authority v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110

A group of public agencies, water contractors, and farmers challenged the Central Valley RWQCB's adoption of two basin plan amendments: one for salt and boron in the lower San Joaquin River and one for Dissolved Oxygen in the Stockton Deep Water Ship Channel. Petitioners brought the challenges under CWA and CEQA. With respect to the San Joaquin River basin plan, the court dismissed the majority of claims under CWA, but found that the plan improperly defined the load concentration because it used a 30-day running average rather than a total maximum *daily* load. The court dismissed all of CEQA claims with respect to the San Joaquin River basin plan and found RWQCB's final staff report was an adequate EIR-equivalent. With respect to the Stockton Deep Water Ship Channel, petitioners' argument was based on the concern that the plan would have a disproportionate impact on irrigated agriculture as compared to USACE or the USBR. The court found the plan directs USACE and USBR to evaluate and mitigate their impacts, which is sufficient.

For more information, see "Basin Plan Amendments Addressing Impairments for Salt, Boron and Dissolved Oxygen Are Valid" at http://blog.aklandlaw.com.

5. EPA Clean Water Act Enforcement

The Clean Water Action Enforcement Plan outlines how the EPA will strengthen the way it addresses pollution caused by numerous, dispersed sources, such as concentrated animal feeding operations, sewer overflows, contaminated water that flows from industrial facilities, construction sites, and runoff from urban streets. The plan aims to: 1) develop more comprehensive approaches to ensure enforcement is targeted to the most serious violations and the most significant sources of pollution; 2) Work with states to ensure greater consistency throughout the country with respect to compliance and water quality; and 3) Use 21st century information technology to collect, analyze and use information in new, more efficient ways and to make that information readily accessible to the public.

For more information, see: http://www.epa.gov/compliance/civil/cwa/cwaenfplan.html.

6. EPA Orders Caltrans to Comply With CWA

On November 16, 2010, the EPA ordered the California Department of Transportation to upgrade its statewide stormwater management program, and exert stronger controls over stormwater discharges from its road construction and maintenance sites.

For more information, see http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/9635d2e39894b2a1852577dd0062cfde!OpenDocument.

7. Amendments to NPDES Construction General Permit

On September 2, 2009, SWRCB adopted a new NPDES General Permit for stormwater discharges associated with construction and land disturbance activities (the "Permit"), adopted in September 2009, to take effect in July 2010. The amendment chances the definitions of Legally Responsible Person ("LRP") and Approved Signatory ("AS"). The LRP is the project proponent and the amendment requires a project to select a single LRP. The AS is the individual with the authority to sign and file the Construction General Permit and the amendment lays out the qualifications for an AS.

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

8. Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, State Water Resources Control Board

See California Water Rights and Supply section for summary.

9. Regional Water Quality Control Board, Central Valley Region issues NPDES Permit to Sacramento Regional County Sanitation District

The Sacramento Regional County Sanitation District ("SRCSD") is required to obtain a new NPDES Permit every five years under CWA. Under the existing permit, the SRCSD discharged secondary treated disinfected wastewater into the Sacramento River. The new permit will require full tertiary treatment including nitrogen removal and tertiary filtration. A concurrently issued Time Schedule Order allows the SRCSD ten years to meet the new permit requirements.

For more information, see http://www.waterboards.ca.gov/centralvalley/board_decisions/tentative_orders/1012/sac_regional/srcsd_npdes.pdf.

10. Senate Bill 1284 (Chapter 645) – Mandatory Minimum Penalties

Under the Porter-Cologne Water Quality Control Act imposes a mandatory minimum penalty ("MMP") of $3,000 for each serious waste discharge violation or for certain other described violations if those violations occur four or more times in any period of six consecutive months, as prescribed. A serious waste discharge violation includes a failure to file a specified discharge monitoring report for each complete period of 30 days following the deadline for submitting the report. SB 1284 makes several revisions to this statute. First, it law exempts dischargers from MMPs for failing to file a discharge monitoring report if the dischargers file a written statement that certifies that no discharges to surface water occurred and that specifies the reasons they failed to file a report. The law also limits MMPs to a single $3,000 penalty for each failure to timely file a discharge monitoring report in situations where: 1) the discharger had not previously received a complaint to impose penalties for failing to file a report from SWRCB or a RWQCB; 2) the discharges to surface waters did not violate effluent limits; and (3) certain other conditions are met. The law applies to violations for which an administrative civil liability complaint or a judicial complaint has not been filed before July 1, 2010, regardless of when the actual violations occurred, and sunsets on January 1, 2014.

11. AB 1674 (Chapter 535) - Hazardous Substances: Storage Tanks

Existing law regulates the storage of hazardous substances in underground storage tanks. This bill amends sections 25270.2, 25270.6, 25281.6, 25283.5 of the Health and Safety Code. The bill exempts some Underground Storage Tanks ("USTs") from the requirements of Chapter 6.7 of the Health and Safety Code requiring all exterior surfaces of the UST to be visually monitored and other regulatory requirements. In addition, the bill would eliminate a provision of current law that allows SWRCB to object to a local agency decision as to whether a tank meets UST regulatory requirements.

12. SB 918 (Chapter 700) - Water Recycling

Existing law requires the California Department of Public Health ("DPH") to establish uniform statewide recycling criteria for each type of use for recycled water. Existing law also imposes civil liabilities for violations of water quality requirements. This bill amends Water Code sections 13350 and 13521 and adds Chapter 7.3, commencing with Section 13560. This bill requires DPH: 1) to develop and adopt as regulations, uniform water recycling criteria for indirect potable water reuse for groundwater recharge by December 31, 2013, and for surface water augmentation by December 31, 2016; 2) to investigate and report to the Legislature on the feasibility of developing water recycling criteria for direct potable reuse; and 3) in consultation with SWRCB, to report annually to the Legislature on progress toward adopting water recycling criteria. This bill allows penalty monies collected for various water quality violations to be made available to SWRCB for purposes of assisting DPH in implementing the bill.

13. SB 1169 (Chapter 288) – Exhaustion of Remedies

Existing law authorizes a party aggrieved by a decision or order issued by SWRCB to file a petition for writ of mandate within 30 days of service of the decision. This bill amends various provisions of the Water Code, and provides that an aggrieved party must file a petition for reconsideration with the state board to exhaust the party's administrative remedies only if the initial decision or order is issued under authority delegated to an officer or employee of the state board and the state board by regulation has authorized a petition for reconsideration.

14. SB 1247 (Chapter 488) - Renewable Energy Resources: Hydroelectric Generation Facilities

Existing law requires the Public Utilities Commission to implement annual targets for the procurement of eligible renewable energy resources for all retail sellers to achieve the targets of the program. This bill amends Public Utilities Code section 399.12.5 to allow a hydroelectric generation facility that is an "eligible renewable energy resource" under the Renewables Portfolio Standard Program, as of January 1, 2010, to maintain its eligibility if the facility is required to make changes in the volume or timing of streamflow, pursuant to Federal Energy Regulatory Commission license conditions approved on or after January 1, 2010.

Notes:

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3. WETLANDS

A. Regulatory Framework

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.

- NEPA process may generate consideration of other federal laws including ESA (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).

B. Update

1. *Butte Environmental Council v. U.S. Army Corps of Engineers* (9th Cir. 2010) 607 F.3d 570

The Ninth Circuit Court of Appeals held that the decision of USACE to issue the City of Redding a permit under section 404 of CWA to discharge dredged or fill material into wetlands was not arbitrary and capricious. USACE did not act unreasonably when it considered the project's "genuine and legitimate" stated purpose of creating a medium to large business park necessary to meet the manufacturing and distribution needs of interested business-park users and to create the desired "synergy" among the park's occupants. Also, USFWS's biological opinion for the project was neither arbitrary nor capricious. (See the Endangered Species Act section for further detail on ESA portion of the case.)

2. *Home Builders Association of Northern California v. U.S. Fish & Wildlife Service* (9th Cir. 2010) 616 F.3d 983

The Ninth Circuit Court of Appeals upheld the designation by USFWS of about 850,000 acres of land as critical habitat for 15 endangered or threatened vernal pool species pursuant to ESA. The industry groups challenged the classification of areas in which the physical and biological features essential to the conservation of the species did not occur simultaneously. But the Court recognized that, in vernal pool complexes, the elements necessary to species' survival were present in distinct areas, and there was no reason that two elements for the conservation of the species had to be present in the same area. The Court also explained that USFWS could determine what primary constituent elements were necessary for conservation without determining exactly when conservation would be complete. Also, USFWS acted consistent with the statutory directive to consider the economic impact to specifying a particular area as critical habitat, which was designed to protect the environment before the government took action.

3. *Northern California River Watch v. Evans* (9th Cir. 2010) 620 F.3d 1075

An environmental organization and an individual sued developers and three state fish and game employees, alleging that the developers violated ESA by digging up and removing an endangered plant species. The Ninth Circuit Court of Appeals affirmed the District Court's granting of summary judgment to the defendants on the single issue of whether the land upon which the endangered plant species was discovered and removed was, as a matter of law, an "area under Federal jurisdiction" for purposes of ESA. The court was not persuaded that USFWS had ever interpreted that term. Plaintiffs' argued that when private land was deemed an adjacent wetland under CWA, the land became an area under federal jurisdiction which was then subject to regulation by USFWS under ESA. The Court disagreed and held that the term "areas under Federal jurisdiction" did not include all of the waters of the United States as defined by CWA, and did not include the privately-owned land at issue in this case.

4. Suisun Marsh Habitat Management, Preservation, and Restoration Plan Draft EIS/EIR

The Bureau of Reclamation and USFWS, as the Federal joint lead agencies under NEPA, and DFG, acting as CEQA state lead agency, made available for public review and comment the Suisun Marsh Habitat Management, Preservation, and Restoration Plan ("SMP") Draft EIS/EIR on October 29, 2010. The SMP is a comprehensive 30-year plan designed to address various conflicts regarding use of resources within approximately 51,000 acres of the Suisun Marsh, with the focus on achieving an acceptable multi-stakeholder approach to the restoration of tidal wetlands and the enhancement of managed wetlands and their functions. The comment period on the Draft EIS/EIR closed on December 28, 2010. The Final EIS/EIR is expected in 2011.

For more information, see http://frwebgate1.access.gpo.gov/cgi-bin/TEXTgate.cgi?WAISdocID=ITSUZ0/0/1/0&WAISaction=retrieve.

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4. AIR QUALITY & CLIMATE CHANGE

A. Regulatory Framework

NEPA

- Must analyze impact of greenhouse gas ("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.

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

- 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 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.)

- 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 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.

- GHGs meet 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. Environmental Protection Agency* (2007) 127 S.Ct. 1438.

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 area's individual needs while meeting minimum federal requirements.

Mobile Sources

- Title II of the CAA 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.

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, 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.)

- California Air Resources Board ("CARB") is responsible for promulgating regulations and is also responsible for monitoring the regulatory activity of California's 35 local air districts. (Health & Saf. Code, § 39602.)

- 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(b).)

- Constraints are placed upon real estate development by requiring projects to include:

    - Transportation control measures;

    - Commute alternatives; and

- Transit-oriented development designs.

- 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.

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.

CEQA

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

- Indirect Impacts to Air Quality - 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.

- ***State of California v. County of San Bernardino***
  (Superior Court of 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 the Update Section below.

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. *American Electric Power v. Connecticut* (2d Cir. 2009) 582 F.3d 309

The Supreme Court accepted review of the Second Circuit's decision in *American Electric Power v. Connecticut* (2009) 582 F.3d 309. The lawsuit was originally brought in the Southern District of New York by the states of Connecticut, New York, California, Iowa, New Jersey, Rhode Island, Vermont, Wisconsin, the City of New York, the Open Space Institute, the Open Space Conservancy, and the Audubon Society of New Hampshire seeking an injunction to curb carbon dioxide emissions of six major power producers. The plaintiffs argued the defendants' emission of 650 million tons of carbon dioxide per year contributed to global warming and thus constituted a nuisance. The trial court dismissed the suit on the grounds that it raised a non-justiciable political question. The Second Circuit Court of Appeals found that the case did not raise a political question and that plaintiffs had stated a claim under common law nuisance. The power producers filed a petition for certiorari, claiming that climate change is a political question to be answered by Congress. On December 6, 2010, the Supreme Court granted certiorari.

2. *South Coast Air Quality Management District v. Federal Energy Regulatory Commission* (9th Cir. 2010) 621 F.3d 1085

South Coast Air Quality Management District challenged Federal Energy Regulatory Commission's ("FERC") approval of a certificate of public convenience and necessity for the expansion of the North Baja Pipeline. The District argued FERC violated its duties under among other laws, NEPA, and CAA, by only examining the environmental impacts relating to the construction and operation of the new pipeline, rather than considering the emissions resulting from the eventual use of the pipeline's gas by users in the region. FERC acknowledged the potential for environmental impacts stemming from the project, and imposed a condition requiring the pipeline only deliver gas of a certain quality. The court found this analysis showed FERC explicitly considered the environmental impact of downstream emissions and imposed what it believed were reasonable mitigation measures.

Under the Clean Air Act, if a federal agency's action will result in direct or indirect emissions exceeding a certain EPA mandated threshold, the agency must prepare a conformity analysis and mitigate the project's emissions. (40 C.F.R. §§ 93.150(b) 93,153 (a)-(b).) Here, the court found that the emissions caused by FERC's authorization were not reasonably foreseeable since they depended on the actual quantity and quality of gas to be transported. Therefore, the emissions were not reasonably foreseeable and FERC was not obligated to perform a full conformity determination.

3. ***Rocky Mountain Farmers Union, et al v. California Air Resources Board*** **(E.D. Cal. 2010) 719 F.Supp.2d 1170**

Plaintiffs challenged the low carbon fuel standard ("LCFS") regulations promulgated by CARB to implement AB 32, California's Global Warming Solutions Act of 2006, California Health & Safety Code, section 38500 et seq. Plaintiffs alleged the LCFS conflicts with and is preempted by federal law. California filed a motion to dismiss, arguing that CAA, 42 U.S.C. § 7545(c)(4)(B) and the CAA savings clause authorizes California to regulate fuels, and Section 211(c)(4)(B) authorizes California to violate the dormant commerce clause. The United States District Court for the Eastern District of California found that Section 211(c)(4)(B) provides no express authority for California's LCFS, the Plaintiffs made a sufficient showing on the issue of preemption to overcome the motion to dismiss, and that Section 211(c)(4)(B) does not authorize the violation of the commerce clause.

4. ***National Association of Home Builders v. San Joaquin Valley Unified Air Pollution Control District et al.*** **(December 7, 2010, E.D.Cal. No. 1:07-cv-00820-LJO DLB) __F.Supp.2d__**

The National Association of Home Builders ("NAHB") brought suit against the San Joaquin Valley Unified Air Pollution District, claiming Rule 9510, adopted to require development sites to reduce the amount of pollutants they emit, was preempted by CAA. Rule 9510 requires developers of projects of a certain size to conduct an Air Impact Assessment, determining how much NOx and PM10 will be produced during the construction and operational phases of the project. NAHB challenges the rule's regulation of the construction phase. The rule requires the developer to reduce the projected emissions of NOx and PM10 by 20 and 40 percent, consecutively, or pay a fee.

