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ABBOTT & KINDERMANN, LLP
ATTORNEYS AT LAW

2100 TWENTY FIRST STREET ■ SACRAMENTO, CALIFORNIA 95818 ■ T 916.456.9595
www.aklandlaw.com ■ blog.aklandlaw.com

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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/
Bills - http://www.leginfo.ca.gov

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ENVIRONMENTAL LAW UPDATE

Diane G. Kindermann Henderson, Glen C. Hansen and Daniel S. Cucchi

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
NELs ..... Numeric Effluent Limitations
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. *Siskiyou County Farm Bureau v. California Department of Fish and Game* (Super. Ct. Siskiyou County, 2012, No. CV 11-00418).

California Fish and Game Code sections 1600 *et seq.* were adopted in 1961 to ensure that the California Department of Fish and Game ("DFG") was notified for projects that substantially altered a watercourse. Section 1602 requires that an entity or person notify DFG and obtain a Lake and Streambed Alteration Agreement ("Agreement") before that entity or person begins any activity that will "substantially divert or obstruct 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 river, stream, or lake …." For over 50 years, ranchers and farmers in Siskiyou County have extracted water from streams and rivers under valid water rights and in accordance with

relevant water adjudication decrees, in order to irrigate crops and pastures, to water livestock, and for use in their homes and businesses, without altering the applicable lake or streambed, and therefore without the necessity to notify the DFG and obtain an Agreement under section 1602. However, DFG is now interpreting section 1602 to mean that notification to DFG and obtaining an Agreement is required under that statute even for the mere act of extracting water from rivers, streams and lakes in accordance with a valid water right where there is no alteration of the watercourse. Violation of section 1602 can be charged criminally. In 2011, the Siskiyou County Farm Bureau filed a declaratory relief action in Superior Court in Siskiyou in order to clarify the rights and duties of its members under section 1602. On December 24, 2012, the Court issued its decision in the case and held in favor of the Petitioners. The Court found that "Fish and Game Code §1602 does not require notification of the act of extracting water pursuant to a valid water right where there is no alteration to the bed, bank, or stream." Therefore, "the Defendant Department of Fish and Game is enjoined from bringing enforcement action against agricultural water diverters for failing to notify the department of the diverter's intention to exercise his water right absent alteration to the bed, bank, or stream."

2. Mendocino County Superior Court Finds State Water Board's Frost Regulations For Russian River Watershed To Be Unconstitutional.

In September 2011, the State Water Resources Control Board ("SWRCB") adopted frost protection regulations for the Russian River watershed. Those regulations provides that any diversion of water from the Russian River stream system, including the pumping of hydraulically connected groundwater, for purposes of frost protection from March 15 through May 15, was a per se unreasonable method of diversion and use and a violation of Water Code section 100, unless such diversion was conducted in accordance with a SWRCB -approved Water Demand Management Program ("WDMP"). The stated intention of the regulations was to limit water use for frost protection in order to prevent strandings of salmonids in the Russian River watershed. According to the SWRCB's analysis, capital costs for implementing the corrective actions under the regulations for a 160-acre vineyard will range from $236,000 to $352,000 and annual upkeep costs will range from $26,000 to $36,200. A number of grape growers and other individuals brought a petition for writ of mandate to challenge the regulations in *Light v. California State Water Resources Control Board*, Mendocino County Superior Court (consolidated), case no. SCUK-CVG-11-59127. On September 26, 2012, the Superior Court issued its decision granting the petition and invalidated the regulations. The Court held (1) the regulations violate the California Constitution because they declare hundreds of vested water rights unreasonable without any case-by-case analysis; (2) the regulations violate the fundamental rule of priority in California water law by making a regulation that treated all water users the same; (3) the SWRCB improperly delegated its authority to adjudicate unreasonable use determinations to the private governing bodies; and (4) the regulations were not "reasonably necessary" because the SWRCB failed to determine what stream conditions are necessary to protect salmonids. A supplemental decision by the Court on the additional CEQA claims in those combined cases is expected at any time.

For more information, visit
http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/russian_river_frost/
http://www.acwa.com/news/regulatory-affairs/new-russian-river-frost-protection-regulation-effect

3. Water Users Required To Measure Monthly Water Diversions, And Annually Report Use To State Water Board

If you divert and use water from a surface water source such as a lake, creek, stream, or river, OR you divert water from a subterranean stream that flows in a known and definite channel, California Water Code §5101 requires that you report your diversion and use to the State of California Water Board, Division of Water Rights. Water use reporting requirements do not apply to individuals who receive all of their water through a municipal water system, such as a city public works system. Nor do they apply to individuals whose entire water diversions are delivered through a public or private water agency. In these cases, the city, agency, or entity that delivers the water to you files the reports with the State Water Board. Reporting is made by a Statement of Water Diversion and Use prior to July 1 of the following year. There are four exemptions to this requirement:

- Diversions from a spring that does not flow off the property on which it is located and from which the person's combined diversions do not exceed 25 acre-feet in any year.
- Diversions covered by a registration for small domestic or livestock stockpond uses, a stockpond certificate, or a permit or license to appropriate water on file with the board.
- Diversions covered by a Notice of Groundwater Extraction and Diversion (Riverside, Los Angeles, San Bernardino, and Ventura counties only).
- Diversions which are regulated by a watermaster appointed by the Department of Water Resources or a court where the watermaster files reports detailing the persons who have diverted and describe the general place of use and the quantity of water that has been diverted from each source.

An initial Statement should be completed for each point of diversion and should identify the amount of water used during the first calendar year. The Statement must be filed with the Division before July 1 of the following year.

A Supplemental Statement must be filed by the owner or agent of record at three-year intervals following the filing of an Initial Statement of Diversion and Use. The Supplemental Statement must then be completed online through the eWRIMS Online Reporting prior to July 1 of that year.

Beginning on January 1, 2012, diverters of water who file Statements are required to measure their monthly water diversions, and report those amounts when they submit their reports the following year. California Water Code section 5103(e)(1) provides: *"On and*

after January 1, 2012, monthly records of water diversions. The measurements of the diversion shall be made using best available technologies and best professional practices. Nothing in this paragraph shall be construed to require the implementation of technologies or practices by a person who provides to the [State Water Board] documentation demonstrating that the implementation of those practices is not locally cost effective."

For more information, see
http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/online_faqs.shtml
http://www.waterboards.ca.gov/waterrights/water_issues/programs/ewrims/online_faqs.shtml#waterusereporting

4. Pre-Public Draft Bay Delta Conservation Plan And Related Draft Environmental Impact Statement/Report Expected To Be Issued In February 2013

Federal and state agencies, local water agencies, and environmental and conservation organizations are in the process of implementing a joint venture called the "Bay Delta Conservation Plan" or "BDCP" for California's Sacramento-San Joaquin Delta ("Delta") The BDCP is expected to provide a regulatory vehicle for project proponents to develop and implement a series of wildlife habitat restoration measures and water operations changes for the Delta in return for regulatory agency approval of the necessary long-term permits for the various projects and state and federal water projects in California over the next 50 years. The BDCP is intended to be developed in compliance with the Federal Endangered Species Act and the California Natural Communities Conservation Planning Act. It is expected that the BDCP will make sweeping environmental, infrastructure, and operational changes to the principal water delivery systems in the Delta, including proposed dual underground tunnels that would divert a portion of the water supplies out of the Sacramento River near the Pocket area and under the Delta to the large pumping stations in the southern part of the Delta. The most recent estimates provide that a complete Pre-Public Draft BDCP and Draft Environmental Impact Report/Environmental Impact Statement is expected to be issued in February 2013 for review, and a Public Draft is expected to be released for formal review and comment in spring of 2013.

In July 2012, the Board of Supervisors for Contra Costa County unanimously voted to reject the BDCP tunnel proposal unless there is additional environmental analysis and other protections, especially in the area of project governance.

For more information, visit
http://baydeltaconservationplan.com/Home.aspx

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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 (e.g., 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 standard's nonattainment is due to toxicity, a pollutant, or pollutants; and remediation of the standard's 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.

<u>California Porter-Cologne Act</u> (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. *Decker v. Northwest Environmental Defense Center*, 183 L.Ed.2d 673, 2012 U.S. LEXIS 4793 (case no. 11-338), on *cert. review* of *Northwest Environmental Defense Center v. Brown* (9th Cir. 2011) 640 F.3d 1063.

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 Clean Water Act ("CWA") on the grounds they did not obtain permits from the U. S. Environmental Protection Agency ("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. That ruling reversed a 30-year practice of exempting stormwater from forest roads from NPDES permitting under the "Silvicultural Rule." On Monday, December 3, 2012, the U.S. Supreme Court heard oral argument after granting certiorari in the case.

However, on Friday, November 30, 2012, the court day before oral argument, the EPA concluded a new rulemaking (in an unusually short timeframe), which amended and reaffirmed the existing Silvicultural Rule, and which specifically disapproved the Ninth Circuit's decision in this case, thereby giving the State of Oregon what Chief Justice Roberts described as "almost all the relief they're looking for" in defending the lawsuit. Chief Justice Roberts chided the government attorneys for not informing the Court a month earlier that a new rule was about to be issued, which could have delayed the Court's oral argument, and possibly allowed supplemental briefing. (The Deputy

Solicitor General conceded that issuing the new rule the Friday before oral argument is "suboptimal.") However, counsel for the respondent environmental group stated that the new EPA rule "simply violates the statute" and "is not as clear as you might think"; that the language in the new rule "doesn't moot the case"; and that "EPA is leaving open our argument." Therefore the group is likely to bring an entirely new citizen suit action against the EPA to challenge the new rule.

During oral argument, the Justices and attorneys struggled with what to do procedurally with the case. For example, Justice Kennedy's questioned whether the Court should "vacate for the court of appeals to consider in the first instance the extent to which this regulation may bear on its opinion." The Justices will now have to consider the following issues:

- Should the Court consider the Ninth Circuit's decision on the merits anyway because that legal interpretation could preempt years of additional litigation regarding the retrospective relief sought by the environmental group in the lawsuit, including attorneys' fees, penalties for alleged past violations, and remediation for alleged past environmental harm;

- Should the Court overturn the Ninth Circuit's decision and find for the State of Oregon on the merits because, according to counsel for the State of Oregon, "that will preclude a large part of the basis for the challenge to the new rule" and "eliminate one of the arguments that the plaintiffs will make in a challenge to the new rule";

- Should the Court merely find the case moot, as the Deputy Solicitor General suggested, because of the EPA's view that the "new rule was not intended to change the meaning of the preexisting definition";

- Should the Court dismiss the case as improvidently granted, as counsel for the environmental group recommended, which would then let the parties return to the Ninth Circuit to address whether any remedies can be given to the environmental group.

Thus, in light of the unique and sudden developments in the case, there is great uncertainty over what the Court will now do with the litigation. The Court ordered supplemental briefing on the impact of the new EPA regulation on the case. Also, Northwest Environmental Defense Center just filed a new lawsuit to challenge the new EPA regulation.

2. *Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc.* (Jan. 8, 2013, No. 11-460) ___ U.S. ___ [2013 U.S. LEXIS 597].

The Los Angeles County Flood Control District (District) operates a municipal separate storm sewer system or MS4, which is a drainage system that collects, transports, and ultimately discharges storm water to the Pacific Ocean. The District is required to obtain

an NPDES permit from the Los Angeles Regional Water Quality Control Board to discharge the storm water to the ocean.

This case arises out of the citizen suit provision (section 505) of the Clean Water Act. Plaintiffs alleged that monitoring data from the Los Angeles and San Gabriel Rivers illustrated that the water quality standards in the District's NPDES permit had been exceeded. The District Court concluded that the evidence in the record was insufficient to warrant a finding that the District's MS4 had discharged storm water containing pollutants in excess of the standards detected at the downstream monitoring stations because there were numerous entities other than the District that discharge into the rivers upstream of the monitoring stations. The Court of Appeal, Ninth Circuit, reversed on the grounds that the District's concrete channels were constructed for flood-control purposes and thus, the discharge of pollutants occurred under the Clean Water Act when the polluted water detected at the monitoring stations flowed out of the concrete channels and into the unlined portions of the river.

The United States Supreme Court granted review of the Ninth Circuit's decision to address a single question: whether the flow of water out of a concrete channel within a river constitutes the "discharge of a pollutant" under the Clean Water Act. The Supreme Court answered in the negative citing to the *South Florida Water Management District v. Miccosukee Tribe* (2004) 541 U.S. 95 case, and reversed the Ninth's Circuit's judgment. Stated another way, the Supreme Court held that "the flow of water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does *not* qualify as a discharge of a pollutant under the Clean Water Act. (Emphasis added.)" The Court reasoned that "no pollutants are 'added' to a water body when water is merely transferred between different portions of that water body." Notably, the Districts new NPDES permit requires end-of-pipe monitoring at individual MS4 discharge points. With this new requirement, the District will have a very difficult time arguing that pollutants contained in the water from the individual MS4 discharge points could have come from another source.

3. *California Sportfishing Protection Alliance v. All Star Auto Wrecking, Inc.* (E.D.Ca. 2012) 860 F.Supp.2d 1144.

A non-profit public benefit corporation, whose mission is to preserve and protect the environment, wildlife and natural resources of the water of California, brought a civil citizen suit enforcement action under the Clean Water Act ("CWA") on the ground that defendant auto salvage yard facility discharges pollutants into the surface waters of Rice Creek in violation of, among other things, a CWA permit. The District Court denied defendants' Rule 12(b)(1) motion to dismiss the complaint that challenged, among other things, plaintiff's standing to bring the action. The court held that, under *Ecological Rights Foundation v. Pacific Lumber Company*, 230 F.3d 1141, 1151, 1152 (9th Cir. 2000), the threshold question of standing under the CWA is whether an individual can show that she has been injured in her use of a particular area because of concerns about violation of environmental laws, not whether the plaintiff can show there has been actual environmental harm. The causal connection put forward by the plaintiff for standing

purposes "cannot be too speculative, or rely on conjecture about the behavior of other parties, but need not be so airtight at this stage of the litigation as to demonstrate that the plaintiffs would succeed on the merits." The motion to dismiss failed as a facial attack because the allegations of the complaint, when taken as true, sufficiently alleged standing to bring the suit. The motion also failed as a factual attack because defendants failed to demonstrate that the standing allegations in the complaint were untrue. The court found that plaintiff sufficiently claimed its individual members' use and enjoyment of the waters at issue, those members' concerns about alleged pollution from defendants' facility, and how these concerns are impeding their use and enjoyment of those waters. Contrary to defendants' argument that plaintiff had to show traceable injury, the court held that "Plaintiff does not need to prove to a scientific certainty that Defendants have in fact discharged pollutants in violation of its permits, in order to obtain standing." Defendants improperly "confuse[d] the jurisdictional inquiry with the merits inquiry, as Plaintiff need not prove the merits of the case at this early stage of the pleadings."

4. *Pacific Coast Federation of Fishermen's Associations v. Glaser* (E.D. Cal., Aug. 31, 2012, No. CIV S-11-2980-KJM-CKD [U.S. Dist. LEXIS 124720]).

A coalition of fishing associations and conservation groups filed suit in the U.S. District Court for the Eastern District of California against the Bureau of Reclamation and the San Luis & Delta-Mendota Water Agency for alleged violations of the Clean Water Act ("CWA"). Specifically, plaintiffs contend that the discharge of polluted irrigation return water through a tile drainage system into San Luis Drain and Mud Slough (known as the Grasslands Bypass Project) is a point-source and that the defendants failed to obtain a National Pollution Discharge Elimination System ("NPDES") permit, thus violating the CWA. The Bureau and the water agency filed a motion to dismiss the suit arguing the regulations implementing the CWA exempt tile drainage systems from NPDES requirements. The court denied the motion to dismiss, finding that the language in the exemption, and case law interpreting it, did not preclude the argument raised by the plaintiffs. The case now continues to a possible resolution on the merits of plaintiffs' claim.

Irrigated agriculture has generally enjoyed a regulatory exemption from NPDES requirements under the CWA. This case, however, could have far reaching implications should the plaintiffs prevail. Depending upon the court's ruling, the scope of the regulatory exemption for irrigated return water could be narrowed or even eliminated.

5. *Surfrider Foundation v. California Regional Water Quality Control Board, San Diego Region* (2012) 211 Cal.App.4th 557.

Plaintiff Surfrider Foundation challenged the San Diego Regional Water Quality Control Board's (Board) adoption of an NPDES permit for a desalination plant proposed for Carlsbad, California on the grounds that, among other things, the permit violated Water Code section 13142.5(b) because the proposed desalination facility would not sufficiently minimize the intake and mortality of marine life. Both the trial court and appellate court rejected plaintiff's arguments. The Board required the discharger (Poseidon Resources

LLC) to prepare a Minimization Plan to mitigate the impacts to marine life cause by impingement and entrainment if and when seawater was necessary for the facility's processing. Additionally, the Coastal Commission required that Poseidon prepare a Marine Life Mitigation Plan (MLMP) as a condition to obtaining a coastal development permit. The Board incorporated the Commission's MLMP into the Minimization Plan required by the NPDES permit. Because the Minimization Plan provided for various mitigation measures in addition to (not instead of) site, design, and technology measures to minimize the intake and mortality of marine life, the Board did not violate Water Code section 13142.5(b).

6. *Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 1255

Plaintiff Asociacion de Gente Unida por el Agua challenged the Regional Board's adoption of Waste Discharge Requirements (WDRs) General Order for Existing Milk Cow Dairies on May 3, 2007 (Dairy Order) on the grounds the Dairy Order unlawfully permitted degradation of groundwater in violation of the State Board's antidegradation policy. The Court of Appeal, Third Appellate District, agreed with plaintiff that the State's antidegradation policy applied to the Dairy Order and that the Board failed to make the necessary findings to support the conclusion that the Dairy Order would not result in degradation of groundwater. Specifically, the Court held that the record lacked substantial evidence to show that the monitoring plan in the Order would protect groundwater. The Court remanded the case to the trial court with direction that the Board be required to comply with the antidegradation policy. The Board is in the process of revising the Dairy Order.

7. *Garland v. Central Valley Regional Water Quality Control Board* (2012) 210 Cal.App.4th 557.

In February 2004, upwards of 641,000 gallons of sediment-laden stormwater was discharged from a residential subdivision construction site owned by plaintiff, and flowed into adjacent ephemeral drainage swales, ditches and culverts which connect to the Feather River and the Thermalito Afterbay (near Oroville). In 2007, the Central Valley Regional Water Quality Control Board (Board) issued an Administrative Liability Complaint (ACL) in the amount of $250,000 against plaintiff for failing to obtain a discharge permit. Plaintiff challenged the ACL on the grounds that the ephemeral drainages impacted by were not "waters of the United States" and further, that the doctrine of laches prevented the Board from issuing the ACL three years after the alleged violation. Both the trial court and Court of Appeal, Third Appellate District, held that the Board's ACL was properly issued. The appellate court reasoned that the Board's alternative basis for the ACL – that an illegal discharge occurred under the Clean Water Act via an indirect discharge to waters of the US – was supported by the plurality opinion in *Rapanos v. United States* (2006) 547 U.S. 715 (*Rapanos*). More specifically, the proof of downstream flow of pollutants required under section 1342 can be satisfied by the presence of a hydrologic connection. Because the Board's record contained substantial evidence that the ephemeral drainages impacted by the sediment-laden stormwater

flowing off of plaintiff's property are tributary to the Feather River (clearly a water of the US), the ACL was proper.

8. *Siskiyou County Farm Bureau v. California Department of Fish and Game* (Super. Ct. Siskiyou County, 2012, No. CV 11-00418).

See item no. 1 of California Water Rights and Supply, page 7.

9. As Lawsuits Begin In California Over Oil and Gas "Fracking," The State Issues "Discussion Draft" Regulations For The Process.

For decades, oil and gas producers in California have been engaged in the process of hydraulic fracturing, commonly called "fracking." That process involves injecting a high pressure stream of water and chemicals deep underground to split rocks and release oil and natural gas. The technique is designed to free oil and natural gas trapped in shale rock. There is a significant amount of such rock in California. For example, the Monterey Shale, which lies under Central California and the southern San Joaquin Valley, could hold up to 15 billion barrels of oil, making it possibly the nation's largest oil shale formation and almost half of the nation's total shale oil resources.

In a news interview in October 2012, Tim Kustic, the State Oil & Gas Supervisor for the California Department of Conservation, Division of Oil, Gas and Geothermal Resources ("DOGGR"), stated that, despite the Legislature's failure to pass bills to regulate fracking this year, DOGGR will move forward in adopting and implementing new administrative regulations. On December 18, 2012, DOGGR released a "discussion draft" of fracking regulations, which is the "starting point for discussion by key stakeholders" in preparation for the formal rulemaking process that will probably begin in early 2013. These "discussion draft" regulations include provisions for pre-fracturing well testing; advance notification; monitoring during and after fracturing operations; disclosure of materials used in fracturing fluid; trade secrets; and storage and handling of hydraulic fracturing fluids. Environmental groups and several political leaders have criticized the discussion draft regulations. For example, Kassie Siegel, the director of the Center for Biological Diversity's Climate Law Institute, stated: "These draft regulations would keep California's fracking shrouded in secrecy and do little to contain the many threats posed by fracking." At a confirmation hearing on January 9, 2013, for the nominee for the Director of the State Department of Conservation, Mark Nechodom, several senators expressed dissatisfaction over the proposed trade secret provisions. Senate leader Darrell Steinberg conditionally supported Nechodom's confirmation, but also stated: "I want written assurance that health and safety trumps all else, including trade secrets."

It appears that DOGGR is preparing to coordinate its new regulations with the Federal Government. On October 16, 2012, the U.S. Bureau of Land Management and DOGGR updated the Memorandum of Understanding (MOU) between the entities regarding procedures for regulating oilfield operations where both entities have jurisdictional authority. That MOU includes the following provision regarding fracking:

> Over the course of the next year the BLM and [DOGGR] will begin to develop specific plans that implement the goals listed below:
> …
> Jointly explore adopting region-wide Best Management Practices specific to California. Coordinate the development and implementation of future hydraulic fracturing and cyclic steaming regulations.

Changes to DOGGR's regulations and practices regarding fracking are also being sought in a new lawsuit filed on October 16, 2012, by the Center For Biological Diversity, Earthworks, Environmental Working Group and the Sierra Club. (*Center for Biological Diversity et al. v. California Dep't of Conservation, Div. of Oil, Gas and Geothermal Resources* (Super. Ct. Alameda County, No. RG12652054).) That action seeks declaratory and injunctive relief

> to challenge the pattern and practice of [DOGGR] in issuing permits for oil and gas wells within the state of California in violation of the California Environmental Quality Act ("CEQA"), Pub. Res. Code, §21000 et seq. In particular, DOGGR's practice of approving permits for oil and gas wells after exempting such projects from environmental review or otherwise issuing boilerplate negative declarations finding no significant impacts from these activities undermines the fundamental review requirements of CEQA.

The complaint further alleges that there are "several significant environmental and public health impacts associated with hydraulic fracturing, including the contamination of domestic and agricultural water supplies, the use of massive amounts of water, the emission of hazardous air pollutants, and the potential for induced seismic activity." Each of those claims is highly disputed by the oil and gas industry, both in California and across the nation.

Meanwhile, in August 2012, a notice of intent to sue letter was sent by the Center for Biological Diversity to the Federal Government, which letter threatened a citizen suit against the U.S. Bureau of Land Management under the federal Endangered Species Act over the BLM's issuance of oil and gas leases in California due to the alleged threats that fracking at those lease sites could potentially have on endangered species.

For more information, visit:
http://www.sfgate.com/business/article/CA-sued-over-environmental-toll-of-fracking-3954148.php
http://online.wsj.com/article/BT-CO-20121016-713592.html
http://www.conservation.ca.gov/dog/Pages/Index.aspx
http://www.conservation.ca.gov/dog/general_information/Documents/121712DiscussionDraftofHFRegs.pdf
http://www.newtimesslo.com/news/8831/state-issues-first-fracking-rules/
http://www.nbcbayarea.com/news/local/California-Will-Regulate-Fracking-After-All-174408581.html
ftp://ftp.consrv.ca.gov/pub/oil/regulations/DOGGR-BLM-%20MOU%202012.pdf

http://www.energyindepth.org/california-lawsuit-filled-with-false-fracturing-claims/
http://earthjustice.org/sites/default/files/CA_Fracking_Complaint.pdf
http://www.energyindepth.org/california-lawsuit-filled-with-false-fracturing-claims/
http://www.biologicaldiversity.org/campaigns/california_fracking/pdfs/BLM_Fracking_ESA_Notice_8_29_12.pdf
http://latimesblogs.latimes.com/california-politics/2013/01/california-conservation-chief-faces-grilling-over-fracking.html

10. Draft NPDES Industrial General Permit

Recently, a number of changes were made to the Draft Industrial NPDES permit, including (1) numeric effluent limits were removed because SWRCB staff acknowledged that they lack information necessary to set them; (2) flexibility was added to the minimum BMP's; (3) maximum inspections and visual observations were reduced from 361 to 49; and (4) a natural background report potential was added to reach Level 2 Numeric Action Level (NAL) exceedance status. The comment period for the draft permit closed on October 22, 2012. Adoption of the permit is expected in early 2013, and the effective date is now anticipated to be July 2013 for existing dischargers. More specifics follow below.