In general, CAA gives the states the responsibility for regulating stationary sources of pollution, but the EPA, and with the EPA's permission, California, is responsible for regulating emissions from motor vehicles and other mobile sources.

Section 110(a)(5) of CAA authorizes the states to adopt indirect source review programs, which are facility by facility reviews of indirect sources of air pollution, including such measures as are necessary to assure, or assist in assuring, that new or modified indirect source will not attract mobile sources of air pollution that would contribute to the exceedance of national air quality standards or would prevent the maintenance of those standards. (42 U.S.C. § 7410(a)(5).) The District claims Rule 9150 is an indirect source review program because it regulates the emissions from construction sites, an indirect source. NAHB argued however that the rule is ultimately directed at emissions that come from construction equipment, a direct source. The court found that the rule does not target direct sources; rather, it targets certain kinds of development. As a result, it is an indirect source.

5. Light-Duty Vehicle GHG Emission Standards and Corporate Average Fuel Economy Standards (75 Fed.Reg. 88 (May 7, 2010))

On May 7, 2010, the EPA and National Highway Transportation Safety Administration ("NTHSA") issued a final rule establishing a national program consisting of new standards for light-duty vehicles that will reduce GHG emissions and improve fuel economy. The EPA issued its rule under CAA and the NHTSA established Corporate Average Fuel Economy standards. The standards apply to passenger cars, light duty trucks, and medium duty passenger vehicles covering model years 2012-2016 and will allow auto makers to meet the requirements of NHTSA and EPA with a single national fleet. Under these standards, the affected vehicles will be required to achieve an average emissions level of 250 grams per mile of carbon dioxide in model year 2016 and 34.1 mpg. The standards begin with the 2012 model year, and increase in stringency through model year 2016. The agencies are now in the process of developing a rulemaking to set standards for model years 2017 to 2025.

For more information, see http://www.gpoaccess.gov/fr/.

6. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (75 Fed.Reg. 106 (June 3, 2010))

Under CAA's prevention of serious deterioration ("PSD") new and modified facilities that emit more than 100 or 250 tons per year of pollutants must obtain PSD permits ("100/250 Rule"). These facilities are also required to use the best available control technology ("BACT") for each pollutant subject to regulation under CAA. The 100/250 rule however is over-inclusive for GHGs. Therefore, in May 2010, the EPA tailored this 100/250 Rule to be appropriate for GHGs. Between January 2, 2011 and June 30, 2011, PSD construction permits are only required to address GHG emissions in their PSD permits if non-GHG emissions trigger the PSD. These sources must incorporate the BACT. Similarly, operating permits only must incorporate GHG-related requirements if their non-GHG emissions trigger the permitting requirements. After July 1, 2011, new construction projects emitting 100,000 tons per year of GHGs will trigger PSD and modifications to existing sources would trigger PSD if they would increase GHG emission by more than 75,000 tons per year. Facilities emitting at least 100,000 tons of GHG per year will be required to obtain an operating permit.

The EPA has issued guidance on PSD and Title V Permitting for GHGs addressing whether PSD applies, and how the BACT should be determined.

For more information, see http://www.gpoaccess.gov/fr/ and http://www.epa.gov/nsr/ghgdocs/epa-hq-oar-2010-0841-0001.pdf.

7. Mandatory Reporting of Greenhouse Gases from Magnesium Production, Underground Coal Mines, Industrial Wastewater Treatment, and Industrial Waste Landfills (75 Fed.Reg. 208 (July 12, 2010))

Facilities containing magnesium production, industrial waste landfills, and/or industrial wastewater treatment are subject to monitoring requirements if they emit 25,000 metric tons of carbon dioxide equivalent or more per year in combined emissions. Underground coal mines that are subject to quarterly sampling of ventilation systems must report their GHGs regardless of actual emissions. Monitoring must begin January 2011, with reporting beginning March 31, 2012.

For more information, see http://www.gpoaccess.gov/fr/.

8. National Emission Standards for Hazardous Air Pollutants from the Portland Cement Manufacturing Industry and Standards for Performance (75 Fed.Reg. 174 (September 9, 2010))

CAA requires the EPA to identify categories of sources emitting one or more hazardous air pollutant and promulgate National Emission Standards for Hazardous Air Pollutants ("NESHAP"). This final rule adds or revises the NESHAP for mercury, total hydrocarbons, and particulate matter from new and existing kilns located at major area sources, and for hydrochloric acid from new and existing kilns located at major sources. The standards for new kilns apply to facilities that commenced construction, modification, or reconstruction after May 6, 2009. New Source Performance Standards implement CAA and are issued for categories of sources which cause, or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The rule also adds or revises the New Source Performance Standards for Portland Cement Plants emission limits for PM, opacity, nitrogen oxides, and sulfur dioxide for facilities that commence construction, modification, or reconstruction after June 16, 2008.

For more information, see http://www.gpoaccess.gov/fr/.

9. Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (75 Fed.Reg. 202 (October 20, 2010))

Effective December 20, 2010, the EPA has amended the requirements for PM2.5 under the PSD program by adding maximum allowable increases in ambient pollutant concentrations and two screening tools, known as the Significant Impact Levels ("SILs") and a Significant Monitoring Concentration for PM2.5. The SILs for PM2.5 are also being added to two other New Source Review rules that regulate the construction and modification of any major stationary source locating in an attainment or unclassifiable area, where the source's emissions may cause or contribute to a violation of the national ambient air quality standards ("NAAQS").

For more information, see http://www.gpoaccess.gov/fr/.

10. National Fuel Efficiency Standards for Combination Tractors, Heavy Duty Pickup Trucks and Vans, and Vocational Vehicles (75 Fed.Reg. 229 (November 30, 2010))

The EPA and NHTSA jointly proposed rules to establish a comprehensive Heavy-Duty National Program to reduce GHG emissions. NHTSA's proposed fuel consumption standards and EPA's proposed carbon dioxide emissions standards would be tailored to each of three regulatory categories of heavy-duty vehicles: Combination Tractors; Heavy-Duty Pickup Trucks and Vans; and Vocational Vehicles, as well as gasoline and diesel heavy-duty engines. EPA's proposed hydro fluorocarbon emissions standards would apply to air conditioning systems in tractors, pickup trucks, and vans, and EPA's proposed nitrous oxide and methane emissions standards would apply to all heavy-duty engines, pickup trucks, and vans. EPA's proposed GHG standards would begin with model year 2014 and NHTSA's proposed fuel consumption standards would be voluntary in model years 2014 and 2015, becoming mandatory with model year 2016 for most regulatory categories.

For more information, see http://www.gpoaccess.gov/fr/.

11. Mandatory Reporting of Greenhouse Gases: Petroleum and Natural Gas Systems (75 Fed.Reg. 229 (November 30, 2010))

This rule adds petroleum and natural gas to the list of source categories required to report GHG if they emit more than 25,000 metric tons carbon dioxide equivalent per year.

For more information, see http://www.gpoaccess.gov/fr/.

12. Mandatory Reporting of Greenhouse Gases: Additional Sources of Fluorinated GHGs (75 Fed.Reg 230 (December 1, 2010))

This rule requires monitoring and reporting of GHG emissions from additional sources of fluorinated GHG, including electronics manufacturing, fluorinated gas production, electrical equipment use, electrical equipment manufacture or refurbishment, as well as importers and exporters of pre-charged equipment and closed-cell foams. Suppliers may use Best Available Monitoring Methods through June 30, 2011, without submitting a petition to the EPA first. Data collection begins in 2011 with the first report submitted to the EPA by March 31, 2012.

For more information, see http://www.gpoaccess.gov/fr/.

13. Mandatory Reporting of Greenhouse Gases: Injection and Geologic Sequestration of Carbon Dioxide (75 Fed.Reg. 230 (December 1, 2010))

Geologic sequestration of carbon consists of any well or group of wells that inject a carbon dioxide stream for long-term containment into a subsurface geologic formation. Research and development projects however are exempt. This rule requires all non-exempt wells must report the amount of carbon dioxide received, develop and implement an EPA approved monitoring, reporting, and verification plan, and report the amount of carbon dioxide sequestered. Injection consists of any other well or group of wells that inject a carbon dioxide stream into the subsurface. All injection facilities must report the annual mass of carbon dioxide received.

For more information, see http://www.gpoaccess.gov/fr/.

14. EPA Finds California and 12 Other States Have Inadequate State Implementation Plans (75 Fed.Reg. 238 (December 13, 2010))

On December 13, 2010, the EPA issued a finding that the 13 EPA-approved state implementation plans that do not apply PSD program to GHG-emitting sources are inadequate to meet CAA requirements. These states must correct their state implementation plans ("SIP") by the state-specific deadline articulated in the regulation. The regulation will affect industry groups which have a direct obligation under CAA to obtain a PSD permit for GHGs from projects that meet the applicability threshold set forth in the Tailoring rule. (See item 6.) California is 1of the 13 states because the Sacramento Metropolitan Air Quality Management District does not include GHG in the pollutants identified in the PSD. The SIP must be updated by January 31, 2011.

For more information, see http://www.gpoaccess.gov/fr/.

15. Mandatory Reporting of Greenhouse Gases (75 Fed.Reg. 242 (December 17, 2010))

This rule makes amendments to 40 C.F.R. § 98, clarifying the provisions relative to the Best Available Monitoring Methods, Calibration Requirements, Reporting of biogenic emissions and the reporting requirements for general stationary fuel combustion, electricity generation, aluminum production, ammonia manufacturing, hydrogen production, nitric acid production, petrochemical production, petroleum refineries, pulp and paper manufacturing suppliers of natural gas and natural gas liquids, suppliers of industrial GHG and suppliers of carbon dioxide. The rule amends the provision applicable to natural gas suppliers, establishing an applicability threshold so that only local distribution companies that deliver 460,000 standard cubic feet or more of natural gas per year are subject to the reporting rule.

For more information, see http://www.gpoaccess.gov/fr/.

16. Methods for Measurement of Filterable PM10 and PM2.5 (75 Fed.Reg. 244 (December 21, 2010))

CAA requires state and local air pollution control agencies to develop, and submit for EPA approval, SIPs that provide for the attainment, maintenance, and enforcement of NAAQS in each air quality control regin in each state. The emission inventories must consider PM 10 and PM2.5. Primary emissions are the solid particles or liquid droplets emitted directly from an air emission source or activity. PM10 and PM 2.5 contain both filterable and condensable fractions of PM. This rule finalizes amendments to methods adopted to measure filterable and condensable fractions.

For more information http://www.gpoaccess.gov/fr/.

17. Proposed Amendments to NEPA Guidance, Council on Environmental Quality

On February 18, 2010, the Whitehouse Council on Environmental Quality ("CEQ") released draft guidance on how to factor climate change into NEPA reviews. CEQ proposes that the NEPA process should incorporate consideration of both the impact of an agency action on the environment through the mechanism of GHG emissions and the impact of changing climate on that agency action. This is not intended as a "new" component of NEPA analysis, but rather as a potentially important factor to be considered within the existing NEPA framework. When an agency determines that an assessment of climate issues is appropriate, the agency should identify and mitigate GHG emissions that cause climate change.

For more information, see www.whitehouse.gov/admininstration/eop/ceq/initiatives/nepa.

18. Electric Utility Stem Generating Units Settlement

EPA settles with California and other respondents agreeing to set standards of performance for GHGs for Electric Utility Stem Generating Units ("EGUs") and refineries**.**

For more information, see http://www.epa.gov/airquality/ghgsettlement.html.

19. AB 1846 (Chapter 195) - Environment: Expedited Environmental Review: Climate Change Regulations

This law amends the Public Resources Code to authorize the use of a focused EIR for a project consisting solely of the installation of pollution control equipment or other components that are necessary to complete the installation of equipment that reduces GHGs.

20. CARB Sets SB 375 Targets

On September 23, 2010, CARB set Targets for emission reductions over a 2005 baseline for three categories of MPOs: the four largest MPOs, the eight San Joaquin MPOs, and the remaining six MPOs.
The four largest MPOs (Metropolitan Transit Commission; Sacramento Area Council of Governments; San Diego Association of Governments; and the Southern California Association of Governments) account for 82 percent of the state's population. These MPOs, for the most part, adopted CARB's targets for 2020 and 2035. The only exception was SCAG's approval of a 5-6 percent per capita reduction in 2035, rather than CARB's proposed 13 percent reduction. CARB adopted the following per capita reduction Targets:

- Metropolitan Transit Commission: 7% reduction by 2020, 15% reduction by 2035
- Sacramento Area Council of Governments: 7% reduction by 2020, 16% reduction by 2035;
- San Diego Association of Governments: 7% reduction by 2020, 13% reduction by 2035; and
- Southern California Association of Governments: 8% reduction by 2020, 13% reduction by 2035.

San Joaquin MPOs (Council of Fresno County Governments; Madera County Transportation Commission; Merced County Association of Governments; Kern Council of Governments; Kings County Association of Governments; San Joaquin Council of Governments; Stanislaus County Council of Governments, and Tulare County Association of Governments) represent 10 percent of state's population, and are expected to grow to 14 percent of the State's population by 2035. CARB set a placeholder target for San Joaquin MPOs of five percent reduction by 2020 and ten percent by 2035.

For more information, see "CARB Adopts DB 375 Targets for GHG Reduction Despite Economic Concerns" at http://blog.aklandlaw.com and http://www.arb.ca.gov/cc/sb375/sb375.htm.

21. Bay Area Air Quality Management District Thresholds of Significance

On June 2, 2010, the Bay Area Air Quality Management District adopted the first ever numeric thresholds for GHG. The Bay Area Guidelines impose plan-level and project-level guidelines for operations only (as opposed to the construction and operation thresholds proposed for Criteria Air Pollutants). The project-level thresholds of significance for GHG are:

- For land use development projects, compliance with a qualified GHG Reduction Strategy, or annual emissions less than 1,100 metric tons per year of carbon dioxide equivalent or 4.6 metric tons per year carbon dioxide equivalent per service population, which includes residents and employees. Land use development projects include residential, commercial, industrial and public land uses and facilities.

- At the project level, the threshold is in compliance with a qualified GHG Reduction Strategy or 6.6 metric tons per service population per year of carbon dioxide equivalent.

For more information, see http://www.baaqmd.gov.

22. Proposed Regulation to Implement the California Cap and Trade Program

On October 28, 2010, CARB released its Initial Statement of Reasons for the Proposed Regulation to Implement the California Cap and Trade Program. CARB approved the program on December 17, 2010. The regulation sets a statewide limit on the emissions from sources responsible for 80 percent of California's GHGs including refineries and power plants, industrial facilities and transportation fuels. The program will impose an enforceable emissions cap beginning in 2012 that will steadily decline over time. The state will distribute allowances, which are tradable permits, equal to the cap. Sources under the cap will need to turn in allowances equal to their emissions at the end of each compliance period.