Deadlines:

- First Board Hearing October 17, 2012
- Written Comments were due by 12:00 PM (Noon), October 22, 2012
- Adoption Expected Early 2013
- As currently drafted effective date would be July 2013 for existing dischargers.

Key Issues Removed From previous draft permit:

- Numeric Effluent Limits Removed due to industry comment.
- Flexibility added to minimum BMP's.
- Maximum Inspections and Visual Observations reduced from 361 to 49.
- Added natural background report potential on reaching level 2 Numeric Action level exceedance status.

Other Issues Raised by Industry Groups:

- Implementation Timeline
- NAL Applicability First Year
- Qualified Industrial Stormwater Practitioner Training Reqs.:
- Design Storm Standard and Existing Sediment Retention basins Intermittently Operating Facilities
- Inactive Mine Site SWPPP and Annual Monitoring Report
- pH Sampling (Draft permit requires portable sampler)
- Sampling Safety Exclusion

- Electronic Filing
- Proprietary Information Protection
- Use of "solely" in background technical report

Overview of Draft Permit Requirements:

Equipment:

- Rain Gauge at each facility.
- Sampling Kit at each facility.
- Trained Personnel (QISP I, II or III) responsible for developing SWPPP at each facility.

All Documents must be submitted electronically and will be public:

- SWPPP's (Must be certified by one of the above by July 2014)
  1. Facility Name and Contact Information for Responsible Parties
  2. Site Map
  3. List of Significant Materials
  4. Description of Potential Pollution Sources
  5. Assessment of Potential Pollutant Sources
  6. Applicable Minimum BMPs
  7. Additional Facility-Specific BMPs
  8. Monitoring Implementation Plan (MIP)
  9. Annual Comprehensive Facility Compliance Evaluation (Annual Evaluation)
  10. Date that SWPPP was initially prepared and the date of each SWPPP Amendment, if Applicable

- Minimum Mandatory BMP's unless:
  - "Dischargers may eliminate or revise any BMPs determined to be inapplicable, infeasible, inappropriate, or that require operational or physical revisions of the facility that exceed BAT/BCT and compliance with WQS."
  - Covering:
    - Good Housekeeping, Preventative Maintenance, Spill Response, material handling, Employee Training, Quality Assurance and Recordkeeping, Erosion and Sediment Controls, Temporary Suspension of Industrial Activities, MONITORING AND IMPLEMENTATION PLAN (MW)
  - MIP Implements visual Monitoring/Sampling Program training and procedures.
  - Mandatory Observations
    - Non Stormwater Discharge (Quarterly)
    - Of Stormwater Discharge for first Qualifying Storm of each month.

        - Contained Stormwater Observed at time of discharge.
        - Of Drainage Areas prior to anticipated storm event (NWS greater than 50% probability)
    - Sampling And Analysis
        - Of Each Qualifying Storm (QSE) event of Quarter for (pH, TSS, and Oil and Grease) Any applicable subpart N.
        - A QSE is more than a tenth of an inch of rain preceded by 3 dry days with less than a combined tenth of rainfall.
        - Collected within 4 hours of start of discharge if during work hours.
        - Within 4 hours of returning to work if discharge began in previous 12 hour period.
        - Results submitted within 30 days of receiving all results of a storm through SMARTS (Electronic Reporting).

Numeric Action Level exceedances:

- Annual NAL Exceedance (average of all annual monitoring results.)
- Instantaneous (Two samples in reporting year outside instantaneous exceedance level [can be same storm] or two samples outside pH range).
- If exceedance occurs, you move to the next compliance level for that pollutant. Levels: Baseline, Level 1, and Level 2.
- First Exceedance you move to level 1 status and must implement increased procedures and operational controls.
- An exceedance in a year following the year you became a Level 1 facility moves you to Level 2 (Structural and Treatment Controls) These reports require a QISP II.

11. New General Construction Permits from the U.S. EPA and Amendments to the California State Water Resources Control Board's Construction Stormwater General Permit

Section 402 of the Clean Water Act prohibits the discharge of pollutants from point-sources into waters of the United States without a National Pollutant Discharge Elimination System ("NPDES") permit. An NPDES permit can either be an individual permit or a general permit. Stormwater discharge from construction or land disturbance activities affecting one or more acres of land can be covered by a general NPDES permit. The U.S. Environmental Protection Agency ("EPA") reissued its general permit for construction stormwater discharge activities ("GCP") in early 2012, which will be effective through early 2017. The 2012 GCP does not apply to most stormwater discharge from construction activities in California because the U.S. EPA delegated authority to the State Water Resources Control Board ("SWRCB") to administer California's NPDES program.

The SWRCB's current general NPDES permit for construction and land disturbance activities was adopted in 2009. Under the State's General Construction Permit, traditional project sites are categorized into Risk Levels (1, 2 & 3) and linear

underground/overhead projects (LUPs) are categorized into LUP Types (1, 2, & 3) based on overall risk to water quality. Risk Level 3 and LUP Type 3 projects were subject to Numeric Effluent Limitations (NELs) for turbidity and pH. In addition, Risk Level 3 and LUP Type 3 projects were required to conduct receiving water monitoring if they violated the NELs. The California Building Industry Association challenged the State's construction permit over these NEL requirements.

On December 27, 2011, the Superior Court for the County of Sacramento issued a judgment and peremptory writ of mandate in *California Building Industry Assn. et al. v. State Water Resources Control Board* (case no. 34-2009-80000338) that held that the Board's adoption of the NELs relied on studies that were characterized by the court as inconclusive and therefore lacking in substantial evidentiary support.

On March 31, 2012 the SWRCB released limited proposed amendments to its current GCP (2009-0009-DWQ). The proposed amendments included:

- The elimination of the NELs for pH and turbidity for pH at Risk Level 3 and LUP Type 3 construction sites; and
- Require receiving water monitoring for stormwater discharge at specific triggering effluent levels which are set at the same level as the invalidated NELs (Note: exceeding the receiving water monitoring triggering level does not constitute a permit violation.)

The proposed amendments became effective on July 17, 2012. The State's General Construction NPDES Permit is set to expire in September 2014.

For additional information, visit:
http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/construction/2009_0009_dwq_nel_amend062512.pdf
http://www.swrcb.ca.gov/water_issues/programs/stormwater/docs/construction/complete_wqo_2009_0009_NEL_06252012.pdf

12. U.S. Environmental Protection Agency Updates Its Guidelines For Water Reuse

The United States Environmental Protection Agency released its 2012 Guidelines for Water Reuse. This update discusses the issues that must be addressed by state and local agencies that are responsible for water recycling and reuse.

For more information, visit
http://www.waterreuseguidelines.org/

13. Pre-Public Draft Bay Delta Conservation Plan And Related Draft Environmental Impact Statement/Report Expected To Be Issued In February 2013

See item no. 4 of California Water Rights and Supply, page 10.

14. State Water Resources Control Board Is Updating The Bay Delta Estuary Water Quality Control Plan In Order To Develop Flow Criteria For The Delta Ecosystem, Which Is Required For The BDCP

In 2009, the Legislature also enacted the Sacramento-San Joaquin Delta Reform Act, which required the State Water Resources Control Board ("SWRCB") to develop flow criteria for the San Francisco Bay/Sacramento-San Joaquin Delta Delta ecosystem. The 2009 legislation also specified that no construction of Bay Delta Conservation Plan ("BDCP") facilities is allowed until the SWRCB approves necessary changes in the point of diversion and that any change in the point of diversion shall include appropriate Delta flow criteria. Because the flow-setting process can take several years, it must be conducted in parallel, rather than sequentially, with the BDCP process to allow for timely consideration of any proposed changes in connection with implementation of BDCP. The SWRCB's San Francisco Bay/Sacramento-San Joaquin Delta Estuary Water Quality Control Plan ("Bay-Delta Plan") is designed to identify beneficial uses of the Bay-Delta, water quality objectives for the reasonable protection of those beneficial uses, and a program of implementation for achieving the objectives. The Bay-Delta Plan, when implemented, can determine the amount and timing of water entering and moving through the Delta. The current update of the Bay-Delta Plan is scheduled for completion in 2014. There are two active phases to this update:

- Phase I (initiated in 2009; proposed adoption February 2013):
  Flow objectives for the protection of fish and wildlife beneficial uses in the San Joaquin River (SJR) that migrate through the Delta;
  Salinity and other objectives for the protection of agricultural beneficial uses in the Southern Delta; and
  Program of implementation for these objectives and monitoring and special studies requirements.

- Phase 2 (initiated in 2012; proposed adoption June 2014):
  Delta outflow, export/inflow and Delta Cross Channel Gate closure objectives;
  Suisun Marsh objectives;
  Potential new reverse flow objectives for Old and Middle Rivers and floodplain habitat flow objectives; and
  Potential changes to the monitoring and special studies program and the program of implementation.

For more information, see
http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/bd_prcss_faq.shtml#1

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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. *Sackett v. United States EPA* (2012) ___U. S.___ [132 S. Ct. 1367, 182 L.Ed.2d 367].

The Sacketts sought to build a home on a lot several blocks from a lake. They obtained all of the required permits and graded the land. However, they did not get a dredging permit from the EPA or from the Army Corps of Engineers. The Federal Government found out about the development, alleged that the lot contained wetlands and issued a compliance order. Under the order, the Sacketts were required to get a permit, "remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years," and remedy any harms caused by discharging without a permit. If they did not comply, EPA could go to court for an enforcement order, and a federal judge could impose civil penalties and fines up to a maximum of $75,000 a day. The Sacketts, in order to avoid the penalties, restored the land to its former state. They tried to argue, to no avail, that the

wetlands at issue were not within the government's regulatory jurisdiction. They then filed a lawsuit of their own in federal court, claiming that the lack of an opportunity to challenge the compliance order before they had to obey it violated their constitutional right to due process. A federal district court dismissed their case, concluding that Congress had not intended to allow any pre-enforcement challenge, leaving it to the EPA to start an enforcement proceeding at its option. The Ninth Circuit Court agreed, noting that every federal appeals court that had confronted the issue had agreed that there was a bar to judicial review at the initiative of a targeted violator. By unanimous decision, the Supreme Court reversed and remanded the case. The Court held that the Sacketts could bring a civil action under the Administrative Procedures Act to challenge the issuance of the EPA's compliance order. The APA provides for judicial review of "final agency action for which there is no other adequate remedy in a court" (5 U.S.C. §704), and the EPA order had all the hallmarks of "final agency action." Contrary to the circuit courts' and the government's position, the Court found that the CWA did not preclude judicial review under the APA. The Court explained: "[T]here is no reason to think that the Clean Water Act was uniquely designed to enable the strong-arming of regulated parties into 'voluntary compliance' with the opportunity for judicial review …." Justice Alito added in a concurrence: "In a nation that values due process, not to mention private property such treatment [by the EPA against the Sacketts] is unthinkable."

In his concurrence, Justice Alito also scolded both Congress and the EPA for failing to provide clarity to the jurisdictional boundaries of the CWA: He stated:

> Real relief requires Congress to do what it should have done in the first place: provide a reasonably clear rule regarding the reach of the Clean Water Act. When Congress passed the Clean Water Act in 1972, it provided that the Act covers "the waters of the United States." 33 U.S.C. § 1362(7). But Congress did not define what it meant by "the waters of the United States"; the phrase was not a term of art with a known meaning; and the words themselves are hopelessly indeterminate. Unsurprisingly, the EPA and the Army Corps of Engineers interpreted the phrase as an essentially limitless grant of authority. We rejected that boundless view, *see Rapanos v. United States*, 547 U. S. 715, 732-739, 126 S. Ct. 2208, 165 L. Ed. 2d 159 (2006) (plurality opinion); *Solid Waste Agency v. United States Army Corps of Eng'rs*, 531 U.S. 159, 167-174, 121 S. Ct. 675, 148 L. Ed. 2d 576 (2001), but the precise reach of the Act remains unclear. For 40 years, Congress has done nothing to resolve this critical ambiguity, and the EPA has not seen fit to promulgate a rule providing a clear and sufficiently limited definition of the phrase. Instead, the agency has relied on informal guidance. But far from providing clarity and predictability, the agency's latest informal guidance advises property owners that many jurisdictional determinations concerning wetlands can only be made on a case-by-case basis by EPA field staff.

2. U.S. Army Corp Reissues Nationwide Permits for the Discharge of Dredged and Fill into U.S. Waters

On March 19, 2012 the U.S. Army Corps of Engineers ("Corps") reissued forty-eight of its existing nationwide permits ("NWPs") and two new NWPs for land and water-based renewable energy generation projects. Twenty-three of the reissued NWPs were left unchanged. All of the NWP Program's existing general conditions and definitions were reissued with the addition of three new general conditions and three new definitions. The 2012 NWP Program will be in effect for the next five years; expiring on March 18, 2017.

The NWPs are subject to Clean Water Act section 401's water quality certification (33 U.S.C. § 1341) by the California State Water Resources Control Board ("SWRCB") as meeting California's water quality standards. The SWRCB's certified 13 NWPs on April 19, 2012. A complete list is available at: http://www.waterboards.ca.gov/water_issues/programs/cwa401/generalorders.shtml

NWPs are also subject to a consistency determination by the California Coastal Commission, in accordance with section 307 of the Coastal Zone Management Act (16 U.S.C. § 1456). The California Coastal Commission objected to the NWPs as inconsistent with state coastal policies at its April 2012 meeting. This means all NWPs within the Coastal Zone jurisdiction will require consistency determinations on an individual basis.

Modifications of interest include:

- Where applicable, the Corps' district engineer can still waive the permit for projects that will cause less than 300 linear feet of streambed loss, but only upon a written determination that the activity will result in minimal adverse effects.
- Reissued NWP 12 – Utility Lines. It now requires a preconstruction notification to be sent to the National Oceanic and Atmospheric Administration for all coastal territories and the Department of Defense for all overhead utility lines, as well as that an access road to the utility line is included in the NWP's one-half acre size limitation.
- Reissued NWP 13 – Bank Stabilization. It clarifies that the NWP's scope includes temporary structures, fills and work necessary to construct the bank stabilization activity and that invasive plant species may not be used as part of the bank stabilization activity.
- Reissued NWP 30 – Commercial Developments. It removed a prohibition against constructing oil and gas wells.
- Reissued NWP 44 – Mining Activities. It added a 300-foot limitation on streambed loss caused by mining activities.
- Reissued NWP 45 – Upland Repairs. It clarifies that beach restoration is not within the scope of this NWP. The scope of this NWP is limited to discharge associated with the restoration of uplands.

A summary of all the modifications in the 2012 NWPs can be found at: http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_sumtable_15feb2012.pdf.

The two new NWPs address renewable energy generation facilities. Most notably, new NWP 51 for land-based renewable energy generation facilities authorizes construction, expansion or modification of land-based renewable energy production facilities and attendant features. Covered facilities include infrastructure for wind, biomass, geothermal and solar energy. This NWP is subject to a one-half acre limit on the loss of non-tidal U.S. waters and a 300 linear feet limit on streambed loss.

The U.S. Army Corps of Engineers, Sacramento District, issued regional conditions to the nationwide permits on March 16, 2012. These conditions specifically apply to activities in the Central Valley and Sierra Nevada of California. More information on regional conditions can be found at: http://www.spk.usace.army.mil/Missions/Regulatory/Permitting/NationwidePermits.aspx

3. U.S. Army Corps of Engineers Adopts Uniform Performance Standards for Compensatory Mitigation Requirements For The South Pacific Division

The USACE has published a notice of procedures to be followed in South Pacific Division's subordinate districts (including San Francisco, Sacramento, and Los Angeles districts) regarding determination of compensatory mitigation performance standards as required for processing of USACE permits under Section 404 of the Clean Water Act, Section 10 of the Rivers and Harbors Act, and Section 103 of the Marine Protection, Research, and Sanctuaries Act.

For more information, see http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences.aspx http://www.spd.usace.army.mil/Missions/Regulatory/PublicNoticesandReferences/tabid/10390/Article/7555/12505-spd.aspx

4. U.S Army Corps of Engineers Announces Updated National Wetland Plant List For Wetland Determinations Under The Clean Water Act.

The U.S. Army Corps of Engineers, as part of an interagency effort with the U.S. Environmental Protection Agency, the U.S. Fish and Wildlife Service and the U.S. Department of Agriculture Natural Resources Conservation Service, announced the final 2012 National Wetland Plant List ("NWPL"). The NWPL is a list of wetland plants by species and their wetland ratings provides botanical information about wetland plants. The NWPL plays a critical role in wetland determinations under the Clean Water Act, and in the Wetland Conservation Provisions of the Food Security Act. Other applications of the NWPL include wetland restoration, establishment, monitoring and enhancement projects. The list became effective on June 1, 2012, and will be used in any wetland delineations performed after that date. The 2012 NWPL may be used in delineations /determinations conducted prior to that date and, for the purpose of clarity and accurate

interpretation, should be referenced in delineation reports or regional supplement determination forms. The 2012 NWPL may be found at: http://wetland_plants.usace.army.mil.

For more information, visit:
http://www.usace.army.mil/Media/NewsReleases/tabid/203/Article/1185/updated-2012-national-wetland-plant-list-is-available.aspx
http://www.gpo.gov/fdsys/pkg/FR-2012-05-09/pdf/2012-11176.pdf;
http://www.spk.usace.army.mil/Media/RegulatoryPublicNotices/tabid/1035/Page/3/Default.aspx

5. The State Water Resources Control Board Issues A Preliminary Draft Wetland and Riparian Area Protection Policy in 2012

Under the Federal Clean Water Act Section 404 (33 U.S.C. § 1344) **t**he "discharge of dredged or fill material into navigable waters at specified disposal sites" are restricted without a permit from U.S. Army Corps of Engineers (USACE"). (33 U.S.C. § 1344(a); 33 C.F.R. § 323.2(d)(1).) After several court decisions narrowing the reach of federally jurisdictional waters, the State Water Resources Board ("SWRCB") in 2008 formally recognized a need to protect surface waters in California no longer protected under the Federal Clean Water Act section 404 program. SWRCB is seeking to implement a state wetlands policy in three phases.

On March 9, 2012, SWRCB issued a Preliminary Draft Wetland and Riparian Area Protection Policy as Phase 1 of that policy. The Preliminary Draft was issued for "informational purposes only and does not constitute the initiation of a formal notice and comment period on a draft policy for water quality control." The stated purposes of the Preliminary Draft are to (1) "[b]ring a uniform regulatory approach between the California Water Boards, other agencies involved in aquatic resource protection and the federal [Clean Water Act] section 404 program . . .", (2) "[a]chieve no overall net loss and a long-term net gain in the quantity, quality and diversity of waters of the state including wetlands," and (3) "[p]rovide a common framework for wetland and riparian area monitoring and assessment to inform regulatory decisions, and ensure consistency with statewide environmental reporting programs.

The Preliminary Draft includes 1) a new wetland definition 2) a new framework for assessing and monitoring wetlands and 3) adjustments to the rules for permitting activities in wetlands.

A new wetland definition**.** Under the federal CWA, wetlands must meet the 3 parameters (hydrology soils and hydrophite veg) but under the state definition, even of the soils and vegetation criteria are not met, it could still be a wetland requiring state regulation. SWRCB suggests defining "wetland" as any area "if, under normal circumstances, it (1) is continuously or recurrently inundated with shallow water or saturated within the upper substrate; (2) has anaerobic conditions within the upper substrate caused by such

hydrology; and (3) either lacks vegetation or the vegetation is dominated by hydrophytes." SWRCB regards "normal circumstances" as the conditions present in the absence of "altered circumstances," which means whenever the hydrology, substrate, or vegetation has been "sufficiently altered by recent human activities or natural processes to preclude wetland conditions."

A new wetland delineation method. SWRCB's preliminary draft policy states that wetlands will be delineated on the ground using the USACE's methods with "adjustments" corresponding to the differences introduced by the new state definition. These differences, of course, may require those undertaking to identify and map wetlands to do so twice, once using the USACE's definition and once using the SWRCB's definition. The draft policy also anticipates development of a new three-level method of monitoring and assessing wetlands entailing use of map-based inventories, rapid assessment of a site's general conditions, and intensive assessment of a site's specific conditions.

A new method of monitoring and assessing wetlands, and new rules governing permits to fill waters and wetlands. SWRCB presents a new set of detailed rules establishing standards and procedures for regulating activities in wetlands. Among the standards is a restriction against permitting any project "unless it is the least-environmentally damaging practicable alternative (LEDPA)." While that terminology has long been used in the USACE's regulatory program, SWRCB gives it new and different meaning. Under Guidelines issued by the EPA, the USACE generally is prohibited from issuing a permit to fill wetlands if there is a practicable alternative to a proposed project that would have less adverse impact on the aquatic ecosystem, as long as the alternative does not have other significant adverse environmental consequences. As implemented by USACE, the practicable-alternatives test is a tough nut to crack. An applicant must show why the "overall project purpose," e.g., build a viable upscale residential community with an associated regulation golf course in the northern Sacramento County area, cannot be accomplished by moving the project to an entirely different site, whether owned by the applicant or not, or by reconfiguring the project on site to avoid wetlands.

USACE and EPA also exclude "prior converted croplands" (i.e., former wetlands that were drained or otherwise dried and cropped before 1985 so they no longer exhibit wetland values) from their definition of "wetlands." SWRCB's draft policy says that wetlands will be delineated on the ground using USACE's methods with "adjustments" corresponding to the differences introduced by the new state definition. These differences, of course, may require those undertaking to identify and map wetlands to do so twice, once using USACE's definition and once using the SWRCB's definition. The draft policy also anticipates development of a new three-level method of monitoring and assessing wetlands entailing use of map-based inventories, rapid assessment of a site's general conditions, and intensive assessment of a site's specific conditions.

SWRCB lists certain activities (including normal farming activities, maintenance, construction or maintenance of farm ponds and irrigation ditches and maintenance (but not construction) of drainage ditches) akin to those USACE excludes from regulation

under its program and says that these activities "are not subject to" its new rules, but nonetheless maintains that this "exclusion . . . does not prohibit the [State or Regional Boards] from issuing or waiving WDRs [i.e., permits] for the activity."

SWRCB would analyze alternatives differently in two fundamental respects. First, SWRCB defines "overall project purpose" quite differently than do USACE and EPA. According to SWRCB, it means "the fundamental, essential, irreducible purpose of the project with consideration to feasible cost, existing technology, and logistics." By so reducing the project purpose to, for instance, housing or commercial buildings or the like, SWRCB naturally expands the universe of possible alternatives—perhaps more than realistically can be analyzed in a permit proceeding—and, in the process, effectively dispenses with much of the general plan and zoning decisions of the pertinent city or county and the land planning decisions of the project proponent. USACE and EPA use much the same definition, which they dub "basic project purpose," only to determine whether a project is water dependent and, thus, whether certain presumptions set forth in their Guidelines are triggered. (The Board's policy includes similar presumptions, but applies them to all projects, regardless of whether they are water dependent, so the Board does not speak of a "basic" project purpose.) In the 1980s, the federal agencies considered using the basic project purpose also to analyze alternatives, and rejected the idea as unwise and unworkable. Second, while USACE recognizes that the existence of alternatives that would avoid impacts to wetlands, but cause significant impacts to other resources (e.g., oak forests or endangered species) is no reason to disapprove a project, SWRCB says nothing to that effect in its draft policy.

SWRCB sets forth detailed requirements for mitigation of impacts to wetlands, warns that it "may require a greater amount of compensatory mitigation than other public agencies," and states that in determining the "sufficiency" of mitigation, it will consider the "goals" of (1) "[a]chievement of no net loss and a long-term net gain in the quality and quantity of aquatic resources," (2) "[r]estoration and achievement of past, present, and probable future beneficial uses in the project area and/or project watershed area, based on an analysis of current and historic conditions," and (3) "[o]ther requirements and goals established in local watershed plans or planning or Policy instruments adopted by public agencies." Unmentioned by the Board is the constitutional standard established by the U.S. Supreme Court in *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) that, notwithstanding any goals or policies an agency may wish to further, it can require a project proponent to provide mitigation only in order to mitigate an impact caused by the proposed project and only to an extent "roughly proportional" to that impact.

Complicating an assessment of a project's impacts is a provision in the draft policy that "[a]ny impact located within 150 feet of a water of the state is presumed to affect the water" and "[i]mpacts further than 150 feet may also be considered by the permitting authority if there is potential for water quality degradation." The law generally calls on agencies actually to find, on the basis of substantial evidence, that projects cause adverse impacts before they require project proponents to mitigate those impacts.

Thus, the Preliminary Draft not only broadens the lands that would be covered by wetlands regulations, but it will also add increased regulatory burdens on those owners of property designated as wetlands.

Currently, SWRCB is developing a Draft Program Environmental Impact Report to accompany the draft wetlands policy and text of the draft regulation.

Notes:

4. AIR QUALITY & CLIMATE CHANGE

A. Regulatory Framework

NEPA

- Under the Clean Air Act, the EPA reviews Environmental Assessments and Environmental Impact statements and comments on any matter relating to its duties under the Clean Air Act. (42 USC § 7609.)

- 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.)

- Draft guidance from Counsel on Environmental Quality states that if a proposed action would reasonably be anticipated to cause direct emissions of 25,000 metric tons or more of CO2 equivalent GHG emissions on an annual basis, agencies should consider whether a quantitative or qualitative analysis would be meaningful to decision makers and the public. Where an action analyzed in an Environmental Assessment or Environmental Impact report would be anticipated to emit GHG, the agency should quantify and disclose its estimates of the expected annual direct and indirect GHG emissions, according to the draft guidance. Agencies should also consider the effects of climate change on the proposed actions.

  For more information:
  http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf

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

- 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. For GHGs however, PSD are required for new construction projects emitting 100,000 tons per year of GHGs and modifications to existing sources that will increase GHG emissions by more than 75,000 tons per year.

- Under CAA's Title V, primary industrial facilities and large commercial operations that emit 100 tons or more per year of a regulated air permit require an operating permit. However, facilities emitting at least 100,000 tons of GHG per year will be required to obtain an operating permit.

- Many stationary sources, including but not limited to, oil refineries, pulp and paper mills, landfills, producers of cement are required to report their GHG emissions pursuant to 40 CFR 98.

Mobile Sources

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

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.

<u>Global Warming Solutions Act of 2006</u> (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 GHGs, 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*** **(Super. Ct. San 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.

- **Guidelines**

  Lead agencies shall consider feasible means, supported by substantial evidence and subject to monitoring and reporting, of mitigating the significant effects of greenhouse gas emissions including:

  1. Measures in an existing plan or mitigation program;
  2. Reductions in emissions from the project through measures such as those in Appendix F (Energy Conservation);
  3. Off-site measures;
  4. Sequestration;

5. In the case of the adoption of a plan, mitigation may include identification of specific measures that may be implemented on a project-by-project basis. (Guidelines, § 15126.4(c).)

Such plan may include a plan for the reduction of greenhouse gas emissions and may be used in a cumulative impact analysis. (Guidelines, § 15130(b)(1).)

Significant effects of GHG may be analyzed at a programmatic level.

GHG may be analyzed and mitigated in a plan for the reduction of GHG which:

1. Quantifies greenhouse gas emissions;
2. Establishes a threshold of significance
3. Identifies and analyzes the greenhouse gas emissions resulting from specific actions;
4. Specifies measures or that would collectively achieve the specified emissions level;
5. Establishes a mechanism to monitor the plan's progress;
6. Is adopted in a public process following environmental review.

Appendix G thresholds: Would the project a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment; or b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?

- **Thresholds of Significance**

Bay Area Air Quality Management District: The adoption of the thresholds was held to be a "project" and set aside for failure to complete CEQA review of the proposed thresholds. The merits of the thresholds were not addressed. (*California Building Industry Ass'n v. Bay Area Air Quality Mgmt. Dist.*, No. RG10-548693 (March 5, 2012).) The thresholds may not be used as a generally applicable measure of the significance of air quality impacts, but the accompanying materials and tools may still be used by agencies solely for assistance in calculating air pollution emissions, obtaining information regarding the health impacts of air pollutants, and identifying potential mitigation measures.

San Joaquin Air Quality Management District: Best Performance Standards

Sacramento County Air Quality Management District: Related to AB 32 reduction goals

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

Regional Transportation Plans are expanded to include a sustainable communities' strategy, for the purposes of achieving GHG reduction targets by coordinating land use and transportation planning. Sacramento Area Council of Governments targets are 7% reduction by 2020; 16% reduction by 2035. San Joaquin County MPOs have a placeholder target of 5% reduction by 2020 and 10% reduction by 2035.

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 under the statute.

B. Update

1. *Air Alliance Houston et al v. Jackson* (D.D.C., No. 1:12-cv-01607).

On September 27, 2012, numerous environmental groups filed a lawsuit in the United States District Court for the District of Columbia against the U.S. Environmental Protection Agency ("EPA") under the Clean Air Act, 42 U.S.C. §§7604(a)(2), 7412(f)(2), 7412(d)(6), on the grounds that the EPA failed to reconsider and revise the emission standards for hazardous air pollutants at oil refineries, including the 21 refineries in California. The California plaintiffs are advocates for environmental justice and protection from toxic air pollution, including California Communities Against Toxics, Coalition For A Safe Environment, and Del Amo Action Committee, whose members include individuals that live near petroleum refineries. The suit alleges that the EPA failed to complete review of the current risk to public health and the environment for petroleum refineries, and promulgate revised standards or required determinations for those refineries, which allegedly should have been done by 2003 and 2010. The suit faults the EPA for withdrawing the rulemaking in 2011, when the EPA announced that it was necessary to "gather better emissions information from the refining industry." The complaint describes information recently obtained by or known to the EPA that allegedly shows a significant amount of previously unreported air toxic emissions at petroleum refineries, as well as the ability of refineries to control pollution at a greater rate. According to plaintiffs, "EPA has not considered or accounted for this new information in regard to communities exposed to toxic air pollution from petroleum refineries as it will be required to do as part of the required health impact assessment under Section 112(f)(2) [of the CAA] and the rulemaking to determine whether to set stronger standards to [p]rotect public health pursuant to this provision."

2. *Coalition for Responsible Regulation, Inc. v. EPA* (D.C.Cir. 2012) 684 F.3d 102.

In 2007, the Supreme Court held in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that greenhouse gases ("GHG") are an "air pollutant" subject to regulation under the Clean Air Act ("CAA"). The Court concluded that the United States Environmental Protection Agency ("EPA") had a "statutory obligation" to regulate harmful GHG, and "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do." Following that decision, EPA promulgated a series of GHG-related rules. First, EPA issued an Endangerment Finding, in which it determined that GHG may "reasonably be anticipated to endanger public health or welfare." Next, EPA issued the Tailpipe Rule, which set emission standards for cars and light trucks. Finally, EPA determined that the CAA requires major stationary sources of GHG to obtain construction and operating permits. But because immediate regulation of all such sources would result in overwhelming permitting burdens on permitting authorities and sources, EPA issued the Timing and Tailoring Rules, in which it determined that only the largest stationary sources would initially be subject to permitting requirements. Various states and industry groups challenge all these rules, arguing that they are based on improper constructions of the CAA and are otherwise arbitrary and capricious. The U.S. Court of Appeals for the District of Columbia concluded (1) the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; (2) EPA's interpretation of the governing CAA provisions is unambiguously correct; and (3) no petitioner had standing to challenge the Timing and Tailoring Rules. The Court of Appeals therefore dismissed for lack of jurisdiction all petitions for review of the Timing and Tailoring Rules, and denied the remainder of the petitions. Petitioners are likely to seek review by the Supreme Court because, as the CEO of the National Association of Manufacturers said on behalf of the impacted industries, "The EPA's decision to move forward with these regulations is one of the most costly, complex and burdensome regulations facing manufacturers."

3. *EME Homer City Generation, L.P. v. U.S. Environmental Protection Agency* (D.C.Cir. 2012) 696 F.3d 7.

In August 2011, the U.S. Environmental Protection Agency promulgated the "Transport Rule" in order to implement the "good neighbor" requirement in the Clean Air Act ("CAA"). The Transport Rule defines emissions reduction responsibilities for 28 "upwind" States based on those States' contributions to "downwind" States' air quality problems, i.e., "nonattainment" under the CAA. The United States Court of Appeals for the District of Columbia Circuit held that the Transport Rule exceeds the EPA's authority under the CAA because (1) contrary to the CAA, upwind States may be required under the Transport Rule to reduce emissions by an amount greater than their own significant contributions to a downwind State's nonattainment; and (2) the Transport Rule constitutes an "unprecedented" application of the good neighbor provision in violation of the CAA in that the EPA did not allow the upwind States a reasonable first opportunity to implement the required reductions with respect to air pollution sources within their

borders. The court observed: "EPA seems reluctant to acknowledge any textual limits on its authority under the good neighbor provision."

4. Federal Courts Rejecting Climate Change Lawsuits Based On Federal Common Law

In *American Electric Power Co. v. Connecticut* (2011) ___ U.S. ___, 131 S.Ct. 2527, 180 L.Ed.2d 435 ("*AEP*"), the Supreme Court held that the Clean Air Act ("CAA") and any Environmental Protection Agency action authorized by the CAA displaces any federal common law of interstate nuisance seeking abatement of carbon-dioxide emissions from fossil-fuel fired power plants. Several federal courts have subsequently held that *AEP* proscribed any federal common law claim for either damages or injunctive relief based on the effects of climate change. The U.S. District Court for the District of Columbia held in *Alec L. v. Jackson, slip opinion,* 2012 U.S. Dist. LEXIS 75791 (D.D.C. 2012), that *AEP* excluded all federal common law claims that addressed climate change based on the public trust doctrine. The U.S. District Court for the Southern District of Mississippi in *Comer v. Murphy Oil USA*, 839 F.Supp.2d 849 (S.D.Miss 2012), dismissed a class action lawsuit for public and private nuisance, trespass, and negligence against defendant oil, electric, chemical and coal companies, where the plaintiffs alleged that defendants' activities are among the largest sources of greenhouse gases that cause global warming; and that global warming led to high sea surface temperatures and sea level rise that fueled Hurricane Katrina, which damaged plaintiffs' property. The Comer court dismissed the action, among other reasons, because the plaintiffs did not have standing since they "cannot allege that the defendants' particular emissions led to their property damage"; because plaintiffs' claims constitute non-justiciable political questions; because plaintiffs' state common law nuisance claims were preempted by the CAA; and because plaintiffs "cannot possibly" demonstrate that their injuries were proximately caused by the defendants' conduct. The Ninth Circuit Court of Appeals in *Native Village of Kivalina v. ExxonMobil Corp*., 696 F.3d 849 (9th Cir. 2012) recently affirmed the dismissal of a claim for damages under the federal common law of public nuisance that was brought by the Native Village of Kivalina and the City of Kivalina, Alaska, against multiple oil, energy, and utility companies based on the allegations that massive greenhouse gas emissions emitted by defendants have resulted in global warming, which, in turn, has led to the reduction of sea ice that shielded the City of Kivalina from powerful coastal storms, which, in turn, have severely eroded the land where the City of Kivalina sits and threatens it with imminent destruction. The Ninth Circuit held that, under *AEP*, the federal common law addressing domestic greenhouse gas emissions has been displaced by Congressional action.

5. *Rocky Mountain Farmers Union v. Goldstene* (E.D.Ca. 2011) 843 F.Supp.2d 1071; *on appeal to* Ninth Circuit Court of Appeal (case no. 12-15131).

In 2010, the California Air Resource Board ("CARB") promulgated the California's Low Carbon Fuel Standard ("LCFS") in order to implement provisions of California's Global Warming Solutions Act of 2006 (i.e., AB 32). In an action challenging the LCFS, the U.S. District Court for the Eastern District of California held on December 29, 2011, that

the LCFS violates the dormant Commerce Clause because it impermissibly discriminates on its face against out-of-state corn ethanol. The LCFS assigned over 10% more favorable carbon intensity scores for corn-derived ethanol produced in California than it does for corn-derived ethanol produced in the Midwest, and those scores ultimately will affect the price of the product. CARB argued that the difference in scores was due to the California-produced fuels benefitting from "shorter transportation distances and lower carbon intensity electrical sources," since CARB assumed that, compared to Midwestern producers, California producers will not use coal in their processes and will have better access to electricity produced from hydropower and nuclear power. The District Court found that argument unavailing: "Indeed, the point of the LCFS is to penalize the differences between the California and Midwest ethanol-the carbon emissions from the transportation, the different farming methods used, and the different types of electricity provided to and used by the plants-to reduce emissions. Although CARB's goal to combat global warming may be 'legitimate,' however, it cannot 'be achieved by the illegitimate means of isolating the State from the national economy.'" The District Court further held that the LCFS violates the dormant Commerce Clause because it controls conduct outside of its borders. By using the lifecycle analysis approach to reducing GHG emissions, and making a difference in carbon intensity scores are based on CARB's assessment of Midwest states' farming practices, crop yields, harvesting practices, and collection and transportation of the crop, and by assigning carbon intensity based on these activities to provide an "incentive for regulated parties to adopt production methods which result in lower emissions," the LCFS has the practical and impermissible effect of controlling conduct occurring wholly outside of California. The District Court further held that California failed to establish that the goal of global warming through the reduction of GHG emissions cannot be adequately served by nondiscriminatory (albeit "less desirable") alternatives, such as "a tax on fossil fuels," "regulating only tailpipe GHG emissions in California," "increasing vehicle efficiency," or "reducing the number of vehicle miles traveled." Thus, the District Court granted plaintiffs' motion for summary judgment, in part, granted plaintiffs' motion for preliminary injunction, and enjoined enforcement of the LCFS during the pendency of the litigation.

Defendants appealed the District Court's judgments and ruling on the motion for preliminary injunction to the United States Court of Appeals for the Ninth Circuit. In April 2012, the Ninth Circuit granted the defendants' motion for a stay of the District Court's orders and judgments pending the appeal. There is no indication when the Ninth Circuit will rule on the merits of the appeal. In light of the potent environmental and constitutional issues at issue in the challenge to the LCFS, the case is likely to be resolved in the U.S. Supreme Court.

6. *American Coatings Assn. v. South Coast Air Quality Management District* (2012) 54 Cal.4th 446.

In 2002, the South Coast Air Quality Management District amended its Rule 1113, which adds new emissions limitations for volatile organic compounds in paints and coatings. An industry trade association filed a mandate action that challenged the amendments on the ground that they exceeded the District's regulatory authority under statutes requiring

the use of "best available retrofit control technology" or "BARCT." The District responded that, if new or developing technology will enable industry to meet a pollution standard by the compliance deadline, that standard is "available" even if the technology does not exist at the time the standard is promulgated. The trial court denied the association's petition for a writ of mandate. The Court of Appeal reversed the trial court, in part, and held that a technology cannot be considered "available" unless it already exists or is ready to be assembled at the time a pollution standard is promulgated. The Supreme Court agreed with the District, reversed in part the judgment of the Court of Appeal, and remanded with directions to affirm the judgment of the trial court. The Supreme Court held that the relevant statutes give the District the authority to promulgate pollution standards based on technologies that do not currently exist but are reasonably anticipated to exist by the compliance deadline. "BARCT is therefore a technology-forcing standard designed to compel the development of new technologies to meet public health goals."

7. *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899.

In this case, the EIR's treatment of project impacts on global warming and climate change was sufficiently thorough and the conclusion that the impact was "too speculative" to quantify was not an abuse of discretion, recognizing in part that the EIR was certified in July 2008. See item no. 13 of CEQA, page 123.

8. AB 1532 (Chapter 807) & SB 535 (Chapter 830): The "Feeding Frenzy" For Dollars From California's Cap-And-Trade Auctions Begins As California Chamber Of Commerce Sues to Stop The Auctions.

The California Legislature and Governor have provided the parameters as to how the State will spend the billions of dollars that are anticipated from the auction of allowances under the "cap-and-trade" program implemented by the California Air Resources Board ("CARB") pursuant to the California Global Warming Solutions Act of 2006 (AB 32). The Governor's 2012-13 budget was based on monies from assumes that CARB will raise $1 billion from the cap-and-trade auctions for the budget year; and as Dan Walters of the Sacramento Bee described the situation earlier in the year, there's a "feeding frenzy beginning in the Capitol over how to spend the windfall …"

On September 30, 2012, Governor Brown signed Assembly Bill 1532 (Perez) and Senate Bill 535 (de Leon), which address what CARB may do with the monies it collects from the auction of allowances. AB 1532 directs that all those monies be deposited into the Greenhouse Gas Reduction Fund ("GHGR Fund"). Monies in the GHRG Fund will then be used "to facilitate the achievement of reductions of greenhouse gas emissions" in California. AB 1532 expressly provides that monies appropriated from the GHRG Fund may be allocated for the purpose of reducing greenhouse gas emissions in this state through "investments" that may include, but are not limited to, funding to reduce greenhouse gas emission through

(1) energy efficiency, clean and renewable energy generation, distributed renewable energy generation, transmission and storage, and other related actions, including, but not limited to, at public universities, state and local public buildings, and industrial and manufacturing facilities;

(2) development of state-of-the-art systems to move goods and freight, advanced technology vehicles and vehicle infrastructure, advanced biofuels, and low-carbon and efficient public transportation;

(3) water use and supply, land and natural resource conservation and management, forestry, and sustainable agriculture;

(4) strategic planning and development of sustainable infrastructure projects, including, but not limited to, transportation and housing;

(5) increased in-state diversion of municipal solid waste from disposal through waste reduction, diversion, and reuse;

(6) investments in programs implemented by local and regional agencies, local and regional collaboratives, and nonprofit organizations coordinating with local governments;

(7) research, development, and deployment of innovative technologies, measures, and practices related to programs and projects funded pursuant to the above. AB1532 provides that it will not become operative unless Senate Bill 535 is enacted.

SB 535 requires that the investment plans established under AB 1532 allocate (1) a minimum of 25% of the available monies in the GHRG Fund to projects that provide benefits to disadvantaged communities that are identified by the California Environmental Protection Agency; and (2) a minimum of 10% of the available monies in the Fund to projects located within identified disadvantaged communities. According to the author, “SB 535 ensures that as California takes steps to address global warming, we invest in the neighborhoods that continue to suffer from higher levels of pollution and who are least able to confront the expected impacts of the climate crisis.”

The Legislative Analyst, Mac Taylor, has indicated that, he does not believe the cost of building the state’s High Speed Rail project would gratify for funds from the cap-and-trade auction because construction of the project will actually increase carbon emissions.

The California Chamber of Commerce filed a lawsuit against CARB on November 13, 2012, in Sacramento County Superior Court, on the ground that AB 32 does not authorize CARB to impose fees other than those needed to cover ordinary administrative costs of implementing a state emissions regulatory program. The Chamber’s complaint alleges: “What was not authorized by AB 32 is [CARB’s] decision to withhold for itself a percentage of the annual statewide greenhouse gas (GHG) emissions allowances and to

auction them off to the highest bidders, thus raising from taxpayers up to $70 billion or more of revenue for the state to use." The Chamber argues that the auctions are an "unauthorized, unnecessary, and illegal attempt by an unelected board to cloak a multi-billion dollar tax increase in an environmental regulation." No date has yet been set for the hearing on the merits of the Chamber's claims.

For more information, visit:
http://blogs.kqed.org/climatewatch/2012/01/19/california-expects-1-billion-from-carbon-trading/
http://leginfo.ca.gov/pub/11-12/bill/asm/ab_1501-1550/ab_1532_bill_20120930_chaptered.html
http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0501-0550/sb_535_bill_20120930_chaptered.html
http://www.mercurynews.com/business/ci_22092533/13-things-know-about-california-cap-trade-program?source=rss
http://www.sfgate.com/science/article/Cap-and-trade-spending-legally-limited-4065869.php#src=fb
http://www.bloomberg.com/news/2012-11-19/california-carbon-allowances-sold-for-10-09-in-first-auction.html
http://www.calchamber.com/PressReleases/Pages/11132012-CalChamberSuestoInvalidateCARBsCapandTradeAuction.aspx

9. AB 523 (Chapter 183) - Corn Ethanol Banned from State Alternative Fuels Program

At the end of the 2011-12 legislative session, Governor Brown signed into law Assembly Bill 523. The new law bans the use of corn-based ethanol fuels as a part of any loans, grants, or other incentives from the state's alternative fuels program. Fuels using non-edible waste from corn are unaffected. The bill was supported by a broad coalition, including the Sierra Club, the Union of Concerned Scientists, as well as California's agricultural sector including: cattle ranchers, dairy producers, and poultry and egg farmers. Corn ethanol's impacts on feed prices were cited as a particular concern.

For more information, visit:
http://www.kcet.org/news/rewire/transportation/bill-bars-corn-ethanol-from-state-alt-fuels-program.html

10. EPA Issues New Source Performance Standards For Fossil Fuel-Fired Power Plants.

Section 111 of the Clean Air Act authorizes the United States Environmental Protection Agency ("EPA") to develop technology based standards which apply to specific categories of stationary sources. These standards are referred to as New Source Performance Standards (NSPS). The NSPS apply to new, modified and reconstructed affected facilities in specific source categories. In March 2012, the EPA issued NSPS for new fossil-fuel power plants. The new NSPS requires any newly constructed power plant

to emit no more than 1,000 pounds of carbon dioxide per megawatt hour of electricity produced, which is averaged for the first 30 years that the new plant operates. The average U.S. natural gas plant, which emits 800 to 850 pounds of CO_2 per megawatt hour, meets that standard; the average coal plant, which emits 1,768 pounds of CO_2 per megawatt hour, does not. Thus, new coal-powered generators will likely have to install carbon capture and sequestration technology to reduce emissions by approximately one half. A spokesman for the American Coalition for Clean Coal Electricity states that the new NSPS "will ban the use of coal in new power plants to generate electricity" and "will prevent any new coal plants from ever being built." The Washington Post similarly reported that the new regulation "could end the construction of conventional coal-fired facilities in the United States" and "dooms any proposal to build a coal-fired plant that does not have costly carbon controls."

For more information, visit:
http://www.power-eng.com/news/2012/07/19/american-coalition-for-clean-coal-electricity-issues-statement-regarding-impact-of-epa-s-war-on-coal.html;
http://seekingalpha.com/article/727501-epa-standard-facilitates-natural-gas-growing-presence-in-electricity-generation;
http://www.washingtonpost.com/national/health-science/epa-to-impose-first-greenhouse-gas-limits-on-power-plants/2012/03/26/gIQAiJTscS_story.html

11. U.S. EPA Issues Regulations Regarding Air Quality At Fractured Natural Gas Wells

On April 17, 2012, the U.S. Environmental Protection Agency (EPA) issued regulations that include the first federal air standards for natural gas wells that are hydraulically fractured, along with requirements for several other sources of pollution in the oil and gas industry that currently are not regulated at the federal level. When natural gas is produced, some of the gas escapes the well and may not be captured by the producing company, which can result in air pollution and threats to public health. A key component of the final rules is expected to yield a nearly 95 percent reduction in volatile organic compounds emitted from more than 11,000 new hydraulically fractured gas wells each year. This significant reduction would be accomplished primarily through the use of widely available technologies in a practice already deployed at approximately half of all fractured wells, known as a "reduced emissions completion" or "green completion." In a green completion, special equipment separates gas and liquid hydrocarbons from the flowback that comes from the well as it is being prepared for production. The gas and hydrocarbons can be captured, treated and used or sold. The estimated revenues from selling the gas that currently goes to waste are expected to offset the costs of compliance. The final rule establishes a phase-in period. During the first phase, until January 2015, owners and operators must either flare their emissions or use green completion technologies. In 2015, all new fractured wells will be required to use green completions.

For more information, visit:
http://www.epa.gov/hydraulicfracture/#air

http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/c742df7944b37c50852579e400594f8f!OpenDocument
http://www.epa.gov/airquality/oilandgas/pdfs/20120417fs.pdf

12. Lake Tahoe's Regional Plan and Regional Transportation Plan/Sustainable Communities Strategy Are Approved

In December 2012, the Tahoe Regional Planning Agency and the Tahoe Metropolitan Planning Organization approved the Final Draft Regional Plan Update and Final Draft Mobility 2035 Regional Transportation Plan. Those plans cover environmental improvements, sustainable redevelopment, and multi-modal mobility in the Lake Tahoe Basin.

For more information, visit
http://www.trpa.org/default.aspx?tabindex=0&tabid=422%20
http://www.tahoempo.org/Mobility2035/Default.aspx?SelectedIndex=1%20

13. Southern California Association of Governments Adopts 2012-2035 Regional Transportation Plan/ Sustainable Communities Strategy

On April 4, 2012, the Regional Council of the Southern California Association of Governments (SCAG) adopted the 2012-2035 Regional Transportation Plan/ Sustainable Communities Strategy (RTP/SCS): Towards a Sustainable Future. The RTP/SCS noted that California's Sustainable Communities and Climate Protection Act (Senate Bill 375), requires the RTP/SCS to reduce greenhouse gas (GHG) emissions from passenger vehicles by 8 percent per capita by 2020 and 13 percent per capita by 2035 compared to 2005, as set by the California Air Resources Board (ARB). Thus, the RTP/SCS included a strong commitment to reduce emissions from transportation sources to comply with SB 375, improve public health, and meet the National Ambient Air Quality Standards as set forth by the federal Clean Air Act. The RTP/SCS therefore contains a regional commitment and implementation steps for the broad deployment of zero- and near-zero emission transportation technologies in the 2023–2035 time frame. The RTP/SCS puts forth an aggressive strategy for technology development and deployment to achieve this objective. The RTP/SCS recognizes not only the high cost that plan, but the political commitment to pay for it: "The 2012–2035 RTP/SCS proposes investing over $524 billion over the next 25 years to improve the quality of life of the region's residents by enhancing our transportation system. However, additional strategies and projects are needed. The Strategic Plan identifies additional long-term initiatives such as zero- and/or near zero emission transportation strategies, new operational improvements, expanded transit investments and high-speed rail system, as well as increased commitment to active transportation. Although elements of these strategies are included in the financially constrained plan, further work is needed to ensure there is regional consensus and commitment to fund the balance in subsequent RTPs."