Starting in 2012, the program will cover electricity generation and large industrial sources and processes with annual GHG emissions at or above 25,000MT carbon dioxide equivalent. The program will expand in 2015 to include fuel distributors to address emissions from combustion of transportation fuels and combustion of natural gas and propane at sources not covered in the first phase of the program.

For more information, see http://www.arb.ca.gov/regact/2010/capandtrade10/capisor.pdf\.

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5. ENDANGERED SPECIES

A. Regulatory Framework

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

- The purpose of 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 ESA requires all federal agencies to ensure, in consultation with 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 a jeopardy or 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 ESA prohibits the "take" of a species listed as endangered. (16 U.S.C. § 1538.)

- Species listed as threatened receive protections under 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 the Secretary of Interior via USFWS and Secretary of Commerce via 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 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. *Arizona Cattle Growers' Association v. Salazar* (9th Cir. 2010) 606 F.3d 1160

In this case, petitioner asserted that USFWS had unlawfully designated areas that were not occupied by the Mexican Spotted Owl as "occupied" habitat. The Ninth Circuit considered: 1) the definition of "occupied" habitat, and 2) the appropriate baseline for determining the economic impact of designating the critical habitat. On the issue of the definition of "occupied," the court stated "Relevant factors [in determining whether an area is occupied] may include how often the area is used, how the species uses the area, the necessity of the area for the species' conservation, species characteristics such as degree of mobility or migration, and any other factors that may bear on the inquiry. Such factual questions are within the purview of the agency's unique expertise and are entitled to the standard deference afforded such agency determinations." Based on these principles, the court found that the agency's interpretation of "occupied" was reasonable and did not violate ESA. As to the second issue of economic impacts, the court ruled that the baseline for determining the economic impacts of designating critical habitat is not pre-designation of the species as endangered, but post-designation. Thus, the agency does not take into account, as petitioners argued, the economic impacts of actually listing the species.

2. *Butte Environmental Council v. United States Army Corps of Engineers, et al.* (9th Cir. 2010) 607 F.3d 570

In relevant part, the Butte Environmental Council challenged the Secretary of the Interior's finding that the construction of a business park on 678 acres in Redding, California would not result in the adverse modification or destruction of critical habitat. Petitioners argued that USFWS applied an improper definition of "destruction or adverse modification," failing to take account of the decision in *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Service* (2004) 378 F.3d 1059, which held that destruction or adverse modification is a direct or indirect alteration that appreciably diminished the value of critical habitat for the survival *or* recovery of a species. Petitioner further argued USFWS's finding of adverse modification conflicted with USFWS' determination that the proposed project would destroy 234.5 acres of critical habitat for the vernal pool crustaceans and 242.2 acres of critical habitat for slender Orcutt grass. Finally petitioner argued that USFWS failed to address the rate of loss of critical habitat. The court found that none of the three arguments had merit and affirmed the judgment of the district court.

3. *Home Builders Association of Northern California v. U.S. Fish and Wildlife Service* (9th Cir. 2010) 616 F.3d 983

Home Builders claimed USFWS violated ESA (16 U.S.C. § 1531 et seq.) in issuing its final rule designating the critical habitat. Home Builders first unsuccessfully argued an area must simultaneously contain all primary constituent elements for a particular species to be designated as occupied critical habitat for that species. The court rejected this theory, explaining that the elements necessary to species' survival may occur in distinct geographic areas. Second, Home Builders claimed that USFWS erred in the designation because it conflated the standards for occupied and unoccupied habitat. The court rejected the argument because: 1) no law required that every area be classified as one or the other; and 2) USFWS had found that areas designated in the final rule met the more rigorous of the two standards. Third, Home Builders claimed USFWS violated ESA by failing to determine, when the species in question would be successfully considered conserved. The court explained the requirement applies only to recovery plans. Fourth, Home Builders argued that USFWS's inadvertent inclusion of structures in the critical habitat area violated ESA's requirement that specific areas be designated. Noting Home Builders' failure to identify an alterative procedure or point to a specific error in the procedure used, the court deferred to USFWS's designation. Finally, Home Builders argued that under ESA, USFWS should have considered the economic impact of designating the critical habitat, using a cumulative analysis. The court explained that although a cumulative analysis would be required under NEPA (42 U.S.C. § 4321 et seq.), it is not required before the government takes action to protect the environment, under ESA. The Ninth Circuit upheld the decision of the district court upholding USFWS's critical habitat designation.

For more information, see "U.S. Fish and Wildlife Service Not Required to Predict the Point of Return for Critical Habitat Under the Endangered Species Act" at http://blog.aklandlaw.com.

4. *Modesto Irrigation District et al. v. Gutierrez et al.* (9th Cir. 2010) 619 F.3d 1024

Central Valley irrigation districts challenged the decision of the NMFS to list the steelhead, defined as a distinct species under ESA, separate from the rainbow trout. Congress added the term distinct population segment ("DPS") in 1978 without defining the term. In 1991, NMFS adopted a policy for classifying Pacific Salmon, which used the word evolutionarily significant unit ("ESU") rather than DPS (the "ESU Policy"). The difference between the ESU Policy, and the DPS policy adopted in 1996 was that under the ESU Policy, "a type of Pacific salmon had to be substantially reproductively isolated from other salmon stock before it could be classified in its own ESU, whereas under the DPS policy, an organism could be placed in its own DPS so long as it was markedly separated from other populations of the same taxon…" NMFS and USFWS determined the policies were consistent and applied the ESU to Pacific salmon and the DPS to all other organisms.

Initially, the agencies determined that due to the interbreeding of the steelhead and rainbow trout, they should be classified as the same ESU because they were not substantially reproductively isolated. However, after receiving additional information about the differences in the two, NMFS determined it would instead apply the DPS policy to the steelhead and rainbow trout so that they could be treated separately, and only the steelhead would be listed as threatened. Central Valley irrigation districts claimed NMFS did not adequately justify this change in policy, and the classification violated the plain language of ESA because NMFS steelhead and rainbow trout were not sufficiently biologically different. The district court found in favor of NMFS and the irrigation districts appealed. The court of appeals found that ESA statute at issue could not be read to unambiguously support the irrigation district's contention that all interbreeding organisms must be treated the same. The court further found that NMFS had provided the required explanation by displaying awareness that it was changing its position; explained how the new construction was permissible; provided good reasons for the new construction; and explained why the new interpretation was better. (*F.C.C. v. Fox Television Stations, Inc* (2009) 129 S.Ct. 1800; *Ad Hoc Shrimp Tract Action Comm. v. United States* (2010) 596 F.3d 1365.) The appellate court affirmed the decision of the district court.

5. *Northern California River Watch et al. v. Wilcox et al.* (9th Cir. 2010) 620 F.3d 1075

DFG Habitat Conservation Manager Sebastopol removed meadowfoam, an endangered plant, from the Schellengers' property, suspecting it was not naturally occurring. River Watch alleged a violation of section 9(a)(2)(B) of ESA, providing that it is unlawful to remove, damage, or destroy an endangered plant species in an area under federal jurisdiction. River Watch claimed that because the meadowfoam was discovered on a site adjacent to wetlands under CWA, the Schellenger property was an area under federal jurisdiction. The district court granted defendants' summary judgment motion, finding that River Watch could not show that the wetlands qualified as areas under federal jurisdiction. The appellate court employed the analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc* (1984) 467 U.S. 837 and concluded that: 1) the meaning of "areas under Federal jurisdiction" was not clear from the plain language of the statute or the legislative history; 2) Congress delegated the authority to interpret ESA to USFWS and the interpretation of the phrase was promulgated in the exercise of that authority; and 3) USFWS had not promulgated rules and regulations. The court, therefore, offered its own interpretation, finding too great of potential for over breadth posed by interpreting "areas under Federal jurisdiction" as including all "waters of the United States" and affirmed the holding of the district court.

6. *Western Watersheds Project et al. v. Kraayenbrink et al.* (9th Cir. 2010) 620 F.3d 1187

Petitioners challenged the 2006 grazing regulations ("2006 Regulations") proposed by the Secretary of the Interior. They challenged the 2006 Regulations as violating NEPA, ESA, and the Federal Land Policy and Management Act. The 2006 Regulations "reduce public oversight of federal grazing management, eliminate the Fundamentals of Rangeland Health as an enforceable standard, allow the BLM additional time to respond to failing allotments, increase monitoring requirement and cede ownership rights to rangeland structures and from the United States to Private Ranchers." The court found that with respect to each of the proposed changes, BLM failed to take the hard look required by NEPA because it did not address concerns raised by its own experts, USFWS, the EPA, and state agencies over the reduction in public involvement in management of grazing on public lands, and weakening the ability of BLM to manage rangelands in a timely fashion, among other issues. The court further found that the BLM violated ESA by failing to consult with USFWS under Section 7(b). Against the advice of BLM scientists and USFWS, BLM concluded that no consultation was necessary because the 2006 Regulations would have no effect on endangered species. The court concluded, "Because the BLM failed to consider relevant expert analysis or articulate a rational connection between the facts found and the choice made, we conclude that the BLM's no effect finding and resulting failure to consult were arbitrary and capricious in violation of BLM's obligations und ESA." The court did not decide the FLPMA issue, finding it was inadequately briefed.

For more information, see "Grazing Cattle and the BLM's Violation of EPA and ESA" at http://blog.aklandlaw.com.

7. *Delta Smelt Consolidated Cases v. Salazar* (December 14, 2010, Case No. 1:09-cv-407-OWW-DLB,1:09-cv-422-OWW-DLB,1:09-cv-631-OWW-DLB,1:09-cv-892-OWW-GSAPARTIALLY CONSOLIDATED WITH:1:09-cv-480-OWW-GSA,1:09-cv-1201-OWW-DLB) __ F.Supp.2d ___

On December 14, 2010, Judge Wanger found that USFWS's Biological Opinion ("BiOp") limiting water exports from the Central Valley Project and State Water Project ("Projects") operations was not supported by evidence in the record. He thus, in effect, turned the pumps back on. Under section 7(a)(2) of ESA and Joint Consultation Regulations, UFWS must evaluate the effects of an action and cumulative effects on listed species or critical habitat and then formulate its biological opinion, as to whether the action, together with its cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

USFWS issued a delta smelt biological opinion on December 15, 2008, concluding that the proposed Projects' operations were likely to jeopardize the continued existence of the delta smelt and adversely modify its critical habitat. The BiOp included a Reasonable and Prudent Alternative ("RPA") designed to allow the Projects' continued operation without causing jeopardy to the species or adverse modification to its critical habitat. The RPA included operational components designed to reduce entrainment of smelt during critical times of year by limiting water exports from the Delta by the Projects.
Plaintiffs San Luis & Delta Mendota Water Authority and Westlands Water District, Metropolitan Water District of Southern California, State Water Contractors, Coalition for Sustainable Delta and Kern County Water Agency, Stewart & Jasper Orchards, Arroyo Farms, LLC and King Pistachio Grove and Family Farm Alliance claimed that USFWS failed to support its BiOp with sufficient scientific evidence. Judge Wanger concluded that USFWS failed to provide lawful explanations for the apparent over-appropriation of project water supplies for species protection, and remanded the BiOp directing USFWS to remedy the faulty portions of the analysis.

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6. 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 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. *United States 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. *United States v. Aerojet General Corp.* (9th Cir. 2010) 606 F.3d 1142

The EPA sought approval of a proposed consent decree under CERCLA incorporating two prior agreements regarding remediation of a certain reservoir. Approval of the consent decree would protect the named potentially responsible parties ("PRPs") from contribution claims by non-settling PRPs. Prior to seeking intervention, non-settling PRPs submitted objections to the proposed consent decree when notice was published in the Federal Register, complaining that the EPA did not provide sufficient information regarding the proposed consent decree's allocation of cleanup costs. Joining the Eighth and Tenth Circuits on an issue that has split the federal courts, the Ninth Circuit held that a non-settling PRP may intervene in litigation to oppose a consent decree incorporating a settlement that, if approved, would bar contribution from the settling PRP. Disposition of the suit would impair their interests, and the existing parties would not adequately represent the non-settling PRPs' interests.

2. *California Department of Toxic Substance Control v. Hearthside Residential Corp.* (9th Cir. 2010) 613 F.3d 910

An owner purchased an undeveloped tract of wetlands, which was adjacent to a residential site, knowing that the wetlands were contaminated with PCBs. The owner agreed to remediate the contamination on the wetlands. The State of California determined that the adjacent residential site was contaminated due to leaks from the wetlands and considered the owner responsible for remediation of the residential site. The owner sold the wetlands property after the state certified that the wetlands site cleanup was complete and before the state filed an instant suit. This case presented the issue of first impression as to whether "owner and operator" status under CERCLA is determined at the time that cleanup costs are incurred or instead at the time that a recovery lawsuit seeking reimbursement is filed. The Ninth Circuit held that the owner of the property, at the time cleanup costs are incurred, is the current owner for purposes of determining CERCLA liability. Thus, a CERCLA action could proceed against the owner here because the state incurred costs in cleaning up the residential site during the time when the owner held title to the adjacent wetlands site.

3. *City of Colton v. American Promotional Events, Inc.* (9th Cir. 2010) 614 F.3d 998

The City of Colton sued industrial entities to recover response costs incurred as a result of perchlorate contamination in three water wells. The city alleged that it had spent $4 million to investigate the contamination and to implement a wellhead treatment program. The city sought to recover the costs from entities that had engaged in industrial activities in the groundwater basin over the years, under the legal argument that such costs were necessary and consistent with the national contingency plan ("NCP") under CERCLA. The Court of Appeal affirmed the district court's granting of summary judgment in favor of the defendant industrial entities. The city's concession that it failed to comply with the NCP was a sufficient ground for summary judgment on past response costs. And the court would not grant declaratory relief against the private parties for future cleanup. The court explained that CERCLA's purposes would be better served by encouraging the city to come to court only after demonstrating its commitment to comply with the NCP and undertake a CERCLA-quality cleanup.

4. *City of Emeryville v. Robinson* (9th Cir. 2010) 621 F.3d 1251

In 2001, a court-approved settlement was negotiated between the City of Emeryville and the Emeryville Redevelopment Agency (collectively "Emeryville") and the Sherwin-Williams Company to resolve a lawsuit filed by Emeryville pursuant to CERCLA. That suit (the "Site A Litigation") sought to recover clean-up costs as to property ("Site A") where Sherwin-Williams manufactured, stored, and distributed pesticides from the 1920s through the 1960s. Under the terms of the 2001 Settlement, Sherwin-Williams paid Emeryville $6.5 million for Site A clean-up, and agreed to a cost-sharing formula for future groundwater remediation. In the instant action, the district court concluded that the release provision in the 2001 Settlement was intended to bar the claims Emeryville is currently asserting against Sherwin-Williams in a separate action, which the Emeryville

Redevelopment Agency filed in 2006 in the California Superior Court (the "State Court Action") to recover $32 million in clean-up costs from Sherwin-Williams and others for a different parcel ("Site B"), but only to the extent the Site B claims arose from or were related to contaminants that "emanated from" Site A. The district court also held that the 2001 Settlement did not cover cross-claims for contribution and/or indemnity filed by intervening recent or current owners of portions of Site B who were not parties to or had notice of the Site A Litigation ("Intervenors"). Intervenors were allowed to intervene in this case to prevent the extinguishment of rights of contribution they seek to enforce against Sherwin-Williams for contamination of their properties at Site B.

The Ninth Circuit affirmed the district court's order. The court held that a contribution claim subject to extinction pursuant to CERCLA is a significantly protectable interest warranting an order allowing third parties, such as non-settling PRPs, to intervene as of right in an action to obtain court approval for a CERCLA consent decree entered into by the United States and would-be settling PRPs (those who have agreed to pay a specific share of clean-up costs at a designated site), in exchange for protection against contribution claims from the non-settling PRPs and others regarding matters addressed in the settlement.

5. *General Electric Co. v. Jackson* (D.C. Cir. 2010) 610 F.3d 110

In this case, the General Electric Company ("GE") challenged the constitutionality of a statutory scheme that authorizes the EPA to issue orders, known as unilateral administrative orders ("UAOs"). In UAOs, the EPA directs companies and others to clean up hazardous waste for which they are responsible. GE argued that the statute, as well as the way in which EPA administered it, violated the Due Process Clause because EPA issues UAOs without a hearing before a neutral decision maker. The Circuit Court for the District of Columbia disagreed. To the extent the UAO regime implicates constitutionally protected property interests by imposing compliance costs and threatening fines and punitive damages, it satisfies due process because UAO recipients may obtain a pre-deprivation hearing by refusing to comply and forcing EPA to sue in federal court. GE argued that the UAO scheme and EPA's implementation of it nonetheless violates due process because the mere issuance of a UAO can inflict immediate, serious, and irreparable damage by depressing the recipient's stock price, harming its brand value, and increasing its cost of financing. But the circuit court held that such "consequential" injuries (injuries resulting not from EPA's issuance of the UAO, but from market reactions to it) are insufficient to merit Due Process Clause protection.

6. *Hinds Investments L.P. v. Team Enterprises, Inc.* (April 21, 2010, E.D.Cal. CVF 07-0703 LSO (GSA)) __F.Supp.2d__

In this case, the District Court for the Eastern District engaged in the fact-intensive analysis laid out by the Supreme Court in the 2009 decision in *Burlington Northern and Santa Fe Railway Co. v. United States* (2009) U.S., 129 S.Ct. 1870, 173 L. Ed. 2d 812 ("*BNSF*"), to determine whether defendants were liable under CERCLA as "arrangers." The *BNSF* court explained that an entity may qualify as an arranger "when it takes intentional steps to dispose of a hazardous substance." The Supreme Court continued: "While it is true that in some instances an entity's knowledge that its product will be leaked, spilled, dumped, or otherwise discarded may provide evidence of the entity's intent to dispose of its hazardous wastes, knowledge alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product."

Here, the district court held that a manufacturer of dry cleaning equipment specifically designed to discharge PCE-bearing wastewater into open drains were not "arrangers" as a matter of law. The court rejected the notion that intent on the part of the manufacturer could be inferred merely from the design of the equipment. There were no allegations that the manufacturer installed the equipment, connected the equipment to an open sewer or other disposal system, directed disposal from the equipment, or inspected the equipment and its disposal. The equipment, by itself, if not comprised of hazardous substances would require treatment or disposal. The court held that the manufacturer "is not subject to arranger liability in absence of allegations of its ownership, possession or control of hazardous substances at disposal or otherwise."

7. *U.S. v. Iron Mountain Mines* (May 6, 2010, E.D.Cal. No. 91-0768-JAM-JFM) __F.Supp.2d__

In the *BNSF* case, the U.S. Supreme Court also determined the standard of establishing divisibility of liability under CERCLA. The court held that apportionment is proper when "there is a reasonable basis for determining the contribution of each cause to a single harm." In one of the few cases that have looked at the divisibility issue since the *BNSF* decision, the District Court for the Eastern District of California ruled on a motion for reconsideration of a 2002 ruling in the same case that had denied defendants' divisibility of harm defense and established defendants' joint and several liability for the cost of cleanup. Defendants argued that *BNSF* was an intervening change in the law for reconsideration purposes. District Judge John Mendez disagreed. *BNSF* did not constitute a change in law, and did not add a new mandate that district courts must apportion harm in CERCLA cases.

8. ***American International Specialty Lines Ins. Co. v. United States*** **(June 30, 2010, C.D.Cal. No. CV 09-01734 AHM (RZX)) __F.Supp.2d__**

An insurance company filed this action against the United States seeking cost recovery and contribution under CERCLA for the environmental cleanup costs for the property of its insured, a manufacturer that produced munitions and ordinance for the U.S. military. More than 90 percent of the manufacturer's production was for the United States government, and hazardous substances were used in the production. The district court held that the United States was liable under CERCLA as an owner of the facilities and as an "arranger" because the evidence established that the government supplied the hazardous materials and knew that they would be released into the environment in the test firing of ammunition. Further, the manufacturer's waste disposal practices were mandated by the government and were subject to government inspection and supervision, and the government knew that the manufacturing and testing processes resulted in the creation and disposal of hazardous waste.

9. ***United States v. Washington State Department of Transportation*** **(W.D.Wash. 2010) 716 F.Supp.2d 1009**

The U.S. District Court for the Western District of Washington held that a state agency that manages highway stormwater runoff could be liable under CERCLA as an "arranger" for disposal of hazardous substances. The agency's liability arose from its design, operation and maintenance of the stormwater systems around highways that discharge into waterways.

10. ***Fullerton Redevelopment Agency v. Southern California Gas Co.*** **(2010) 183 Cal.App.4th 428**

A city acquired property from a railroad that was contaminated by several hazardous materials. A remedial action order issued by the DTSC listed the railroad and a utility as potentially responsible parties for the cleanup of the property. The city sued the utility for injunctive relief and damages. The utility cross-complained against the city and the railroad for contribution and indemnity. The city and the utility entered into a settlement agreement, and the trial court determined that the agreement was a good faith settlement. The Court of Appeal affirmed the order. The court concluded that the good faith settlement agreement between the city and the utility barred any claims against the city for contribution and indemnity asserted by the railroad under the Carpenter-Presley-Tanner Hazardous substance Account Act ("HSAA"). The good faith settlement principles outlined in Code of Civil Procedure sections 877 and 877.6 apply to the statutory right to contribution and indemnity created under HSAA.

11. California's Green Chemistry Regulations

In September 2008, Governor Arnold Schwarzenegger signed legislation that authorized the DTSC to: (1) identify and prioritize chemicals of concern, evaluate alternatives as well as to specify regulatory responses; and (2) establish an online Toxics Information Clearinghouse to provide public access to information on the toxicity of chemicals. According to the DTSC, the objective of the legislation is "that chemical and consumer product prioritization processes should seek to identify and give priority to those chemicals, and the consumer products that contain them, that pose the greatest public health and environmental threats, are most prevalently distributed in commerce and used by consumers, and for which there is the greatest potential for consumers or environmental receptors to be exposed to the chemical in quantities that can result in public health or environmental harm.

In September 2010, DTSC issued regulations in response to that legislation. Among other things, the proposed regulations create a process by which certain chemicals in products will be evaluated for their potential to cause harm. Manufacturers will be required to conduct an analysis of whether there are more environmentally friendly alternatives to the potentially harmful chemical. Manufacturers may be required to re-formulate products or the products may be banned, among other possible agency responses. The regulations were to be implemented by January 1, 2011. However, DTSC revised the proposed regulations in December 2010. The next round of discussions on the proposed regulations will begin in early 2011.

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7. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

A. Regulatory Framework

- The National Environmental Policy Act of 1970 ("NEPA") (42 U.S.C. § 4321 et seq.) was the first of the modern federal environmental statutes. NEPA is the nation's basic charter for environmental responsibility. Unlike CWA or CAA, NEPA is often referred to as a "procedural statute," establishing a process by which federal agencies must study the environmental effects of their actions. It requires the federal government to prepare and publish information about the environmental effects of and alternatives to actions that the government may take.

- NEPA process is outlined in NEPA's Section 102(2)(C) (42 U.S.C. § 4332(2)(C)) and is fully described in the Whitehouse Council on Environmental Quality ("CEQ") NEPA implementing regulations (40 C.F.R. Parts 1500-1508). NEPA process includes efforts to inform and seek comments from the public, state and local agencies, Native American tribes, and other federal agencies.

- There are three potential findings that a federal agency can make under NEPA:

  (1) Categorical Exemption/Exclusion – The project falls under those sets of projects that have been pre-determined to not have a significant impact on the environment, known as categorical exemptions or exclusions. (CEQ NEPA Guidance, § 1508.4.)

  (2) Environmental Assessment ("EA") – If it is determined that the project may have a significant impact, an EA is completed. If the EA shows that the project will not have a significant impact on the environment, then the agency may issue a finding of no significant impact based on the EA. (CEQ NEPA Guidance, §§ 1508.9, 1508.13.)

  (3) Environmental Impact Statement ("EIS") – If it is determined that a project will have a significant impact on the environment, then an EIS is required. (CEQ NEPA Guidance, § 1508.11.)

B. Update

1. *Monsanto Co. v. Geertson Seed Farms* (2010) 130 S.Ct. 2743

The Supreme Court held that a district court abused its discretion in enjoining the Animal and Plant Health Inspection Service ("APHIS"), a division of the United States Department of Agriculture ("USDA"), from implementing partial deregulation of Roundup Ready Alfalfa. The Court concluded that a NEPA violation alone is insufficient for granting injunctive relief. The Court also held that although an injunction was not warranted, full deregulation required a complete EIS, and not just an environmental assessment, because full deregulation may have a significant impact on the environment.

2. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. Allen* (9th Cir. 2010) 615 F.3d 1122

In this case, the Ninth Circuit Court of Appeals upheld an EIS for a Forest Service project, which authorized commercial logging on certain forest lands in order to prevent catastrophic forest fires. Conservation groups challenged the cumulative impacts analysis and the responses to opposing expert analysis. The court held that the cumulative impacts may be evaluated using an aggregate effects approach without detailing every past project by time, scale and location. The court also held that an agency is only required to adequately acknowledge and respond to comments raised by opposing parties, including opposing expert analysis. Therefore, EIS did not violate NEPA.

3. *Western Watershed Project v. Kraayenbrink* (9th Cir. 2010) 620 F.3d 1187

See the Endangered Species Act section for a summary.

4. *Center for Biological Diversity v. United States Department of Interior* (9th Cir. 2010) 623 F.3d 633

Plaintiffs appealed a ruling from the district court in favor of the Bureau of Land Management ("BLM"). Plaintiffs argued that BLM's approval of a land exchange violated NEPA (42 U.S.C.S. § 4321 et seq.), the Federal Land Policy and Management Act ("FLPMA") (43 U.S.C.S. § 1701 et seq.) and the Mining Law of 1872 (30 U.S.C.S. § 21 et seq.). In the final EIS, the BLM assumed, without analysis, that intervenor mining company's mining plan of operations ("MPO") process would impose no constraints on, and have no effect on, the manner in which it would conduct new mining operations on exchanged land. BLM treated the MPO process as a meaningless formality that provided no environmental protection and reasoned that the mining operations would be the same whether or not the United States owned the land. This was a flawed assumption. Consequently, BLM did not compare the environmental effects of exchanging the land with the effects of the no action alternative. For this reason, the Ninth Circuit ruled that BLM failed to take a hard look at the environmental consequences of its proposed action in violation of NEPA, and its action was arbitrary and capricious. Additionally, the court stated that BLM's approval of the land exchange violated the FLPMA and was also arbitrary and capricious because the conclusion that the exchange was in the "public interest" was based on BLM's flawed assumption. The court did not reach the question of whether the Mining Law of 1872 would have been violated if the land exchange were to be effectuated.

5. ***Te-Moak Tribe of Western Shoshone of Nevada et al v. United States Department of the Interior*** **(9th Cir. 2010) 608 F.3d 592**

Petitioners argued that BLM's approval of an amendment to the Horse Canyon/Cortez Unified Exploration Project, in Lander and Eureka Counties in Nevada, violated NEPA, among other laws. The amendment would allow the project to disturb 250, rather than just 50 acres over the course of the three-phase project. BLM prepared an EA tiered to the previous EIS and assessments, including those for the Horse Canyon/Cortez Unified Exploration Project and another nearby mining project. Petitioners claimed the BLM failed to take a hard look at the cultural and environmental impacts because it approved the three-phased amendment without knowing the precise location of all drill sites, access roads, and support facilities. The court found that the failure to name the specific locations did not violate NEPA because the nature of an exploration project is necessarily uncertain. Petitioners briefly and unsuccessfully argued BLM violated NEPA because the discussion of a range of alternatives in the EA was inadequate. Finally, petitioners argued that BLM's cumulative impact analysis was insufficient. The court agreed, finding the agency failed to provide detailed or quantified information about the reasonably foreseeable nearby mining activities. The court reversed the district court's award of summary judgment in favor of plaintiffs and remanded the matter to BLM for further proceedings.

6. ***Native Ecosystems Council v. Tidwell*** **(9th Cir. 2010) 599 F.3d 926**

Appellants challenged the district court's grant of summary judgment for appellees USFWS. Appellants argued that the court erred in finding that USFWS's approval of a project to update grazing allotments complied with the National Forest Management Act ("NFMA") and NEPA. Given that the management indicator species ("MIS") population had consistently declined and had not appeared in the project area in nearly two decades, and because the agency's analysis conflicted with that of the scientific experts, USFWS's use of the proxy-on-proxy approach to ensure viability of species requiring sagebrush habitat did not comply with the dictates of NFMA (16 U.S.C.S. § 1604) to monitor population trends of the sage grouse as the selected MIS. The district ranger's determination that the project would have minimal effects on the sage grouse was not derived from a reliable methodology. Consequently, the Ninth Circuit reversed the district court's grant of summary judgment in favor of USFWS, on the NFMA claim. Given the presence of potential nesting habitat and the corollary effect on that habitat of cattle grazing, the 2004 information impacted the project sufficiently that the EA should have been further revised. Therefore, USFWS failed to take the requisite "hard look" at the project as required by NEPA. Consequently, the Ninth Circuit Court of Appeals reversed and the case was remanded for USFWS to prepare a new or supplemental EA consistent with the opinion.

7. Proposed and Adopted Amendments to NEPA Guidance, Council on Environmental Quality

On February 18, 2010, the CEQ proposed four steps to modernize and reinvigorate the NEPA: (1) *Draft Guidance on the Consideration of Greenhouse Gases*; (2) *Draft Guidance Clarifying Appropriateness of "Findings of No Significant Impact" and Specifying When There is a Need to Monitor Environmental Mitigation Commitments*; (3) *Revised Draft Guidance Clarifying Use of Categorical Exclusions*; (4) *Enhanced Public Tools for Reporting on NEPA Activities*. According to CEQ, these measures will assist Federal agencies to meet the goals of NEPA, enhance the quality of public involvement in governmental decisions relating to the environment, increase transparency, and ease implementation.