For more information, visit: http://scagrtp.net/

14. Securing the Future of High-Quality Wine Through Adaption

A 2011 study from researchers at Stanford University has been making the rounds recently, considering the potential effects of climate change on high-value winegrowing regions. Trond Arne Undheim in a recent article in Color Magazine reviewed the study and concluded that the most important takeaway was the resulting innovation climate change will likely bring about. The result: For wine lovers, new varietals and new regions may emerge, bringing with it exciting new wines to enjoy.

For those vineyard owners in existing high-value winegrowing regions, the prospect of climate change may not be so exciting. How does one ensure the long-term viability of their passion and business? The Stanford study does provide some hope. While not a panacea, it does suggest that implementation of techniques like new cultural practices and winery science, called 'adaptation wedges' by the researchers, can combat the effects of an increase in growing degree days (GDD) and severe hot days.

What these studies and predictions remind us about is that planning ahead for climate change is important for long-term success and yet another opportunity right now. First, the effectiveness of various cultural practices to combat climate change creates opportunity today. Implementation of 'adaptation wedges' has the potential of opening up new areas of marginal vineyard land to grow more high-quality grapes and expand options for varietals in others. Second, increased temperatures no doubt will increase the need for water. Various new cultural practices could affect both overall supply needs, as well as timing for water delivery. Securing water rights now for future needs down the road is essential no matter what the future may hold.

For more information, visit:
http://iopscience.iop.org/1748-9326/6/2/024024
http://www.colormagazineusa.com/index.php?option=com_content&view=article&id=664

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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. *Alliance for the Wild Rockies v. Salazar* (9th Cir. 2012) 672 F.3d 1170.

As part of the 2011 Appropriations Act, Congress passed a statute that ordered the Secretary of the Interior to remove a distinct population of gray wolves in the northern Rocky Mountains from the protections of the Endangered Species Act ("ESA") without regard to any statute or regulation that might otherwise apply. The statute effectively undid an earlier U.S. District Court decision that found that such an action by the government, a "partial delisting," would violate the ESA. Environmental groups brought this action seeking to enjoin the implementation of the statute on the ground that the statute violates the separation of powers. Relying on the separation of powers doctrine in *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 112 S. Ct. 1407, 118 L. Ed. 2d 73 (1992), however, the Ninth Circuit held that Congress had acted within its constitutional authority to change the laws applicable to pending litigation.

2. *Karuk Tribe of California v. U.S. Forest Service* (9th Cir. 2012) 681 F.3d 1006.

An 7-4 en banc panel of the U.S. Court of Appeals for the Ninth Circuit reversed a 2-1 panel from that court, and held that the U.S. Forest Service must consult with appropriate federal wildlife agencies under Section 7 of the Endangered Species Act ("ESA") before allowing recreational gold mining activities to proceed in the Klamath National Forest under a Notice of Intent ("NOI") submitted by potential miners in critical habitat of coho salmon, a listed species. The court held that the Forest Service's approval of four NOIs to conduct mining is "agency action" under Section 7 because the Forest Service District Rangers in this case made affirmative, discretionary decisions about whether, and under what protective conditions and criteria, to allow private mining activity to proceed under the NOIs (even though the agency was not requiring a "Plan of Operations" for which Section 7 consultation would certainly be required). The court distinguished earlier precedents where private parties "were not required to submit proposals to the agency" and "the agency was not required to respond affirmatively to the private parties." Here, the court here found that the "Forest Service must authorize mining activities before they may proceed under a NOI" and the Forest Service must make a "mandatory, affirmative response to a NOI." The court further held that Section 7 consultation was required because the mining activities approved under the NOIs "may affect" the coho salmon and its critical habitat, and Forest Service regulations in effect in 2004 required a NOI for all proposed mining activities that "might cause" disturbance of fisheries. The dissent

argued, however, that the NOI was only "an information-gathering tool" and a "precautionary agency notification procedure," and not an application for a mining permit or license issued by the agency. The dissent therefore argued that the majority wrongly equated "implicit authorization" of the mining activities as an agency "decision" or "authorization" under Section 7. The dissent believed that this case was similar to case law involving agency "inaction" that does not require Section 7 consultation, where private conduct may take place until the agency takes affirmative steps to intervene. In the dissent's view, "the Forest Service is not approving, authorizing, or rejecting anything," but is instead "receiving and analyzing information, and deciding not to take further action," such as requiring a Plan of Operations. In dissent, Justice Smith lamented: "Most miners affected by this decision will have neither the resources nor the patience to pursue a consultation with the EPA; they will simply give up, and curse the Ninth Circuit."

3. *The Consolidated Salmonid Cases* (E.D. Cal. 2011) 791 F.Supp.2d 802*, on appeal to* Ninth Circuit Court of Appeal (cases nos. 11-15871, 11-16617, 11-16621, 11-16623, 11-16624, 11-16660, 11-16662, 11-17143).

On June 4, 2009, the United States National Marine Fisheries Service ("NMFS") issued a Biological Opinion ("BiOp") that addressed the impacts of the coordinated operations of the federal Central Valley Project and State Water Project on several species listed as endangered or threatened under the Endangered Species Act ("ESA"). Those species included the Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern Distinct Population Segment of North American green sturgeon, and Southern Resident killer whales. Numerous water contractors and water agencies filed several lawsuits against a variety of federal agencies on the grounds that provisions of the BiOp and its Reasonable and Prudent Alternative ("RPA") violated the ESA and the Administrative Procedures Act. The cases were consolidated in a single proceeding before Judge Oliver W. Wanger in the United States District Court for the Eastern District of California. Judge Wanger granted some portions of the cross-summary judgment motions, and denied others. Judge Wanger held that certain portions of the BiOp and its RPA were arbitrary, capricious and unlawful, and were remanded to NMFS. The Ninth Circuit Court of Appeal heard oral argument on the appeal on September 11, 2012. The issue before the Ninth Circuit is whether Judge Wanger gave the appropriate amount of deference to the science prepared by the Federal Government, or whether his concerns regarding its accuracy warranted his invalidation of related pumping restrictions. The case is now under submission.

4. *Natural Resources Defense Council Inc. v. Abbey et al* (C.D.Ca., No. 2:12-cv-02586).

See item no. 2 of Renewable Energy, page 64.

5. Federal Lawsuit Threatened Over Issuance Of Oil And Gas Permits In California Due To Alleged Impacts Of Fracking On Endangered Species.

See item no. 9 of Water Quality, page 22.

6. SB 1148 (Chapter 565) Mitigation Banks and the Strategic Plan for Trout Management

Mitigation Banks must be approved by the Department of Fish and Wildlife ("DFW") before issuing credits. SB 1148 requires the DFW to set up an approval process for mitigation banks, including recordation of a conservation easement before making credits available for purchase. A web database providing information on improved banks and available credits is also required. The bill also amended the system used to calculate the base fees for specified hunting and fishing licenses and ordered the inclusion of all state trustee agencies as defined in Public Resources Code section 21070 in the development of the State Environmental Goals and Policy Report. SB 1148 also requires a number of changes to DFW's update process for the Strategic Plan for Trout Management. These include: (1) continually revise and maintain an inventory of streams, stream systems, and lakes and to make the inventory available on the web; (2) decrease the required reports to the legislature from annually to every even-numbered year; (3) updates every 5 years; (4) prioritize the use of hatchery-produced trout for stocking California's waters; (5) increase outreach to the angler community and adjust regulations to ensure consistency with the Plan; (6) authorize the use of funds generated by the sport fishing license fee programs to support hatchery production goals, the Heritage and Wild Trout Program, and other related activities to promote the hatchery programs and prioritize funding for "Heritage rout Waters"; and (7) appropriate $1 million from the Hatchery and Inland Fisheries Fund to cover improvements to state hatchery facility and system improvements.

7. EPA And NMFS Issues Draft Regulations For Economic Analysis In Habitat Designations

The U.S. Fish and Wildlife Service and the National Marine Fisheries Service are jointly proposing to revise their regulations pertaining to impact analyses conducted for designations of critical habitat under the Endangered Species Act. The new rules are being made pursuant to the President's February 28, 2012, memorandum, which directed the agencies to revise their regulations to provide that the economic analysis be completed and made available for public comment at the time of publication of a proposed rule to designate critical habitat. While the decision to list a species as endangered or threatened is made without reference to the economic effects of that decision, the agency may designate critical habitat only after considering the economic impact of the designation on any particular area. The agency has discretion to exclude any area from the designation if the agency determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless exclusion would result in extinction of the species. The new proposed rule would establish the "baseline" approach to considering the economic impacts from critical habitat designations. Under that approach, any economic impacts of protecting the species that will occur regardless of the critical habitat designation--in particular, the burdens imposed by listing the species--are treated as part of the regulatory "baseline" and are not factored into the economic analysis of the effects of the critical habitat designation. That approach, as opposed to the broader "coextensive" approach, limits the scope of economic impacts considered in that context to "incremental" impacts. The

"baseline" approach was rejected by the Tenth Circuit Court of Appeals in New Mexico Cattle Growers Assn. v. U.S. Fish and Wildlife Service, 248 F.3d 1277 (10th Cir. 2001), as inconsistent with the ESA. However, the Tenth Circuit's holding was rejected, and the "baseline" approach adopted, by the Ninth Circuit Court of Appeals in Arizona Cattle Growers' Assn. v. Salazar, 606 F.3d 1160, 1172 (9th Cir. 2010), cert. denied, 131 S. Ct. 1471 (2011). The agencies intend on formally adopting the Ninth Circuit's "baseline" approach.

For more information, see
http://www.gpo.gov/fdsys/pkg/FR-2012-08-24/html/2012-20438.htm

8. US Fish and Wildlife Service Issues Voluntary Land-Based Wind Energy Guidelines.

In March 2012, the U.S. Fish and Wildlife Service issued its "Land-Based Wind Energy Guidelines." The Guidelines are designed to provide federal and state agencies, developers, and consultants with a process for planning, operating and monitoring wind energy facilities that minimize impacts to birds, bats and other wildlife. While the Guidelines are stated to be "voluntary," they are purposefully designed to become the industry standard. USF&W expressly "encourages project proponents to use the process described in these voluntary [Guidelines] to address risks to species of concern," and "intends that these Guidelines, when used in concert with the appropriate regulatory tools, will form the best practical approach for conservation of species of concern." The National Wildlife Federation explains that the "voluntary" nature of the Guidelines is designed to broaden their reach: "Voluntary guidelines encompass more species than would mandatory regulations and, in this case, provide conservation benefits for many bat species (only a few of which are protected under the ESA), non-migratory birds such as prairie chicken and sage grouse, and species not listed as federally threatened or endangered that are nonetheless of conservation concern."

For more information, visit:
http://www.fws.gov/cno/docs/2012_Wind_Energy_Guidelines_final.pdf;
http://www.nwf.org/News-and-Magazines/Media-Center/News-by-Topic/Global-Warming/2012/~/media/0CD153B6EE3A4AFFBCB38584F0CCE55B.ashx

9. Pre-Public Draft Bay Delta Conservation Plan And Related Draft Environmental Impact Statement/Report Expected To Be Issued In February, 2013.

See item no. 4 of California Water Rights and Supply, page 10.

10. California Department of Fish and Game Issues Updated Staff Report on Burrowing Owl Mitigation.

On March 7, 2012, the California Department of Fish and Game ("DFG") issued a "Staff Report on Burrowing Owl Mitigation" that revises and replaces the 1995 version of that report. The 2012 report is designed to be a compilation of the best available science to consider when assessing impacts of projects, determining mitigation or other activities

involving burrowing owls, especially in determining compliance with the California Environmental Quality Act.

In the 2012 report, DFG identified three main actions that together will facilitate a more viable, coordinated and concerted approach to conservation and mitigation for burrowing owls. Those actions include:

(1) Incorporating burrowing owl comprehensive conservation strategies into landscape-based planning efforts such as Natural Community Conservation Plans and multi-species Habitat Conservation Plans that specifically address burrowing owls.

(2) Developing and implementing a statewide conservation strategy and local or regional conservation strategies for burrowing owls, including the development and implementation of a statewide burrowing owl survey and monitoring plan.

(3) Developing more rigorous burrowing owl survey methods, working to improve the adequacy of impacts assessments; developing clear and effective avoidance and minimization measures; and developing mitigation measures to ensure impacts to the species are effectively addressed at the project, local, and/or regional level (the focus of this document).

The 2012 Report provides DFG's recommendations for implementing that third action.

The 2012 Report includes specific guidance regarding the preparation of impact assessments that evaluate the extent to which burrowing owls and their habitat may be impacted on and within a reasonable distance of a proposed project. DFG also listed best practices for avoiding negative impacts and disturbances, including the following measures:

- Avoid disturbing occupied burrows during the nesting period, from 1 February through 31 August.
- Avoid impacting burrows occupied during the non-breeding season by migratory or non-migratory resident burrowing owls.
- Avoid direct destruction of burrows through chaining (dragging a heavy chain over an area to remove shrubs), disking, cultivation, and urban, industrial, or agricultural development.
- Develop and implement a worker awareness program to increase the on-site worker's recognition of and commitment to burrowing owl protection.
- Place visible markers near burrows to ensure that farm equipment and other machinery does not collapse burrows.
- Do not fumigate, use treated bait or other means of poisoning nuisance animals in areas where burrowing owls are known or suspected to occur (e.g., sites observed with nesting owls, designated use areas).
- Restrict the use of treated grain to poison mammals to the months of January and February.

The 2012 Report also lists recommended restricted activity dates and setback distances from owl nesting sites by level of disturbance caused by the project activity.

The 2012 Report can be found at http://www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf.

Notes:

6. RENEWABLE ENERGY

A. Regulatory Framework

- **Renewables Portfolio Standard**.

  Established in 2002 under Senate Bill 1078 (Chap. 516, Stats. 2002), California's Renewables Portfolio Standard ("RPS") was accelerated in 2006 under Senate Bill 107 (Chap. 464, Stats. 2006) by requiring that 20 percent of electricity retail sales be served by renewable energy resources by 2010. In November 2008, Governor Arnold Schwarzenegger signed Executive Order S-14-08 requiring that "...[a]ll retail sellers of electricity shall serve 33 percent of their load with renewable energy by 2020." The following year, Executive Order S-21-09 directed the California Air Resources Board, under its Assembly Bill 32 authority, to enact regulations to achieve the goal of 33 percent renewables by 2020. In the ongoing effort to codify the ambitious 33 percent by 2020 goal, Senate Bill X1-2 (Chap. 1, Stats. 2011) was signed by Governor Edmund G. Brown, Jr., in April 2011. This new RPS preempts the California Air Resources Boards' 33 percent Renewable Electricity Standard and applies to all electricity retailers in the state including publicly owned utilities ("POUs"), investor-owned utilities ("IOUs"), electricity service providers ("ESPs"), and community choice aggregators ("CCAs"). All of these entities must adopt the new RPS goals of 20 percent of retails sales from renewables by the end of 2013, 25 percent by the end of 2016, and the 33 percent requirement being met by the end of 2020.

  For more information, visit
  http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm;
  http://www.energy.ca.gov/portfolio/index.html

- **California Solar Initiative ("CSI").**

  In January 2007, California began a $3.3 billion effort to install 3,000 megawatts of new solar over the next decade. The California Public Utilities Commission portion of the solar effort is known as the CSI program. The CSI offers solar incentives to energy users (except new homes) in investor-owned utility territories in California (Pacific Gas and Electric, Southern California Edison, San Diego Gas & Electric). The CSI program has a goal to install 1,940 MW of new solar by 2017.

  For more information, visit http://www.cpuc.ca.gov/PUC/energy/Solar

- **California Solar Rights Act (Civ. Code, § 714)**

  The California Solar Rights Act (Civ. Code §714), enacted in 1978, bars restrictions by homeowners associations on the installation of solar-energy systems, but originally did not specifically apply to cities, counties, municipalities

or other public entities. The Act was amended in September 2003 to prohibit a public entity from receiving state grant funding or loans for solar-energy programs if the entity prohibits or places unreasonable restrictions on the installation of solar-energy systems. A public entity is required to certify that it is not placing unreasonable restrictions on the procurement of solar-energy systems when applying for state-sponsored grants and loans. The Act was amended again in September 2004 by extending its prohibition on restrictions to all public entities. Additional key changes minimize aesthetic solar restrictions to those that cost less than $2,000 and limits building official's review of solar installations only to those items that relate to specific health and safety requirements of local, state and federal law. In 2008, Assembly Bill 1892 (Chap. 40, Stats. 2008) further amended the civil code to nullify any restrictions relating to solar energy systems contained in the governing documents of a common interest development.

B. Update

1. *Rocky Mountain Farmers Union v. Goldstene* (E.D.Ca. 2011) 843 F.Supp.2d 1071; *on appeal to* Ninth Circuit Court of Appeal (case no. 12-15131).

See item no. 5 of Air Quality and Climate Change, page 46.

2. *Natural Resources Defense Council Inc. v. Abbey et al* (C.D.Ca., No. 2:12-cv-02586).

An increasing number of lawsuits have been filed by environmental groups against utility-scale solar projects. Two of those lawsuits in 2011 involved First Solar's plans to build the 550 megawatt Topaz Solar Farm and SunPower's plans to construct the 250 megawatt California Valley Solar Ranch in the Carrizo Plain of San Luis Obispo County, California. Those cases were quickly settled when the developers entered into agreements with the Sierra Club, the Defenders of Wildlife and the Center for Biological Diversity to add 9,000 acres to the 17,000 acres they had already planned to set aside for wildlife protection.

Another lawsuit was filed by the Natural Resources Defense Council ("NRDC") in March 2012 against the Federal agencies that approved the 4,613-acre Calico Solar project on what the NRDC alleges are the "pristine lands in the Mojave Desert's Pisgah Valley." The 663.6-megawatt plant included both solar panels and "stirling engines," which are giant parabolic dish of mirrors that heat hydrogen gas in an engine that produces electricity. In the action, NRDC alleges that the project approval was expedited in a manner that failed to properly consider the impacts on wildlife in the area, including the threatened desert tortoise and bighorn sheep. Before the Federal defendants answered the complaint, the developer informed the Bureau of Land Management and the California Energy Commission in June 2012 that it wanted to amend the project by reduce the footprint of the site to 3,851 acres, and "to further reduce environmental impacts of the site." The new proposal will only use solar panels for the project, and the generation capacity of the project will be reduced to 618 megawatts. Because that change in the scope of the project triggers new environmental review and public comment, the

parties agreed and the District Court Judge ordered on July 5, 2012, that the lawsuit is put on hold pending a new or amended Record of Decision on the proposed project that is issued or on August 31, 2013, whichever date is earlier.

For more information, visit:
http://www.energy.ca.gov/sitingcases/calicosolar/compliance_2012/applicant/Calico_Amendment/01_Calico%20Solar%20Project%20Petition%20to%20Amend_Full_Document.pdf;
http://www.renewableenergyworld.com/rea/news/article/2012/06/k-road-wants-to-modify-calico-solar-project-again

3. *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior et al.* (S.D.Ca., No. 3:12-cv-01167); *Desert Protective Council et al v. United States Department of the Interior et al*. (S.D.Ca., No. 3:12-cv-01281).

See item no. 1 of Cultural Resources Protection, page 95.

4. *Save Panoche Valley v. San Benito County* (Super. Ct. San Benito County, 2011, No. 10-220).

In August 2011, the San Benito County Superior Court denied a legal challenge under the California Environmental Quality Act and the Williamson Act to a 3,200 acre, 399-magawatt solar generation project involving up to 4 million solar panels in the Panoche Valley, a semiarid open space and range land west of Interstate 5 in San Benito County. The approved project will become one of the largest solar farms in the world. The Santa Clara Audubon Society, the Sierra Club and a group of local residents challenged the action under CEQA, arguing that the project would 'destroy' Panoche Valley," which they describe as "an area that has been designated by Audubon California as an Important Bird Area (IBA), and is recognized by the National Audubon Society and Birdlife International as an Important Bird Area of Global Significance," and "a place where time has stood still for the past century that only the most adventurous birders and bay area backroaders have seen." The Superior Court judge found substantial evidence to support the County's decision to cancel the Williamson Act contract based on the finding that "a significant public concern in creating renewable energy substantially outweighed the objectives of the Act." The case is now on appeal in the Sixth Appellate District, and an oral argument is scheduled for the end of 2012.

For more information, visit:
http://www.scvas.org/index.php?page=text&id=cons_solar
http://savepanochevalley.com/environment

5. Promulgation Of Regulations And Litigation Continues Over Cancellation Of Williamson Act Contracts For Solar Energy Projects.

In 2011, Governor Brown signed Senate Bill 618. That bill authorizes parties to a Williamson Act contract, under specific circumstances, after approval by the Department

of Conservation, and in consultation with the Department of Food and Agriculture, to mutually agree to rescind the contract in order to simultaneously enter into a solar-use easement. In most cases, the easement will require that the land be used for solar photovoltaic facilities for a term no less than 20 years. The lands must either consist predominately of soil with significantly reduced agriculture productivity for agriculture activities, or have severely adverse soil conditions that are detrimental to agricultural activities and production. Also, the parcel must not be located on prime farmland, unique farmland, or land of statewide importance as determined by the Farmland Mapping and Monitoring Program of the California Natural Resources Agency, unless the California Department of Conservation determines that the parcel is eligible for a photovoltaic easement based on circumstances that cause limited agricultural use for the parcel. During 2012, the Department of Conservation provided an initial draft of proposed regulations that would implement the provisions of SB 618. The Department is now evaluating the public comments it received and is preparing for the formal regulatory adoption process. The proposed regulations will require an application for cancellation that includes a written narrative demonstrating that even under the best currently available management practices, continued agricultural practices would be substantially limited on the solar-use easement land due to the soil's reduced agricultural productivity from chemical or physical limitations. Such physical limitations include the insufficiency of water supplies for continued agricultural production on the land.

Meanwhile, a lawsuit that preceded the effective date of SB 618 continues over the cancellation of a Williamson Act contract involving prime agricultural land for the purpose of constructing a solar project on the land. In October 2011, the California Farm Bureau Federation filed a lawsuit in Fresno County Superior Court and alleged that alleges that the Fresno County Board of Supervisors violated its authority when it voted to cancel a Williamson Act contract and authorized construction of a utility-scale solar power project on 90 acres of prime farmland. The hearing on the merits of that action occurred on October 19, 2012, and the matter is presently under submission.

For more information, visit
http://www.conservation.ca.gov/dlrp/lca/Pages/SolarUseEasements.aspx;
http://www.conservation.ca.gov/dlrp/lca/Documents/SB%20618%20Regs%20Pre-Draft%20071612.pdf;
http://www.cfbf.com/news/showPR.cfm?rec=D709F38EF758B5066EF31B18039B8CE5&PRID=370; http://www.law.berkeley.edu/files/HarvestingCleanEnergy.pdf;
http://blogs.kqed.org/climatewatch/2012/01/03/can-solar-and-farming-make-good-neighbors/

6. AB 523 (Chapter 183) Corn Ethanol Banned from State Alternative Fuels Program

At the end of the 2011-12 legislative session, Governor Brown signed into law Assembly Bill 523, authored by Assembly member Valadao. The new law bans the use of corn-based ethanol fuels as a part of any loans, grants, or other incentives from the state's alternative fuels program. Fuels using non-edible waste from corn are unaffected. The bill was supported by a broad coalition, including the Sierra Club, the Union of Concerned

Scientists, as well as California's agricultural sector including: cattle ranchers, dairy producers, and poultry and egg farmers. Corn ethanol's effects on feed prices were cited as of particular concern.

For more information visit:
http://www.kcet.org/news/rewire/transportation/bill-bars-corn-ethanol-from-state-alt-fuels-program.html

7. US Fish and Wildlife Service Issues Voluntary Land-Based Wind Energy Guidelines

See item no. 8 of Endangered Species Act, page 60.