On November 23, 2010, the CEQ released its *Final Guidance on "Establishing, Applying and Revising Categorical Exclusions under NEPA,"* in an effort to help federal agencies ensure the integrity of their environmental reviews. According to CEQ, this guidance is based on NEPA, the CEQ Regulations, legal precedent and agency NEPA experience and practice. The guidance describes the following:

- How to establish or revise a categorical exclusion;
- How to use public involvement and documentation to help define and substantiate a proposed categorical exclusion;
- How to apply an established categorical exclusion, and determine when to prepare documentation and involve the public; and
- How to conduct periodic reviews of categorical exclusions to assure their continued appropriate use and usefulness.

For more information, see http://www.whitehouse.gov/administration/eop/ceq/initiatives/nepa.

Notes:

8. MINING

A. Regulatory Framework

Surface Mining and Reclamation Act ("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. *Te-Moak Tribe of Western Shoshone of Nevada v. United States* (9th Cir. 2010) 608 F.3d 592

See National Environmental Policy Act ("NEPA") section for summary.

2. *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252

See California Environmental Quality Action ("CEQA") section for summary.

3. State Mining and Geology Board's Vested Rights Decisions

When determining whether there is a vested right to mine, the SMGB first addresses the threshold question of whether a vested right to mine exists, and then, if there is a vested right, SMGB determines the scope of the vested right. In 2010, two mining operations requested a final determination by SMGB of their respective vested rights. The first request came from Western Aggregates, LLC, which wanted to mine aggregate from the Yuba Goldfields. SMGB ruled that there was a vested right to mine a large portion of the Yuba Goldfields and that the scope of that right included the following: it was not limited to any particular equipment or mining method; it included the right to mine, process, otherwise produce, and market a variety of materials, including aggregate; there is no depth limitation on the mining; and the annual production can continue in accordance with historic levels, taking into account the annual increase. The second request for a determination came from the Big Cut Mine in El Dorado County. Unlike the Yuba Goldfields, SMGB ruled that there was no vested right to mine Big Cut Mine. According to SMGB, the evidence only showed that Big Cut Mine was mined up until 1940. This was not sufficient to establish a vested right. Yuba Goldfields, on the other hand, had volumes and volumes of evidence showing mining activities throughout the last century, which was sufficient to establish a vested right.

4. Name Change: Division of Mines & Geology to California Geological Survey

Identified in statutes as the Division of Mines & Geology, the California Department of Conservation's oldest division has a new identity for the 21st Century to better reflect the nature of its current work. Its new name is the "California Geological Survey."

For more information, see
http://www.conservation.ca.gov/index/AboutUs/Pages/aboutus_cgs.aspx.

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9. 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 DFG before beginning any activity that will substantially modify the bed, bank or channel of a river, stream or lake.

B. No Updates

Notes:

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10. 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 effect 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, § 136(h).)

- 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. (Fish & G. Code, § 1364.) In order to qualify and 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. (Fish & G. Code, § 1366(a).) The plan must protect and restore oak woodlands above and beyond what the law in the jurisdiction already requires.

- The funds may be granted to local government entities, park and open-space districts, resource conservation districts, private landowners, and nonprofit organizations. (Fish & G. Code, § 1364.) In order to qualify and 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. (Fish & G. Code, § 1366(a).)

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 THP 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/GeneralPlanOakWoodlands.htm.)

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, DFG 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; and

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

  For 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. *An Inventory of Carbon and California Oaks: California Oak Woodlands and Forests Could Sequester a Billion Tons of Carbon*, Tom Gaman (2008) California Oaks Foundation

This publication was written to provide an inventory of the California oaks, their importance in contributing to carbon sequestration, and the significance of increasing sequestration by reforestation and conservation of trees in California's existing oak woodlands.

For more information, see http://www.californiaoaks.org/ExtAssets/CarbonResourcesFinal.pdf.

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11. CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

National Historic Preservation Act of 1966 ("NHPA") (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.
- USACE's guidelines on its duties under the NHPA 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 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, 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).)

- 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. No Update

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12. 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 Wat. Code, § 1052; Fish & G. Code, § 5650.)

- Citizen Enforcement Actions under section 505 of 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. Update

1. *Northwest Environmental Defense Center v. Brown* (9th Cir. 2010) 617 F.3d 1176

See the Water Quality section for a summary.

2. *Sackett v. U.S. Environmental Protection Agency* (9th Cir. 2010) 622 F.3d 1139

See the Water Quality section for a summary.

3. *Arc Ecology v. U.S. Maritime Administration* (January 21, 2010, E.D.Cal. No. 2:07-cv-2320-GEB-GGH) __F.Supp.2d__

This case concerns the operation and management of the Suisun Bay Reserve Fleet ("SBRF"). Plaintiff environmental organizations and plaintiff-intervenor California RWQCB, San Francisco Bay Region moved for partial summary judgment on their claims that defendants were liable under CWA for discharge of pollutants from the non-retention vessels of the SBRF to navigable waters. Plaintiffs also moved for partial summary judgment of their claims under Resource Conservation and Recovery Act ("RCRA") and the California Hazardous Waste Control Law. Defendants were the United States Maritime Administration and its Administrator, and the United States Department of Transportation and its Secretary. The district court granted plaintiffs' and plaintiff-intervenor's motion as to CWA claims because the exfoliated paint and other materials from the SBRF non-retention vessels are pollutants that have been discharged into Suisun Bay without a valid NPDES permit. The district court also granted plaintiffs' and plaintiff-intervenor's motion as to Hazardous Waste Control Law because each SBRF non-retention vessel has accumulated exfoliated paint that is hazardous waste at the SBRF site for more than ninety days, and such storage of hazardous waste has been

without a permit or other authorization. However, the district court denied plaintiff's motion as to the claim that defendants' maintenance of the SBRF violates RCRA's "open dumping" prohibition because the EPA did not intend for the surface water criteria to authorize citizen suits for open dumping practices in violation of RCRA.

4. *Remington v. Matheson* (March 26, 2010, N.D.Cal. No. CV 09-4547 NJV) __F.Supp.2d__

Plaintiff property owner brought a citizen suit against defendant neighbors alleging state law claims and federal environmental claims of violations RCRA, CWA, CERCLA and the Emergency Planning and Community Right to Know Act (EPCRA). There were also two actions between the same parties that were pending in state court in Humboldt County: one by defendants against plaintiff for trespass, quiet title and nuisance; the other by plaintiff against defendants filed a few days later for nuisance, trespass, water pollution and environmental damage, unfair competition, deceit, fraudulent concealment, false promise, intentional misrepresentation, quiet title, conversion, breach of the covenant of good faith and fair dealing, common counts, harassment, and negligence. In this federal action, the defendant neighbors filed a motion to dismiss or to stay. The district court granted the motion in part and stayed the state claims of trespass, nuisance, negligence, and negligence per se pending resolution in state court because if the state court determined that the disputed property belonged to the neighbors, the owner's state law claims might be moot. Also, the resolution of the trespass, nuisance, and negligence claims in the state action raised the possibility of inconsistent judgments. The district court denied dismissal for lack of subject matter jurisdiction because the majority of the courts had found that the federal courts had exclusive jurisdiction over citizen suits under the RCRA, CWA, and CERCLA. The district court also declined to exercise supplemental jurisdiction under 28 U.S.C.S. § 1367(c) because the federal environmental claims, which had not been dismissed, predominated over the state law claims. Finally, the district court found that abstention was inappropriate because the state and federal actions were not substantially similar and the state claims did not afford an adequate opportunity to raise the federal issues.

5. *Ecological Rights Foundation v. PG&E* (May 10, 2010, N.D.Cal. No. C 09-3704 SBA) __F.Supp.2d__

Ecological Rights Foundation brought this action against Pacific Gas and Electric ("PG&E") alleging that PG&E's wooden utility poles are leaching the chemical pentachlorophenol into public waterways in violation of CWA and the RCRA. Prior to filing the action, plaintiff sent PG&E a Notice of Violations of Federal Law and Notice of Intent to Begin Citizen Enforcement Action that stated that certain of PG&E wooden utility poles are treated with an oil-based mixture containing a toxic chemical known as pentachlorophenol; that as a result of water run-off, pentachlorophenol makes its way into storm drains, and eventually, the San Francisco Bay and other waterways; and that the poles that are the subject of the notice specifically are pentachlorophenol-treated poles located in Alameda, Contra Costa, Marin and San Francisco Counties, California. The letter included the location of fifty-three poles that allegedly violate CWA and

RCRA. PG&E filed a motion to dismiss on the ground that the notice was deficient because it did not specify the location of each of the poles at issue. The district court denied the motion and held that PG&E's argument lacked merit. EPA regulations do not require the precise location where each violation is alleged to have occurred. Rather, the notice need only provide sufficient information for the defendant to identify and rectify the problems.

6. *McCoy v. Gustafson* (2009) 180 Cal.App.4th 56

After a jury awarded damages to a property owner in a suit against adjacent owners alleging continuing nuisance and trespass by reason of soil contamination, the trial court granted a new trial and denied a motion for judgment notwithstanding the verdict. The complaint alleged that oil was discharged into the ground and migrated downhill. A previous owner of the downhill property had complained about the oil about 16 years before the suit was filed. Cleanup efforts were unsuccessful. By special verdict, the jury stated that it was "unknown" whether the contamination could be abated at a reasonable cost by reasonable means. That the answer was "unknown" established that the nuisance and trespass had to be considered permanent. The Court of Appeal reversed the new trial order, reversed the order that had denied the motion for judgment notwithstanding the verdict, and remanded to the trial court with directions to enter judgment in favor of the defense. The court held that the nuisance was a permanent nuisance because the evidence did not show that the contamination reasonably could be abated. Thus, the cause of action was barred by the three-year statute of limitations in Code of Civil Procedure section 338, subdivision (b), for damages to real property, which began to run when the previous owner discovered the oil.

7. EPA Fines Waste Management for Improperly Managing PCBs at Kettleman City Landfill

On November 30, 2010, the EPA fined Chemical Waste Management, Inc. ("CWM") more than $300,000 for failure to properly manage PCBs at its Kettleman Hills Hazardous Waste Landfill ("Landfill"). The Landfill handles the treatment, storage and disposal of PCBs, hazardous and non-hazardous waste. The Landfill is the only landfill in California, and just one of ten in the country, that is federally regulated to handle PCBs. EPA levied the fine because their inspectors found that CWM improperly managed PCBs, because there was evidence of spills next to the facility's PCB storage and flushing building, and because CWM failed to fully comply with the information and decontamination requirements.

8. Agreement Signed For Cleanup of Santa Susana Field Laboratory

On December 6, 2010, an agreement was signed between Department of Toxic Substances Control and both the federal Department of Energy and the federal National Aeronautics and Space Administration regarding the environmental cleanup at the Santa Susana Field Lab near Simi Valley and Chatsworth, California. The agreement incorporates the provisions of the state's stringent environmental standards and an accelerated approach to cleaning up low-level radiation and toxic chemical contamination on 741 acres of the former rocket-engine test site and nuclear energy facility.

For more information, see http://www.dtsc.ca.gov/SiteCleanup/Santa_Susana_Field_Lab/Final-Agreements-SSFL-Cleanup.cfm.

Notes:

B. REAL ESTATE AND EASEMENTS UPDATE

Glen C. Hansen

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1. REAL ESTATE

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.

- Under new section 580e of the Code of Civil Procedure, the proceeds of a short sale for a residential property are full payment on the note and the remaining amount owed by the borrower on the note is discharged.

- Whether a private person has a right to enforce statutory loan modification or pre-foreclosure programs depends upon whether the programs at issue are general in nature and enforced by regulatory agencies, or whether they are applied on an individualized basis.

- Even though a purchase and sale agreement constitutes an option where the offer to purchase remains open for a fixed time, and where the buyer has the power to elect not to continue the transaction "at its absolute and sole discretion," subsequent part performance by the buyer may provide sufficient consideration to render the option irrevocable.

- Lost profits may be awarded as consequential damages under Civil Code section 3306 for breach of a real property sale agreement where the buyer intends to renovate and sell the property at a profit, if the lost profits can be proven with reasonable certainty.

- A real estate agent and broker for a seller has the duty to disclose to a buyer that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, where either the cooperation of the lender in a short sale or the ability of the seller to put a substantial amount of cash into the escrow is necessary in order to obtain the release of the monetary liens and encumbrances affecting title.

- A borrower cannot state a claim that a lender misrepresented the borrower's ability to afford a loan based on the lender's knowingly false determination that the borrower is qualified for the loan.

B. Update

Foreclosure

1. *Mabry v. Superior Court* (2010) 185 Cal.App.4th 208; *Vuki v. Superior Court* (2010) 189 Cal.App.4th 791

Two reported decisions, issued in 2010, addressed whether a private right of action existed to enforce compliance with foreclosure-related statutes. In *Mabry*, plaintiff borrowers brought an action that sought a restraining order to prevent a foreclosure sale based on their lender's alleged failure to comply with Civil Code section 2923.5 (sunsets on January 1, 2013). That statute requires, before a notice of default may be filed, that a lender contact the borrower in person or by telephone to "assess" the borrower's financial situation and to "explore" options for the borrower to prevent foreclosure. The court of appeal held that an individual cause of action *did* exist to enforce section 2923.5.

However, in *Vuki*, the same court held that a private right of action *did not* exist to enforce the requirements in Civil Code sections 2923.52 and 2923.53 (sunset on January 1, 2011). Those sections require lenders to have a "comprehensive loan modification program." No individual action lies in this context because the general program requirements in sections 2923.52 and 2923.53 are evaluated by "regulatory commissioners" and enforcement "is committed to regulatory agencies."

2. SB 931 (Chapter 701) – Short Sales

Existing law prohibits a deficiency judgment against a borrower after residential property was foreclosed under a power of sale (i.e., a non-judicial foreclosure). This bill adds a new section 580e to Code of Civil Procedure, which prevents a similar deficiency judgment against the borrower in the event of a short sale. A short sale occurs where a lender sells the residential property for less than the remaining amount of the indebtedness due at the time of the sale with the written consent of the lender. In other words, under the new section 580e, the proceeds of the short sale are full payment on the note and the remaining amount owed by the

borrower on the note is discharged. As with foreclosures under existing law, a refinanced loan in a short sale context may not quality for this anti-deficiency protection depending upon what was financed. And the anti-deficiency rule in the new section 580e does not apply where the borrower has committed fraud or waste, or where the borrower is a corporation or a political subdivision of the state.

Real Estate (General)

3. *Steiner v. Thexton* (2010) 48 Cal.4th 411

The California Supreme Court held that a purchase and sale agreement was an option because it required that the offer remain open for a fixed time, and gave the buyers the power to elect not to continue the transaction "at its absolute and sole discretion." At the outset the consideration was illusory and the agreement was therefore unenforceable due to the buyer's unfettered right to cancel. However, the court held that there was sufficient consideration under Civil Code section 1605 to render the option irrevocable, and that consideration was in the form of the buyers' subsequent part performance of the bargained-for promise to seek a parcel split that benefitted seller, including buyer's incurring thousands of dollars in expenses in the effort.

4. *Greenwich S.F. v. Wong* (2010) 190 Cal.App.4th 739

The Court of Appeal for the First Appellate Division held that lost profits may be awarded as consequential damages under Civil Code section 3306 for breach of a real property sale agreement where the buyer intended to renovate and sell the property at a profit. However, the court also held that, in this particular case, the jury's award of lost profits was not proper because the evidence was insufficient to show lost profits with "reasonable certainty." The assumptions that plaintiff would have constructed the residence according to the unapproved plans and specifications without changes and that the venture would have been profitable were "inherently uncertain, contingent, unforeseeable and speculative."

5. *Holmes v. Summer* (2010) 188 Cal.App.4th 1510

The buyers and the seller agreed to the purchase and sale of a residential real property for the price of $749,000. Unbeknownst to the buyers, the property was subject to several deeds of trust for a total debt of $1,141,000, and the lenders had not agreed to accept less than the amounts due under the loans in order to release their deeds of trust. The seller's brokers were aware of that situation, but never disclosed it to the buyers. The Court of Appeal for the Fourth Appellate District held that the brokers owed a duty of disclosure to the buyers in that circumstance. The court held that when a real estate agent or broker for a seller is aware that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, so as to require either the cooperation of the lender in a short

sale or the ability of the seller to put a substantial amount of cash into the escrow in order to obtain the release of the monetary liens and encumbrances affecting title, the agent or broker has a duty to disclose this state of affairs to the buyer, so that the buyer can inquire further and evaluate whether to risk entering into a transaction with a substantial risk of failure.

For more information, see "Seller's Broker has a Duty to Inform Buyer that Property is so Over-Encumbered that Escrow Will Likely Not Close" at http://blog.aklandlaw.com.

6. *Perlas v. GMAC Mortgage, LLC* (2010) 187 Cal.App.4th 429

Borrowers applied for a loan from GMAC, a commercial mortgage lender. One of the documents tendered at closing was a "purported" application for the loan, which borrowers had neither prepared nor reviewed. The application stated borrowers' total income was $9,466 per month, which was substantially greater than the actual income information borrowers provided to GMAC. At closing, borrowers signed the preprinted application and other documents without being given an opportunity to read or review them, or to confirm the accuracy of the information in the application. In actuality, at no time did borrowers' income permit them to make the payments called for in the loan documents. The Court of Appeal for the First Appellate District held that the borrowers could not state a cause of action for fraudulent misrepresentation or concealment against a lender, because a borrower is not entitled to rely upon a lender's knowingly false determination that the borrower is qualified for a loan as an actionable representation by the lender that the borrowers could afford the loan. The court stated that "absent special circumstances…a loan transaction is at arm's length and there is no fiduciary relationship between the borrower and lender." The court added that a lender is under no duty to determine the borrower's ability to repay the loan.

A different result could occur if the lender was also found to be the loan broker for the borrowers (i.e., a fiduciary duty existed). In an unreported portion of the *Perlas* decision, the Court noted that, although the borrowers alleged that they "went directly to GMAC to obtain their loans," the borrowers nevertheless failed to allege that GMAC acted as a broker at any time in its dealings with borrowers.

For more information, see "A Lender's Loan Approval is Not an Implied Promise That the Borrower Can Afford the Loan" at http://blog.aklandlaw.com.

7. *Pinnacle Museum Tower Association v. Pinnacle Market Development (UC), LLC* (2010) 187 Cal.App.4th 24

A developer of a condominium project recorded a declaration of covenants, conditions and restrictions ("CC&Rs") that formed a homeowners association. The CC&Rs contained a mandatory arbitration procedure for the resolution of construction defect disputes that included the waiver of the right to a jury. When it sold each of the condominium units to the buyers, the developer used a standard purchase and sale agreement that contained a dispute resolution provision that referenced the arbitration provision in the CC&Rs. The association filed a construction defect action against the developer on its own behalf and as a representative of its members for damage to common areas, property owned by the association, and property owned by individual members. The Court of Appeal for the Fourth Appellate District held that the arbitration provision in the CC&Rs did not constitute an "agreement" sufficient to waive the constitutional right to jury trial for construction defect claims because (a) the association did not exist until the CC&Rs were recorded; (b) only the developer signed the CC&Rs; and (c) there was no evidence that the association agreed to the arbitration provision. The Court of Appeal declined to follow a contrary result, also issued by the Fourth Appellate Division, in the case of *Villa Milano Homeowners Ass'n v. Il Davorge* (2000) 84 Cal.App4th 819.

On November 10, 2010, the California Supreme Court granted review of the *Pinnacle Museum* decision and depublished the case.

For more information, see "Arbitration Clause in Condominium Project CC&Rs Unenforceable in Construction Defects Action by Homeowners' Association Against Developer" at http://blog.aklandlaw.com.

Other Real Estate Legislation

8. SB 189 (Chapter 697) – Comprehensive revision governing mechanics' liens and stop notices

At the recommendation of the California Law Revision Commission in 2008, the legislature amended the statutory scheme governing mechanic's liens and stop notices. This bill separates the statutes into sections and makes substantive changes to the law, including permitting an owner to record a notice of completion on a private improvement up to 15 days after completion of the work and extends the period from 30 days to 60 days for cessation of labor to constitute completion of a public work.

9. Foreclosure Statute Amendments (SB 1221, AB 2347, SB 1427)

These bills are yet another attempt by the legislature to clarify the foreclosure statutes as well as address the many foreclosure issues that have cropped up during the recession. The various changes contained in these bills include new timelines for filing the notice of sale, adding additional protections under statutes relating to the power of postponement and statutes relating to the maintenance of vacant property purchased at a foreclosure sale.

10. AB 1373 (Chapter 533) – Deed copy service

Prior legislation prohibiting certain practices by deed copy services appeared to make it unlawful for title companies to continue their practices of providing deeds and other title documents as part of their services to consumers, lenders and realtors. This bill changes the definition of a deed copy service to only include those companies sending mail solicitations offering to obtain deeds or other title documents for compensation. Thus, this bill clarifies that the law does not prohibit title companies from continuing their current business practices. This bill also adds disclosure requirements to those who hold themselves out as a deed copy service as defined by the statute.

Notes:

2. 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. *Pinnacle Museum Tower Association v. Pinnacle Market Development (UC), LLC* (2010) 187 Cal.App.4th 24

See the Real Estate section for a summary.

2. *Clear Lake Riviera Community Association v. Cramer* (2010) 182 Cal.App.4th 459

A homeowners' association sued a homeowner for violating the association's height limitations in building his house. The homeowner attempted to argue that the height limitations had not been adopted properly. The court ruled that circumstantial evidence can be used to support a finding that a policy was properly adopted by the association. In this case, there was enough circumstantial evidence to constitute substantial evidence, and the height limitation was upheld, to the homeowner's chagrin.

3. *Dover Village Association v. Jennison* (November 24, 2010, Nos. G0427141, G042990) __ Cal.App.4th __

A sewer pipe leaked two feet beneath the concrete slab of a condominium. The $15,000 in repairs involved cutting through the condo floor, jack-hammering the concrete slab, and trenching out and replacing 50 feet of sewer pipe that connected the condo to the main service line. The homeowners' association wanted the condo owner to pay the bill for the repairs on the ground that the sewer pipe was "exclusive use common area" for which the condo owner was responsible. The trial court and court of appeal disagreed. As a matter of law under both the Davis-Stirling Common Interest Development Act (Civ. Code, §§1350 *et seq*.) and the applicable CC&Rs, the sewer pipe is common area to be maintained and repaired by the homeowners' association. The court of appeal added that the determination of whether the sewer line was exclusive use common area is a legal issue governed by statutory and contract language; it is not an issue that lends itself to the discretion of the board of directors of the homeowners' association.

Notes:

3. 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 has 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. No Update

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C. LAND USE LAW UPDATE

William W. Abbott and Kate J. Hart

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1. CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

A. Regulatory Framework

Summary

- Over 40 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 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/Issues

- Baseline

- Sufficiency of water supply analysis; what approvals are subject to SB 610?

- Sufficiency as to the level of detail in mitigation measures; avoiding deferred mitigation claims.

- Global warming. (See Air Quality & Climate Change section.)

B. Update

1. *Parchester Village Neighborhood Council v. City of Richmond* (2010) 182 Cal.App.4th 305

A municipal services agreement between the Scotts Valley Band of Pomo Indians of California and the City of Richmond did not constitute a project for the purposes of CEQA. The agreement required the tribe to make payments in exchange for fire, police and public works services and the city to support the tribe's fee-to-trust application submitted to the federal government. The court found the agreement was not a project because the city had no authority over the fee-to-trust application, casino construction, or public works programs and the potential construction of fire facilities was too speculative to constitute a project.

For more information, see "City Gambles and Wins on Agreement with Tribe Over Casino: CEQA Does Not Apply" at http://blog.aklandlaw.com.

2. *San Diego Navy Broadway Complex Coalition v. Manchester Pacific Gateway LLC* (2010) 185 Cal.App.4th 924

Before getting to the question of whether a supplemental EIR is required, the threshold CEQA question is whether there is a discretionary approval by the governmental agency. In this case, petitioner argued that a supplemental EIR was required on the issue of climate change impacts, and the discretionary approval was the agency's required consistency review of construction drawings for certain aesthetic impacts. The court of appeals held that the agency's discretionary authority, if it had any at all, was limited to only aesthetics. Because the agency would have no power related to climate change impacts, there was no discretionary action that triggered CEQA.

For more information, see "Limited Discretion Related to Aesthetics Did Not Trigger Need for Supplemental EIR on Climate Change Impacts" at http://blog.aklandlaw.com.

3. *Friends of the Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286

The court of appeals found the provision of the Palo Alto municipal code requiring a 60-day delay prior to the issuance of a demolition permit did not render the act discretionary. The city properly treated the demolition permit as ministerial and exempt from environmental review under CEQA. The court found that under the municipal code the issuance of the demolition permit was ministerial because 1) the decision involved only the use of fixed standards or objective measurements, and 2) the city did not have the authority to impose conditions on approval of the permit that would render it discretionary.

For more information, see "Authority to Delay a Project Does Not Make the Project Discretionary" at http://blog.aklandlaw.com.

4. *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55

The court of appeal held that an agreement between the County of San Diego and the Department of Corrections under which the county identified potential locations for a state prison reentry facility in exchange for preference in the awards of state financing of county jail facilities did not constitute a commitment to a definite course of action. As such, the holding of *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 did not require the county to conduct environmental review prior to entering into the agreement.

For more information, see "Appellate Court Post-Save Tara: Preliminary Exploration Does Not Constitute Project Commitment for CEQA" at http://blog.aklandlaw.com.

5. *Tomlinson v. County of Alameda* (2010) 188 Cal.App.4th 1406

The court of appeals considered: 1) whether CEQA Guidelines section 21177 required appellant to exhaust its administrative remedies; and 2) whether the project at issue qualified as infill development for the purposes of the Guidelines section 15332 categorical exemption. The court held that Section 21177 does not apply to exemption determinations and the infill exemption only applies to projects within the limits of a city.

6. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2010) 181 Cal.App.4th 521

The coastal city of Manhattan Beach adopted Ordinance No. 2115, which prohibited certain retailers and establishments from distributing plastic bags. The city prepared a negative declaration. An association of plastic bag manufacturers brought suit, claiming the ordinance may result in the increased use of paper bags, which in turn would result in significant environmental impacts. The appellate court found the association presented substantial evidence of a fair argument that the ordinance may have a significant environmental impact and therefore an EIR had to be prepared. Petition for Review has been granted in this case.

For more information, see "Paper or Plastic? Public Right Exception Allows Plastic Bag Producers to Challenge Negative Declaration for Environmental Ordinance" at http://blog.aklandlaw.com.

7. *Nelson v County of Kern* (2010) 190 Cal.App.4th 252

In this case, a mining company submitted an application to the County of Kern to surface mine 250,000 cubic yards per year of calcite marble from a 40-acre foothill property on federal land over a period of 30 years, and for a reclamation plan to restore the land after the completion of the mining. The Bureau of Land Management conducted environmental review of the project under NEPA, and the county conducted environmental review of only the reclamation plan under CEQA. The county adopted the mitigated negative declaration and approved a conditional use permit for the reclamation plan. Petitioners sued the county arguing the county should have been the lead agency for the entire project – not just the reclamation plan – and that the failure to consider the entire mining project along with the reclamation plan violated CEQA. The appellate court agreed with petitioners and reversed the trial court's decision.

For more information, see "County Dug Itself a Hole by Limiting its Scope of Review" at http://blog.aklandlaw.com.

8. ***California Oak Foundation v. The Regents of the University of California*** **(2010) 188 Cal.App.4th 227**

The appellate court applied a deferential standard of review to determine whether the Regents adhered to the proper procedures in certifying EIR and upheld Regents' certification process. The court held that the Regents correctly tiered from the Long Range Development Plan EIR to a second tier EIR for the next phase of development, and upheld the trial court's award of $51,000 in costs to the agency for preparing the administrative record.

For more information, see "Go Bears! Court Approves Cal Bears Athletic Facility Expansion" at http://blog.aklandlaw.com.

9. ***Communities for a Better Environment v. City of Richmond*** **(2010) 184 Cal.App.4th 70**

The appellate court concluded the EIR failed CEQA's informational purpose because the project description was inadequate with respect to whether the project would enable the refinery to process heavier crude, and EIR failed to properly establish and analyze baseline conditions.

For more information, see "898,000 Metric Tons of Unmitigated CO_2: Prime Conditions for the First Appellate Court Decision on CEQA and Climate Change" at http://blog.aklandlaw.com.

10. ***Communities for a Better Environment v. South Coast Air Quality Management District*** **(2010) 48 Cal.4th 310**

The Supreme Court found that CEQA air quality impacts are to be measured against existing physical conditions not existing permitted level of operations for emitter.

For more information, see "Baseline Depends Upon Whether You Have a New or Modified Project or Existing Project Without Significant Expansion of Use" at http://blog.aklandlaw.com.

11. *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (December 16, 2010, No. H035135) __ Cal.App.4th __

In this case, the City of Sunnyvale proposed to construct the Mary Avenue Extension project, a four-lane northerly extension of Mary Avenue, including light rail transit tracks, over two freeways to Eleventh Avenue. The city's EIR analyzed the project and its impacts based on 2020 conditions, as opposed to present day conditions. A neighborhood group sued to challenge the approval of the project. The superior court ruled in the neighbor's favor and the city appealed. The appellate court upheld the trial court's decision holding that despite the city's arguments the project was a traffic congestion-relief project, there is no provision of CEQA which allows a roadway infrastructure project to be evaluated differently than other projects. Further, even if the court was to assume the decision to use the projected 2020 conditions as a baseline was proper, it found the administrative record was devoid of any substantial evidence to support the decision to deviate from the norm of using current conditions as baseline for project analysis.

For more information, see "Project to Remedy Traffic Congestion Not Exempt from Analysis of Current Baseline Conditions" at http://blog.aklandlaw.com.