8. CPDA Model Solar Energy Facility Ordinance

The California County Planning Director's Association (CCPDA) released a Model Solar Energy Facility (SEF) Ordinance on February 3, 2012 to provide local jurisdictions with ideas on how to approach the entitlement process for solar facilities in their jurisdiction. The model ordinance and accompanying supporting documents identify a range of four different types of solar projects from a Tier 1 (small, typically rooftop-mounted) to a Tier 4 (Utility-Scale). Information is provided on important considerations such as SEF's effects on agricultural lands, other environmental issues such as aesthetics and biological resources, concerns regarding site abandonment and decommissioning, and the alignment of regulatory systems with state energy policy.

For more information visit: http://www.ccpda.org/en/solar.

9. Little Hoover Commission Recommends Major Governance Restructuring Of Energy Policy In California To Accomplish Renewable Energy and Greenhouse Gas Policies

On December 3, 2012, the independent and bipartisan Little Hoover Commission issued a report entitled "Rewiring California: Integrating Agendas For Energy Reform." In that report, the Commission warned of a "balkanized and "dysfunctional" collection of state energy agencies engaged in renewable energy and greenhouse gas reduction policies, and that such a regulatory environment threatened to create a "profoundly expensive policy failure." The Commission stated that, for the health of the state's environment and its economy, it is critical for California to get right the transformation from an electrical power system dependent on fossil fuels to one that increasingly emphasizes renewable energy. The Chairman summarized the Commission's findings, in part, as follows:

> California's path to success, however, is complicated by a balkanized energy governance structure, a subject of concern to the Little Hoover Commission for nearly 40 years. …

In public hearings, the Commission was told repeatedly that the state is well on its way to achieving its Renewable Portfolio Standard goal, despite the burden of an organizational structure no one would have designed on purpose.

Witnesses at these hearings, however, also shed light on issues that went beyond structure, specifically on how rapidly integrating new renewable energy resources could cause electricity rates to rise, may affect reliability and may impede the state's ability to achieve other environmental policy goals. These goals include compliance with federal clean air and clean water laws, and developing river flow requirements to bolster the environmental health of the Sacramento San Joaquin River/Bay Delta.

The Commission's concerns center on reliability and a lack of clarity regarding the aggregated cost of implementing the state's consolidated energy policy goals. The failure to assure reliability or an unanticipated spike in rates could sour Californians on renewable energy policy, which would have repercussions nationwide and beyond.

Also not clear is the degree to which meeting California's renewable targets, while maintaining reliability, will come at the expense of the state's greenhouse gas reduction goals. Intermittent renewable resources, such as solar and wind, will require back-up power supplies, such as gas-fired plants. Hurricane Sandy has only fueled a sense of urgency to mitigate greenhouse gas emissions by those who see a linkage between emissions and global warming.

California can mitigate the need for additional fossil fuel plants if it develops a truly diverse portfolio of renewable resources without over-relying on any one source. By encouraging greater balance in its renewable portfolio, it can avoid unnecessary costs to both utility customers and to the environment.

The lack of an overall cost estimate points up a more profound concern. Despite assembling an ambitious agenda that has gained the world's attention, the state has failed to develop a comprehensive, energy strategy with clearly delineated priorities to ensure that policies are not working at cross-purposes and that California achieves its environmental stewardship goals.

Policies and regulations affecting electricity have been piled upon each other piecemeal. As a result, numerous state bodies are implementing a long and complicated list of new directives through multiple, sometimes overlapping public processes. In this report, the Commission calls for a timeout.

… The Commission calls on the Governor to develop, through a public process, a comprehensive and cohesive state energy strategy that delineates and prioritizes goals. Such a plan should sequence implementation of this strategy in a way that maximizes progress toward these goals and minimizes avoidable costs. Until

such a plan exists, the Commission urges policy-makers to refrain from imposing any new energy-related mandates.

For a copy of the report, visit:
http://www.lhc.ca.gov/studies/214/Report214_Final%20Complete.pdf

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7. 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.

Safer Consumer Products (Green Chemistry Regulations) (Health and Saf. Code, §§ 25252-25253 and Cal. Code Regs., Div. 4.5, Title 22, Chapter 55, Safer Consumer Products Sections 69501 et seq.)

- In 2008, the Department of Toxic Substance Control ("DTSC") was statutorily authorized to: (1) identify and prioritize chemicals of concern, evaluate alternatives as well as specify regulatory responses; and (2) establish an online Toxics Information Clearinghouse to provide public access to information on the toxicity of chemicals. In September 2010, DTSC issued regulations in response to that legislation, but those were subsequently withdrawn. DTSC is currently proposing revised regulations.

B. Update

1. California Department of Toxic Substances Control Issues Proposed Safer Consumer Products Regulation.

On July 27, 2012, the California Department of Toxic Substances Control ("DTSC") issued a proposed "Safer Consumer Products Regulation. That proposed regulation is the result of an extensive regulatory process that began with the "Green Chemistry Initiative" that was signed into law in 2008. The proposed regulation applies to all consumer products sold, offered for sale, distributed, supplied, or manufactured in California that contain specific "Chemicals of Concern" ("COC") The regulation creates a process by

which manufacturers who are using such products containing COC must perform an alternatives analysis for the product and the COC in the product to determine how best to limit exposures to, or the level of adverse public health and environmental impacts posed by, the COC in the product. If an alternative is not feasible, DTSC will identify steps the manufacturer must take to ensure the product is safely used, disposed of, or phased out. The regulation also provides consumers with enhanced information about product ingredients. The public comment period for the regulations closed on January 4, 2013. DTSC revised the Initial Statement of Reasons ("ISOR") for the proposed regulations, and public comment period on the ISOR runs from December 21, 2012 until January 22, 2013. Various industry groups oppose the proposed regulations.

For more information, visit
http://www.dtsc.ca.gov/SCPRegulations.cfm

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8. 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. *Save the Peaks Coalition v. United States Forest Service* (9th Cir. 2012) 691 F.3d 1151.

After seven years of litigation, the Ninth Circuit strongly stated its discontent with plaintiffs' procedural posture in its decision affirming the district court's grant of summary judgment to the defendant, U.S. Forest Service. In *Save the Peaks Coalition v. United States Forest Service*, 691 F.3d 1151 (9th Cir. 2012) the Ninth Circuit upheld the U.S. Forest Service's grant of a snowmaking permit to an Arizona ski resort. The Court of Appeals called this case a "gross abuse of the judicial process," as plaintiffs' claims were brought "for no apparent reason other than to ensure further delay and forestall

development." However, despite plaintiffs' gross abuse off the judicial system, the Court of Appeals was unable to apply laches to bar plaintiffs' claims because the U.S. Forest Service was unable to demonstrate that it suffered prejudice.

This case began in 2005 when several Native American Tribes and environmental groups brought suit against the U.S. Forest Service. The plaintiffs sought to halt the permitting of an Arizona ski resort to produce artificial snow using Class A+ reclaimed water. Plaintiffs claimed that U.S. Forest Service violated the National Environmental Policy Act (NEPA) by failing to discuss the risks posed by the possible human ingestion of snow made from reclaimed water in its Final Environmental Impact Statement (FEIS). The district court granted summary judgment to U.S. Forest Service on all NEPA claims. Sitting en banc, the Ninth Circuit upheld the district court's decision and the U.S. Supreme Court denied plaintiffs' petition for a writ of certiorari. See *Navajo Nation v. U.S. Forest Service.*, 535 F.3d 1058, 1080 (9th Cir. 2007); *cert denied*, 129 S. Ct. 2763 (2009).

Save the Peaks Coalition closely monitored the *Navajo Nation* litigation, but refused to join as a party. Several members of Save the Peaks participated in the *Navajo Nation* litigation and actively solicited funds to pay for the litigation. Shortly after the U.S. Supreme Court denied certiorari in *Navajo Nation*, Save the Peaks initiated this suit against U.S. Forest Service. Save the Peaks alleges that the FEIS does not thoroughly discuss the environmental consequences of using reclaimed water to make snow. Save the Peaks is represented by the same attorney that represented plaintiffs in the *Navajo Nation* litigation.

In this second round of litigation, the district court granted summary judgment for the U.S. Forest Service. The district court found that laches applied to bar Save the Peaks' NEPA claims and, even if laches was inapplicable, the U.S. Forest Service did not violate NEPA. On appeal, the Ninth Circuit affirmed the district court's decision on the merits and dismissed Save the Peaks' claim.

However, significantly, the Court of Appeals was unable to find that laches applied to Save the Peaks' claim. Laches is an equitable defense that limits the time during which a party may bring a suit. A court can properly find laches applies if (1) the opposing party lacked diligence in pursuing its claim and (2) prejudice resulted from that lack of diligence. *Neighbors of Cuddy Mountain v. U.S. Forest Service* (9th Cir. 1998) 137 F.3d 1372, 1381. The Court of Appeals found that Save the Peaks clearly lacked diligence by actively supporting but declining to join the *Navajo Nation* litigation.

Nevertheless, laches could not be applied because the U.S. Forest Service was unable to sufficiently demonstrate it suffered prejudice. In determining prejudice, courts assess "the money spent on the project and the extent to which a project has progressed so far that 'the harm [plaintiffs] fear' has already occurred." *Neighbors of Cuddy Mountain*, 137 F.3d at 1382. No money had been invested in the snowmaking project prior to the *Save the Peaks* litigation. Further, plaintiffs' feared harm from ingesting reclaimed water in the form of snow had not already occurred. Arizona Snowbowl Resort argued that it suffered

prejudice in the form of large economic losses from operating without the ability to make snow. However, Ninth Circuit precedent holds that a private company's economic loss is irrelevant to determining prejudice. See *Klamath Siskiyou Wildlands Center v. Boody*, 468 F.3d 549, 555 (9th Cir. 2006).

While the Court of Appeals refusal to apply laches is consistent with prior precedent regarding findings of prejudice, this case demonstrates the difficulty parties face in making a sufficient demonstration of prejudice. The Court of Appeals was clearly displeased with the plaintiffs' procedural posture stating "that this lawsuit represents a serious abuse of the judicial process." Nevertheless, under Ninth Circuit precedent, the Court of Appeals' hands were tied in finding defendants suffered prejudice.

2. *Alcoa, Inc. v. Bonneville Power Admin.* (9th Cir. 2012) 698 F.3d 774.

Bonneville Power Administration's ("BPA") decision to use a Categorical Exclusion and not to prepare an EIS was upheld as neither arbitrary nor capricious. The Court reasoned that BPA's expertise when determining the applicability of the Department of Energy categorical exclusion regulations and proper consideration of the exclusion's relevant factors entitled BPA's judgment to deference.

3. *Native Ecosystems Council v. Weldon* (9th Cir. 2012) 697 F.3d 1043.

The Court upheld the lower court's grant of summary judgment in favor of the U.S. Forest Service because the agency had taken the required "hard look" at the environmental impacts of a fuels reduction project and, thus, the agency's scientific judgments and interpretations of its own regulations and plans were entitled to "substantial deference."

4. *Earth Island Institute v. United States Forest Service* (9th Cir. 2012) 697 F.3d 1010.

The U.S. Forest Service's decision to prepare an Environmental Assessment ("EA") was upheld as not arbitrary and capricious. The Court deferred to the agency's scientific determinations as sufficiently supporting its claims, and held that the requirement for environmental impact statements ("EIS") to respond to every comment (40 C.F.R. § 1502.9(b)) did not apply to EAs. The Court also held that the Forest Service's consideration of only the proposed project and the no project alternatives was sufficient because NEPA's requirements regarding the evaluation of alternatives are less rigorous than for an EIS.

5. *Pacific Coast Federation of Fishermen's Association v. Blank* (9th Cir. 2012) 693 F.3d 1084.

The National Marine Fisheries Service ("NMFS") decision to analyze two amendments to the Pacific Coast Groundfish Fishery Management Plan under separate NEPA documents was proper. The Court reasoned that each amendment had "overlapping, but not co-extensive goals" and, thus, the project's each had "independent utility."

Furthermore, it reasoned that the agency avoided any concerns that it failed to consider collectively substantial impacts required by 40 C.F.R. § 1508.25 by including a sufficiently thorough analysis of both amendments in each environmental document.

6. *Center for Biological Diversity v. Salazar* (9th Cir. 2012) 695 F.3d 893.

The Court upheld a U.S. Fish & Wildlife Service Environmental Assessment ("EA") prepared for a final rule allowing for incidental take authorization of polar bears and walruses for certain defined oil exploration activities. The Center for Biological Diversity ("CBD") sued, claiming, among other things, violations of NEPA regarding analysis of alternatives and potential impacts of an oil spill. The Court reasoned that an EA need only include a brief discussion of alternatives, unlike the requirements for an EIS, and that the consideration of impacts of an oil spill was sufficient because the likelihood of a large spill was remote due to the nature of the exploration activities and the five-year limit on the duration of the regulations.

7. *Grand Canyon Trust v. United States Bureau of Reclamation* (9th Cir. 2012) 691 F.3d 1008.

The Court held that the Bureau of Reclamation's adoption of the Annual Operating Plan ("AOP") for Glen Canyon Dam was not a "major federal action" requiring the preparation of an EA or EIS. It focused on the distinction between "major federal action" and "agency action," the latter of which is a much broader standard than the former. It reasoned that given that the AOP did not materially change the Dam's current operations, it did not rise to the level of "major federal action" requiring NEPA compliance.

8. *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. United States Forest Service* (9th Cir. 2012) 689 F.3d 1060.

The U.S. Forest Service's Environmental Impact Statement ("EIS") for an experimental forest thinning, fuels reduction and research project was upheld as properly considering a reasonable range of alternatives. The Court afforded the agency considerable deference in developing is statement of purpose and need, rejecting the claim that the statement was overly narrow by tying it to the agency's statutory authority to manage forest lands. It then upheld the range of alternatives as reasonable, despite the fact that the narrow statement led to the analysis of alternatives which were very similar. It reasoned that the agency did not need to consider in detail proposed alternatives that did not provide the research data it wanted.

9. *Tri-Valley CAREs v. United States Department of Energy* (9th Cir. 2012) 671 F.3d 1113.

The U.S. Department of Energy's ("DOE") Environmental Assessment ("EA") of a proposed "biosafety level-3" facility at the Lawrence Livermore National Laboratory was upheld. The Court held that the DOE took the requisite "hard look" of the impacts from an intentional terrorist attack when it considered three types of general terrorist attacks:

(1) a direct attack leading to loss of containment; (2) theft and release by a terrorist outsider; and (3) theft and release by a terrorist insider. Despite utilizing a similar methodology for direct attacks that was held to be insufficient in an earlier suit, the Court found that the revisions to the analysis sufficiently supported the agency decision to choose that methodology to simulate the consequences of a direct attack event.

10. *Pacific Rivers Council v. United States Forest Service* (9th Cir. 2012) 689 F.3d 1012, *rehearing and en banc rehearing denied*.

See item no. 1 of Forest Resources, page 90.

11. Council on Environmental Quality Issues Guidance On NEPA Efficiencies.

On March 6, 2012, the Council on Environmental Quality released final guidance for Federal agencies on improving the efficiency and timeliness of their environmental reviews under the National Environmental Policy Act ("NEPA"). CEQ's NEPA regulations already described efficiencies that can be applied when preparing Environmental Impact Statements, the most intensive type of NEPA environmental review. The guidance clarifies that these efficiencies can and should be applied to all types of environmental reviews, including Environmental Assessments. The guidance outlines the following principles for agencies to follow when performing NEPA environmental reviews

- NEPA encourages straightforward and concise reviews and documentation;
- NEPA should be integrated into project planning to ensure decisions reflect environmental considerations and avoid delays later in the process rather than be an after-the-fact process that justifies decisions already made;
- NEPA reviews should coordinate and take appropriate advantage of existing documents and studies;
- NEPA reviews should use early and well-defined scoping to focus environmental reviews on appropriate issues and avoid unnecessary work;
- Agencies should develop meaningful and expeditious timelines for environmental reviews; and
- Agencies should target their responses to comments to appropriate issues raised.

For more information, visit
http://www.whitehouse.gov/administration/eop/ceq/Press_Releases/March_6_2012
http://www.whitehouse.gov/sites/default/files/microsites/ceq/improving_nepa_efficiencies_06mar2012.pdf

Notes:

9. 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. State Mining and Geology Board Information Report - A Survey of California Surface Mining Operations: Satisfaction with Annual Mining Operation Reporting Fees

Public Resources Code (PRC) Section 2207(d) requires the State Mining and Geology Board (SMGB) to impose by regulation an annual reporting fee on each active and idle surface mining operation. Active and idle surface mining operations are defined in PRC Sections 2207(f), 2714, 2727.1, 2735, and Title 14 California Code of Regulations (CCR) Section 3501. The definition includes operations conducted by public agencies. As of 2010, there are currently 1,355 mining operations subject to the reporting fee regulation. PRC Section 2207(d) states the annual fee imposed shall not be less than $100 or more than $4,000 for each operation. Statute requires that these amounts be adjusted annually for cost of living, as measured by the California Consumer Price Index.

The SMGB is currently considering the equity of the current reporting fee schedule. In considering changes to the SMGB regulations, the SMGB conducted a survey of affected mining operations. An eight-question survey was conducted of all 1,355 surface mining operations during the period of December 2011 and February 2012. Changing the basis on which Annual Mine Fees are calculated, or increasing the cap for total revenues generated, was considered.

Raising the single mining operation cap to about $8,000, without changing the way or basis in which the fees are calculated, or raising the total revenues generated, provided a more equitable distribution of Annual Mine Fees, and most closely addresses the intent of PRC Section 2207(d)(2).

For more information, see: http://www.conservation.ca.gov/smgb/reports.

Notes:

10. 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. Update

1. *Siskiyou County Farm Bureau v. California Department of Fish and Game* (Super. Ct. Siskiyou County, 2012, No. CV 11-00418).

See item no. 1 of Water Rights and Supply, page 7.

2. AB 2402 (Chapter 559) The New "Department of Fish and Wildlife"

The Legislature has changed the name of the Department of Fish and Game and tasked the department with developing a strategic plan. AB 2402 remakes the department into the Department of Fish and Wildlife ("DFW") and requires the development of a Strategic Plan to implement the recently completed Strategic Vision required by AB 2376 in 2010. It also created a new advisory program called the Science Institute charged with providing independent scientific review, advice and recommendations for the work of the department. AB 2402 also included some fiscal elements including the consolidation of the Augmented Deer Tags, Bighorn Sheep Permit and Wild Pig accounts into the Big Game Management account, increased fees for certain hunting, guide and aquatic licenses, and extend the repayment date of a loan from the Renewable Resource Trust Fund to the Renewable Energy Resources Development Fee Trust Fund until December 31, 2013. Finally, AB 2402 includes law enforcement officers employed by the new DFW in the definition of "state peace officer/firefighter" for disability rules purposes.

Notes:

11. FOREST RESOURCES

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.)

<u>Oak Woodlands Conservation Act</u> (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).)

<u>Z'berg-Nejedly Forest Practice Act of 1973</u> (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. *Pacific Rivers Council v. United States Forest Service* (9th Cir. 2012) 689 F.3d 1012, *rehearing and en banc rehearing denied*.

The Court of Appeals for the Ninth Circuit held that the Final Supplemental Environmental Impact Statement issued by the United States Forest Service in 2004 ("2004 Framework") for the eleven Forest Plans for the Sierra Nevada Mountains complied with the National Environmental Protection Act ("NEPA") as to the analysis of environmental consequences on amphibians, but did not comply with NEPA as to environmental impacts on fish. The majority on the panel held that the Forest Service did not take a hard look on environmental consequences on fish, because there was no analysis of such consequences in the 2004 Framework as there was in a 2001

environmental impact statement on the forest plans, and because the Forest Service failed to provide any explanation as to why it was not "reasonably possible" to analyze such consequences as it did in 2001. The dissent argued that, because the 2004 Framework was a programmatic environmental impact statement ("EIS") that called for a more flexible approach based on specific conditions and therefore left review of critical decisions for environmental analysis for the project-specific level, the majority opinion has the effect of imposing additional procedures on a programmatic EIS that are not required under NEPA. The dissent also argued that the rule adopted by the majority diminishes the deference to the Forest Service's discretion in determining the scope of its analysis. It remains to be seen if the practical result of the majority opinion in *Pacific Rivers Council* will create "an unclear rule based on 'reasonable possibility,'" as the dissent warns. (Interestingly, a dissenting justice in *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012), discussed below, lamented over a number of recent environmental decisions issued by the Ninth Circuit, and made the following comment about the *Pacific Rivers Council* case: "Because environmental agencies will never be certain whether the unclear 'reasonably possible' standard applies, it will take even longer for the agencies to approve forest plans.")

2. *Decker v. Northwest Environmental Defense Center*, 183 L.Ed.2d 673, 2012 U.S. LEXIS 4793 (case no. 11-338), on *cert. review* of *Northwest Environmental Defense Center v. Brown* (9th Cir. 2011) 640 F.3d 1063.

See item no. 1 of Water Quality, page 17.

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12. CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

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

- The NHPA review process is 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. Update

1. Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior et al. (S.D.CA., No. 3:12-cv-01167); *Desert Protective Council et al v. United States Department of the Interior et al.* (S.D.CA., No. 3:12-cv-01281).

In May 2012, lawsuits were filed in the U.S. District Court for the Southern District of California challenging the approvals by the U.S. Interior Department and the County of Imperial, California, of the Ocotillo Wind Energy Facility Project ("OWEF"), located in western Imperial County, California. OWEF is a 315 megawatt, 2,400-acre project that will include 112 wind turbines that will be 450 feet tall. The project borders the Anza-Borrego Desert State Park, the largest state park in the U.S. On May 11, 2012, a Memorandum of Agreement was entered into by the California State Historic Preservation Historic Office, the Advisory Council on Historic Preservation, the U.S. Bureau of Land Management, the Army Corps of Engineers, and the developer of the project as part of the Record of Decision in order to mitigate and minimize adverse impacts of the OWEF Project on cultural resources. However, the Quechan Tribe of the Fort Yuma Indian Reservation's filed an action against the Department on May 14, 2012, challenged the OWEF on the ground that the Department approved the project in violation of the Federal Lands Policy Management Act ("FLPMA"), the National Historic Preservation Act, the National Environmental Policy Act ("NEPA"), the Administrative Procedures Act ("APA"), and the 1980 California Desert Conservation Area Plan ("CDCA"). The Tribe's principal concern is that the project will lead to the desecration of sacred lands, including cremation/burial sites, that the Tribe was not included in consultations that the Federal Government is required to conduct for cultural resources purposes, and that the project will destroy the desert viewshed. The Federal defendants responded that they engaged in a two-year consultation process during which they held four site visits with tribal representatives, conducted dozens of tribal consultation meetings, met with the Tribe's Cultural Committee on two occasions, attempted to establish monthly meeting to discuss OWEF, and invited the Tribe to comment on and observe the archeological resources survey (which the Tribe allegedly did not do). On May 22, 2012, the District Court Judge denied the Tribe's request for a temporary restraining order to immediately halt construction activities on the project.

Then, on May 25, 2012, the non-profit Desert Protective Council ("DPC") and Laborers' International Union of North America, Local Union No. 1184 filed another federal lawsuit that alleges that, in approving the OWEF project, the U.S. Secretary of the Interior violated the right-of-way provisions of the FLPMA, the Secretary acted illegally in amending the CDCA, the Secretary ignored the requirements of NEPA to explore all reasonable alternatives and to take into account the cumulative impacts of this project, the Secretary and Imperial County failed to take adequate measures to protect the endangered Peninsular Bighorn Sheep and the protected golden eagles that inhabit the site, and the County ignored the requirements of CEQA and County noise ordinance standards.

DPC's complaint alleges improper environmental review of the harm from the noise and sound created by the wind turbines on the local residents.

Cross-motions for summary judgment in the Quechan Tribe case are scheduled to be heard on January 18, 2013. Cross-motions for summary judgment in the Desert Protective Council case are scheduled to be heard on February 22, 2013.

For more information, visit:
http://indiancountrytodaymedianetwork.com/2012/06/23/quechan-tribe-sues-to-halt-construction-of-wind-factory-on-sacred-land-119945;
http://indiancountrytodaymedianetwork.com/2012/06/06/ocotillo-express-wind-facility-opposition-grows-116580
http://dpcinc.org/index.php/site/article/desert_protective_council_files_lawsuit_against_ocotillo_wind_energy_facili/

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13. 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. *Air Alliance Houston et al. v. Jackson* (D.D.C., No. 1:12-cv-01607).