12. *Jones v. The Regents of the University of California* (2010) 183 Cal.App.4th 818

The appellate court upheld EIR for a Long Range Development Plan for Lawrence Berkeley National Library against the challenge that its range of alternatives was insufficient, in part because it did not include an off-site alternative. The court found the range of alternatives was adequate, and an off-site alternative was not necessary because it would not meet the project's primary objective of creating a campus-like setting with existing facilities. The court also found that project opponents' general identification of water quality impacts was insufficient to preserve for trial the more specific complaint that the project failed to attain water quality benchmarks. Project opponents also failed to exhaust their administrative remedies on the greenhouse gas issue because it had the opportunity to bring the issue to the lead agency's attention prior to certification of EIR, but did not do so.

For more information, see "Regents' CEQA Document Receives a Passing Grade; Opponent Marked Down for Inadequate Participation" at http://blog.aklandlaw.com.

13. ***Watsonville Pilots Association v. City of Watsonville, et al.*** **(2010) 183 Cal.App.4th 1059**

A city acting as its own Airport Land Use Commission is subject to all of the substantive requirements under the State Aeronautics Act. The city should have considered a low growth alternative as part of its general plan update as it would meet most general plan update objectives. On the issue of water supply, a water analysis as part of a general plan update does not have to identify a firm source of water supply, only the likely impacts.

For more information, see "City's New General Plan Is Not Cleared for Take-off, Returns to Base and Is Grounded" at http://blog.aklandlaw.com.

14. ***Center for Biological Diversity v. County of San Bernardino*** **(2010) 184 Cal.App.4th 1342**

County of San Bernardino presented insufficient evidence of economic and technological infeasibility to support its decision to reject a project alternative that could feasibly mitigate the air quality impacts of an open air composting facility by approximately 80 percent. The appellate court also held that a SB 610 analysis should have been completed because the project, an open-air composting facility, falls within the definition of processing plants. On the issue of exhaustion of administrative remedies, the court held that petitioner exhausted its administrative remedies to challenge the water supply assessment even though it did not specifically mention the 610 analysis.

For more information, see **"**Put a Lid on It: EIR for Open Air Human Waste Composting Facility Held Invalid" at http://blog.aklandlaw.com**.**

15. ***Cherry Valley Pass Acres and Neighbors v. City of Beaumont*** **(2010) 190 Cal.App.4th 316**

In defining the baseline for water impact analysis, a lead agency could rely upon an adjudicated groundwater right. A lead agency's rejection of agricultural land mitigation strategies was supported by substantial evidence, and sufficient evidence supported the statement of overriding considerations.

For more information, see "Alternative Baseline Considered a Good Egg" at http://blog.aklandlaw.com.

16. ***Katzeff v. California Department of Forestry and Fire Protection*** **(2010) 181 Cal.App.4th 601**

Once imposed, an agency must state its basis, supported by substantial evidence, for cancelling or nullifying a mitigation measure, even if the proposed act is many years after the mitigation measure is imposed.

For more information, see "The Long Life of CEQA Mitigation Measures" at http://blog.aklandlaw.com.

17. *Melom v. City of Madera* (2010) 183 Cal.App.4th 41

A CEQA document is not mandated to address urban decay merely because the project contains a retail supercenter. The holding in *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, does not require this analysis for every CEQA document, but like most CEQA issues, the need for an urban decay analysis is determined based upon the specific facts of each situation.

For more information, see "Subsequent EIRs: It is Still a Matter of the Evidence in the Record" at http://blog.aklandlaw.com.

18. *San Joaquin River Exchange Contractors v. State Water Resources Control Board* (2010) 183 Cal.App.4th 1110

Final staff report prepared by Central Valley Regional Water Quality Control Board Staff for basin plan amendments qualifies for an EIR-equivalent document because basin planning is a certified regulatory program under CEQA.

For more information, see "Basin Plan Amendments Addressing Impairments for Salt, Boron and Dissolved Oxygen are Valid" at http://blog.aklandlaw.com.

19. *Friends of Glendora v. City of Glendora* (2010) 182 Cal.App.4th 573

Local agencies may impose a fee for the filing of an appeal of a CEQA decision so long as that fee is reasonable.

For more information, see "Yes, Local Appeal Fees Apply to CEQA Appeals" at http://blog.aklandlaw.com.

20. *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32

The Supreme Court reversed the Sixth Appellate District Court of Appeal holding that the filing of a notice of determination triggers a 30-day statute of limitations for all CEQA challenges to the decision announced in the notice regardless of the nature of CEQA violation.

For more information, see "NODs Provide Bullet-Proof Protection 30 Days After Posting" at http://blog.aklandlaw.com.

21. ***Stockton Citizens for Sensible Planning v. City of Stockton*** **(2010) 48 Cal.4th 481**

Supreme Court found that flaws in the decision-making process underlying a facially valid and properly filed Notice of Exemption ("NOE") do not prevent the NOE from triggering the 35-day period to file a lawsuit challenging the agency's approval of a CEQA-exempt project.

For more information, see "No Fooling: A Facially Valid NOE Triggers a 35-Day Statute of Limitations" at http://blog.aklandlaw.com.

22. ***Ebbetts Pass Forest Watch v. California Department of Forestry and Fire Protection*** **(2010) 187 Cal.App.4th 376**

After losing at the Supreme Court, petitioners in this case came back to the trial court requesting attorneys' fees under the private attorney general doctrine. Petitioners asserted that although they had lost their claims, the lawsuit had resulted in an opinion from the Supreme Court clarifying the California Department of Forestry and Fire Protection's duties in relation to timber harvest plans. The court held this was not enough to make petitioners successful parties under the private attorney general doctrine and denied the award of any fees.

For more information, see "Are 1021.5 Attorneys Fees All or Nothing?" at http://blog.aklandlaw.com.

23. ***Sonoma County Water Coalition v. Sonoma County Water Agency*** **(2010) 189 Cal.App.4th 33**

In preparing an urban water management plan ("UWMP"), the agency may rely upon reasonable assumptions, supported by substantial evidence. A reviewing court should apply deference to the agency's decision. The issue is not whether there are more reasonable assumptions which should have been incorporated into the UWMP, but whether substantial evidence supported the agency's choice.

For more information, see "Court Upholds Agency's Reasonable Assumptions in its Urban Water Management Plan" at http://blog.aklandlaw.com.

24. ***Environmental Protection Information Center v. California Department of Forestry and Fire Protection*** **(2010) 190 Cal.App.4th 217**

The long legal battle over Pacific Lumber Company's logging of timberland in Humboldt County continues as the parties now fight over Section 1021.5 attorney's fees. Although the appellate court was unwilling to make the final determination on fees and remanded the decision to the trial court, the court enunciated three principles that can be applied in all writ contexts: (1) under the element of "necessity of private enforcement," exhaustion of administrative remedies does not satisfy any pre-litigation settlement requirement; (2) attempts at pre-litigation settlement must be considered when evaluating whether private enforcement was necessary, but it is not dispositive; and (3) in evaluating whether a petitioner had limited success warranting a reduction in attorney's fees, the fact that all of the causes of action are based on the same administrative record does not mean that all of the claims are necessarily related for purposes of Section 1021.5. The same factual analysis applied in all other types of cases applies to writs of mandate.

25. SB 1456 (Chapter 496) – Tiering of Overriding Statement of Considerations

A later project that is tiering off of an environmental impact report for which the lead agency also made a finding of overriding considerations may incorporate the finding of overriding considerations, if specified conditions are met. The Legislature expanded the mediation options as an option for resolving CEQA disputes.

26. AB 2565 (Chapter 210) – Fees for Copies of Environmental Documents

This bill permits agencies to collect a fee from members of the public for copies of environmental documents. The fee cannot exceed the reasonable copying costs. The bill also allows the agency to provide the documents in an electronic format.

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2. 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, such as affordable housing.
- 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/Issues

- Farmland mitigation; legal adequacy of open space elements; impact fees.
- Over time, more cities and counties are warming up to development agreements.
- Developers are becoming more aggressive in asserting rights guaranteed by development agreements.

B. Update

1. *Building Industry Association of Central California v. County of Stanislaus, et al.* (2010) 190 Cal.App.4th 582

In this much anticipated decision, the California Court of Appeal, Fifth District reversed trial court's ruling to invalidate the Farmland Mitigation Program adopted as an update to the County of Stanislaus' agricultural element of the county's general plan.

For more information, see "Appellate Court Upholds Facial Challenge to 1 to 1 Agricultural Lands Mitigation" at http://blog.aklandlaw.com.

2. *Embassy LLC v. City of Santa Monica* (2010) 185 Cal.App.4th 771

A property owner seeking to remove 19 rental units under the Ellis Act (Government Code section 7060 et seq.) stated a claim to compel the city to process a request to allow it to remove the units, notwithstanding an earlier settlement agreement which included a waiver of rights under the Ellis Act. The court of appeals reversed a trial court decision which granted city's demurrer, based upon estoppel and statute of limitations. The settlement agreement did not come within the exception for agreements including public agency financial contribution to the development project.

3. *World Wide Rush, LLC, et al. v. City of Los Angeles* (9th Cir. 2010) 606 F.3d 676

The plaintiffs sued the city to enjoin enforcement of a freeway facing sign ban and supergraphic and off-site sign bans. The Ninth Circuit first addressed the freeway facing sign ban. The court held that the city's exception to permit freeway facing billboards at the Staples Center and in the Fifteenth Street special use district did not undermine the city's interests in aesthetics and safety. In addressing the second issue – whether the city could employ various exceptions in the ordinance to the ban of supergraphic and off-site billboards - the Ninth Circuit held that the city was well within its discretion to grant exemptions to its ordinance as the prior restraint doctrine did not apply. The court reasoned that since the city council's power to authorize the exceptions to the sign bans arises out of the police power as opposed to the bans themselves, the city council had the authority to exercise discretion.

For more information, see "Police Power Gives Cities Wide Discretion in Enforcing Billboard Bans" at http://blog.aklandlaw.com.

4. *City of Cerritos v. Cerritos Taxpayers Association* (2010) 183 Cal.App.4th 1417

Redevelopment law establishes statutory requirements on the expenditure of tax increment funds for low and moderate income housing. A complex transaction which allowed for use of funds to develop replacement school district administrative office space, linked to the development of the district's old administrative building site for housing, was consistent with the statute. A senior housing site, administered by a city formed non-profit still qualified as a privately owned project, and as a result, no Article XXXIV vote was required.

For more information, see "Article XXXIV Voter Requirements Inapplicable to Senior Housing Project Owned by a City Formed Non-Profit Public Benefit Corporation" at http://blog.aklandlaw.com.

5. ***Anderson v. City of Hermosa Beach*** **(9th Cir. 2010) 621 F.3d 1051**

Tattoos, and the practice of tattooing, are protected by the First Amendment activities. A city may not completely ban the practice, and any regulations are subject to reasonableness in terms of time, place and manner.

For more information, see "Got Ink?" at http://blog.aklandlaw.com.

6. ***Madain v. City of Stanton*** **(2010) 185 Cal.App.4th 1277**

An application for an adult bookstore was denied based upon a pending application for a sensitive use (church). Where the applicant has presented evidence in the administrative hearing that his application was improperly managed by city staff, the result of which was to permit a later application for a sensitive use to acquire processing priority and protection under the city's ordinances, the city council needs to make findings regarding the allegation.

For more information, see "Racing to the Starting Line; Competing Permit Applications and First Amendment Activities" at http://blog.aklandlaw.com.

7. ***County of Los Angeles v. Sahag-Mesrob Armenian Christian School*** **(2010) 188 Cal.App.4th 851**

This decision involves the interface of local zoning regulation with the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") (42 U.S.C. § 2000cc (a-b).) The county required a school owned and operated by the Sahag-Mesrob Armenian Church to get a use permit for operating the school and refused to grant a waiver during the permit process to allow the school to continue in operation without the permit. The first issue was whether the county's requirement for a conditional use permit and the denial of the waiver violated the "substantial burden" test. Reviewing a number of decisions from other states, the appellate court concluded that the necessity for a conditional use permit and the denial of the clean hands waiver did not coerce or affect an individual's practice of faith and therefore, was not an unreasonable burden. The church also argued that the county's denial of the clean hands waiver was improper, as a number of other faith and non-faith based waiver requests had been granted. The evidence supporting the preliminary injunction was the code enforcement action and waiver denial were land use neutral in character, in that the granted waivers were for activities in locations which would not have the same level of adverse impacts to surrounding uses as would the defendant's school operation. On this basis, the county was able to argue that it had a sufficient factual basis upon which it could justify granting waivers to others, but denying this particular request.

For more information, see "Forgive Me Father, For I Have Violated the Zoning Ordinance" at http://blog.aklandlaw.com.

8. *Hashalom v. City of Santa Monica* (2010) 190 Cal.App.4th 375

Government Code section 37361, subdivision (c), contains a noncommercial, religious exemption to landmark designation. In this case, the appellate court held that an apartment complex did not fall within the exemption from historic preservation provided by section 37361, subdivision (c), because the property had always been a commercial enterprise, both when the current owner purchased it and when the owner sought the exemption. To fall within the exemption, the noncommercial use must predate the landmark designation and the exemption application; and a property's use must be related to the religious-entity owner's fulfillment of its religious mission but not for profit making.

9. *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes* (December 30, 2010, No. C059239) __ Cal.App.4th __

In 1997, plaintiff and defendant, Town of Mammoth Lakes, entered into a development agreement whereby plaintiff would lease the land encompassing and surrounding the airport from the town with an option to purchase and would operate the airport in conjunction with developing the land near the airport into a condominium or hotel complex. In 2000, after plaintiff completed the required airport improvements, plaintiff submitted an application for development of a residential condominium complex. The town disliked the residential concept, and eventually, plaintiff submitted another application involving time-share facilities with the option of renting the units out when the owners were not using them. This new plan was submitted in 2004. Around the same time, the town contacted the Federal Aviation Administration ("FAA") to gain approval to expand their airport facilities to accommodate commercial jets. The FAA stated that it would not approve the expansion if a condominium/hotel complex would be built on the surrounding property. The town then proceeded to work against plaintiff's application for development and refused to process the application without first resolving the FAA issues. Plaintiff sued the town on the grounds of anticipatory breach of contract. A jury found in favor of plaintiff and awarded plaintiff $30 million. Subsequently, the judge also granted plaintiff approximately $2.3 in attorney's fees under the "prevailing party" provision of the development agreement. The court ruled that contract interpretation principles, not statutory interpretation principles, applied to the development agreement, and exhaustion of administrative remedies, required in writs of mandate, did not apply to this breach of contract action. The court held that substantial evidence supported the jury's finding of breach, and therefore, the court affirmed the trial court's damages award.

10. AB 1867 (Chapter 367) – Changes to Housing Element Law

This bill amends Section 65583.1(c)(2)(B)(vi) of the Housing Element Law to include multifamily rental or ownership housing complex of three or more units, instead of four or more units as it reads under existing law. Subdivision (c) covers the circumstances under which a city or county may substitute 25 percent of its required inventory for specific income levels, if it establishes a committed assistance program for that income level. This amendment constitutes a minor revision to the program requirements.

11. AB 987 (Chapter 354) – Transit Village Development District

This bill expands the maximum area of a transit village development district under section 65460.1 of the Government Code to a half mile from the main entrance of a transit station, instead of a quarter mile.

12. AB 1641 (Chapter 665) – Redevelopment Project Areas

This bill clarifies that public housing may be included within redevelopment project areas under section 33030 of the Health and Safety Code.

13. SB 1374 (Chapter 182) – Redevelopment Agency Report to Legislative Body

Under existing law, the redevelopment agency must adopt a report to the legislative body before the public hearing on the proposed extension of the redevelopment plan. (Health & Saf. Code, § 33333.11.) This bill requires additional information to be included in the report, such as a detailed response to any written objections or concerns that have been expressed by members of the public. This bill also adds a requirement that the redevelopment agency and the legislative body must consider any objections at the public hearing.

14. AB 1965 (Chapter 60) – Williamson Act Contracts and Lot Line Adjustments

This bill amends Government Code section 51257 to extend the repeal date of the contract rescission provision to process a lot line adjustment from January 1, 2011 to January 1, 2013. It requires that an application to rescind a contract for lot line adjustments be processed to its completion if it is submitted to the requisite local agency prior to the January 1, 2013 date.

15. AB 2530 (Chapter 391) – Shortening Williamson Act Contracts

This bill was intended to "save" the Williamson Act. When budget cuts precluded counties from receiving subvention funds for the Williamson Act Contracts, many counties indicated the inability to fiscally renew contracts. To prevent that from happening, this bill was introduced to amend various provisions of the Williamson Act to authorize a county to reduce the term for new contracts by ten percent and require the assessor to value the property based on the new contract when the county's reimbursement for lost revenue is less than one-half the actual foregone general fund property tax revenue. In begin able to shorten the term of the contract, the county increases its property tax revenue. The bill provides that a landowner may choose to non-renew and being the cancellation process if a new contract is requested. The amendments become effective January 1, 2011 and remain in effect until January 1, 2015.

Notes:

3. 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.
- The rule on when offsite improvements can be used to trigger a mandatory extension is uniformly misunderstood by cities, counties, developers and consultants.

Trends/Issues

- How does one extend an approved tentative map?
- When do old maps create separate legal parcels?
- When does an exclusive use easement constitute a subdivision?
- How to unwind recorded but un-built subdivisions?

B. Update

1. *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032

The procedures for vacating roads and easements under the Subdivision Map Act (Gov. Code, § 66434) is an alternative to vacation under the Streets and Highways code (Sts. & Hy. Code § 8300 et seq.) Absent a specific requirement for separate notices, a local agency may utilize a single notice to meet noticing requirements for land use approvals and related actions.

2. *Torrey Hills Community Coalition v. City of San Diego* (2010) 186 Cal.App.4th 429

Petitioners challenging subdivision map approvals must obtain and serve a summons within 90 days or face dismissal. CEQA has an independent procedural requirement that the petitioner file and serve a request for a hearing within 90 days.

For more information, see "Land Use Litigation Traps" at http://blog.aklandlaw.com.

3. ***Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*** **(2010) 187 Cal.App.4th 1461;** ***Colony Cove Properties, LLC v. City of Carson*** **(2010) 187 Cal.App.4th 1487**

Generally, Section 66427.5 limits all forms of local regulation on mobilehome park conversions, although conversions may be subject to Coastal Act and Mello Act requirements. The Supreme Court granted review of this case.

Notes:

4. 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 11, section 7 supports a wide range of legislative enactments under the police power.

B. Update

1. *Los Angeles Unified School District v. County of Los Angeles* (2010) 181 Cal.App.4th 414

This case involved a tug-of-war between a county and a school district over a share of the property tax increment distributed by redevelopment agencies. In the wake of Proposition 13, property tax revenues are limited and their allocation is coveted by local government, special districts and school districts. Under redevelopment law, redevelopment agencies must give a portion of the incremental increase in property tax revenues to local entities, including schools, based on the percentage of property tax revenue received by the entity in that fiscal year. In this case, the court held that the Los Angeles Unified School District was entitled to a larger share of the property tax increment than it had been allocated because defendants, which included multiple redevelopment agencies, the County of Los Angeles and the City of Los Angeles, failed to take certain property taxes into account received by the school district through the Educational Revenue Augmentation Fund. (Rev. & Tax. Code, §§ 97.2, 97.3).

For more information, see "The Fight Over Property Taxes Continues: School District Entitled to Larger Share of Property Tax Increment" at http://blog.aklandlaw.com.

2. *Gualala Festivals Committee v. California Coastal Commission* (2010) 183 Cal.App.4th 60

Section 30600, subdivision (a) of the California Coastal Act ("Act") requires any local government, state, regional, or local agency, or any person "wishing to perform or undertake any development in the coastal zone" to "obtain a coastal development permit." Under the Act, development is broadly defined and includes the "discharge or disposal of any dredged material." (Gov. Code, § 30103.) The Coastal Commission issued a cease and desist order prohibiting the Gualala Festivals Committee from discharging fireworks over the Gualala River estuary without first obtaining a coastal development permit. Petitioners challenged the order claiming the Coastal Commission had exceeded its jurisdiction. The appellate court found the proposed fireworks display was a development within the meaning of Public Resources Code section 30106 because it would result in the discharge of solid and chemical waste within a coastal zone.

3. *Azusa Land Partners v. Department of Industrial Relations* (December 21, 2010, No. B218275) ___Cal.App.4th___

The Second Appellate District Court of Appeals upheld determinations by the Department of Industrial Relations ("DIR") and trial court that (1) a master planned community project is a "public work" subject to prevailing wage laws applicable to public improvement work performed by private contractors where such work was a condition of project approval, (2) Mello-Roos proceeds are "public funds," and (3) once a project is deemed a "public work" under Prevailing Wage Law, the entire project is subject to the law – including those improvements which are privately financed.

4. Medical Marijuana Update

Since the enactment of the Compassionate Use Act of 1996 by initiative and the Medical Marijuana Program ("MMP") by the legislature in 2003, counties and cities have struggled to figure out how the local police power fits in with the state statutes exempting from criminal prosecution qualified patients and assistants under the medical marijuana laws and the federal statutes prohibiting all marijuana use and possession. In 2009, a California appellate court held that a city was not required to zone to allow medical marijuana dispensaries. (*City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153.) This year an appellate court faced the question of whether the state statutes were preempted by the federal Controlled Substances Act and whether a local ordinance making it a misdemeanor to operate or own a medical marijuana dispensary violated the Unruh Civil Rights Act. (*Qualified Patients Association v. City of Anaheim* (2010) 187 Cal.App.4th 734.) The court held that federal law did not preempt the state medical marijuana statutes because the fact that medicinal marijuana was exempted from state criminal liability did not conflict with or obstruct the imposition of federal criminal liability. Additionally, the court held that the local ordinance did not violate the Unruh Civil Rights Act because the city is not a "business entity," and therefore the Unruh Civil Rights Act is not applicable to the city. Back in the trial court, the court will also have to determine whether state law preempts the local ordinance. This will likely result in another appellate opinion. (*Id.*) Another trial court opinion invalidating a local zoning ordinance permitting dispensaries in certain zones and requiring all dispensaries to acquire a use permit on the grounds of equal protection was subsequently reversed by an appellate court on the grounds that the lawsuit was untimely. (*County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312.) This issue will likely be tried in another venue in the coming years. The only other development in this area worth mentioning is the passage of AB 2650 (Chapter 603), which amends the MMP to prohibit any dispensary from being within a 600 foot radius of a public or private school, subject to certain exceptions. The new statute specifically permits a local jurisdiction to impose stricter requirements than those in the MMP. The Attorney General's guidelines on the regulation of dispensaries already recommended the prohibition of dispensaries within 1000 feet of a school, but this provides a statutory mandate that all local jurisdictions must follow.

5. SB 1284 (Chapter 645) – Mandatory Minimum Penalties

SB 1284 makes several revisions to the Mandatory Minimum Penalties ("MMPs") statute. For one, the law exempts dischargers from MMPs for failing to file a discharge monitoring report if the dischargers file a written statement that certifies that no discharges to surface water occurred and that specifies the reasons they failed to file a report. The law also limits MMPs to a single $3,000 penalty for each failure to timely file a discharge monitoring report in situations where: 1) the discharger had not previously received a complaint to impose penalties for failing to file a report from the State Water Board or a RWQCB; 2) the discharges to surface waters did not violate effluent limits; and (3) certain other conditions are met.

For more information, see "Governor Schwarzenegger Signs Bill to Relieve POTWs of Some MMPs" at http://blog.aklandlaw.com.

6. SB 85 (Chapter 5) – Property Tax Allocation

This bill modifies the property tax allocation formulas to increase annual allocations to specific counties. (Rev. & Tax. Code, §§ 96.11, 97.81.)

7. SB 1340 (Chapter 649); AB 44 (Chapter 564) - Contractual Assessment Financing

SB 1340 (Chapter 649) and AB 44 (Chapter 564) authorize contractual assessment financing for electric vehicle charging infrastructure and seismic strengthening improvements on real property, respectively.

8. SB 902 (Chapter 67) – Regulation of Fire Companies

This bill reduces the population threshold for counties that can regulate fire companies from 1,000,000 to 400,000 pursuant to section 14831 of the Health and Safety Code.

9. SB 1023 (Chapter 68) – Community Services Districts

This bill creates expedited procedures to convert Resort Improvement Districts and Municipal Improvement Districts into Community Services Districts by amending section 57077 of the Government Code.

10. AB 2795 (Chapter 47) – Local Agency Formation Commissions

This bill makes several minor, non-controversial changes to the laws affecting local government organization and reorganization. Among the substantive revisions, this bill extends, from 15 days to 30 days, the amount of time that local officials can renegotiate a property tax transfer agreement if the LAFCO modifies the proposed boundary change, and provides additional time for a local agency that is negotiating a property tax exchange as part of a proposal or reorganization by allowing that local agency to notify the LAFCO, the county auditor, and the other affected local agencies of its desire to extend the negotiating period to 90 days.

Notes:

5. 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 to a requirement to dedicate a 100-stream conservation easement to Department of Fish & 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. *Greene v. Marin County Flood Control and Water Conservation District* (2010) 49 Cal.4th 277

The California Supreme Court, in a unanimous decision, reversed the First Appellate District and upheld a trial court's decision rejecting a challenge to overturn a Proposition 218 election. The basis of the challenge was whether the district conducting the election had maintained the requisite level of voting secrecy. Although the appellate court believed that the district could have maintained a higher level of secrecy, the Supreme Court concluded that actions taken by the district were consistent with both Proposition 218 and the implementing legislation, and the fact that more secrecy could have been applied was not mandated by Article 11, section 7, at least with respect to the facts involving a 218 election.

For more information, see "Now You Have a Secret, Now You Don't. Secret Balloting and Proposition 218" at http://blog.aklandlaw.com.

2. *Homebuilders Association of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554

Impact fees can be based upon a general description of facilities to be developed. The Quimby Act is not preemptive as to recreation fees imposed on non-subdivision facilities or city-wide recreation improvements. A fire fee which is used to pay back a city for general fund constructed improvements, but which does not result in new facilities or rehabilitation of facilities, violates the Mitigation Fee Act.

For more information, see "Court Affirms Range of City Impact Fees Based Upon a General Description of Facilities; Puts Out the Flame for Fire Impact Fees**"** at http://blog.aklandlaw.com.

3. *Galbiso v. Orosi Public Utility District* (2010) 182 Cal.App.4th 652

This case finally concluded the long fought battle over sewer assessments levied against property subsequently purchased by petitioner. Previously, the district attempted a judicial foreclosure due to a failure of petitioner to pay the assessment. The appellate court in that case found that a judicial foreclosure could not be used, and the remedy provided in the statute is a tax sale. After that decision, the district instituted a tax sale, which is the subject of this recent case. The court held that the six month limitation on holding a tax sale is directory and not mandatory, and therefore, the district had not violated any statute by holding the tax sale more than six months after the diagram or recordation of the assessment. The court also held that granting the reassessment of petitioner's property was within the district's discretion, and petitioner provided no legal basis in her petition for writ of mandate that would dictate otherwise.

4. *Beutz v. County of Riverside* (2010) 184 Cal.App.4th 1516

An agency proposing to impose an assessment bears the burden of justifying the allocation and amount of the assessment. These determinations have to be made based upon substantial evidence. Assessments which are absolutely uniform are suspect in the absence of competent evidence.

For more information, see "When All Else Fails, Blame the Engineers" at http://blog.aklandlaw.com.

Notes:

6. 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. Const., 5th Amendment; Cal. Const., 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. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2010) 130 S.Ct. 2592

In a divided ruling, the United States Supreme Court held that a property owner had failed to establish the existence of protected property rights under Florida law to stop a beach replenishment project, and as a result, the Court need not determine whether or not a ruling by the Florida Supreme Court constituted a physical taking affecting ocean front property owners.

For more information, see "Takings Analysis Potentially Applies to Judicial Decisions as Well" at http://blog.aklandlaw.com.

2. *Adam Bros. Farming, Inc. v. County of Santa Barbara* (2010) 604 F.3d 1142

Adam Bros. Farming, Inc. has spent the last decade battling the County of Santa Barbara over its faulty wetlands delineation. In state court, Adam Bros. Farming won its declaratory and injunctive relief claims, but the jury's award of damages was overturned by the appellate court. Adam Bros. Farming then went to federal court. Unfortunately, the Ninth Circuit Court of Appeals held that the federal claims had already been adjudicated in state court, and therefore, Adam Bros. Farming takings claim is barred by the doctrine of res judicata.

For more information, see "The Adam Bros. Farming Saga Ends at the Ninth Circuit" at http://blog.aklandlaw.com.

3. *Guggenheim v. City of Goleta* (December 22, 2010, No. 06-56306) __ F.3d __

The plaintiffs in this case filed a lawsuit against the City of Goleta claiming that its mobilehome rent control ordinance violated the takings clause, substantive due process and equal protection. The rent control ordinance imposed a cap on the amount mobilehome park landowners could charge for rent as well as provided procedures for increasing the rental amount. When the plaintiffs originally purchased their mobilehome park decades prior to filing the lawsuit, the property was located in the unincorporated area of the county, and the existing county code imposed the same rent control ordinance that was subsequently adopted by the city when it incorporated. In 2009, a three-judge panel of the Ninth Circuit Court of Appeals found that the rent control ordinance constituted a taking and held in favor of plaintiffs. Upon request by the city, the Ninth Circuit decided to re-hear the case en banc. The fact that plaintiffs purchased their property knowing of the rent control ordinance was central to the Ninth Circuit's final decision. According to the court, plaintiffs had no distinct investment-backed expectations because the rental control ordinance was in place when plaintiffs bought the property. Although the ordinance being challenged was the city's, plaintiffs had no reasonable expectation that the rent control ordinance would one day be eliminated. Therefore, the court held that no regulatory taking had occurred under *Penn Central Transportation Co. v. New York City*, which was a reversal from the three-judge panel's original decision. Additionally, the court held that the ordinance's goal of reducing the rental burden on mobilehome owners/tenants was legitimately related to the ordinance's rent control procedures. Thus, the city had not violated plaintiff's substantive due process or equal protection rights.

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