On September 27, 2012, numerous environmental groups filed a lawsuit in the United States District Court for the District of Columbia against the U.S. Environmental Protection Agency ("EPA") under the Clean Air Act, 42 U.S.C. §§7604(a)(2), 7412(f)(2), 7412(d)(6), on the grounds that the EPA failed to reconsider and revise the emission standards for hazardous air pollutants at oil refineries, including the 21 refineries in California. The California plaintiffs are advocates for environmental justice and protection from toxic air pollution, including California Communities Against Toxics, Coalition For A Safe Environment, and Del Amo Action Committee, whose members include individuals that live near petroleum refineries. The suit alleges that the EPA failed to complete review of the current risk to public health and the environment for petroleum refineries, and promulgate revised standards or required determinations for those refineries, which allegedly should have been done by 2003 and 2010. The suit faults the EPA for withdrawing the rulemaking in 2011, when the EPA announced that it was necessary to "gather better emissions information from the refining industry." The complaint describes information recently obtained by or known to the EPA that allegedly shows a significant amount of previously unreported air toxic emissions at petroleum refineries, as well as the ability of refineries to control pollution at a greater rate. According to plaintiffs, "EPA has not considered or accounted for this new information in regard to communities exposed to toxic air pollution from petroleum refineries as it will be required to do as part of the required health impact assessment under Section 112(f)(2) [of the CAA] and the rulemaking to determine whether to set stronger standards to protect public health pursuant to this provision."

2. *City of Maywood v. Los Angeles Unified School District* (2012) 207 Cal.App.4th 1075.

In *Conservatorship of Whitley* (2010) 50 Cal. 4th 1206, the California Supreme Court examined the third requirement that litigants must prove in order to recover attorneys' fees under California's 'private attorney general' fee statute in Code of Civil Procedure section 1021.5. That factor is "the necessity and financial burden of private enforcement are such as to make the award appropriate." Under that requirement, the trial court places the estimated value of the case beside the actual cost and makes the value judgment whether it is desirable to offer the bounty of a court-awarded fee in order to encourage litigation of the sort involved in that case. The Court pointed out that the focus is "not on plaintiffs' abstract personal stake, but on the financial incentives and burdens related to bringing suit"; therefore, courts should not consider claimants' aesthetic or other nonpecuniary interests in evaluating the "necessity and financial burden" requirement. In *City of Maywood v. Los Angeles Unified School District*, the Court of Appeal for the Second Appellate District applied the Whitley holding to public enforcement cases where a public entity has pursued attorneys' fees against another public entity. In that case, a city filed a petition for writ of mandate seeking to overturn a decision by a school district that certified a final environmental impact report ("FEIR") that analyzed the environmental consequences of constructing a high school. The trial court issued a peremptory writ of mandate that prohibited the school district from taking any further actions to approve the school construction project until it had prepared and certified a revised FEIR. The trial court then granted attorneys' fees to the city pursuant to section 1021.5. The Court of Appeal reversed the trial court's order awarding attorneys' fees and remanded that issue for further proceedings. The court found that "the holding of Whitley applies equally to both private and public litigants who seek attorneys' fees pursuant to section 1021.5." Therefore, when assessing the financial burden element in the context of a public entity's legal victory, "the trial court may only consider the public entity's pecuniary interests and the pecuniary interests of its constituents."

3. North Coast Water Board Staff Recommends $5.5 Million Caltrans Fine For Discharges Into Russian River Tributary

Staff of the North Coast Regional Water Quality Control Board (Regional Water Board) issued a $5.5 million Administrative Civil Liability Complaint against Caltrans and its contractor, Ghilotti Construction Company, for threatening salmon and steelhead spawning areas by discharging soil into tributaries of the Russian River. The administrative complaint also alleges that Caltrans and its contractor failed to file monthly reports on the Sonoma County project to the Regional Water Board. The complaint involves a road-widening project on Highway 101 from Petaluma to Rohnert Park. It alleges that Caltrans, through its contractor, Ghilotti, allowed 150 cubic yards of soil to be discharged into Copeland Creek and Laguna de Santa Rosa in the Russian River watershed; and failed to file monthly reports to the Regional Water Board for most of the project's construction time. The soil was used to construct temporary earthen dams at the project. The soil allegedly caused excess turbidity in the creek, threatening salmon and steelhead spawning areas. A hearing on the matter is expected to be held before the Regional Water Board on January 24, 2013

For more information, see http://www.waterboards.ca.gov/northcoast/press_room/pdf/2013/121108_Caltrans_ACLC_Region_1.pdf

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B. REAL ESTATE AND EASEMENTS UPDATE

Glen C. Hansen

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1. REAL ESTATE

A. Update

1. *RealPro, Inc. v. Smith Residual Company, LLC* (2012) 203 Cal.App.4th 1215.

The Court of Appeal for the Fourth Appellate District upheld a trial court judgment sustaining a seller's and their agent's demurrer to a cooperating broker's complaint to recover a real estate commission, where the cooperating broker presented a written offer of a buyer that was "ready, willing, and able to purchase the Property … on all material terms" contained in the listing, including an all cash purchase at the full listing price of $17 million, but where the seller did not accept the offer and a sale was never completed.

2. *Rony v. Costa* (2012) 210 Cal.App.4th 746.

A homeowner decided to install an outdoor pizza oven in a corner of his backyard. To clear a path for the smoke and heat that might emanate from the oven, the homeowner hired an unlicensed day laborer to remove overhanging tree limbs from a 50-80 foot Monterey cypress tree growing on the neighbor's property. However, the laborer not only trimmed limbs overhanging the homeowner's property, he also entered the neighbor's yard without permission and lopped off portions of the cypress solely on the neighbor's property. Even the homeowner's expert described the tree as "aesthetically compromised" and the cuts were not something the expert would ever do or approve of. The neighbor who owned the tree sued the homeowner, but not the laborer, for wrongful injuries to timber. The trial court not only awarded the neighbor damages for the diminution in value of the tree, and for loss of aesthetics and functionality, but also awarded the neighbor attorney fees under Code of Civil Procedure section 1029.8. That section authorizes a fee award against an "unlicensed person who causes injury or damage to another person as a result of providing goods or performing services for which a license is required." The Court of Appeal for the First Appellate District affirmed the judgment awarding damages and reversed the order awarding attorney fees. The attorney fee award in that statute may be made only against an unlicensed person, not against someone (such as the defendant homeowner) who hires an unlicensed person. Furthermore, the general respondent superior statute (Civ. Code, § 2338) cannot be used to apply impose vicarious liability for attorneys' fees upon a hirer of an unlicensed contractor.

3. *Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182.

After a homeowner lost her home to foreclosure, she sued the receiver for the thrift institution/lender, the trustee under the deed of trust and the trustee's agent for negligent misrepresentation, fraud, breach of oral contract, violation of Civil Code section 2924g, subdivision (d), intentional and negligent infliction of emotional distress, and rescission of the foreclosure sale. The Court of Appeal for the Fourth Appellate District partially affirmed and partially reversed the trial court's granting the collective defendants' motion for summary judgment and summary adjudication. As to the issues of misrepresentation,

reliance, and damages for intentional infliction of emotional distress, the court held that plaintiff produced evidence that created a triable issue of fact regarding whether the thrift institution induced her to miss a loan payment, thereby wrongfully placing her loan in foreclosure, and whether she suffered damages as a result. Because of claims she made to the thrift institution regarding possible forgery of loan documents, the thrift institution's representatives allegedly told her repeatedly that the matter was being considered by the thrift institution's legal department, and that she should not make any further payment (and even refused to accept several payments). But the thrift institution simultaneously initiated the foreclosure process anyway. The court held that plaintiff presented evidence that in reliance on representations made by the thrift institution's representatives, she did not make a loan payment; and therefore there was a triable issue of fact whether plaintiff was in default when she spoke with the representatives. However, Plaintiff's rescission cause of action was no longer viable because her home was resold after the sale to a bona fide purchaser for value.

4. New "Homeowners Bill of Rights" (AB 278, SB 900) Imposes Many New Rules To Protect Borrowers In The Residential Foreclosure Process

In 2012, the Legislature passed and Governor Brown signed two bills commonly referred to as the "Homeowners Bill of Rights." That legislation, Assembly Bill 278 (Eng) and Senate Bill 900 (Leno), will impose statewide regulations that are similar to those in the mortgage settlement reached between 49 state attorneys general and the nation's five largest banks. Those new regulations apply only to mortgages or deeds of trust secured by residential real property not exceeding 4 dwelling units that is owner-occupied, and only to those entities who conduct more than 175 foreclosure sales per year. Among other things, those regulations require the following:

- Mortgage servicers are included in the list of persons and entities that must contact the borrower prior to filing a notice of default in order to explore options for the borrower to avoid foreclosure;

- The borrower must be provided with specified information in writing prior to recordation of a notice of default and, in certain circumstances, within 5 business days after recordation.
- Prohibits a mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent from recording a notice of default or recording a notice of sale or conducting a trustee's sale while a complete first lien loan modification application is pending;

- Establishes additional procedures to be followed regarding a first lien loan modification application, the denial of an application, and a borrower's right to appeal a denial

- Requires a written notice to the borrower after the postponement of a foreclosure sale in order to advise the borrower of any new sale date and time;

- Provides that an entity shall not record a notice of default or otherwise initiate the foreclosure process unless it is the holder of the beneficial interest under the deed of trust, the original or substituted trustee, or the designated agent of the holder of the beneficial interest;

- Prohibits recordation of a notice of default or a notice of sale or the conduct of a trustee's sale if a foreclosure prevention alternative has been approved, and requires recordation of a rescission of those notices upon execution of a permanent foreclosure prevention alternative;

- Prohibits the collection of application fees and the collection of late fees while a foreclosure prevention alternative is being considered, and requires a subsequent mortgage servicer to honor any previously approved foreclosure prevention alternative;

- Requires, upon request from a borrower who requests a foreclosure prevention alternative, a mortgage servicer who conducts more than 175 foreclosure sales per year or annual reporting period to establish a single point of contact and provide the borrower with one or more direct means of communication with the single point of contact. The bill would specify various responsibilities of the single point of contact.

- Requires that a specified declaration, notice of default, notice of sale, deed of trust, assignment of a deed of trust, substitution of trustee, or declaration or affidavit filed in any court relative to a foreclosure proceeding or recorded by or on behalf of a mortgage servicer shall be accurate and complete and supported by competent and reliable evidence. Also, before recording or filing any of those documents, a mortgage servicer shall ensure that it has reviewed competent and reliable evidence to substantiate the borrower's default and the right to foreclose, including the borrower's loan status and loan information. Any mortgage servicer that engages in multiple and repeated violations of these requirements shall be liable for a civil penalty of up to $7,500 per mortgage or deed of trust, in an action brought by specified state and local government entities, and would also authorize administrative enforcement against licensees of the Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate.

- Authorizes a borrower to seek an injunction and damages for violations of certain of the provisions described above; also authorizes the greater of treble actual damages or $50,000 in statutory damages if a violation of certain provisions is found to be intentional or reckless or resulted from willful misconduct; also authorizes the awarding of attorneys' fees for prevailing borrowers;

- Violations of these provisions by licensees of the Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate would also be violations of those respective licensing laws.

- Many of these provisions are designed to sunset on January 1, 2018.

- The Department of Corporations, the Department of Financial Institutions, and the Department of Real Estate are authorized to adopt regulations applicable to persons and entities under their respective jurisdictions for purposes of the provisions described above. Violations of those regulations would be enforceable only by the regulating agency.

Banking institutions are concerned that the new statutory rules are too vague and that a significant amount of litigation will result from them. It remains to be seen whether the regulations implementing the legislation will help to resolve the vagueness concerns.

For more information, see
http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0251-0300/ab_278_bill_20120711_chaptered.html
http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0251-0300/ab_278_cfa_20120702_105700_asm_floor.html
http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_900_bill_20120711_chaptered.html
http://leginfo.ca.gov/pub/11-12/bill/sen/sb_0851-0900/sb_900_cfa_20120702_103745_sen_floor.html
Paul Jones, "Lenders Say Mortgage Relief Comes With Lawsuits," Daily Recorder, July 5, 2012, pp. 1, 2.

5. Local Governments Consider Controversial Plan To Use Eminent Domain Law To Seize Mortgages To Help Homeowners Refinance.

In 2012, the County of San Bernardino formed a joint powers authority with the cities of Fontana and Ontario ("JPA") to explore the possibility of using eminent domain law to acquire underwater mortgages. The idea is being proposed by the San Francisco investment firm Mortgage Resolution Partners ("MRP"). Under the MRP plan, local governments would identify which loans in their jurisdictions are most likely to default or which have defaulted, and then "seize" them using eminent domain. The local government would identify the potential target loans from a pool of debt held by "private label" mortgage-backed securities. MRP pay the holder of the mortgage "fair market value" for the note. The local governments would secure the loan notes and then modify the loans to current market value, which would lower monthly mortgage payments for homeowners who chose to refinance. The loans would then be sold and the proceeds paid to the investors of MRP. MRP would take a flat fee of $4,500 for each loan seized. However, the Securities Industry and Financial Markets Association and other trade organizations have warned the County of San Bernardino that it could become mired in legal action with holders of mortgage loans should it go forward with the plan. Those trade organizations have obtained a legal memorandum drafted by former Solicitor General Walter Dellinger that outlines several challenges that can be made against those plans on the basis of the Takings, Contract and Commerce Clauses in the United States

Constitution. In response, California Lt. Gov. Gavin Newsom wrote a letter to U.S. Attorney General Eric Holder, asking the Justice Department to investigate those trade groups or anyone else who may be engaging in anti-competitive practices to block the eminent domain proposal. There have even been bills introduced in Congress to block those eminent domain proposals.

Meanwhile, the Federal Housing Finance Authority ("FHFA") upped the ante by expressing serious concerns about the consequences of these types of plans on mortgage markets due to the doubt they may cast on the security of mortgage contracts. Then Mortgage Resolution Partners responded that any action against local governments by the FHFA would essentially create the conditions for denying someone a loan just because of an area they live in, and therefore would be contrary to the FHFA's mandate. MRP has also met with representatives of the cities of Elk Grove, Rancho Cordova and Sacramento about its eminent domain plan. And at one point, the City Council of the City of Berkeley expressed an interest in the County of Alameda using eminent domain to take over home loans, maybe for free without paying the bank, if the bank holding it cannot prove ownership.

Expect this issue to heat up in 2013. Says John Vlahoplus, a founder and chief strategy officer for MRP: "In 2013, we will clean up this mess, and we'll fix this problem." "We're going to have strong success in 2013." Everyone is waiting to see what the JPA will do. Its next meeting is scheduled for January 24, 2013.

For more information, see
http://www.dailynews.com/breakingnews/ci_21550860/foreclosure-fix
http://www.aba.com/issues/letterstocongress/documents/mortgage-ed-jointletter-090712.pdf
https://www.federalregister.gov/articles/2012/08/09/2012-19566/use-of-eminent-domain-to-restructure-performing-loans
http://www.dailycal.org/2012/08/05/berkeley-city-council-explores-solutions-to-home-foreclosures/
http://www.sacbee.com/2012/08/17/4733747/experts-debate-legality-of-plan.html
http://www.cmba.com/new/index.asp
http://www.sbsun.com/news/ci_22105597?source=rss

Notes:

2. COMMON INTEREST DEVELOPMENTS

A. Regulatory Framework

- Common interest developments are governed by the Davis-Stirling Act (Civil Code §§1350-1378). That Act applies only if the membership in the community association is mandatory.

- Community associations are usually incorporated and governed under the Nonprofit Mutual Benefit Corporation Act (Corp. Code §§7110-8910).

B. Update

1. *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (US), LLC* (2012) 55 Cal.4th 223.

Resolving a split of opinion in the appellate courts, the California Supreme Court held that a defendant developer who recorded a declaration of covenants, conditions, and restrictions ("CC&Rs") could enforce an arbitration provision in those CC&Rs in a construction defect action filed against the developer by a condominium association governed by those CC&Rs, even though the association did not exist as a separate entity when the CC&Rs were drafted and recorded.

2. *Glen Oaks Estates Homeowners Assn. v. Re/Max Premier Properties, Inc.* (2012) 203 Cal.App.4th 913.

The trial court sustained demurrers to a homeowners association's ("HOA") complaint against real estate brokers who acted as dual agents in the developers' sale of properties in the development to HOA members. The HOA alleged in the complaint that the realtors had obtained inaccurate soil reports and had misled the members, resulting in defects of a common roadway and common area slopes. The Court of Appeal for the Second Appellate District reversed the trial court's determination that the association did not have standing to assert claims on behalf of its members against the brokers under Civil Code section 1368.3. The Court of Appeal held that standing existed under that statute (a) because the allegations of the complaint were sufficient to show that the matter pertained to damage to the common area roadway and slopes; and (b) because that statute confers the privity necessary for an association to bring its members' claims, and does not limit standing to suits against developers or otherwise limit the parties who can be sued.

3. *Quail Lakes Owners Assn. v. Kozina* (2012) 204 Cal.App.4th 1132.

The Court of Appeal for the Third Appellate District affirmed a trial court's decision to grant a verified petition by a homeowners' association for an order under Civil Code section 1356 to modify the association's governing laws to reduce a supermajority voting restriction. The trial court did not abuse its discretion in deciding the case based on the

verified petition, without live testimony, and without citing the evidence as to each of the six requirements provided in section 1356.

Notes:

3. EASEMENTS

A. Regulatory Framework

Source of Law

The law of easements is governed by both the Civil Code (§§801-813) and case law.

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 sub-divider 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.

- Equitable easements - Where a structure lies over the property line and on the neighboring residential property, courts may allow the structure to exist, even though it is an encroachment, on equitable grounds if (1) the owner of the structure is innocent; (2) the neighboring owner's injury caused by the encroachment is less than irreparable; and (3) the cost of removing the encroachment is greatly disproportionate to the neighboring owner's injury caused by the encroachment. (*See generally*, Glen C. Hansen, "'The Court Let Me Keep My Fence On Your Land': Neighborhood Boundary Encroachments And Exclusive Easements," 29 CALIF. REAL PROPERTY JOURNAL 10 (2011).)

Permitted Scope of Easements and Responsibilities

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

Termination of Easements

- Unity of ownership/merger of property.

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

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

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

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

- By eminent domain.

Determining Rights and Liabilities

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

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

- Determine the location and description of the easement.

- Identify if maintenance obligations exist, if any.

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

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

B. Update

1. *Connolly v. Trabue* (2012) 204 Cal.App.4th 1154.

A trial court implicitly found that plaintiff property owners acquired a prescriptive easement over adjacent real property owned by defendants because it found that plaintiffs continuously and openly used the disputed portion for approximately 15 years prior to any controversy arising between them and defendants or any of the prior legal owners. However, the trial court then held that plaintiffs claim to use the prescriptive easement was barred by the doctrine of laches. The Court of Appeal for First Appellate District reversed the trial court's judgment on the grounds that laches is not a bar to a claim of adverse possession, and a claim of an easement by prescription is a legal twin to a claim of adverse possession. Furthermore, laches applies to equitable actions, not actions at law, and an action to determine the existence of an easement by prescription is an action at law and not equity.

2. *Cottonwood Duplexes, LLC v. Barlow* (2012) 210 Cal.App.4th 1501.

The Court of Appeal for the Third Appellate District held that a trial court may not order the partial extinguishment of an express easement based on a finding that the reasonable use requirements of the dominant tenement do not require the full size and scope of the original easement. The appellate court rejected the argument that changed circumstances over the history and development of the servient tenement can result in the partial extinguishment of a granted easement, without the dominant owner intending to abandon

the easement. The court also rejected the argument that the owner of the servient tenement can, by making a part of a granted easement for all practicable purposes unusable, compel the extinguishment of that part of the easement against the will of the dominant owner. Furthermore, the court distinguished *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, which held that the owner of a servient tenement could place water tanks and plant grape vines within the area of a 52-foot-wide roadway easement, where that use did not unreasonably interfere with the dominant tenement holder's normal use of a 15-foot-wide strip in the easement area for ingress and egress. The court in *Cottonwood* explained: "*Scruby* dealt with the scope of use of an easement, not its continued existence."

3. *Martin v. Van Bergen* (2012) 209 Cal.App.4th 84.

The Court of Appeal for the Second Appellate District held that a property owner who unknowingly had raised almond trees for decades up to a common fence that was actually located on a neighboring parcel could not raise the doctrine of boundary by agreement as a defense to the neighbor's quiet title action. There was no evidence of an actual agreement to locate the fence as the boundary between the parcels. Under that doctrine, long acquiescence by the adjoining property owners in the location of the fence was not sufficient

4. *Wooster v. Department of Fish & Game* (2012) 211 Cal.App.4th 1020.

The Court of Appeal for the Third Appellate District held that a conservation easement granted to the California Department of Fish and Game and recorded over 30 years ago is not extinguished or rescinded because the Department failed to post no hunting and no trespassing signs on the property as required by the conservation easement. Also, the grant of hunting rights to the Department in the easement (which allowed the Department to prohibit all hunting in the easement area) is consistent with the applicable statutes because "a hunting ban is unquestionably a legitimate aspect and aim of a conservation easement."

Notes:

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.)

Trends/Issues

- Ballot initiatives subject to CEQA?

- What are "unusual circumstances"?

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

- Alternatives analysis.

- SB 226 Guidelines to bring relief to cities for certain qualifying infill projects.

- Legislative reform in 2013?

B. Update

1. IS IT A PROJECT?

***Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394**: A measure placed on local ballot by city council providing for competitive bidding for trash hauling was not subject to CEQA because it was a matter pertaining to government funding under CEQA Guidelines section 15378(b)(4).

For more information, see "No Commitment, No "Project"" at http://blog.aklandlaw.com

2. CATEGORICAL EXEMPTIONS

***Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096**: The small project categorical exemption in CEQA did not apply to exempt an agreement for water service from CEQA review due to the unusual circumstances surrounding the agreement.

For more information, see "Two Recent Decisions Highlight the Special Powers Held By LAFCo" at http://blog.aklandlaw.com

***Berkeley Hillside Preservation v. City of Berkeley* (2012) 203 Cal.App.4th 656**: A larger than average house, to be constructed on a Berkeley hillside, met the test for "unusual circumstances," limiting the use of a CEQA categorical exemption. Based upon disputed testimony of a soils engineer, the Court found that there was substantial evidence of a fair argument, necessitating the preparation of an EIR.

For more information, see "Applying CEQA's Unusual Circumstances Exception to an Otherwise Exempt Activity Results in an EIR for a Single Family Residence" at http://blog.aklandlaw.com **NOTE: The Supreme Court granted review in this case.**

***Central Basin Municipal Water District v. Water Replenishment District Of Southern California* (2012) 211 Cal.App.4th 943**: A 1991 groundwater basin judgment provided the legal framework for a later, 2010 declaration of water emergency. In those circumstances, the agency issuing the declaration of emergency under the authority of the prior judgment lacked any meaningful discretion and CEQA did not apply.

For more information, see "Declaration of Water Emergency in Furtherance of a Judgment Was Exempt From CEQA" at http://blog.aklandlaw.com

***Tuolumne Jobs & Small Business Alliance v. Superior Court (Wal-Mart Stores, Inc.)* (2012) 210 Cal.App.4th 1006**: Under the Elections Code, a city council facing a qualifying citizen sponsored land use initiative measure is precluded from direct adoption of the measure without first complying with CEQA. The Fifth Appellate District rejected the holding in *Native American Sacred Site & Environmental Protection Association v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961.

For more information, see "Appellate Court Draws Line In Sand Requiring CEQA Review Before City Council Enactment of Land Use Measure" at http://blog.aklandlaw.com

***Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950**: The lead agency correctly applied a Class 3 CEQA exemption to applications for permits to add wireless equipment throughout the City and County of San Francisco. The cumulative impacts exemption is limited to activities in "the same place" not city wide. Completion of the exemption after the permit was issued was not reversible error.

For more information, see "Lead Agency Correctly Applied CEQA Categorical Exemption To Permits For Wireless Equipment To Be Added To Existing Utility Poles" at http://blog.aklandlaw.com

***Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162**: The processing of sequential boundary line adjustments is categorically exempt from CEQA, as long as a discretionary permit is not concurrently processed. Although the lead agency could exercise some discretion, it was insufficient in character to shape the project, and therefore, compliance with CEQA would not be meaningful.

For more information, see "Court Upholds Processing of Sequential Boundary Line Adjustments" at http://blog.aklandlaw.com

3. NEGATIVE DECLARATIONS: FAIR ARGUMENT TEST

***Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187**: To the extent a lead agency questions the credibility of a witness in a CEQA administrative proceeding, the agency should identify the "evidence with sufficient particularity to allow the reviewing court to determine whether there were legitimate department issues of credibility." In the absence of this showing, the lead agency may be precluded from arguing the validity of proffered evidence.

4. NEGATIVE DECLARATIONS: SECOND TIER

***Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156**: A county's approval of a negative declaration for an oak woodlands program and related impact fee was overturned where the program EIR did not adequately study the potential impacts of the oak woodland management plan and fee program because it did not assess how the payment of a mitigation fee would lessen the impacts of development on the county's oak woodlands. A tiered EIR was required because the evidence in the record did not support a conclusion that payment of the fee presumptively established full mitigation.

For more information, see "Approval of Oak Woodland Management Plan and Mitigation Fee Program Based on a Negative Declaration is Overturned by Third District Appellate" at http://blog.aklandlaw.com

***Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650**: The appellate court applied the traditional substantial evidence (not "fair argument") standard to a CEQA challenge to 2008 minor amendments to a water allocation regulation. Applying CEQA Guidelines section 15162, the lead agency had concluded that no new CEQA document was required. The 2008 regulatory amendments come on the heels of the adoption of policy in 2006 (based upon a negative declaration), and the adoption of complementary regulations in 2007, which also relied upon the 2007 negative declaration. The appellate court affirmed the applicability of *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467.

For more information, see "Court Affirms Use of Substantial Evidence Test in CEQA Challenge to Annual Adjustment in Water Allocation Regulations" at http://blog.aklandlaw.com

5. NEGATIVE DECLARATIONS: FUNCTIONALLY EQUIVALENT ENVIRONMENTAL ASSESSMENTS

***W.M. Barr & Company, Inc. v. South Coast Air Quality Management District* (2012) 207 Cal.App.4th 406**: Applying the substantial evidence standard, the court upheld a challenge to the use of an environmental assessment (as a de facto negative declaration) for the adoption of new air district rules regulating manufacturer use of ozone forming volatile organic compounds. The Air District's CEQA review was performed under CEQA's "functionally equivalent" rules. Substantial evidence supported the District's determination of no impact, thus, no mitigation measures or discussion of alternatives was required.

6. EIRs: PROJECT DESCRIPTION

***Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209**: Plaintiff argued that the City's EIR improperly described the Sunset Ridge Park project to include only the park and the access road. In particular, plaintiff claimed that the project description should have included a neighboring housing development (the Banning Ranch project), and the failure to do so constituted piecemeal review of a project. The court of appeal disagreed and denied the writ.

For more information, see "Neither A Shared Access Road Nor The Gnatcatcher Stop Sunset Ridge Park Project Under CEQA" at http://blog.aklandlaw.com

***Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899**: The lead agency's failure to list a development agreement as an approval required as part of project did not preclude "informed decision making concerning the project" and therefore, was not a basis for setting aside the EIR certification.

For more information, see "Multiple Harmless Errors Do Not Require Project Approvals Be Overturned Unless Prejudice Is Shown" at http://blog.aklandlaw.com

7. EIRs: BASELINE

***Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2012) 204 Cal.App.4th 1480**: The Court of Appeal, Second District, upheld the use of a variable baseline in *Neighbors for Smart Rail*. The project was a phase II rail line extension, and as to traffic and air quality, the lead agency used a future year scenario as the baseline (as opposed to existing conditions). Notably, the Second Appellate District sharply disagreed with the decisions in *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 and *Madera Oversight Coalition, Inc. v. County of Madera*

(2011) 199 Cal.App.4th 48 to the extent the decisions categorically rejected any use of future baseline scenarios.

For more information, see "A Judicial Throwdown on CEQA's Baseline Requirements" at http://blog.aklandlaw.com **NOTE: The Supreme Court granted review in this case.**

8. EIRs: AGRICULTURAL IMPACTS

***Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296**: Appellants challenged the City's analysis of project impacts on agriculture arguing that the city failed to disclose the cumulative impacts to agriculture, and failed to support its rejection of a heightened mitigation ratio (i.e., 2:1) with substantial evidence. The court of appeal soundly rejected both contentions and upheld the City's mitigation measure which required Wal-Mart to purchase a permanent agricultural conservation easement over 40 acres (1:1 ratio) to mitigate for the loss of the 40 acres of prime land due to the project's development.

For more information, see "Revised EIR for Wal-Mart Supercenter Is Upheld On Second Go-Around" at http://blog.aklandlaw.com

9. EIRs: LAND USE AND PLANNING

***Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209**: An EIR prepared for a public park project was consistent with the California Coastal Act as it properly identified relevant Coastal Act policies, and provided for mitigation of the potentially sensitive areas should they be designated as environmentally sensitive habitat area by the Coastal Commission in the future. The EIR's analysis of wetlands was also consistent with the Coastal Act since no wetlands as defined by the Act were located on the park site according to the biological technical report.
For more information, see "Neither A Shared Access Road Nor The Gnatcatcher Stop Sunset Ridge Park Project Under CEQA" at http://blog.aklandlaw.com

10. EIRs: PUBLIC SERVICES/RECREATION IMPACTS

***City of Hayward v. Board of Trustees of the California State University* (2012) 207 Cal.App.4th 446**: There was a lack of substantial evidence to support the conclusion that the impacts to parks would be less than significant.

For more information, see "Town Versus Gown Fight Continues Over State University EIR" at http://blog.aklandlaw.com **NOTE: The Supreme Court granted review in this case.**

11. EIRs: TRAFFIC IMPACTS

***City of Hayward v. Board of Trustees of the California State University* (2012) 207 Cal.App.4th 446**: With respect to traffic impacts, the EIR was a programmatic EIR, and

was not required to analyze neighborhood street impacts as that would be analyzed in conjunction with the review and approval of specific projects which would be the basis for more detailed evaluation. A mitigation requirement for a Transportation Demand Management program did not result in deferred mitigation, as the mitigation measure included a required performance standard.

For more information, see "Town Versus Gown Fight Continues Over State University EIR" at http://blog.aklandlaw.com **NOTE: The Supreme Court granted review in this case.**

12. EIRs: WATER SUPPLY ASSESSMENTS

***Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260:** EIR held to be inadequate for (1) failure to explain material distinction between the EIR and the water supply assessment's water demand numbers, (2) failure to disclose potential uncertainties associated with long term delivery of a firm water supply, (3) failure to assess impacts of groundwater extraction to fill and maintain a 10 acre project lake.

For more information, see "EIR Set Aside For Failure To Explain Discrepancy Between EIR And WSA In Water Demand Number And To Analyze Groundwater Impacts Resulting From Filling A Lake" at http://blog.aklandlaw.com

13. EIRs: ECONOMIC INFEASIBILITY

***Flanders Foundation v. City of Carmel-By-The-Sea* (2012) 202 Cal.App.4th 603**: An EIR is not required to contain an economic infeasibility analysis, even when used as the basis to reject an alternative or mitigation measures. The standard for economic feasibility for a public agency is based upon a "reasonably prudent property owner" standard, not necessarily what the agency or applicant can afford to pay.
For more information, see "EIR Fails For Insufficient Response To One Comment Letter" at http://blog.aklandlaw.com

14. EIRs: CUMULATIVE EFFECTS

***Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209**: Plaintiff contended the cumulative traffic analysis of a proposed public park failed to consider any traffic impacts from an adjacent proposed development (the Banning Ranch project). The appellate court disagreed holding that the final EIR outlined the park access road which was consistent with the general plan and that the general plan EIR had assumed worst-case scenarios (including development on the Banning Ranch property) and analyzed the traffic impacts from the proposed access road as well as the intersection with the West Coast Highway. Plaintiff also argued that the draft EIR analysis for cumulative biological impacts was inadequate because it failed to mention the Banning Ranch project all together. However, the appellate court held that the final EIR reasonably and practically addressed cumulative impacts on biological resources.

For more information, see "Neither A Shared Access Road Nor The Gnatcatcher Stop Sunset Ridge Park Project Under CEQA" at http://blog.aklandlaw.com

***Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260:** A lead agency properly conditioned a project on meeting or exceeding the requirements for a multi-species conservation plan. The lead agency could reasonable assume that additional future development would comply with the multi-species plan. This evidence supported the conclusion that the project's cumulative effects were not cumulatively considerable.

For more information, see "EIR Set Aside For Failure To Explain Discrepancy Between EIR And WSA In Water Demand Number And To Analyze Groundwater Impacts Resulting From Filling A Lake" at http://blog.aklandlaw.com

***Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899**: For purposes of analyzing cumulative traffic impacts, the lead agency could rely upon a regional transportation assessment prepared by the COG, and was not confined to using the list method for assessing cumulative effects. The lead agency could, for purposes of cumulative air quality impacts, rely upon its direct impacts as a reflection of cumulative effects in lieu of a quantification of impacts in conjunction with nearby projects. This practice conformed to the Air Maintenance District's recommendations for CEQA cumulative assessments. The EIR's treatment of project impacts on global warming and climate change was sufficiently thorough and the conclusion that the impact was "too speculative" to quantify was not an abuse of discretion, recognizing in part that the EIR was certified in July 2008.

For more information, see "Multiple Harmless Errors Do Not Require Project Approvals Be Overturned Unless Prejudice Is Shown" at http://blog.aklandlaw.com

15. EIRs: GROWTH-INDUCING IMPACTS

***Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209**: The EIR for a city-sponsored park project properly concluded that the park project would have no growth-inducing impacts despite the fact that the project would contain an access road linking a proposed separate but adjacent mixed-used development project.

For more information, see "Neither A Shared Access Road Nor The Gnatcatcher Stop Sunset Ridge Park Project Under CEQA" at http://blog.aklandlaw.com

16. EIRs: MITIGATION MEASURES AND PUBLIC SAFETY IMPACTS

***City of Hayward v. Board of Trustees of the California State University* (2012) 207 Cal.App.4th 446**: Reviewing a master plan for a state university campus, the appellate court found that substantial evidence supported the conclusion that the construction of an additional fire station would have less than significant impacts. The lead agency was not required to mitigate for the socio-economic impacts such as station staffing.

For more information, see "Town Versus Gown Fight Continues Over State University EIR" at http://blog.aklandlaw.com **NOTE: The Supreme Court granted review in this case.**

17. EIRs: MITIGATION MEASURES AND SPECIES

***Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209**: Mitigation measures, including no scrub removal during breeding and nesting season and preserving two acres of habitat for every one acre lost, to reduce impacts on habitat for the California gnatcatcher were sufficient for purposes of CEQA. The court noted that "mitigation need not account for every square foot of impacted habitat to be adequate" and that mitigation could be implemented over time. Additionally, the City's park project site was included in a Natural Communities Conservation Plan/Habitat Conservation Plan area, which sufficed for the mitigation of cumulative biological resources.

For more information, see "Neither A Shared Access Road Nor The Gnatcatcher Stop Sunset Ridge Park Project Under CEQA" at http://blog.aklandlaw.com

***Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899**: Species mitigation measures which call for coordination with USFWS through the Section 10a process was a valid approach for mitigating species impacts. Likewise, a mitigation measure for CNPS listed species considered "rare, threatened, or endangered," which called for further field assessment and set standards and strategies for mitigation including a monitored success ratio, was acceptable mitigation. Finally, with respect to burrowing owls, pre-grading burrow surveys (with protocols already approved by USFWS and CDFG), and a requirement to generally follow the Western Riverside Multiple Species Habitat Conservation Plan, was sufficient.

For more information, see "Multiple Harmless Errors Do Not Require Project Approvals Be Overturned Unless Prejudice Is Shown" at http://blog.aklandlaw.com

18. EIRs: ALTERNATIVES

***Habitat & Watershed Caretakers v. City of Santa Cruz* (2012) 211 Cal.App.4th 429**: As part of a settlement agreement between the city and the UC Santa Cruz Regents over the North Campus Long Range Development Plan, the City prepared an EIR to support an application to the local agency formation commission (LAFCo) for a sphere of influence amendment and a request for extra-territorial water and sewer service for on-campus housing. Habitat sued claiming violations of CEQA regarding analysis of water supply, watershed resources, biological resources, inadequate mitigation measures, and the failure to provide a reasonable range of alternatives. The trial court denied all claims. The court of appeal upheld the trial court's determination that the impact analysis and mitigation measures were supported by substantial evidence, but overruled the trial court regarding the alternatives analysis. It reasoned that the city misstated the project objectives by indicating the city was required to provide water and sewer service to North

Campus when the settlement agreement only required the city to seek LAFCo approval. The court of appeal held that the misstated project objectives improperly limited the range of potential alternatives that could be considered by LAFCo and vacated the certification of the EIR. It's unclear at this time whether the city and/or the Regents will appeal the decision.

***Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184**: In absence of evidence of other feasible alternatives, an EIR which examines the project and no project alternative may be sufficient. Alternatives considered and rejected early on do not count towards the reasonable range of alternatives.

For more information, see "Co-Gen EIR With Limited Range Of Alternatives Upheld" at http://blog.aklandlaw.com

***City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362**: A lead agency could rely upon DTSC's clean up requirements as a basis for concluding no impacts from hazardous wastes. An EIR is only required to include a reasonable range of alternatives. It is good CEQA practice to always recite alternatives considered but rejected early on. An EIR can rely upon growth assumptions in its traffic analysis as long as there is substantial evidence in the record to support the assumption.

For more information, see "Appellate Court Re-grades EIR Exam and Gives L.A.U.S.D. High Marks; Assigns More Homework to Address Pedestrian Safety for High School Project" at http://blog.aklandlaw.com

***Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899**: When considering a proposal for a 284,000 square foot commercial center, the lead agency properly rejected an alternative which retained the 250,000 square foot Wal-Mart, but eliminated the outparcels. The lead agency found that the smaller project alternative would not meet project objectives of providing a mix of retail and restaurant tenants, thus providing residents with additional shopping and eating options. This finding was supported by substantial evidence in the record.

For more information, see "Multiple Harmless Errors Do Not Require Project Approvals Be Overturned Unless Prejudice Is Shown" at http://blog.aklandlaw.com

***Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296**: The Third Appellate District rebuffed Petitioner Lodi First's contention that an EIR must include alternatives that both satisfy most of the project objectives *and* reduce significant effects of the project. Focusing on subdivision (a) of CEQA Guidelines section 15126.6 and citing to *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, the court of appeal reiterated the "rule of reason" as a guide to selecting what alternatives should be analyzed in an EIR, and held that despite the fact the revised EIR did not discuss an alternative that would feasibly attain the most basic project objectives *and* avoid or significantly reduce project impacts to less than significant, the record contained

substantial evidence to support the conclusion that a reasonable range of alternatives had been analyzed.

For more information, see "Revised EIR for Wal-Mart Supercenter Is Upheld On Second Go-Around" at http://blog.aklandlaw.com

***Association of Irritated Residents v. California Air Resources Board* (2012) 206 Cal.App.4th 1487**: The Association of Irritated Residents and several other nonprofit organizations (collectively, "AIR") filed a petition challenging the California Air Resources Board's ("CARB") adoption of the Climate Change Scoping Plan alleging the scoping plan fails to achieve the maximum technologically feasible and cost-effective reductions in greenhouse gas emissions, fails to require emissions reduction measures for significant sources of emissions, fails to include policies to avoid the downsides of other greenhouse gas emission trading programs, fails to address how CARB will monitor and enforce reductions in a regional market, fails to assess the likely impacts of proposed policy choices and regulatory programs, and fails to prevent increases in criteria and toxic co-pollutant emissions. AIR also alleged the related functional equivalent document did not comply with CEQA, including the failure to adequately analyze alternatives to the regional cap-and-trade program included in the scoping plan. Applying a deferential standard of review, the appellate court held there was substantial evidence in the record to uphold CARB's approval of the Scoping Plan as in compliance with the Global Warming Solutions Act of 2006 (AB 32).

19. EIRs: RESPONSES TO COMMENTS

***Flanders Foundation v. City of Carmel-By-The-Sea* (2012) 202 Cal.App.4th 603**: A lead agency has a duty to respond to comments which raise significant environmental issues. The failure to do so can result in setting aside the certification of the EIR.

For more information, see "EIR Fails For Insufficient Response To One Comment Letter" at http://blog.aklandlaw.com

20. EIRs: RECIRCULATION

***Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184**: Reports summarized and relied upon in a draft EIR, but then physically attached to the final EIR did not constitute substantial new information necessitating recirculation.

For more information, see "Co-Gen EIR With Limited Range Of Alternatives Upheld" at http://blog.aklandlaw.com

21. EIRs: STATEMENT OF OVERRIDING CONSIDERATIONS

***Flanders Foundation v. City of Carmel-By-The-Sea* (2012) 202 Cal.App.4th 603**: It is acceptable practice for lead agencies to structure statements of overriding considerations

in the alternative (as compared to drafting them in the cumulative.) This forces the opponents to argue the insufficiency of each ground, and the evidence in the record to support each finding.

For more information, see "EIR Fails For Insufficient Response To One Comment Letter" at http://blog.aklandlaw.com

22. SECOND TIER / SUPPLEMENTAL DOCUMENTS

***Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156**: A county's approval of a negative declaration for an oak woodlands program and related impact fee was overturned where the program EIR did not adequately study the potential impacts of the oak woodland management plan and fee program because it did not assess how the payment of a mitigation fee would lessen the impacts of development on the county's oak woodlands. A tiered EIR was required.

For more information, see "Approval of Oak Woodland Management Plan and Mitigation Fee Program Based on a Negative Declaration is Overturned by Third District Appellate" at http://blog.aklandlaw.com

***Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650**: The appellate court applied the traditional substantial evidence (not "fair argument") standard to a CEQA challenge to 2008 minor amendments to a water allocation regulation. Applying CEQA Guidelines section 15162, the lead agency had concluded that no new CEQA document was required. The 2008 regulatory amendments come on the heels of the adoption of policy in 2006 (based upon a negative declaration), and the adoption of complementary regulations in 2007, which also relied upon the 2007 negative declaration. The appellate court affirmed the applicability of *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467.

For more information, see "Court Affirms Use of Substantial Evidence Test in CEQA Challenge to Annual Adjustment in Water Allocation Regulations" at http://blog.aklandlaw.com

23. ADMINISTRATIVE APPEALS

***No Wetlands Landfill Expansion v. County of Marin* (2012) 204 Cal.App.4th 573**: While CEQA provides for an administrative appeal of the certification/approval of CEQA documents, (Public Resources Code section 21151; CEQA Guidelines sections 15090(b), 15356), a local board of supervisors does not have appellate review rights of a landfill permit granted by a local enforcement agency.

24. LITIGATION: STANDING

***Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899**: A citizen group challenging a city's approval of a Wal-Mart had standing to challenge the city's approval on the grounds that the citizen group met the public interest exception to the general rule that the petitioner(s) must be beneficially interested in the litigation.

For more information, see "Multiple Harmless Errors Do Not Require Project Approvals Be Overturned Unless Prejudice Is Shown" at http://blog.aklandlaw.com

25. LITIGATION: PUBLIC AGENCIES AS PLAINTIFFS

***Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187**: A water district has sufficient statutory interest to bring a CEQA lawsuit challenging assessment of impacts to groundwater basins.

26. LITIGATION: EXHAUSTION OF ADMINISTRATIVE REMEDIES

***Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184**: Lead agencies can adopt rules for the submission of written documentation in advance of a hearing. Comments submitted after the allowed filing date but before the final hearing on appeal were untimely.

For more information, see "Co-Gen EIR With Limited Range Of Alternatives Upheld" at http://blog.aklandlaw.com

***Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281**: In circumstances in which a county provided a noticed public hearing on a project it deemed to be exempt pursuant to CEQA, it was entitled to assert Public Resources Code section 21177 as defense to a CEQA claim that the exemption was improperly applied.

For more information, see "Supreme Court Says Exhaustion Requirement Applies in CEQA Exemption Suit" at http://blog.aklandlaw.com

27. LITIGATION: STATUTES OF LIMITATION

***Van De Kamps Coalition v. Board of Trustees of Los Angeles Community College District* (2012) 206 Cal.App.4th 1036**: Follow-up actions by a school district in leasing out surplus property did not constitute a new project and therefore, did not trigger a new CEQA claim. A writ filed challenging the later actions was properly dismissed as duplicative and barred by the original statute of limitations triggered by the District's prior approval of an interim use plan.

For more information, see "Court Says No Second Servings in CEQA Case" at http://blog.aklandlaw.com

***Coalition for Clean Air v. City of Visalia* (2012) 209 Cal.App.4th 408**: The City of Visalia approved a distribution facility up to 750,000 square feet. The Coalition challenged the city's use of a CEQA exemption (ministerial approval) as well as the City's agreement to reimburse the developer for street improvements related to the project. The trial court granted the real party's demurrer on the basis that the lawsuit was filed more than 35 days after the notice of exemption (NOE) was filed. However, as reflected in the pleadings, City records indicated that the project was approved on November 8, 2010, three days after the NOE was posted. The appellate court held that a notice of exemption filed before a final project approval does not trigger the 35-day statute of limitations contained in Public Resources Code section 21167(d), and thus, the demurrer should not have been granted as the facts, as alleged on the face of the petition, were that the lawsuit was filed within the 180 day CEQA default statute of limitation.

28. LITIGATION: AUGMENTING THE LITIGATION RECORD

***Consolidated Irrigation District v. City of Selma* (2012) 204 Cal.App.4th 187**: An appellate court reviews a trial court order to augment the record under the traditional appellate substantial evidence test.

***Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296**: The appellate court found that the trial court erred in excluding 22 emails from the administrative record based on the deliberative process privilege asserted by the city. The court reasoned that the city failed to make the detailed and specific showing required to establish a claim of privilege and never demonstrated that the public's interest in nondisclosure outweighed the public's interest in disclosure of the 22 emails. Notwithstanding, the appellate court rejected appellant's argument that any time one document is erroneously excluded from an administrative record, reversal of project approval is required.

For more information, see "Revised EIR for Wal-Mart Supercenter Is Upheld On Second Go-Around" at http://blog.aklandlaw.com

***Consolidated Irrigation District v. Superior Court of Fresno County* (2012) 205 Cal.App.4th 697**: Substantial evidence supported a conclusion that a City's subconsultant files were not considered public agency files under Public Resources Code section 21167.6(e)(10). Additionally, the court held that audio recordings of public meetings were "other written materials" pursuant to Section 21167.6(e)(10) and therefore, should have been included in the administrative record. Finally, documents merely referenced in a comment letter and which were not made readily available to the public agency could not be considered "written evidence submitted" under 21167.6(e)(7), and thus, were properly excluded from the administrative record.

29. LITIGATION: TOLLING AGREEMENTS

***Salmon Protection and Watershed Network v. County of Marin* (2012) 205 Cal.App.4th 195**: It is not uncommon in CEQA cases for the opponents and the lead agency to extend the statute of limitations through a tolling agreement. The use of such agreements can help facilitate settlement by taking the press of litigation off the front burner. In a case involving the use of a tolling agreement to extend the time lines for a CEQA challenge to a general plan update, a demurrer was sustained to a complaint in intervention brought by property owners potentially affected by the CEQA lawsuit. The complaint alleged that the underlying lawsuit was barred due to the passage of the statute of limitations, and that any extension was contrary to public policy. Relying in part on the policy favoring settlement of litigation, the court of appeal upheld the dismissal of the complaint in intervention.

For more information, see "Tolling Agreement for CEQA Lawsuit Challenging a General Plan Update is Upheld Against Property Owner Challenge" at http://blog.aklandlaw.com

30. LITIGATION: PREJUDICE, REMEDIES

***Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184**: A mathematical error of 7 percent in calculating emissions was not prejudicial, and could not have "precluded informed decision making or informed public participation."

For more information, see "Co-Gen EIR With Limited Range Of Alternatives Upheld" at http://blog.aklandlaw.com

***Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260**: The trial court has the discretion to fashion a CEQA remedy to fit the nature of the violation. A trial court is not compelled to set aside all of the approvals.

For more information, see "EIR Set Aside For Failure To Explain Discrepancy Between EIR And WSA In Water Demand Number And To Analyze Groundwater Impacts Resulting From Filling A Lake" at http://blog.aklandlaw.com

31. LITIGATION: ATTORNEYS FEES

***Healdsburg Citizens for Sustainable Solutions v. City of Healdsburg* (2012) 206 Cal.App.4th 988**: In awarding attorneys' fees under the authority of Code of Civil Procedure section 1021.5, the trial court has the discretion to award fees to an attorney who is also a named petitioner.

32. SB 1278 (Chapter 553) & AB 1965 (Chapter 554) Flood Protection

These bills require DWR to release floodplain maps for 100 and 200 year flood plains in urban areas within the Sac-SJ Valley by July 2, 2013, exempts their release from CEQA

and the OAL, and requires local agencies to amend their GPs to be consistent with the maps by July 2, 2015.

33. SB 1241 (Chapter 311) Land Use: General Plan: Fire Hazards

Requires local agencies to update their Safety Elements upon the next update of their housing element occurring on or after Jan 1, 2014, to incorporate new requirements for state fire responsibility areas and very high fire hazard severity zones. It also requires OPR to incorporate updated fire provisions in the next update of the general plan guidelines and requires OPR to prepare recommended changes to the CEQA Guidelines checklist regarding fire hazards and transmit to the Natural Resources Agency at the time of the next guidelines update.

34. AB 1665 (Chapter 721) CEQA Exemption: At-Grade Rail Crossings

Exempts the closure of an at-grade railroad crossing from CEQA until Jan 1, 2016, if the PUC finds that the crossing presents a threat to public safety.

35. AB 2245 (Chapter 680) CEQA Exemption: Bike Lanes

Exempts from CEQA until Jan 1, 2018, the re-striping of streets and highways for bicycle lanes in urbanized areas consistent with a prepared bicycle transportation plan.

36. AB 890 (Chapter 528) CEQA Exemption: Roadway Improvement

Exempts from CEQA until Jan 1, 2016, the repair maintenance, and minor alteration to an existing roadway to improve public safety that meets certain requirements: city or county of less than 100,000; does not cross waterway; negligible or no expansion of use; not a state roadway; does not contain wetlands, riparian areas, or wildlife habitat; no impact on cultural resources or scenic resources.

37. AB 2669 (Chapter 548) Certified Regulatory Programs: CEQA Processing

Authorizes the update of the protocol for reviewing applications under the Certified Regulatory Programs and evaluate the programs consistency with CEQA; requires two public meetings and a 10-day notice to those who have requested notice as a part of the update process. Statutory CEQA cleanups of related provisions.

38. SB 226 Guidelines: CEQA Streamlining

Section 15183.3 is intended to streamline the environmental review process for eligible infill projects and reduce the time and cost of the environmental review. To be eligible, the infill project must meet specific criteria and satisfy the performance standards as defined in the guidelines. The new guidelines were adopted on January 4, 2013.

For more information go to:
http://ceres.ca.gov/ceqa/sb226_guideline_updates.html.

Comparing SB226 v. 21083.3

	SB226/15183.3	21083.3/15183
Applicability	Project must meet the proscribed Infill Performance Standards. Project may include GPAs and Zoning amendments, though new effects must be analyzed.	Project must be consistent with GP and Zoning where EIR was adopted. Provision must be expressly invoked during the administrative process
Scope of Review	CEQA does not apply to effects that either: (1) were previously analyzed in a programmatic EIR for a planning-level decision; or (2) are "substantially mitigated" by uniformly applicable development policies. Can include new effects not previously analyzed.	Only those effects that are "peculiar" to the project that were not previously or sufficiently analyzed in the prior EIR for the GP or Zoning Code.
Development Standards	Can use uniformly applicable development standards to avoid additional review, so long as they "substantially mitigate" the effect. Natural Resources Agency staff suggest this does not require mitigation to less-than-significance, but issue remains to be seen.	Can use uniformly applicable development standards to avoid additional review, so long as they "substantially mitigate" the effect and the agency makes such a finding either at the adoption of the standard or in consideration of the project.
Standard of Review	All determinations made consistent with the Guidelines section are reviewed under substantial evidence standard.	Determination of the adequacy of impact analysis in prior EIR is likely reviewed under substantial evidence; any impacts not previously or sufficiently analyzed are not exempt and are thus reviewed under fair argument to determine need for SEIR.
Subsequent Review Procedures	If there are no new specific effects or more significant effects, or if development standards would significantly reduce such effects then complete NOD; If there are new effects not addressed by development standards, then if those effects can be mitigated to a less than significant level then complete MND and file NOD; If new effects are significant and not addressed by development standards then complete "Infill EIR" (Infill EIR does not require analysis of growth-inducing impacts and requires a limited range of alts).	Any impacts not previously or sufficiently analyzed in prior EIR, subject to CEQA following standard CEQA procedures.
Statement of Overriding Considerations	No new Statement of Overriding Considerations required for significant impacts identified in prior EIR when approving a qualifying project.	No new Statement of Overriding Considerations required for significant impacts adequately addressed in prior EIR, agency adopts any and all feasible mitigation measures addressing impact, and no impacts are more significant than described in prior EIR.
Cases	N/A	*Gentry, Walmart v. City of Turlock*

Source Document: California Resources Agency

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2. PLANNING, ZONING, AND DEVELOPMENT

A. Regulatory Framework

Summary

- California's basic planning, zoning, and development law was formed largely during the 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 with the exception of 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

- More MPO's adopted their sustainable community plans (SB375) in 2012. SANDAG loses round one.
- Updates to open space / conservation easement laws
- News laws to assist with affordable housing financing

B. Update

1. *Friends of Aviara v. City of Carlsbad* (2012) 210 Cal.App.4th 1103.

A city can revise its housing element to increase densities on parcels identified in the housing element to meet the city's fair share of regional housing needs and that are inconsistent with the land use element so long as the city sets forth an implementation plan and timeline for amending the land use element to resolve those inconsistencies.

2. *Sierra Club v. Department of Parks & Recreation* (2012) 202 Cal.App.4th 735.

The Court of Appeal for the Second Appellate District held that the Sierra Club did not have standing to bring an action to compel the California Department of Parks and Recreation ("State Parks") to amend its general development plan for the Oceano Dunes

State Vehicular Recreational Area near Pismo Beach State Park ("SVRA") and to ban dune buggies and off-highway vehicles ("OHV's") on the La Grande Tract, a 584-acre area that State Parks leases from County of San Luis Obispo ("County") that is part of the SVRA. State Parks operates SVRA pursuant to a 1982 coastal development permit ("Coastal Development Permit") issued by the California Coastal Commission ("Coastal Commission"). In 2007, State Parks offered to purchase the La Grande Tract but the County Board of Supervisors determined that the sale would be inconsistent with County's general plan ("General Plan") and the County's local coastal plan ("LCP") which depicts the La Grande Tract as a "buffer area." In its action, Sierra Club argued that the General Development Plan conflicts with the LCP. The Court of Appeal affirmed the trial court's sustaining a demurrer without leave to amend, holding that Sierra Club failed to allege that State Parks had a clear and present ministerial duty to ban OHV activities on the property at issue. Furthermore, Sierra Club had no standing to sue for three reasons. First, Sierra Club never challenged the 1982 coastal development permit that allowed OHVs on portions of the La Grande Tract within the 60-day period for administrative mandamus review in California Coastal Act of 1976 (Public Resources Code §30801). The Coastal Commission's on-going ability to issue cease and desist orders to enforce a coastal development permit or certified local coastal program does not extend to third parties such as Sierra Club, which has no power to stand in the shoes of the Coastal Commission. Second, there was no current "development" within the meaning of the Coastal Act. Third, it was too early for judicial review of the OHV recreational activities, which may reviewable in the future when the General Development Plan is amended or when relevant portions of the County's LCP or General Plan are amended.

3. *Housing Partners I, Inc. v. John C. Duncan* (2012) 206 Cal.App.4th 1335.

Appellate court affirms the decision of the Director of the Department of Industrial Relations denying exemption from paying prevailing wages for a seniors project in circumstances in which the developer utilized two sources of otherwise exempt funds.

4. *State Building and Construction Trades Council of California, AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547.

A charter city can exempt itself from prevailing wage requirements for locally funded projects.

5. *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301.

An RV and boat storage use operating for over 30 years did not have a vested right to expand when intervening general plan policy and voter initiative made activity non-conforming and strictly restricted expansion of non-conforming uses.

6. ***General Development Co., L.P. v. City of Santa Maria*** **(2012) 202 Cal.App.4th 1391.**

Denial of a rezoning request is subject to the ninety-day statute of limitations set forth in Government Code section 65009.

7. ***Okasaki v. City of Elk Grove*** **(2012) 203 Cal.App.4th 1043.**

The ninety day statute of limitations provisions found in Government Code section 65009 is not extended by the timelines in the Code of Civil Procedure 1094.6 pertaining to requests for the production of the administrative record.

8. ***Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*** **(2012) 55 Cal.4th 783.**

The conversion of an existing mobilehome park through the Subdivision Map Act to a tenant owned park is also subject to the Coastal Act and Mello Act.

9. ***Rialto Citizens for Responsible Growth v. City of Rialto*** **(2012) 208 Cal.App.4th 899.**

The harmless error provisions contained in Government Code section 65010 (b) can operate to insulate errors of procedure (e.g. insufficient findings).

10. ***Mount Shasta Bioregional Ecology Center v. County of Siskiyou*** **(2012) 210 Cal.App.4th 184.**

Issues raised for the first time on administrative appeal from a planning commission approval are not issues raised ‘before project approval” and therefore may not satisfy the exhaustion requirement.

11. ***Building a Better Redondo, Inc. v. City of Redondo Beach*** **(2012) 203 Cal.App.4th 852.**

Compliance by the agency with the writ issued by the trial court will in many circumstances render moot an appeal on the merits. Regarding an award of attorneys’ fees under CCP 1021.5, the appellate court will largely defer to the judge of the trial court with respect to the reasonableness of the hours and rates set forth in the fee application.

12. AB 2544 (Chapter 306) Forestry and Fire Protection: Land Purchases and Property Use

Removes right to purchase land and instead, authorizes the Department of Forestry and Fire Protection to enter into agreements, easements, licenses, or permits to acquire real property rights for the use of land for fire protection related activities, including telecommunications equipment and for "special use permits" with the federal government for maintaining a fire patrol system. The approval of the Department of General Services is also now required.

13. AB 2169 (Chapter 252) Property Acquisition Law: Conservation Easements

Removes requirement for the acquisition of conservation easements under the California Forest Legacy Program Act of 2007 to be made by the State Public Works Board and instead authorizes the Wildlife Conservation Board to make these acquisitions directly.

14. AB 2680 (Chapter 128) Williamson Act: Lot Line Adjustments

Extends, indefinitely, the Williamson Act provision which allows for the rescission and re-adoption of contracts to facilitate lot line adjustments that was scheduled to expire on January 1, 2013.

15. SB 1094 (Chapter 705) Land Use: Mitigation Lands: Non-Profit Organizations

Expands the list of entities allowed to hold lands dedicated for mitigation for conservation purposes to include a governmental entity or an expanded definition of special district; allows the holder of the endowment for the long-term maintenance of the property to be held by a specified entity other than the holder of the land; requires an annual fiscal report to be prepared by the holder of the endowment; and authorizes a state or local agency to hold its own endowment administered by an elected official that is used to meet its own obligations for mitigation.

16. SB 1501 (Chapter 875) Open-Space Easements

Adds additional allowed purposes for a jurisdiction to accept grants for open-space easements including: (1) to preserve the rural character of the area; (2) to prevent floods or provide watershed value; (3) is within an established scenic highway corridor; (4) has value as a wildlife preserve or sanctuary; or (5) is otherwise consistent with the purposes of the Open-Space Easement Act. It also requires the inclusion of such easements on an indexing system maintained by the county recorder.

17. AB 1585 (Chapter 777) Community Development

Allows for the use of Low and Moderate Income Housing Fund dollars to be used for administrative and planning purposes to implement related provisions of housing law and appropriates $25 million for infill incentive grants and $25 million for transit-oriented development grants and loans.

18. AB 1699 (Chapter 780) Affordable Housing

Authorizes the Department of Housing and Community Development to extend existing loans, subordinate a department loan to new debt, and invest tax credit equity under certain rental housing finance programs and to provide data on its web site regarding household income and rents of projects approved for restructuring.

19. AB 1551 (Chapter 555) Housing

Authorizes down-payment assistance loans under the CalHome Program, the California Homebuyer's Downpayment Assistance Program, and the Home Purchase Assistance Program to subordinate to refinancing under certain specified conditions.

20. AB 1616 (Chapter 415) Food Safety: Cottage Food Operations

Requires local agencies to allow for Cottage Food Operations in residential zones and outlines various requirements relating to training, sanitation, preparation, labeling, and permissible types of sales and subjects a cottage food operation to inspections under specified circumstances. The bill also requires a food facility that serves a cottage food product without packaging or labeling to identify it as homemade.

21. AB 1915 (Chapter 640) Safe Routes To Schools

Expands the use of Safe Route to School funds up to 10% for infrastructure improvements, other than school bus shelters, for safe routes to school bus stops located outside of the vicinity of schools.

22. City of San Leandro "tithes" $2,300,000.00 to International Church of the Foursquare Gospel to settle RLUIPA claims.

According to the City's press release:

- The City admits no liability and ICFG dismisses all claims against the City in return for a $2.3 million payment;
- The City preserves its general plan and zoning provisions while ICFG may continue in its efforts to find a new, properly-zoned site; and
- ICFG cannot sue the City under RLUIPA if it denies development of a church on a site outside of the City's current Assembly Use (AU) Overlay District or Residential Zones where assembly uses are permitted.

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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

- Mobile-Home Park Conversions
- Boundary Line Adjustments.
- What!? No Map Extensions!?!

B. Update

1. *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783.

The conversion of an existing mobilehome park through the Subdivision Map Act to a tenant owned park is also subject to the Coastal Act and Mello Act.

2. *Sierra Club v. Napa County Board of Supervisors* (2012) 205 Cal.App.4th 162.

Court upholds processing of multiple sequential boundary line adjustments, each one processed upon recordation of the prior adjustment. The court also affirms that the approvals are appropriately viewed as ministerial as long as other discretionary permits are not processed concurrently. Finally, a general appearance by stipulating to an extension in the record resulted in the waiver of the service of the summons within 90 days as required by the SMA.

3. *Chino MHC, LP v. City of Chino* (2012) 210 Cal.App.4th 1049.

Once an application including a tenant survey, for a mobilehome park conversion, was deemed complete under the Permit Streamlining Act, the City could not reject the survey

due to alleged errors in how the survey was conducted. While the city council could consider the results of the survey, it was for the limited purpose of determining whether or not the conversion request was a sham.

4. *Paul Goldstone v. County of Santa Cruz* (2012) 207 Cal.App.4th 1038.

The board of supervisors was allowed to consider the negative results of a tenant survey when deciding whether or not to grant the approval for the conversion of a rental mobilehome park to an individual ownership style park.

Notes:

4. LOCAL GOVERNMENT AND LOCAL GOVERNMENT ORGANIZATION

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 authority of the police power.

Trends/Issues

- The Application of Proposition 218

B. Update

1. *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (2012) 209 Cal.App.4th 1182.

Residents ordered to be annexed under the island annexation law are not entitled to a Proposition 218 vote in favor of special taxes. (Government Code section 56375.3)

2. *Voices for Rural Living v. El Dorado Irrigation District* (2012) 209 Cal.App.4th 1096.

El Dorado Irrigation District ("EID") was not authorized to unilaterally abrogate a limitation on service to tribal lands previously imposed by LAFCO.

3. *Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394.

Chung, a City resident, filed suit to remove a City Council proposed measure regarding competitive bidding for trash service from the ballot arguing the City violated the California Environmental Quality Act (CEQA) and failed to follow the initiative measure requirements under California Elections Code. The Second District Appellate Court agreed with the trial court that found that the measure was not a "project" under CEQA and, therefore, not subject to environmental review requirements, and refused to address the issue of whether the measure bound future Councils as unripe. It held that the measure was not a "project" under CEQA citing to CEQA Guidelines section 15378(b)(4) which defines "government fiscal activities, which do not involve any commitment to any specific project . . . " as an activity which does not fall under the definition of a "project." It reasoned that because the measure's effect is limited to the bidding process and the fact that the City can award the contract to a single provider or multiple providers as it sees fit, then the measure is a "fiscal activity" in which "the City has not committed itself to any particular course of action," and is therefore not a "project." Regarding the measure's consequences on the authority of a future council to amend the ordinance, it held that the issue was an unripe advisory opinion since no proposal to amend or repeal it had yet to take place.

4. *Duea v. County of San Diego* (2012) 204 Cal.App.4th 691.

A selling property owner is not automatically entitled to carry forward an older property tax base to replacement property simply because the buyer is carrying out economic activity as part of a redevelopment plan.

5. *Tuolumne Jobs & Small Business Alliance v. Superior Court (Wal-Mart Stores, Inc.)* (2012) 210 Cal.App.4th 1006.

Under the Elections Code, a city council when facing a qualifying citizen sponsored land use initiative measure is precluded from direct adoption by the legislative body without first complying with CEQA. The Fifth Appellate District rejected the holding in *Native American Sacred Site & Environmental Protection Association v. City of San Juan Capistrano* (2004) 120 Cal.App.4th 961.

6. *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982.

Annual rental inspection program and related fee did not violate Proposition 218 as it was a regulatory fee. (*Apartment Ass'n of Los Angeles County v. City of Los Angles* (2001) 24 Cal.4th 830, 833) The city ordinance was not pre-empted by state housing law. The city satisfied its burden under Proposition 26 that the revenues would not exceed the estimated cost of the inspection program.

7. *Summit Media LLC v. City of Los Angeles* (2012) 211 Cal.App.4th 921.

Settlement of a legal challenge to a new billboard ordinance which operated to exempt selected billboard owners from otherwise applicable regulations was an ultra vires act. A trial court properly invalidated the settlement agreement and City issued permits based upon the settlement.

8. *Acosta v. City of Costa Mesa* (9th Cir. 2012) 694 F.3d 960.

The plaintiff, Acosta, filed suit against the City of Costa Mesa when he was arrested at a City Council meeting after allegedly violating the City's ordinance prohibiting "disorderly, insolent, or disruptive behavior" at a City meeting in violation of his First and Fourth Amendment rights. The district court ruled in the City's favor and Acosta appealed. The Ninth Circuit Court of Appeal held that use of the term "insolent" in describing actions by the public which could violate the ordinance was an "overbroad" restriction on free speech rights, but that the term could be severed from the ordinance and upheld the remaining language in the statute as constitutional. Despite Acosta's partial victory on the ordinance language, the Court upheld the district court's ruling that the City and the officers were immune from damages claims under the doctrines of public entity immunity for the City and qualified immunity for the arresting officers. The Court held that the City was immune because its officers were entitled to immunity for discretionary actions. The Court also held that the arresting officers were entitled to qualified immunity because they relied on a "duly-promulgated" ordinance that "was not

so obviously unconstitutional as to require a reasonable officer not to enforce it," and because they had probable cause to arrest under the ordinance.

9. 95 Ops.Cal.Atty.Gen. 16 (June 2012).

Attorney General opines on "what is an island" for purposes of island annexations. Government Code section 56375.3.

10. AB 2314 (Chapter 201) Blight Removal Regarding Foreclosed Properties

The Legislature passed and the Governor signed a new law providing additional powers to local enforcement agencies and incentives to property owners to remove blight related to foreclosed homes. AB 2314 implements four strategies designed to address the issue. First, it removes the sunset provision from existing law which allows local enforcement agencies to impose fines and penalties for failing to maintain foreclosed properties. It was set to expire on January 1, 2013, but now will continue indefinitely. Second, the new law extends the prohibition of enforcing fines on new property owners of foreclosed residential properties that were foreclosed on or after January 1, 2008, from 30 days to 60 days, so long as the new property owner is diligently addressing any violation. The local enforcement agency can shorten the 60 day period, however, if the severity of the unsafe conditions warrants more immediate action. Third, AB 2314 requires any entity to notify the enforcement agency in writing within 30 days when that entity releases a lien on a property which has a recorded notice of lis pendens. Fourth, the legislation authorizes a court with the discretion to order unrecovered costs related to the repair and maintenance of a substandard building in receivership to be paid by the property owner as an additional remedy to recover costs.

11. SB 1003 (Chapter 732) Local Government: Open Meetings

Prohibits a district attorney or an interested person from filing an action for an alleged violation of the Brown Act for past actions of a legislative body, unless certain conditions are met, including, but not limited to, a requirement that the district attorney or interested person submit a cease and desist letter to the legislative body being accused of the violation setting forth the alleged violation, and the legislative body has failed to issue an unconditional commitment to cease and desist from the alleged past action within 30 days of receiving the letter. It also requires the unconditional commitment to cease and desist from the alleged past action to meet certain requirements; requires that an action filed to challenge an alleged violation of the Brown Act pursuant to these provisions be dismissed with prejudice if the legislative body enters into an unconditional commitment to cease and desist from the alleged past action; authorizes the legislative body to enter into an unconditional commitment to cease and desist from the alleged action at any time, unless the plaintiff succeeds in a civil action against the legislative body and is awarded attorney's fees; provides for an award of costs and reasonable attorney fees to the plaintiff under certain conditions. It also requires a legislative body that wishes to rescind a commitment to do so by a majority vote of the membership of the legislative body.

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; Gov. Code, §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-foot 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. *Concerned Citizens for Responsible Government v. West Point Fire Protection District* (2011) 196 Cal.App.4th 1427 (UPDATE).

The appellate court held that Proposition 218 largely precluded the use of assessments for funding general public services such as fire protection and emergency medical services. Attempts to fund services traditionally funded by property tax face a significant uphill legal fight. The Supreme Court granted review of the case, but later dismissed it as moot on November 28, 2012. (*Concerned Citizens for Responsible Government v. West Point Fire Protection District* (Cal., Nov. 28, 2012) 2012 Cal. LEXIS 11043.) The request for publication was denied.

For more information, see "Fire Protection Assessments Fail Prop. 218 Challenge" at http://blog.aklandlaw.com.

2. *Citizens Association of Sunset Beach v. Orange County Local Agency Formation Commission* (2012) 2029 Cal.App.4th 1182.

Residents ordered to be annexed under the island annexation law are not entitled to a Proposition 218 vote in favor of special taxes. (Government Code section 56375.3)

3. *Griffith v. City of Santa Cruz* (2012) 207 Cal.App.4th 982.

Annual rental inspection program and related fee did not violate Proposition 218 as it was a regulatory fee. (*Apartment Ass'n of Los Angeles County v. City of Los Angles* (2001) 24 Cal.4th 830, 833) The city ordinance was not pre-empted by state housing law. The city

satisfied its burden under Proposition 26 that the revenues would not exceed the estimated cost of the inspection program.

4. *Koontz v. St Johns River Water Management District* (Fla. 2011) 77 So. 3d 1220, cert. granted Oct. 5, 2012, ___ U.S. ___ [133 S.Ct. 420, 184 L.Ed.2d 251].

Koontz had been trying to develop his property since 1994, when he had applied to the District for a permit. The District agreed to grant the permit on two conditions: (1) deed a portion of the property into a conservation area; and (2) perform offsite mitigation several miles from the property by replacing culverts and plugging drainage canals on District-owned properties. Koontz agreed to the first condition, but refused the second one. The District then denied the permit based upon the refusal to implement the second condition. Koontz sued in state court, arguing that the District's offsite mitigation condition was an unconstitutional exaction because it violated the *Nollan-Dolan* test. The trial court agreed and the intermediate appellate court affirmed. The Florida Supreme Court reversed, holding that there was no taking. The Court reasoned that the *Nollan-Dolan* test only applied to exactions of real property where a permit was actually issued imposing the onerous exaction. The Supreme Court granted certiorari in October, 2012, and is scheduled to hear the case on January 15, 2013.

The Supreme Court will be considering two issues: (1) whether the *Nollan-Dolan* exactions test applies to exactions other than real property, such as where a permit applicant is required to pay for work; and (2) whether the *Nollan-Dolan* exactions test applies where a permit is denied because an applicant rejects an exaction. Abbott & Kindermann, LLP will continue to follow the case to its conclusion.

5. AB 1801 (Chapter 538) Land Use: Fees

Prohibits a city, county, or city and county from basing the calculation of the fee charged for a solar energy system on the valuation of the solar energy system, or any other factor not directly associated with the cost to issue the permit, or from basing the calculation of the fee on the valuation of the property or the improvement, materials, or labor costs associated with the improvement. It also requires the city, county, or city and county to separately identify each fee assessed on the applicant for the installation of a solar energy system on the invoice provided to the applicant. It also express a legislative finding and declaration that oversight of permit fees for renewable energy systems is an issue of statewide concern and not a municipal affair and that, therefore, all cities, including charter cities, would be subject to the provisions of the bill.

6. AB 1222 (Chapter 201) Solar Energy: Permits

Requires permit fees for rooftop solar energy systems, as specified, by a city, county, city or county, or charter city to not exceed the estimated reasonable cost of providing the service for which the fee is charged, which cannot exceed $500 plus $15 per kilowatt for each kilowatt above 15kW for residential rooftop solar energy systems, and $1,000 plus $7 per kilowatt for each kilowatt between 51kW and 250kW, plus $5 for every kilowatt

above 250kW, for commercial rooftop solar energy systems, unless certain conditions are met.

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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. *West Washington Properties, LLC v. California Department of Transportation* (2012) 210 Cal.App.4th 1136.

The Court of Appeal, Second Appellate District, held that despite over two decades of no enforcement by the California Department of Transportation (Caltrans), the defenses of equitable estoppel and laches would not stand to insulate the property owners of a building near Interstate 10 (I-10) in Los Angeles from obtaining a permit and reducing the size of an advertising display that was unlawfully erected on the side of the building in violation of the Outdoor Advertising Act (Act) (Cal. Bus. & Prof. Code[1], § 5300, *et seq*.).

[1] All further statutory references are to the California Business and Professions Code unless otherwise noted.

2. ***Besaro Mobile Home Park, LLC v. City of Fremont*** **(2012) 204 Cal.App.4th 345.**

Denial of request for a rate increase to market rate for a mobile home park was not a taking because the owner was receiving a fair rate of return on the investment despite receiving below market rates. Owner has no constitutionally protected right to charge market rates in excess of the amount to receive a fair rate of return.

3. ***People ex rel. Dept. of Transportation v. Dry Canyon Enterprises, LLC*** **(2012) 211 Cal.App.4th 486.**

In order to invoke the right to have a jury determine the amount of "business goodwill" lost due to a taking under Code of Civil Procedure section 1263.510, the property owner must first provide substantial evidence to show that the business had goodwill to lose.

Notes: