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2013 4th QUARTER ENVIRONMENTAL LAW UPDATE

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Welcome to Abbott & Kindermann's 2013 4th Quarter Environmental update. This update discusses selected litigation, regulations / administrative guidance and pending legislation, on both the federal and state levels, in the following general areas of environmental law: (A) Water Supply, (B) Water Quality, (C) Wetlands, (D) Air Quality and Climate Change, (E) Endangered Species, (F) Renewable Energy, (G) Hazardous Substance Control and Cleanup, (H) NEPA, (I) Mining, (J) Cultural Resources, and (K) Environmental Enforcement.

A. Water Supply

1. *Tehama-Colusa Canal Authority v. U.S. Department of the Interior*, 721 F.3d 1086 (9th Cir. 2013).

The Tehama-Colusa Canal Authority ("Canal Authority"), a joint powers authority comprised of sixteen Central Valley Project ("CVP") contractors, brought an action against the U.S. Department of the Interior, the Bureau of Reclamation ("Bureau"), San Luis & Delta-Mendota Water Authority and Westlands Water Authority. Canal Authority alleged that the area of origin protections in California Water Code section 11460, among other laws, requires that member agencies receive their full water supply allocation before any water is exported to users south of the Sacramento-San Joaquin Delta. The Ninth Circuit affirmed the U.S. District Court's summary judgment in favor of defendants on the grounds that California Water Code § 11460 does not give priority water rights to the Canal Authority members. The court reasoned that the Canal Authority and its members voluntarily consented to the water service contracts for water from the Central Valley Project in the 1960s and 1970s. All original contracts contained shortage provisions that permitted the Bureau to reduce available water supply during years of water shortage. Before the original contracts expired in 1995, the Bureau delivered less than the full allocation to Canal Authority members during five separate years. Interim contracts between 1995 and 2005 included water shortage provisions authorizing the Bureau to reduce the amount of water to agencies under shortage conditions. During the interim period, the Bureau provided less than the full allocation to Canal Authority members during four separate years. During negotiations of the long-term contracts, the Canal Authority repeatedly requested and the Bureau repeatedly denied the Canal Authority's request that its members receive 100% of their supplies during shortage years. In 2005, Canal Authority members executed long-term CVP water contracts which expressly and explicitly provided that "in times of shortage, the Bureau may divert water to other contractors to meet the Bureau's overall goal to provide water to the maximum number of users for the greatest potential benefit." Thus, the Bureau's exercise of discretion therefore when apportioning water during shortage years in accordance with these renewal contracts was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.

2. *Young v. State Water Resources Control Board* (2013) 219 Cal. App. 4th 397.

Customers of Woods Irrigation Company ("Woods"), a water distribution corporation, filed suit against the State Water Resources Control Board ("Water Board") alleging that the Water Board lacked authority to issue a cease and desist order for unlawful diversion of water ("CDO") prior to formal adjudication of the water rights. The Water Board claimed that California Water Code section 1831 authorizes the Water Board to make an initial determination of the validity of riparian or appropriative water rights. Under section 1831, the Water Board may issue a CDO against unauthorized diversions. It was undisputed that the Water Board does not have the authority to regulate riparian and pre-1914 appropriative water rights. The issue in this case was whether the Water Board may make a preliminary determination whether a diverter has the riparian or pre-1914 appropriative water right it claims for enforcement purposes. The court held that the Water Board had such authority. The court reasoned that the Legislature expressly vested the Water Board with the authority to determine if any person is unlawfully diverting water. To determine whether the diversion is unlawful, the Water Board must make some sort of initial determination regarding the claimed riparian or pre-1914 appropriative right. The diverter or interested parties can thereafter seek judicial review if warranted. The board was authorized to issue a cease-and-desist order for an illegal diversion of water and was not required to initiate civil proceedings to have a court determine whether the diverter had either riparian or pre-1914 appropriative rights. Thus, the Board's issuing a CDO prior to formal adjudication in this case did not violate section 1831.

3. County *of Siskiyou v. Superior Court* (*Environmental Law Foundation*) (2013) 217 Cal.App.4th 83.

Real parties in interest Environmental Law Foundation, Pacific Coast Federation of Fishermen's Associations, and Institute for Fisheries Resources (collective, "RPI") filed a petition for a writ of mandate in Sacramento County, seeking to halt the issuance of well-drilling permits for nonadjudicated groundwater within the Scott River sub-basin in Siskiyou County. RPI alleged that the authority of the State Water Resources Control Board ("Board") to protect and manage public trust resources extends to the protection of the described groundwater resource and that the County of Siskiyou ("County"), which has a duty to protect public trust resources, must act to protect and manage the groundwater resource through monitoring, regulating, and limiting extractions of groundwater. RPI alleged that the County is not protecting the Scott River from "injurious extractions of interconnected groundwater through their pattern and practice of issuing new well drilling permits (not subject to the adjudication) without any analysis of the impacts" to the detriment of the fish and wildlife of the Scott River. RPI sought injunctive, mandamus, and declaratory relief that recognized the authority of the Board to protect such groundwater under the public trust doctrine, and to compel the County to put in place a well-drilling permit or management plan to protect public trust resources.

The County demurred to the petition on the grounds that the Siskiyou Superior Court issued a decree in 1980 that adjudicated "all surface water rights in the Scott River stream system" and "all rights to ground water that is interconnected with the Scott River," and

reserved jurisdiction to thereafter "review its decree and to change or modify the same as the interests of justice may require." RPI responded that the relief sought in this case is limited to "groundwater not previously adjudicated within the Scott River sub-basin," which consisted of "wells or sumps to be constructed 'at least 500 feet from the Scott River or at the most distant point from the river on the land that overlies the interconnected groundwater, whichever is less." Thus, RPI argued that they do not request a reopening of the 1980 adjudication. The County also moved to change venue based on the argument that groundwater constitutes real property, and under Code of Civil Procedure section 392, subdivision (a)(1), actions involving right or interest to real property must be tried in the superior court in the county where the property is located. The trial court overruled the demurrer and denied the motion to change venue. The County sought a writ of mandate challenging both decisions.

The Court of Appeal denied the County's writ petition. The court first held that the doctrine of exclusive concurrent jurisdiction did not apply here: "The question of whether [County] must follow the public trust doctrine to monitor groundwater extractions that are not subject to the 1980 adjudication is not a matter necessarily related to the 1980 decree. There is no evidence the public trust doctrine was even considered in the formulation of the 1980 decree. Nor are the issues in the petition 'substantially the same' as the issues adjudicated in the 1980 decree. In the 1980 decree, the court sought to determine water rights to groundwater interconnected with the Scott River. The petition asks the court to determine whether or not the Board and Siskiyou have the authority under the public trust doctrine to protect public trust resources. The petition argues Siskiyou has failed to consider the public trust doctrine in issuing permits for wells used to extract groundwater interconnected with the Scott River."

Next, the Court of Appeal held that the trial court did not abuse its discretion in denying the County's motion to change venue. The court explained that the primary thrust of RPI's action is the regulatory authority of the Board over the application of the public trust doctrine to interconnected ground and surface water. This case was not an action that fit within the provision of CCP §39 "[f]or the recovery of real property, or of an estate or interest therein, or for the determination in any form, of that right or interest, and for injuries to real property" or "[f]or the foreclosure of all liens and mortgages on real property." This matter involved the regulatory authority of the Board and the County, not any relief against individual water rights holders. Therefore the trial court did not abuse its discretion in maintaining venue in Sacramento County.

4. Governor Brown Signed A Proclamation Of A State Of Emergency Declaring A Drought On January 17, 2014.

On January 17, 2014, Governor Brown signed a Proclamation of a State of Emergency, declaring a drought state of emergency and directed state officials to take all necessary actions to prepare for drought conditions ("Proclamation"). "We can't make it rain, but we can be much better prepared for the terrible consequences that California's drought now threatens, including dramatically less water for our farms and communities and increased fires in both urban and rural areas." said Governor Brown.

The Governor directed state officials to assist farmers and communities that are economically impacted by dry conditions and to ensure the state can respond if Californians face drinking water shortages. The Governor also directed state agencies to use less water and hire more firefighters. He further initiated a greatly expanded water conservation public awareness campaign.

This Proclamation has put into motion an assortment of important policy and procedural directives that are key to California's management of the driest year since the late 1800's when record keeping began. For example:

> The Proclamation requires water agencies to implement specific conservation and delivery measures; and
>
> It carves out CEQA exemptions, plus exemptions from compliance with aspects of adopted water quality plans, when undertaking actions necessary to make water immediately available during the drought.

The Governor's Proclamation further provides the following:

1. Local urban water suppliers and municipalities should implement their local water shortage contingency plans immediately in order to avoid or forestall outright restrictions that could become necessary later in the drought season. Local water agencies should also update their legally required urban and agricultural water management plans, which help plan for extended drought conditions. The Department of Water Resources will make the status of these updates publically available.

2. The Department of Water Resources and the State Water Resources Control Board (Water Board) shall expedite the processing of water transfers, as called for in Executive Order B-21-13. Voluntary water transfers from one water right holder to another enable water to flow where it is needed most.

3. The Water Board shall immediately consider petitions requesting consolidation of the places for use of the State Water Project and Federal Central Valley Project, which would streamline water transfers and exchanges between water users within the areas of these two major water projects.

4. The Department of Water Resources and the Water Board shall accelerate funding for water supply enhancement projects that can break ground this year and shall explore whether any existing unspent funds can be repurposed to enable near-term water conservation projects.

5. The Water Board shall put water rights holders throughout the state on notice that they may be directed to cease or reduce water diversions based on water shortages.

6. The Proclamation further considers ESA issues by requiring the Water Board to consider modifying requirements for reservoir releases or diversion limitations, where existing requirements were established to implement a water quality control plan. These changes would enable water to be conserved upstream later in the year to protect cold water pools for salmon and steelhead, to maintain water supply, and improve water quality.

7. The Department of Water Resources must evaluate changing groundwater levels, land subsidence, and agricultural land fallowing as the drought persists and shall provide a public update by April 30 that identifies groundwater basins with water shortages and details gaps in groundwater monitoring.

8. The California Department of Food and Agriculture shall launch a one-step website (**www.cdfa.ca.gov/drought**) that provides timely updates on the drought and connects farmers to state and federal programs that they can access during the drought.

9. The Department of Fish and Wildlife shall work with the Fish and Game Commission, using the best available science, to determine whether restricting fishing in certain areas will become necessary and prudent as drought conditions persist.

10. The Department of Water Resources shall take necessary actions to protect water quality and water supply in the Delta, including the installation of temporary barriers or temporary water supply connections as needed, and shall coordinate with the Department of Fish and Wildlife to minimize impacts to affected aquatic species.

11. The State Drought Task Force shall immediately develop a plan that can be executed as needed to provide emergency food supplies, financial assistance and unemployment services in communities that suffer high levels of unemployment from the drought.

5. January 27, 2014 – California's Natural Resources Agency, Environmental Protection Agency and Department of Food and Agriculture Release the Final California Water Action Plan.

California, the state whose original existence was premised on taking liberties with the manipulation of water, has finalized a 5 year California Water Action Plan ("Plan") intended to meet three broad objectives: 1) provide more reliable water supplies; 2)

restore important species and habitat; and 3) provide a more resilient sustainably managed water resources system that can better withstand the future pressures on the supply. The Plan was in process prior to the Governor's 2014 emergency declaration of drought, but is updated to reflect the state's response to one of the driest winters on record. The Plan was quickly completed after the release of the public review draft in October, 2013.

This Plan was a collaborative effort with state agencies and reflects nearly 100 substantive public and stakeholder comments responding to the draft Plan released in October. In light of yet another low rainfall season, the Plan includes an expanded section on drought response and a new effort on better management of Sierra Nevada headwaters to help water storage, water quality and ecosystems. The ten (10) key actions of the Plan are:

1) Make conservation a California way of life;
2) Increase regional self-reliance and integrated water management across all levels of government;
3) Achieve co-equal goals for the Delta;
4) Protect and Restore important ecosystems;
5) Manage and prepare for dry periods;
6) Expand water storage capacity and improve groundwater management;
7) Provide safe water for all communities;
8) Increase flood protection;
9) Increase operational and regulatory efficiency; and
10) Identify sustainable and integrated financing opportunities.

http://www.calepa.ca.gov/PressRoom/Releases/2014/WaterPlan.pdf

Three noteworthy policies entrenched in the Plan are:

1) The controversial BDCP is heralded again as the answer to "…Recover Populations of Threatened and Endangered Species in the Delta and Improve Water Supply Reliability for Users of the Delta".

2) The Legislature and Office of Planning and Research are urged to include water as a mandatory feature of the general plan guidelines. Perhaps water supply, conservation and management will become a general plan element; and

3) Groundwater is targeted for sustainable management. This proclamation may result in legislation allowing the state to regulate groundwater pumping. Currently groundwater is managed: a) by prior court adjudications in the state's major groundwater basins; or b) alternatively regulated by local governments' police power through groundwater management planning. In general however, the overlying landowner is entitled to unlimited pumping of groundwater under the land owned (overlying rights). In that sense,

groundwater pumping is unregulated by the State. That lack of regulation is changing.

6. January 31, 2014 - State Department of Water Resources Announces that it is dropping State Water Project Allocations to Zero.

In response to the Governor's state of emergency drought declaration, the Department of Water Resources ("DWR") penned a press release announcing that contracted water agencies will not receive any water from the State Water Project ("SWP") in 2014. The release contains several pages of graphics detailing rainfall levels since 1970, water levels in reservoirs and such similar statistics. The goal of withholding SWP allocations is to preserve remaining supplies and balance multiple needs as a result of this historic drought.
http://www.water.ca.gov/news/newsreleases/2014/013114prerss_conference.pdfwebsite

DWR manages the SWP, which is the world's largest publicly built and operated multi-purpose water project. Developed in 1963, it stores and delivers water for 29 urban and agricultural water suppliers in the state though a system of reservoirs, aqueducts, power plants and pumping plants. It includes 21 dams and 700 miles of canals, pipelines and tunnels. Seventy percent (70%) of the contracted water is for urban uses. The remaining thirty percent (30%) of it goes to agricultural users in the Central Valley. The SWP serves two thirds of California's population or approximately 25 million people.

If the dry spell continues, according to the DWR, only carryover water from last year will be channeled to the farmers and towns that get their water from the SWP. This conservation measure is expected to protect supplies and it will affect farmers, fish and people. Currently, 17 communities and water districts are in danger of running out of water within 100 days, including Cloverdale and Healdsburg, and the list is expected to grow.

Without SWP water, some water districts will have to obtain their water from local groundwater and the water they purchase from other sources such as the Central Valley Project ("CVP") or the Hetch Hetchy system. In general, as water becomes more scarce, less fortunate agencies will have to rely on healthier ones for assistance.

The CVP, administered by the Federal Bureau of Reclamation was built in 1933 and it provides irrigation and municipal water to the Central Valley. The CVP's storage and conveyance facilities are similar in type to those of the SWP and it actually shares some of the SWP facilities. The CVP stores an average of 13 million acre feet of water and the Shasta Dam is the primary water storage and power generating facility of the CVP. It regulates the flow of the Sacramento River.

Although no similar formal federal agency announcements have been made regarding the drought as of February 1, 2014, the Bureau of Reclamation is working closely with the State DWR to facilitate water transfers and to provide operational flexibility to convey and store available water. This water transfer cooperation and facilitation mirrors the

mandates in the Governor's drought declaration as well. Water agencies that have carefully conserved water during these dry years are concerned that the federal government will seize their stored water to address shortfalls elsewhere in the state.

7. CEQA Strategies and the Drought.

1. <u>The Drought Proclamation May not be Deemed New Information.</u>

In the 2011 case of *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, (2011) 196, Cal App 4th 515, the 4th District Court of Appeal upheld an EIR addendum over claims that a supplemental EIR was required to analyze "new" environmental impacts related to a drought proclamation and global warming. The EIR addendum was being prepared for the final phase of a master planned community, but the petitioners believed that the supplemental EIR was required for the entire project.

Governor Schwarzenegger had declared a drought and the DWR provided notice that it would be reducing water deliveries. CREED alleged that the drought declaration and notice of reduced deliveries occurred after the project's water supply assessment ("WSA") had been approved and therefore, it was the new type of information that required the City to prepare a SEIR.

The Court rejected CREED's allegations because the WSA analyzed water availability during multiple dry years. Moreover, the Court affirmed that is was proper to rely on testimony form City staff that the drought was only temporary and that the City had an adequate water supply to serve the project in the long term.

The existence of a satisfactory analysis of water availability in multiple dry years and evidence of an agency's ability to provide water for a project can support a lead agency's position that an existing Draft EIR need not be recirculated, or an existing EIR for a later phase of a project need not be supplemented with new environmental analysis. In the alternative, it may support a finding that supplemental environmental analysis is warranted especially in light of the gravity of this year's historic drought conditions and the drought's effect on the specific project and that lead agency.

2. <u>Baseline Discussion of Drought</u>

Depending upon the project, the 2014 Drought may have significance for purposes of the baseline discussion. This would include not only a discussion of water availability but also the baseline for species and habitat.

For example, where relevant to a given project, instream warming and related impacts should be incorporated in the baseline conditions under which CEQA (or NEPA) analyses are performed. Projects can then self- mitigate by incorporating needed adaption measures to ameliorate impacts to species and habitat.

3. Drought and Climate Change

DWR has taken the lead on integrated regional water management planning and climate change mitigation and adaption. This historic drought has served to underscore the need for planning synthesis. This synthesis is apparent in the actions taken by the governor and the agencies' drought response documents identified above. Additionally, there is further guidance in The Climate Change Handbook, published in 2011 by DWR and the State EPA in partnership with the USACE and the Resources Legacy Fund. It is one tool that local planning agencies can refer to when analyzing water availability in the short term with the current drought, and in the future as a consequence of climate change. www.water.ca.gov/climatechange/CCHandbook.cfm

We can also expect to see more tools to help local and regional planners, such as:

a) interactive websites that enable planners to visualize what the future will look like;

b) climate change modelling for water planning; and

c) further efforts at the legislative and executive level to identify who is diverting surface and ground water and in what quantity.

8. Draft Bay Delta Conservation Plan Released In November 2013, Amidst Growing Opposition.

On November 15, 2013, a draft of the Bay Delta Conservation Plan (BDCP) and supporting EIR/EIS was released by the California Natural Resources Agency and made available for 120 days of formal review and acceptance of formal written comments. The BDCP includes two giant water diversion tunnels through the Delta region. A series of public meetings will be held during January and February 2014 to provide information about the project and accept formal comments.

In August 2013, the twin tunnels plan in the BDCP was changed so as to reduce the footprint of the project, reduce the amount of private land affected by about 400 acres, reduce the number of buildings to be demolished or moved by half, downsize and move a reservoir at the north end of the tunnels, shorten the tunnels by five miles, and move the tunnels farther to the east to avoid Sacramento River communities. Furthermore, the tunnels are now intended to be built underneath Staten Island, which is the winter home to about 15% of the Central Valley's population of greater sandhill cranes, a threatened species under California law. Staten Island is owned by The Nature Conservancy, which purchased the land with public funds to protect the cranes and other wildlife. Thus, additional environmental and legal issues have arisen over the impact of the changed tunnel location on Staten Island.

Public opposition has been building against the tunnel project. On May 23, 2013, the Delta Protection Commission, a state agency made of primarily of local governmental

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officials from throughout the five-county Delta region, voted to oppose the BDCP on the ground that the plan is not supportive of the Delta. While 12 Members of Congress from Central and Southern California and Senator Diane Feinstein (all Democrats) signed a letter to the Secretary of the Interior and Governor Brown in May 2013 expressing their "continued support for the Bay Delta Conservation Plan (BDCP) process" and how "half measures" are unacceptable, 6 other Members of Congress from Northern California (also all Democrats) repeated late in May 2013 that they were staunchly opposed to the BDCP, as currently drafted. In addition, a group of over 30 organizations from across the political spectrum have formed "Californians for a Fair Water Policy" to oppose the tunnel project.

Also, a competing plan called the "Portfolio-Based BDCP Conceptual Alternative" emerged, involving one smaller water tunnel and other measures that are more conservation oriented.

The overall cost to the state continues to be disputed. An editorial in The Sacramento Bee noted: "The basic financial framework for example, remains unresolved. Yet to be determined is how the multibillion-dollar cost would be split among water agencies who would benefit, and the state and federal governments."

For more information:
http://baydeltaconservationplan.com/news/news/13-09-27/Formal_Public_Review_of_the_BDCP_and_EIR_EIS_to_Begin_November_15_2013.aspx
http://www.sacbee.com/2013/05/24/v-print/5446259/delta-protection-commission-opposes.html
http://www.acwa.com/news/delta/congressional-delegation-expresses-support-bdcp
http://www.acwa.com/sites/default/files/news/delta/2013/05/05-22-13_bdcp_support_process_letter.pdf
http://www.ibabuzz.com/politics/2013/05/30/house-members-blast-browns-delta-water-plan/?utm_source=feedly&utm_medium=feed&utm_campaign=Feed%3A+PoliticalBlotter+%28Political+Blotter%29
http://www.indybay.org/newsitems/2013/06/12/18738303.php
http://www.recordnet.com/apps/pbcs.dll/article?AID=/20130816/A_NEWS/308160325
http://www.acwa.com/news/delta/coalition-calls-portfolio-based-alternative-be-analyzed-bdcp;
http://www.sacbee.com/2013/12/12/5993202/editorials-two-tunnel-study-leaves.html

B. WATER QUALITY

1. *Decker v. Northwest Environmental Defense Center*, ___ U.S. ___, 133 S.Ct. 1326 (2013).

On March 20, 2013, the U.S. Supreme Court in *Decker v. Northwest Environmental Defense Center*, handed down its much-anticipated opinion regarding stormwater runoff from logging roads. The Northwest Environmental Defense Center ("NEDC") filed suit

in September 2006 alleging that the defendants caused discharges of channeled stormwater runoff into two Oregon waterways without a proper NPDES permit. The U.S. District Court for the District of Oregon dismissed the suit for failure to state a claim, concluding that NPDES permits were not required because the ditches, culverts, and channels were not point sources of pollution under the Clean Water Act and the Silviculture Rule.

On appeal, the Ninth Circuit reversed the lower court decision, holding these conveyances to be point sources under the Silviculture Rule. The Ninth Circuit also concluded that the discharges were an industrial activity as defined in the Industrial Stormwater Rule.

Three days prior to oral arguments, the EPA finalized amendments to the Industrial Stormwater Rule that sought to clarify the types of silviculture activities that would require an NPDES permit. The amended regulation specified four activities that would fall within the NPDES process: rock crushing, gravel washing, log sorting, and log storage facilities.

The Court discussed whether the EPA's interpretation of the Industrial Stormwater Rule was entitled to deference or whether the agency's interpretation was "plainly erroneous or inconsistent with the regulation." The Court acknowledged that the EPA had been consistent in its view that these types of discharges did not require NPDES permits. Furthermore, the EPA's interpretation that the references to "facilities," "establishments," "manufacturing," "processing," and an "industrial plant" extends only to traditional industrial buildings or other relatively fixed sites was a reasonable interpretation. For these reasons, the Court reversed the Ninth Circuit decision and concluded that stormwater runoff from logging activities does not require an NPDES permit.

For more information:
http://blog.aklandlaw.com/2012/12/articles/water-quality-wetlands-clean-water-act/epa-tells-supreme-court-its-actions-were-suboptimal-but-the-oral-argument-on-the-challenge-to-epas-silvicultural-rule-raises-more-questions-than-it-answers/#more

2. ***Los Angeles County Flood Control Distric v. Natural Resources Defense Council, Inc.*, ___ U.S. ___, 133 S.Ct. 710 (2013).**

The Los Angeles County Flood Control 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 County of Los Angeles and the Los Angeles County Flood Control District's (collectively, the County Defendants) NPDES permit had been exceeded. The District Court concluded that the evidence in the record was insufficient to warrant a finding that the County Defendants' 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 County Defendants that discharge into the rivers upstream of the monitoring stations. The Court of Appeal, Ninth Circuit, reversed on the grounds that the County Defendants' 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. In *L.A. County Flood Control Dist. v. NRDC, Inc*., the United States Supreme Court held that the flow of water out of a concrete channel within a river does not constitute the "discharge of a pollutant" under the Clean Water Act, 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." On remand, the Ninth Circuit held that the pollution exceedances detected at the County Defendants' monitoring stations are sufficient to establish the County Defendants' liability for NPDES permit violations as a matter of law. Thus, the Ninth Circuit reversed the District Court's grant of summary judgment in favor of the County Defendants, and remand to the District Court for a determination of the appropriate remedy for the County Defendants' violations.

3. *Virginia Department of Transportation v. U.S. EPA*, 2013 U.S. Dist. LEXIS 981 (E.D.Va., Case No. 1:12-CV-775, January 3, 2013).

The U.S. District Court for the Eastern District in Virginia held that the U.S. Environmental Protection Agency did not have the authority under the Clean Water Act ("CWA") to regulate flows of stormwater into a creek because stormwater did not qualify as a pollutant under the Act. In *Virginia DOT v. U.S. EPA*, the EPA had established a total maximum daily load ("TMDL") limiting stormwater flow rate into the creek in order to reduce the amount of sediment entering the creek. EPA viewed stormwater flows as a proxy for sediment, a pollutant under the CWA. The court focused on the plain language of the CWA in determining that EPA had exceeded the scope of its authority. The court explained: "EPA is authorized to set TMDLs to regulate pollutants, and pollutants are carefully defined. Stormwater runoff is not a pollutant, so EPA is not authorized to regulate it via TMDL. Claiming that the stormwater maximum load is a surrogate for sediment, which is a pollutant and therefore regulable, does not bring stormwater within the ambit of EPA's TMDL authority."

4. *Alt v. U.S. EPA*, 2013 U.S. Dist. LEXIS 65093 (N.D.W.Va., case no. 2:12-CV-42, April 22, 2013).

In *Sackett v. United States EPA* (2012) ___U. S.___ , 132 S. Ct. 1367, 182 L.Ed.2d 367, a unanimous U.S. Supreme Court held that a property owner could bring a civil action under the Administrative Procedures Act to challenge the Environmental Protection Agency's issuance of a compliance order that demanded that the owner get a dredging permit, remove all fill allegedly placed into jurisdictional wetlands, replace any lost vegetation, and monitor the fenced-off site for three years, or else be subject to an enforcement order and civil penalties and fines up to a maximum of $75,000 a day.

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Subsequent cases have demonstrated the significant impact that the *Sackett* decision has had on the EPA's use of compliance orders.

For example, in *Alt v. U.S. EPA*, an owner of a chicken farm was issued a compliance order by the EPA because she was determined by EPA to be the owner of a non-permitted point source discharge of pollutants to waters of the United States because of stormwater runoff may come into contact with dust (feathers and fine particulate of dander and manure) from the ventilation exhaust fans that settled on the ground, and with manure at the south end of the poultry houses, and because of several man made ditches with culverts that help facilitate stormwater away from the poultry houses and towards Mudlick Run, a water of the United States. The owner filed an action in the District Court seeking a declaratory judgment that the compliance order was invalid because it required her to obtain a permit under the federal Clean Water Act ("CWA") for discharges that she believes are exempt from the CWA's permitting process. After the court allowed several Farm Bureaus to intervene in order to protect the interests of farmers who were in a position similar to the owner and sought a resolution of the same issues, the EPA withdrew the compliance order, alleged that the proceeding was therefore moot, and moved to have the case dismissed. The court denied the motion because EPA reserved the right to issue yet another compliance order against the owner in the event of a significant change in "circumstances or operations." Also, the EPA had not retracted, altered or changed its position "on whether any stormwater that might come into contact with dust, feathers, or dander from poultry house ventilation fans deposited on the ground outside of the production areas constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements or whether any stormwater that might come into contact with small amounts of manure incidentally present on the ground outside of the production areas as a result of normal poultry farming operations constitutes agricultural stormwater that is expressly exempt from NPDES permitting requirements." The court explained why the action is not actually or prudentially moot: "EPA's adherence to its underlying position, as evidenced by numerous other actions it has taken, demonstrates that the Agency's challenged assertion of authority not only can be 'reasonably expected to recur,' but in fact is ongoing even now." In other words, "the same controversy persists despite the defendant's voluntary cessation."
[Note: On cross-motions for summary judgment, the District Court later held that the litter and manure that is washed from the owner's farmyard to navigable waters by a precipitation event is an agricultural stormwater discharge and therefore not a point source discharge, thereby rendering it exempt from the NPDES permit requirement of the Clean Water Act. *See Alt v. U.S. EPA*, 2013 U.S. Dist. LEXIS 152263 (N.D.W.Va., case no. 2:12-CV-42, October 23, 2013),]

5. Proposed Regulations Require Identification of High Quality Surface Waters

On September 4, 2013, the U.S. Environmental Protection Agency recently proposed changes to the federal water quality standards ("WQS") regulations that implement parts of the Clean Water Act. The core of the current regulation has been in place since 1983. Since then, a number of issues have been raised by states, tribes, or stakeholders or identified by the EPA in the implementation process that would benefit from clarification

and greater specificity. The proposed rule addresses the following program areas: Administrator's determinations that new or revised WQS are necessary, designated uses, triennial reviews, anti-degradation, variances to WQS, and compliance schedule authorizing provisions. As drafted, the proposed rule would establish uniform state anti-degradation standards for protecting high quality waters by requiring states to identify high quality water bodies and perform an alternatives analysis before authorizing degradation. States would also be required to develop implementation methods and make those methods available to the public. Furthermore, the proposed regulations would allow the EPA to review and approve or disapprove the anti-degradation policies and implementation methods adopted by the state. Comments on the proposed regulation were due by December 3, 2013.

For more information:
http://water.epa.gov/scitech/swguidance/standards/wqsregs.cfm
http://www.gpo.gov/fdsys/pkg/FR-2013-09-04/html/2013-21140.htm

6. Draft NPDES Industrial General Permit Issued For Public Comment.

The State Water Resources Control Board ("SWRCB") issued the Final Draft NPDES Industrial General Permit on July 19, 2013. That permit regulates discharges associated with 10 broad categories of industrial activities. As compared to drafts from 2011 and 2012, the July 2013 Draft Industrial General Permit provides a reduced cost of compliance, excludes numeric effluent limitations, and streamlines the regulatory process while protecting water quality. Public comments were received on the Final Draft Permit through September 19, 2013.

Responses to comments on previous drafts and the July 2013 draft documents are here:
http://www.swrcb.ca.gov/water_issues/programs/stormwater/industrial.shtml

7. Construction Stormwater Permit Technical Notices Available

The State Water Resources Control Board has made available technical notices regarding implementation and interpretation of the Construction General Permit ("CGP"). Issue 2013.1 covers how to average pH values for reporting and options for meeting stabilization criteria in the CGP.

For more information:
http://www.waterboards.ca.gov/water_issues/programs/stormwater/gen_const_faq.shtml

8. State Water Board Releases Nitrate Report

The State Water Resources Control Board ("State Water Board") released its report containing recommendations to address nitrate-contaminated groundwater. The report was issued as part of efforts by the State Water Board to develop pilot projects focusing on nitrate contamination in groundwater in the Tulare Lake Basin and Salinas Valley.

The report cites agricultural activities as the largest source of nitrate contamination. The report relies on independent studies conducted by UC Davis, input from public meetings and stakeholder groups, and the Interagency Task Force as the foundation for its 15 recommendations. According to the report, the most critical recommendation is that a new funding source be established to ensure access to safe drinking water for all Californians. Many of the recommendations require a stable funding source in order to be effective.

For more information:
http://www.waterboards.ca.gov/water_issues/programs/nitrate_project/index.shtml

9. Groundwater Regulations Imposed On Areas Of Central Valley Farmland.

The Central Valley Regional Water Quality Control Board ("CVRWQCB") adopted new waste discharge requirements within the Tulare Lake Basin area on September 19, 2013, in order to protect ground and surface water from irrigated agricultural discharges. The area impacted by the new requirements includes farmland in Fresno, Tulare, Kings and Kern counties. The requirements apply to farmers in the region who join an approved third-party group or coalition. (Those growers who do not join a coalition will be directly regulated by the CVRWQCB, and will be subject to higher costs.) Under the new rules, farmers will be required to report their water quality protection practices to their respective coalition. Growers who have not already implemented practices that protect water quality will be required to improve their practices. All growers will be required to prepare nitrogen management plans. Farmers whose land lies above the most vulnerable groundwater aquifers must submit information to the coalition on their nitrogen use efficiency. The coalition will prepare technical reports, conduct required studies and monitoring, and submit reports to the Central Valley Water Board on behalf of the growers.

For more information:
http://www.swrcb.ca.gov/rwqcb5/press_room/announcements/press_releases/r5_2013sep24_ilrptlbwdr_press.pdf
http://www.fresnobee.com/2013/09/19/3507274/state-oks-new-water-rules-for.html
http://www.bakersfieldcalifornian.com/local/x558589998/State-mandates-additional-groundwater-monitoring-in-valley

C. Wetlands

1. *Mingo Logan Coal Co. v. EPA*, 714 F.3d. 608 (D.C. Cir. 2013).

The Mingo Logan Coal Company ("Mingo Logan") applied to the United States Army Corps of Engineers ("Corps") for a permit under section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, to discharge dredged or fill material from a mountain-top coal mine in West Virginia into three streams and their tributaries. The Administrator of the United States Environmental Protection Agency ("Administrator" or "EPA") has "veto" authority over discharge site selection under CWA subsection 404(c), 33 U.S.C. §

1344(c). While EPA expressed the “significant and unavoidable environmental impacts” that were not adequately described in the draft Environmental Impact Statement for the project, EPA nevertheless declined to pursue a subsection 404(c) objection. EPA stated in an email to the Corps that the EPA had “no intention of taking [EPA’s] concerns any further from a Section 404 standpoint.” Without any objection from EPA, the Corps issued the permit to Mingo Logan on January 22, 2007, and approved the requested disposal sites for the discharged material. The permit expressly advised that the Corps “may reevaluate its decision on the permit at any time the circumstances warrant” and that “[s]uch a reevaluation may result in a determination that it is appropriate to use the suspension, modification, and revocation procedures contained in 33 CFR 325.7.” The permit made no mention of any future EPA action.

However, on September 3, 2009, EPA wrote the Corps requesting it "use its discretionary authority provided by 33 CFR 325.7 to suspend, revoke or modify the permit is-sued authorizing Mingo Logan Coal Company to dis-charge dredged and/or fill material into waters of the United States in conjunction with the construction, operation, and reclamation of the [mine],” based on “new information and circumstances . . . which justif[ied] reconsideration of the permit.” The Corps responded that there were “no factors that currently compell[ed it] to consider permit suspension, modification or revocation.” Nevertheless, the EPA went forward with formal process for a determination to restrict or prohibit the discharge of dredged and/or fill material at the mine “consistent with our authority under Section 404(c) of the Clean Water Act.” On January 13, 2011, EPA formally withdrew the specifications of two of the streams as disposal sites, thereby prohibiting Mingo Logan from discharging into them.

Mingo Logan filed an action challenging EPA’s withdrawal of the specified sites on the grounds that (1) EPA lacked statutory authority to withdraw site specification after a permit has issued, and (2) EPA’s decision to do so was arbitrary and capricious in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq. The U.S. District Court for the District of Columbia granted summary judgment to Mingo Logan on the first ground without reaching the second. The District Court concluded EPA “exceeded its authority under section 404(c) of the Clean Water Act when it attempted to invalidate an existing permit by withdrawing the specification of certain areas as disposal sites after a permit had been issued by the Corps under section 404(a).” EPA appealed. On April 23, 2013, a 3-judge panel of the U.S. Court of Appeals for the District of Columbia Circuit reversed the District Court and remanded the case.

The Court of Appeals held in *Mingo Logan Coal Company v. EPA*, that the EPA has the statutory authority under CWA section 404(c) “to withdraw a disposal site specification post-permit.” The Court of Appeals noted that subsection 404(c) authorizes the Administrator, after consultation with the Corps, to veto the Corps’s disposal site specification. The statute provides that the Administrator “is authorized to prohibit the specification (including the withdrawal of specification) of any defined area as a disposal site, and . . . to deny or restrict the use of any defined area for specification (including the withdrawal of specification) as a disposal site”—“whenever he determines” the discharge will have an “unacceptable adverse effect” on identified environmental resources. The

court explained that such statutory language not only grants EPA "a broad environmental 'backstop' authority over the [Corps'] discharge site selection"; and such language "imposes no temporal limit on the Administrator's authority to withdraw the Corps' specification but instead expressly empowers him to prohibit, restrict or withdraw the specification "whenever" he makes a determination that the statutory "unacceptable adverse effect" will result." Furthermore, "because the Corps often specifies final disposal sites in the permit itself--at least it did here, … EPA's power to withdraw can only be exercised post-permit," and a contrary interpretation would "render subsection 404(c)'s parenthetical 'withdrawal' language superfluous." Thus, the court held that "the unambiguous language of subsection 404(c) manifests the Congress's intent to confer on EPA a broad veto power extending beyond the permit issuance," which is an interpretation that EPA has "consistently maintained … for over thirty years."

Mingo Logan argued that EPA's and the Court of Appeal's interpretation would trample on provisions in the CWA "that are intended to give permits certainty and finality." However, the court responded: "[T]he Administrator retains authority to withdraw a specified disposal site 'whenever' he determines such effects will result from discharges at the sites. And when he withdraws a disposal site specification, as he did here, the disposal site's 'terms and conditions specified' in the permit are in effect amended so that discharges at the previously specified disposal sites are no longer in '[c]ompliance with' the permit--although the permit itself remains otherwise in effect to the extent it is usable."

The Court of Appeal denied rehearing en banc, and a petition for certiorari was filed with the U.S. Supreme Court on November 13, 2013.

For more information:
http://wvrecord.com/news/s-3960-federal-court/260680-mingo-logan-coal-argues-for-rehearing-of-revoked-permit-case

2. *Jones III v. National Marine Fisheries Service*, ___ F.3d ___, 2013 U.S. App. LEXIS 25353 (9th Cir. 2013)

Ninth Circuit upholds CWA analysis in support of 404 Permit that rejects alternative mining sites as impracticable. See Item No.1 under NEPA.

3. EPA Submits Draft Rule and Supporting "Connectivity" In Efforts To Develop Regulatory Definition of "Waters of the United States."

In September 2013, the United States Environmental Protection Agency and the U.S. Army Corps of Engineers have sent a draft rule to clarify the jurisdiction of the Clean Water Act to the Office of Management and Budget for interagency review. The proposed rule is designed to provide greater consistency, certainty, and predictability nationwide in determining what are "Waters of the United States" under the Clean Water Act. The proposed rule includes exclusions from Clean Water Act jurisdiction for:

- Non-tidal drainage, including tiles, and irrigation ditches excavated on dry land.
- Artificially irrigated areas that would be dry if irrigation stops.
- Artificial lakes or ponds used for purposes such as stock watering or irrigation.
- Areas artificially flooded for rice growing.
- Artificial ornamental waters created for primarily aesthetic reasons.
- Water-filled depressions created as a result of construction activity.
- Pits excavated in uplands for fill, sand, or gravel that fill with water.

The draft rule takes into consideration the draft science report titled "Connectivity of Streams and Wetlands to Downstream Waters," which presents a review and synthesis of peer reviewed scientific literature. EPA's independent Science Advisory Board solicited public comment and held a public peer review meeting in December 2013. The EPA's final report will provide a scientific basis needed to clarify Clean Water Act jurisdiction, including a description of the factors that influence connectivity and the mechanisms by which connected waters affect downstream waters.

For more information:
http://water.epa.gov/lawsregs/guidance/wetlands/CWAwaters.cfm;
http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=238345

4. The State Water Resources Control Board Issues A Preliminary Draft Wetland and Riparian Area Protection Policy in 2012 And Updated It In 2013.

Under the Federal Clean Water Act Section 404 (33 U.S.C. § 1344) the "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."

Alternatives

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.

Mitigation

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.

Impact Threshold

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.

2013 Update

In 2013, the SWRCB and DFW continued to progress though its 2011 Five Year Wetlands Conservation Workplan to lay the foundation for the formal adoption and implementation of the State's Wetlands Conservation Program. This activity included the completion of white papers regarding water quality standards, the development of portals to facilitate wetlands monitoring, assessment and reporting; and the development of riparian mapping tools to identify existing state resources. A thorough chart of 2013 activities can be accessed on the SRWCB website in a report entitled "2012 Annual Plan Update", and it is dated May 22, 2013. In this report the SWRCB staff provided updates to Tables 3 and 4 for the various tasks of the Workplan.

For more information visit:
http://www.swrcb.ca.gov/water_issues/programs/cwa401/wrapp.shtml

D. Air Quality and Climate Change

1. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C.Cir. 2012) on cert. review, Utility Air Regulatory Group v. U.S. EPA (docket no. 12-1146).

In *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court clarified that greenhouse gases are an "air pollutant" subject to regulation under the Clean Air Act ("CAA"). Following that decision, the U.S. Environmental Protection Agency ("EPA") promulgated a series of greenhouse gas-related rules. First, EPA issued an "Endangerment Finding," in which it determined that greenhouse gases may "reasonably be anticipated to endanger public health or welfare." Second, it issued the Tailpipe Rule, which set emission standards for cars and light trucks. Third, EPA determined that the CAA requires major stationary sources of greenhouse gases to obtain construction and operating permits. Fourth, 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 challenged all these rules in numerous cases filed with the Court of Appeals for the District of Columbia Circuit. In *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (D.C.Cir. 2012), the D.C. Circuit held that the Endangerment Finding and Tailpipe Rule are neither arbitrary nor capricious; that EPA's interpretation of the governing CAA provisions is unambiguously correct; and that no petitioner has standing to challenge the Timing and Tailoring Rules. On October 16, 2013, the U.S. Supreme Court granted certiorari on only one of those issues addressed by the Court of Appeals. In *Utility Air Regulatory Group v. U.S. EPA* (docket no. 12-1146), the Court agreed to hear the following question: "Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases." Thus, the Court left intact the Endangerment Finding, as well as the regulation of the Tailpipe Rules that establish emission standards for cars and light trucks.

The issue that the Court will consider was described by the D.C. Circuit as follows:

> CAA Title I, Part C—entitled "Prevention of Significant Deterioration of Air Quality" (PSD)—largely focuses on the maintenance of national ambient air quality standards (NAAQS). Under the PSD program, EPA designates specific pollutants as "NAAQS pollutants" and sets national ambient air quality standards for those pollutants—requiring, for example, that the concentration of a given NAAQS pollutant may not exceed more than a certain number of parts per billion in the ambient air. Thus far, EPA has designated six NAAQS pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. None of these NAAQS pollutants is one of the six well-mixed greenhouse gases defined as an "air pollutant" in the Endangerment Finding.
>
> The PSD program applies to those areas of the United States designated as in "attainment" or "unclassifiable" for any NAAQS pollutant and requires permits

for major emitting facilities embarking on construction or modification projects in those regions. A separate part of Title I of the CAA, Part D, governs the construction and modification of sources in nonattainment regions. It bears emphasis that attainment classifications are pollutant-specific: depending on the levels of each NAAQS pollutant in an area, a region can be designated as in attainment for NAAQS pollutant A, but in nonattainment for NAAQS pollutant B. If a major emitting facility in such a region wishes to undertake a construction or modification project, both Part C and Part D's substantive requirements apply—that is, the source must obtain a general PSD permit and must also abide by Part D's more stringent, pollutant-specific requirements for any NAAQS pollutants for which the area is in nonattainment.

The key substantive provision in the PSD program is CAA Section 165(a), which establishes permitting requirements for "major emitting facilities" located in attainment or unclassifiable regions. … To obtain a PSD permit, a covered source must, among other things, install the "best available control technology [BACT] for each pollutant subject to regulation under [the CAA]"—regardless of whether that pollutant is a NAAQS pollutant. Since the Tailpipe Rule became effective, EPA has regulated automotive greenhouse gas emissions under Title II of the Act. Thus, greenhouse gases are now a "pollutant subject to regulation under" the Act, and, as required by the statute itself, any "major emitting facility" covered by the PSD program must install BACT for greenhouse gases.

The dispute in this case centers largely on the scope of the PSD program—specifically, which stationary sources count as "major emitting facilities" subject to regulation. …

As mentioned above, since 1978 EPA has interpreted the phrase "any air pollutant" in the definition of "major emitting facility" as "any air pollutant regulated under the CAA." Thus, because the PSD program covers "major emitting facilities" in "any area to which this part applies," EPA requires PSD permits for stationary sources that 1) are located in an area designated as attainment or unclassifiable for any NAAQS pollutant, and 2) emit 100/250 tpy of any regulated air pollutant, regardless of whether that pollutant is itself a NAAQS pollutant. Consequently, once the Tailpipe Rule took effect and made greenhouse gases a regulated pollutant under Title II of the Act, the PSD program automatically applied to facilities emitting over 100/250 tpy of greenhouse gases.

According to EPA, its longstanding interpretation of the phrase "any air pollutant"—"any air pollutant regulated under the CAA"—is compelled by the statute. Disputing this point, Industry Petitioners argue that the phrase is capable of a far more circumscribed meaning and that EPA could have—and should have—avoided extending the PSD permitting program to major greenhouse gas emitters. [684 F.3d at 132-134 (citations omitted).]

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The D.C. Circuit agreed with EPA's "longstanding interpretation of the PSD permitting trigger" and held that the CAA "requires PSD coverage for major emitters of any regulated air pollutant." That is the issue now being considered by the Supreme Court. A decision is expected by June 2014.

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

The Clean Air Act ("CAA") charges the United States Environmental Protection Agency ("EPA") with setting National Ambient Air Quality Standards ("NAAQS"), which prescribe the maximum permissible levels of common pollutants in the ambient air. EPA designates "nonattainment" areas — that is, areas within each State where the level of the pollutant exceeds the NAAQS. Once EPA sets a NAAQS and designates nonattainment areas within the States, the lead role shifts to the States. The States implement the NAAQS within their borders through State Implementation Plans ("SIPs"). In their SIPs, States choose which individual sources within the State must reduce emissions, and by how much. States must submit SIPs to EPA within three years of each new or revised NAAQS. One of the required elements of a SIP submission is the "good neighbor" provision, which recognizes that emissions from "upwind" regions may pollute "downwind" regions. The good neighbor provision requires upwind States to bear responsibility for their fair share of the nonattainment in downwind States. EPA plays the critical role in gathering information about air quality in the downwind States, calculating each upwind State's good neighbor obligation, and transmitting that information to the upwind State. With that information, the upwind State can then determine how to meet its good neighbor obligation in a new SIP or SIP revision. If a State does not timely submit an adequate SIP (or an adequate SIP revision) to take account of the good neighbor obligation as defined by EPA, responsibility shifts back to the Federal Government. Within two years of disapproving a State's SIP submission or SIP revision, or determining that a State has failed to submit a SIP, EPA must promulgate a Federal Implementation Plan ("FIP") to implement the NAAQS within that State.

In August 2011, the EPA promulgated the "Transport Rule" (also known as the "Cross-State Air Pollution Rule") in order to implement the statutory good neighbor requirement. The Transport Rule defines emissions reduction responsibilities for 28 upwind States based on those States' contributions to downwind States' air quality problems. The Rule limits emissions from upwind States' coal- and natural gas-fired power plants, among other sources. Those power plants generate the majority of electricity used in the United States, but they also emit pollutants that affect air quality. The Transport Rule targets two of those pollutants, sulfur dioxide (SO2) and nitrogen oxides (NOx).

In *EME Homer City Generation, L.P. v. U.S. Environmental Protection Agency*, 696 F.3d 7 (D.C.Cir. 2012), various States, local governments, industry groups, and labor organizations petitioned the United States Court of Appeals for the District of Columbia Circuit for review of the Transport Rule. The Court of Appeals held that the Transport Rule exceeds the EPA's authority under CAA in two ways. First, the Transport Rule violated the statutory text in the CAA that grants EPA authority only to require upwind

States to reduce their own significant contributions to a downwind State's nonattainment. Second, the Transport Rule violated the statutory provision in the CAA that affords States the initial opportunity to implement reductions required by EPA under the good neighbor provision. Thus, the Court of Appeals vacated the Transport Rule rulemaking action and the Transport Rule FIPs, remanded the proceeding to the EPA, and ordered that EPA continue administering the Clean Air Interstate Rule of 2005 pending promulgation of a valid replacement.

The United States Supreme Court granted certiorari (case no. 12-1182) and accepted the following questions for review:

1. Whether the court of appeals lacked jurisdiction to consider the challenges on which it granted relief.
2. Whether States are excused from adopting SIPs prohibiting emissions that "contribute significantly" to air pollution problems in other States until after the EPA has adopted a rule quantifying each State's interstate pollution obligations.
3. Whether the EPA permissibly interpreted the statutory term "contribute significantly" so as to define each upwind State's "significant" interstate air pollution contributions in light of the cost-effective emission reductions it can make to improve air quality in polluted downwind areas, or whether the Act instead unambiguously requires the EPA to consider only each upwind State's physically proportionate responsibility for each downwind air quality problem.

At oral argument, which was held on December 10, 2013, a majority of the Justices appeared inclined to uphold the EPA's authority and discretion to implement the Transport Rule regulations. A decision by the Supreme Court is expected by June 2014.

For more information:
http://blog.aklandlaw.com/2012/09/articles/air-quality/in-striking-down-epas-transport-rule-under-the-clean-air-act-federal-court-is-struck-with-epas-refusal-to-acknowledge-any-textual-limits-on-its-authority/

3. *American Trucking Associations v. City of Los Angeles*, ___ U.S. ___, 133 S.Ct. 2096 (2013).

The City of Los Angeles' Board of Harbor Commissioners runs the Port of Los Angeles pursuant to a municipal ordinance known as a tariff, which sets out various regulations and charges. In the late 1990's, the Board decided to enlarge the Port's facilities to accommodate more ships. Neighborhood and environmental groups objected to the proposed expansion, arguing that it would increase congestion and air pollution and decrease safety in the surrounding area. To address the community's concerns, the Board implemented a Clean Truck Program beginning in 2007. Among other actions, the Board devised a standard-form "concession agreement" to govern the relationship between the

Port and any trucking company seeking to operate on the premises. Under that contract, a company may transport cargo at the Port in exchange for complying with various requirements. Two of those requirements compel the trucking company to (1) affix a placard on each truck with a phone number for reporting environmental or safety concerns, and (2) submit a plan listing off-street parking locations for each truck when not in service. The Board then amended the Port's tariff to ensure that every company providing drayage services at the facility would enter into the concession agreement. Violations of that policy were subject to criminal penalties. In *American Trucking Associations v. City of Los Angeles*, ___ U.S. ___, 133 S.Ct. 2096 (2013), a unanimous U.S. Supreme Court held that the Federal Aviation Administration Authorization Act of 1994 expressly preempts the two requirements described above. The Court declined to decide in the case's present, pre-enforcement posture, whether federal law governing licenses for interstate motor carriers prevents the Port from using the agreement's penalty clause to punish violations of other, non-preempted provisions. It remains to be seen what climate change or anti-pollution actions local jurisdictions may use, short of criminal sanctions, to avoid the preemption problem present in this case.

4. *Washington Environmental Council v. Bellon*, 732 F.3d 1131, (9th Cir. 2013).

Non-profit conservation groups brought a citizen suit under the federal Clean Air Act ("CAA") to compel the Washington State Department of Ecology and other regional agencies to regulate greenhouse gas emissions from the state's five oil refineries under the Clean Air Act. Plaintiffs argued that the defendant agencies failed to define emission limits--called "reasonably available control technology" ("RACT")--for greenhouse gases, and apply those limits to the oil refineries, in violation of two provisions of Washington's CAA State Implementation Plan (SIP). The defendant agencies admitted that they have never set or applied RACT standards for GHG emissions at the oil refineries. Plaintiffs insisted that the Agencies do so pursuant to the mandate in SIP. Defendants responded that Washington's SIP is not federally enforceable as to regulation of greenhouse gases because they are not properly criteria pollutants with recognized NAAQS under the CAA. The District Court awarded plaintiffs summary judgment on one of the plaintiffs' claims, but dismissed the other. On appeal, the Ninth Circuit held that the plaintiffs failed to establish two requirements for Article III standing for both of those claims, and remanded the case to be dismissed for lack of subject matter jurisdiction.

First, the court held that plaintiffs failed to satisfy the "causality" requirement for standing purposes. Under the causality requirement, plaintiffs must show that the injury is causally linked or "fairly traceable" to the Agencies' alleged misconduct, and not the result of misconduct of some third party not before the court. Here, "Plaintiffs offer only vague, conclusory statements that the Agencies' failure to set RACT standards at the Oil Refineries contributes to greenhouse gas emissions, which in turn, contribute to climate-related changes that result in their purported injuries. …Plaintiffs' causal chain--from lack of RACT controls to Plaintiffs' injuries--consists of a series of links strung together by conclusory, generalized statements of 'contribution,' without any plausible scientific or other evidentiary basis that the refineries' emissions are the source of their injuries.

While Plaintiffs need not connect each molecule to their injuries, simply saying that the Agencies have failed to curb emission of greenhouse gases, which contribute (in some undefined way and to some undefined degree) to their injuries, relies on an 'attenuated chain of conjecture' insufficient to support standing." The court continued: "[T]he critical inquiry for standing purposes is whether the Agencies' alleged misconduct causes injury to Plaintiffs. Injury to the environment alone is not enough to satisfy the causation prong for standing."

Second, the court held that plaintiffs failed to meet the "redressability" requirement of Article III standing. Redressability requires "a substantial likelihood that the injury will be redressed by a favorable judicial decision." Here, the record is devoid of any evidence that RACT standards would curb a significant amount of GHG emissions from the oil refineries. Furthermore, plaintiffs did not submit any evidence that an injunction requiring RACT controls would likely reduce the pollution causing plaintiffs' injuries. In fact, the evidence showed the opposite:
It is undisputed that GHG emissions is not a localized problem endemic to Washington, but a global occurrence. Because the effect of collective emissions from the oil refineries on global climate change is "scientifically indiscernible," plaintiffs' injuries are likely to continue unabated even if the oil refineries have RACT controls."

The case is significant because the Ninth Circuit panel refused to extend to plaintiff non-profit conservation groups the relaxed standing that the U.S. Supreme Court allowed in the pivotal GHG case of *Massachusetts v. EPA* 549 U.S. 497 (2007). That is because "the present case neither implicates a procedural right nor involves a sovereign state."

5. *Rocky Mt. Farmers Union v. Corey*, 730 F.3d 1070, (9th Cir. 2013).

Plaintiffs Rocky Mountain Farmers' Union *et al*. and American Fuels & Petrochemical Manufacturers Association *et al*. separately sued Defendant California Air Resources Board ("CARB"), contending that the Low Carbon Fuel Standard ("LCFS"), Cal. Code Regs. tit. 17, §§95480-90) violated the dormant Commerce Clause of the United States Constitution and was preempted by the federal Renewable Fuel Standard in Section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o). The LCFS is part of CARB's implementation of AB32, the Global Warming Solutions Act. In September 2013, a divided 2-1 panel of the United States Court of Appeals for the Ninth Circuit held that the LCFS' regulation of ethanol does not facially discriminate against out-of-state commerce, and the LCFS' initial crude-oil provisions did not discriminate against out-of-state crude oil in purpose or practical effect. The Majority opinion also held that the LCFS does not violate the dormant Commerce Clause's prohibition on extraterritorial regulation. The Ninth Circuit remanded the case to the United States District Court to consider whether the LCFS's ethanol provisions discriminate in purpose or in practical effect. If so, then the District Court should apply strict scrutiny to those provisions. If not, then the District Court should apply the balancing test established in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), to the LCFS' ethanol provisions. The District Court was also directed to apply the *Pike* balancing test to the crude oil provisions. To prevail under that test, Plaintiffs must show that the LCFS imposes a burden on interstate commerce that is

"clearly excessive" in relation to its local benefits. The Majority opinion also rejected CARB's argument that Section 211(c)(4)(B) of the Clean Air Act authorized the LCFS under the Commerce Clause. The Dissenting/Concurring opinion agreed with Majority's conclusions concerning the crude oil regulations and preemption under the Clean Air Act, but disagreed with the Majority's conclusion that the LCFS' ethanol regulations do not facially discriminate against interstate commerce.

6. *Morning Star Packing Co. et al. v. California Air Resources Board* was filed in (Sacramento Superior Court, case no. 2013-80001464).

The California Chamber of Commerce filed a lawsuit against the California Air Resources Board ("CARB") on November 13, 2012, in Sacramento County Superior Court (case no. 34-2012-80001313), on the ground that the California Global Warming Solutions Act of 2006 (Assembly Bill 32) does not authorize the California Air Resources Board to impose fees other than those needed to cover ordinary administrative costs of implementing a state emissions regulatory program. On April 16, 2013, the related case of *Morning Star Packing Co. et al. v. California Air Resources Board* was filed by several petitioners, including a processor of bulk tomato products, an oil company, the California Construction Trucking Association, the Loggers Association of Northern California, the Construction Industry Air Quality Coalition, the National Tax Limitation Committee and individuals. Pacific Legal Foundation represents the petitioner. In *Morning Star*, the petitioner alleges that "[t]he revenues CARB has collected and intends to collect by auctioning emission allowances constitute illegal taxes levied on Californians in violation of the California Constitution, while the auctions generating such revenues are not authorized by AB 32." Petitioner also alleges that the legislation enacted in 2012 to allocate the funds raised by the cap-and-trade auction is also unconstitutional because such legislation did not meet the 2/3rds requirement.

On November 12, 2013, Sacramento County Superior Court Judge Timothy held that AB 32 expressly authorized ARB to adopt regulations that establish a market based compliance mechanism, including the cap-and-trade program, and to choose the method of distribution of allowances under the program. "Distribution" includes sale of allowances via an auction; thus the court held that "the sale of allowances is within the broad scope of authority delegated to ARB in ARB 32." Although the court found that the auction charges "do not fit squarely within any of the recognized fee classifications," the court also held that the charges are valid under Proposition 13 and are not illegal taxes. "On balance, the court agrees [with ARB] that the charges are more like traditional regulatory fees than taxes, but it is a close question." Also the court found that "because the proceeds can only be used to advance the regulatory purposes of AB 32, by definition the total amount of fees collected will not exceed the costs of the regulatory programs they support." The court then held that there was a sufficient lexis between the fees charged and the regulatory burden imposed by the fee payers' products or operations, because there was a "reasonable relationship between the charges and the covered entities' (collective) responsibility for the harmful effects of GHG emissions."

7. Truckers' Legal Battle Against CARB's Diesel Regulations Rejected By Ninth Circuit As Untimely.

The California Construction Trucking Association ("CCTA"), filed a lawsuit against the California Air Resources Board ("CARB") in 2011 challenging CARB's diesel engine regulations. The U.S. District Court dismissed the case, finding that the U.S. EPA was an indispensible party to the litigation and that the District Court no longer had jurisdiction over the case. CCTA appealed to the Ninth Circuit. On July 11, 2013, the Ninth Circuit held in *California Construction Truck v. USEPA* (docket no. 13-70562) that the petition for review was untimely since it was filed in February 2013, which was more than 60 days after notice of the agency's decision was published in the Federal Register on April 4, 2012.

8. CARB's Off-Road and On-Road Diesel Regulations

On September 13, 2013, the United States Environmental Protection Agency ("USEPA") authorized the California Air Resources Board ("CARB") to enforce all provisions of the In-Use Off-Road Diesel Vehicle Regulation ("Off-Road Regulation"). The Off-Road Regulation was originally approved by the Board in May 2007, and amended in January 2009, July 2009, and December 2010. In order to provide fleets adequate time to ensure compliance, ARB will phase in enforcement of various elements of the rule beginning January 1, 2014. ARB will begin to enforce the emissions performance requirements for large fleets on July 1, 2014 and then annually each January 1 thereafter. Fleets that fail to comply with the Off-Road Regulation will be subject to enforcement action, including potential fines.

In June 2013, CARB published an advisory to clarify requirements of the extension for manufacturer delays in the Truck and Bus Regulation ("regulation"). The advisory clarifies the requirements, the length of the temporary extension and how compliance is determined. The Truck and Bus regulation requires diesel truck and bus owners to take steps to reduce their engine emissions. Nearly all trucks and buses with a manufacturer's gross vehicle weight rating greater than 14,000 pounds that operate in California are required to be upgraded to reduce exhaust emissions between 2012 and 2023.

Also in June 2013, CARB approved an extension of the compliance deadline for the particulate matter ("PM") filter requirements to January 1, 2018, for certain types of on-road cranes that are subject to the Truck and Bus Regulation ("regulation"), Title 13, California Code of Regulations, Section 2025. This extension remains in effect unless circumstances regarding the extension change including but not limited to retrofit feasibility and Occupational Safety and Health Administration ("OSHA") requirements. Crane operators expressed concerns that installation of PM filter retrofits on crane engines in heavier cranes may change weight distribution and reduce engine performance, which would conflict with existing crane certification, safety requirements, and highway weight limits. To address safety concerns and avoid conflicts with OSHA requirements and related certification of on-road cranes, and to provide more time to

further investigate retrofit feasibility and safety, CARB issued the compliance extension for the PM filter installation deadline for certain types of on-road cranes.

For more information:
http://www.arb.ca.gov/msprog/mailouts/msc1325/msc1325.pdf
http://www.arb.ca.gov/msprog/mailouts/msc1317/msc1317.pdf

9. Draft AB 32 Scoping Plan Updated

On October 1, 2013, the California Air Resources Board issued the public discussion draft of the required update to the AB 32 Scoping Plan. The Scoping Plan describes the comprehensive range of efforts California must take to reduce greenhouse gas emissions to 1990 levels by 2020 and meet the state's long-term goals to combat climate change. California's strategy to meet the goals of AB 32 is based on the continued implementation of adopted actions including Advanced Clean Cars, the 33% Renewables Portfolio Standard, statewide energy-efficiency initiatives, Cap-and-Trade, the Low Carbon Fuel Standard and other programs.

For more information:
http://www.arb.ca.gov/newsrel/newsrelease.php?id=509

10. New Regulation of Mobile Farm Equipment in San Joaquin Valley

In March 2013, the California Air Resources Board (CARB) held two public workshops to gain input on strategies to achieve both near-term and long-term reduction of diesel emissions from mobile farming equipment, such as tractors, harvesters, and combines. The initial rulemaking is aimed at enabling the San Joaquin Valley Air Pollution Control District (District) to attain compliance with the 8-hour ozone standard in the 2007 State Implementation Plan (SIP). The emphasis will be on incentivizing through subsidies the replacement of older equipment with the cleanest available technology (mainly Tier 3 off-road engines).

The second rulemaking involves developing strategies for the District to comply with the new eight-hour ozone standard that will have to be met under the next SIP. (The SIP is to be developed in 2014 and submitted to U.S. EPA in 2015.) The San Joaquin Valley is not the only region of the State in need of a new SIP, but is the only region where controls on farming equipment are seen as a necessary component of achieving the required ozone reductions. Strategies aimed at achieving emission reductions for mobile farming equipment under the new SIP will likely be highly reliant on public-sector incentives, including financial subsidies to help fund acquisition of the cleanest technologies available.

For more information:
http://www.arb.ca.gov/newsrel/newsrelease.php?id=414

11. Office Of Planning And Research Issues Discussion Draft Of The Environmental Goals And Policy Report

On September 30, 2013, the Governor's Office of Planning and Research issued a discussion draft of the Environmental Goals and Policy Report for public comment. The report considers the state's environmental goals in light of a projected growth to 50 million residents by 2050.

For more information:
http://opr.ca.gov/news.php?id=55

E. Endangered Species

1. *Conservation Congress v. U.S. Forest Service*, 720 F.3d 1048 (9th Cir. 2013).

The Ninth Circuit Court of Appeals upheld a decision by the United States District Court for the Eastern District of California that denied a preliminary injunction sought by a plaintiff environmental group to enjoin the U.S. Forest Service's authorization of a timber sale known as the Mudflow Vegetation Management Project in the Shasta-Trinity National Forest in California. Plaintiff alleged that federal agencies failed to adequately evaluate the effects of the Mudflow Project on the Northern Spotted Owl's critical habitat in violation of the Endangered Species Act. The Ninth Circuit first held that the appeal was not rendered moot by a new 2013 habitat designation, and subsequent reinstatement of informal consultation between the United States Forest Service and the Fish and Wildlife Service, because that new designation and consultation continue the same governmental action challenged in the lawsuit; namely, the approval of the Mudflow Project without conducting a cumulative effects analysis. The appeals court also held that the District Court did not abuse its discretion when it determined that plaintiff failed to show a likelihood of success on the merits as to its Endangered Species Act claim that federal defendants arbitrarily or capriciously approved the Mudflow Project.

2. *Central Coast Forest Assn. v. Fish & Game Commission* (2012) 211 Cal.App.4th 1433, *rev. granted*, 2013 Cal. LEXIS 1470.

The California Fish and Game Commission rejected timber owners and harvesters' petition that sought to redefine the southern boundary of the Central California Coast evolutionary significant unit to remove (delist) coho salmon in coastal streams south of San Francisco from the register of endangered species. The trial court reversed that decision, and a divided panel of the Court of Appeal for the Third Appellate District reversed the trial court judgment. The Court of Appeal held that the petition failed at the outset because a petition to delist a species may not be employed to challenge a final determination of the commission. While Fish & Game Code section 2077 provides for periodic review whether a species is endangered, the review is limited to the present condition of the species - whether the conditions that led to the original listing are still present - and not the conditions upon which a prior decision of the commission was based. The court concluded that the California Endangered Species Act (Fish & G. Code,

§ 2050 *et seq*.) authorizes the delisting of a species only where the species is no longer endangered and that the final 2004 determination of the commission to group coho salmon both south and north of San Francisco as a single evolutionary significant unit was binding on the timber owners and harvesters. However, the California Supreme Court granted review in order to consider the following limited issues: "Under the California Endangered Species Act, Fish and Game Code section 2050 *et seq*., may the Fish and Game Commission consider a petition to delist a species on the ground that the original listing was in error? If so, does the petition at issue here contain sufficient information to warrant the Commission's further consideration?" No date has been set for the Supreme Court's determination of those questions.

3. Economic Impacts Analysis In Designating Critical Habitat Under ESA.

While the Endangered Species Act ("ESA") explicitly prohibits the consideration of economic impacts in making the decision to designate a species as "endangered," consideration of such factors is allowed in the designation of "critical habitat" for that species. On August 28, 2013, the Unites States Fish and Wildlife Services ("USFWS") and National Marine Fisheries Service ("NMFS"), collectively the "Services," finalized a regulation that requires USFWS and NMFS to publish a draft economic analysis for public comment at the time they propose critical habitat for listed species. It codifies the Services' use of a "baseline" approach, limiting the scope of economic impacts considered in habitat designations to "incremental" (but for) effects. In *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011), the Ninth Circuit held that the Services may employ the baseline approach in analyzing the critical habitat designation. The new rule became effective on October 30, 2013.

For more information:
https://www.federalregister.gov/articles/2013/08/28/2013-20994/endangered-and-threatened-wildlife-and-plants-revisions-to-the-regulations-for-impact-analyses-of
http://www.gpo.gov/fdsys/pkg/FR-2013-08-28/html/2013-20994.htm

4. Proposed Federal Regulations For Incidental Take Statements.

On August 21, 2013, the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") jointly proposed new regulations for incidental take statements ("ITS") under Section 7 of the Endangered Species Act. The purpose of the proposed changes is to address the use of surrogates to estimate the amount or extent of anticipated incidental take. USFWS and NMFS have used surrogates for years in cases where the biology of the listed species or nature of the proposed action make it impractical to detect or monitor take of individuals. The proposed new regulations also provide clarity for programmatic ITSs. Programmatic ITSs address large-scale management programs covering many activities, but typically do not authorize specific numbers of take because activities carried out under the program go through separate ESA consultations, during which specific take numbers are authorized. The proposed new regulations reiterate that specific take numbers need not be authorized in a

programmatic ITS, and allow agencies to include measures in a programmatic ITS in lieu of establishing specific take levels.

For more information:
http://www.fws.gov/endangered/improving_ESA/ITS.html
http://www.fws.gov/endangered/improving_ESA/pdf/Final%20Proposed%20Rule%20e-version%20to%20Federal%20Register%208-26-2013.pdf

5. U.S. Fish and Wildlife Service Reopens Comment Period On Endangerment Listing Of Frog And Toad Species.

Following numerous requests, the U.S. Fish and Wildlife Service ("USFWS") reopened the comment periods for listing the Sierra Nevada yellow-legged frog and the northern distinct population segment of the mountain yellow-legged frog as endangered species, the Yosemite toad as a threatened species, and designate critical habitat of these species. The original 60-day comment period ended on June 24, 2013. On July 18, 2013, the Service reopened the public comment period and it closed on November 18, 2013. On January 10, 2014, the draft economic analysis on the proposed critical habitat for the three sierra amphibians was issued by the USFWS. The release of the draft economic analysis opened a new 60 day comment period that will close on March 11, 2014. In a letter addressing the designation, Congressman Tom McClintock and seven colleagues state that the listings and the associated critical habitat will impact nearly two million acres of private, state, and federal land. Opponents are concerned that critical habitat designations will likely cause severe restrictions on land access and could limit or forbid activities such as grazing, trout stocking, logging, mining, and recreational use resulting in a devastating impact on the local economies. According to the USFWS, critical habitat does not in general, restrict further development or the expansion of other type of land uses. Only activities that involve a federal permit, license or funding, and may destroy habitat must consult with USFWS. Then, project modifications may or may not be required, but the project can usually move forward.

For more information:
http://www.fws.gov/sacramento/outreach/2013/08-05/docs/QA-SierraAmphibianscommentreopening-2013aug5.pdf

F. Renewable Energy

1. AB 327 (ch. 611): Governor Brown Signs Solar Net Energy Metering Bill

In a far- effort to expand public access of solar energy, Governor Brown signed Assembly Bill 327 on October 7, 2013. AB 327 does the following:

1. The legislation repeals the limitations upon increasing the electric service rates of residential customers, including the rate increase limitations applicable to electric service provided to low-income customers of the California Alternate Rates for Energy (CARE) program. However, the legislation requires the Public Utilities Commission

(“PUC”) to ensure that low-income ratepayers are not jeopardized or overburdened by monthly energy expenditures and to adopt CARE rates in which the level of discount for low-income electricity and gas ratepayers correctly reflects their level of need. The legislation authorizes the PUC to approve fixed charges for electric utilities for the purpose of collecting a reasonable portion of the fixed costs of providing service to residential customers, but not to do so in a manner that unreasonably impairs incentives for conservation and energy efficiency, and do not overburden low-income and moderate-income customers. The legislation imposes a $10 limit per residential customer account per month for customers not enrolled in the CARE program, would impose a $5 per month limit per residential customer account per month for customers enrolled in the CARE program, and would, beginning January 1, 2016. Solar power advocates are concerned that such fixed charges could potentially dampen consumer investments in solar and energy efficiency, and could flatten tiered rates that would change the economics of solar power.

2. Beginning on January 1, 2018, the PUC may require or authorize electrical utilities to employ default time-of-use pricing to residential customers, and to offer residential customers the option of receiving service pursuant to time-variant pricing. Unless the commission has authorized an electrical corporation to employ default time-of-use pricing, the bill would require the commission to require each electrical corporation to offer default rates to residential customers with at least 2 usage tiers and would require that the first tier include electricity usage of no less than the baseline quantity established by the commission. The bill would authorize the commission to modify the baseline seasonal definitions and applicable percentage of average consumption for one or more climate zones. Addressing the concerns of solar power interests, Governor Brown added the following written comments in signing the bill: “As the CPUC considers rules regarding grandfathering of net metering customers, I expect the Commission to ensure that customers who took service under net metering prior to reaching the statutory net metering cap on or before July 1, 2017, are protected under those rules for the expected life of their systems.”

3. Existing law requires electric utilities, upon request, to make available to eligible customer generators contracts or tariffs for net energy metering on a first-come-first-served basis until the time that the total rated generating capacity used by eligible customer generators exceeds 5% of the electric utility’s aggregate customer peak demand. AB 327 removes that cap and essentially require an unlimited rooftop solar program to be developed by the PUC. The legislation requires electric utilities with more than 100,000 service connections in California to provide net energy metering to additional eligible customer-generators in its service area through July 1, 2017, or until the utility reaches its net energy metering program limit. AB 327 prohibits a limitation on the number of new eligible customer-generators entitled to receive service pursuant to a new standard contract or tariff developed by the PUC for large electrical utilities.

4. By July 1, 2015, electrical utilities must submit to the PUC commission a distribution resources plan proposal to identify optimal locations for the deployment of distributed resources. The legislation requires that any electrical utility spending on

distribution infrastructure necessary to accomplish the distribution resources plan be proposed and considered as part of the next general rate case for the utility, and the legislation authorizes the PUC to approve this proposed spending if it concludes that ratepayers would realize net benefits and the associated costs are just and reasonable.

5. The California Renewables Portfolio Standard Program requires the PUC to establish a rewewables portfolio standard that requires procurement of a minimum quantity of electricity products from eligible renewable energy resources at specified percentages of the total kilowatthours sold to their retail end-customers during specified compliance periods. Existing law prohibits the PUC from requiring the procurement of eligible renewable energy resources in excess of the specified quantities. However, AB 327 authorizes the PUC to require the procurement of eligible renewable energy resources in excess of the specified quantities. In other words, the legislation makes the state's 33% by 2020 Renewable Portfolio Standard a floor, and no longer a ceiling.

For more information:
http://www.latimes.com/business/la-fi-brown-energy-bills-20131008,0,6466305.story?track=rss

2. SB 43 (ch. 413): Governor Signs Legislation For "Solar Gardens."

Governor Brown recently signed the long-awaited "solar gardens" legislation into law. Solar gardens are often created by electric cooperatives that construct and operate an array or "garden" of solar panels. Consumers can buy panels outright or subscribe to their output, and the electricity generated from those panels is delivered to the customers via the cooperative's transmission lines or deducted from their metered consumption. Senate Bill ("SB") 43 creates a program that allows any customer of California's largest utilities – PG&E, SCE, and SDG&E – to purchase up to 100% renewable electricity for their home or business. That power would come from small to medium-sized solar and other renewables projects. Participants would then receive a credit on their utility bill for the clean energy produced. The California Public Utilities Commission ("CPUC") will set up rules delineating which clean energy projects qualify for the program, and how costs and benefits will be applied to the generation portion of subscribing customer bills.

For more information:
http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_43&sess=CUR&house=S&author=wolk_%3Cwolk%3E

3. Proposed Desert Solar Projects May Harm Threatened Tortoises.

On September 20, 2013, the United States Bureau of Land Management ("BLM") announced its final proposed plan for the Silver State Solar South utility scale solar project on public land near Primm, Nevada. The final proposal is for a photovoltaic solar facility that will generate 250 megawatts of power. The BLM is also in the initial stages of reviewing the Stateline Solar Farm Project, a 2,143 acre, 300 megawatt photovoltaic solar project that is located 2 miles south of the California-Nevada border and ½ mile

west of Interstate 15 in eastern San Bernardino County, California. However, the U.S. Fish and Wildlife Service's Biological Opinion ("BiOp") on the proposed Stateline and Silver State South projects that was released on September 30, 2013, estimates that more than 2,000 desert tortoises may currently occupy the project sites, but says developing the projects won't harm the species. The BiOp estimates that the two projects combined will displace or kill as many as 2,115 desert tortoises, the vast majority of them being small tortoises and eggs that the agency admits may well be destroyed without being detected. Under the terms of the Incidental Take Statement included in the BiOp, the Stateline project must stop work and re-consult with USFWS if the builders find and relocate more than 89 large tortoises. Silver State South's limit is 107 large tortoises.

For more information:
http://www.blm.gov/ca/st/en/fo/needles/stateline_solar_farm.html
http://www.blm.gov/nv/st/en/fo/lvfo/blm_programs/energy/Silver_State_Solar_South.html
http://www.blm.gov/nv/st/en/info/newsroom/2013/september/blm_publishes_final.html
http://www.kcet.org/news/rewire/wildlife/two-desert-solar-plants-may-harm-thousands-of-tortoises.html

G. Hazardous Substance Control and Cleanup

1. AB 227 (ch. 581): Limitations to Citizen Enforcement of Alleged Proposition 65 Violations.

In September 2013, the California Legislature passed Assembly Bill 227, which is designed to limit the monetary recovery by private citizen enforcement actions under the Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) for specified types of exposure to chemicals causing cancer or birth defects or other reproductive harm in those circumstances when the failure to provide clear and reasonable warnings has been remedied and a penalty has been paid. Specifically, AB 227 requires a person filing an enforcement action in the public interest for certain specified exposures to provide a notice in a specified proof of compliance form. The bill prohibits an enforcement action from being filed by that person, and would prohibit the recovery of certain payments or reimbursements, if the notice to the alleged violator alleges a failure to provide a clear and reasonable warning for those specified exposures and, within 14 days after receiving the notice, the alleged violator corrects the alleged violation, pays a civil penalty in the amount of $500 per facility or premises, and notifies the person bringing the action that the violation has been corrected pursuant to the specified proof of compliance form. The bill specifies that the alleged violator may correct the violation, pay the civil penalty, and serve a correction notice on the person who served notice of the violation only one time for a violation arising from the same exposure in the same facility or on the same premises. The bill requires the Judicial Council, on April 1, 2019, and at each 5-year interval thereafter, to adjust that civil penalty, as specified. AB 227 was signed by the Governor on October 5, 2013.

For more information

http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0201-0250/ab_227_cfa_20130910_201438_asm_floor.html; http://www.leginfo.ca.gov/pub/13-14/bill/asm/ab_0201-0250/ab_227_bill_20130918_enrolled.htm

2. California Department of Toxic Substances Control Issues "Safer Consumer Products" Regulations.

The Safer Consumer Products regulations that the Department of Toxic Substances Control ("DTSC") have been developing for several years were approved by the Office of Administrative Law ("OAL") and took effect on October 1, 2013. They will be phased in over the next several years to coordinate with the timing of the various regulatory requirements. The regulations require manufacturers or other responsible entities to seek safer alternatives to harmful chemical ingredients in widely used products. According to DTSC, the regulations provide for a four-step process to identify safer consumer product alternatives:

- Chemicals – The regulations establish an immediate list of Candidate Chemicals (~1,200) based on the work already done by other authoritative organizations, and specify a process for DTSC to identify additional chemicals as Candidate Chemicals (CCs).

- Products – The regulations require DTSC to evaluate and prioritize product/Candidate Chemical combinations to develop a list of "Priority Products" for which Alternatives Analyses must be conducted. A Candidate Chemical that is the basis for a product being listed as a Priority Product is designated as a Chemical of Concern (COC) for that product and any alternative considered or selected to replace that product.

- Alternatives Analysis – The regulations require responsible entities (manufacturers, importers, assemblers, and retailers) to notify DTSC when their product is listed as a Priority Product. DTSC will post this information on its web site. Manufacturers (or other responsible entities) of a product listed as a Priority Product must perform an Alternatives Analysis (AA) for the product and the COCs in the product to determine how best to limit exposures to, or the level of adverse public health and environmental impacts posed by, the COCs in the product.

- Regulatory Responses – The regulations require DTSC to identify and require implementation of regulatory responses designed to protect public health and/or the environment, and maximize the use of acceptable and feasible alternatives of least concern. DTSC may require regulatory responses for a Priority Product (if the manufacturer decides to retain the Priority Product), or for an alternative product selected to replace the Priority Product.

For more information:
http://www.dtsc.ca.gov/SCP/index.cfm
http://www.dtsc.ca.gov/SCPRegulations.cfm
http://www.contracostatimes.com/west-county-times/ci_24184843/california-rolls-out-new-environmental-regulatory-regime-at?source=rss

3. Pending Federal Legislation To Preempt California's Regulation Of Toxic Chemicals

The Chemical Safety Improvement Act (S.1009) is currently pending in the United States Senate. The principal co-sponsors of the legislation, the late Sen. Frank R. Lautenberg (D-N.J.) and Sen. David Vitter (R-La.), have developed legislation that would grant the U.S. Environmental Protection Agency ("EPA") new authorities to review nearly every chemical currently in use. That federal legislation, which has significant support from industry and the environmental community, could potentially preempt California's newly promulgated Safer Consumer Products regulations (discussed below). California's Attorney General wrote Congress expressing her "deep concerns" about the preemption language. Over the past summer, California Senator Barbara Boxer, chair of the Senate Environment and Public Works Committee, has been a vocal opponent of the bill. Committee hearings were held in late July, but there has not been any recent action on the bill.

For more information:
http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s.01009:
http://www.sacbee.com/2013/10/02/5786334/dan-morain-states-attempt-to-regulate.html#mi_rss=Opinion

4. EPA Amends "All Appropriate Inquiries" Rule For Purposes Of CERCLA Landowners Defenses and Brownfields Site Assessments.

The primary defenses to liability for contaminated property under the Comprehensive Environmental Response, Compensation & Liability Act ("CERCLA") are for innocent landowners, contiguous property owners and bona fide purchasers. In order to avail themselves of those defenses, potentially responsible landowners must demonstrate that they conducted "All Appropriate Inquiries." On December 30, 2013, the U.S. Environmental Protection Agency amended the standards and practices for conducting All Appropriate Inquiries at 40 CFR Part 312 to reference ASTM International's E1527–13 "Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process." The amended rule now makes it clear that persons conducting All Appropriate Inquiries may – but is not required to – use the procedures included in ASTM International's E1527–13 to comply with the All Appropriate Inquiries Rule. That amended rule not only applies to landowners who wish to avail themselves of the liability defenses, above, but also to any party conducting a site characterization or assessment on a property with a brownfields grant awarded under CERCLA section 104(k)(2)(B)(ii), including state, local and tribal governments that receive brownfields

site assessment grants. According to the EPA "The newly revised standard provides some clarifications and additional guidance for the environmental assessment of commercial and industrial properties and the determination of whether there are recognized environmental conditions or conditions indicative of releases or threatened releases of hazardous substances at a property."
For more information:
http://www.gpo.gov/fdsys/pkg/FR-2013-12-30/pdf/2013-31112.pdf

H. National Environmental Policy Act ("NEPA")

1. *Jones III v. National Marine Fisheries Service*, ___ F.3d ___, 2013 U.S. App. LEXIS 25353 (9th Cir. 2013).

In 2008, Oregon Resources Corporation ("ORC") applied for various state permits to mine chromite, garnet, and zircon sands from four sites near Coos Bay, Oregon. ORC also applied for a permit from the Army Corps of Engineers ("Corps") under Section 404 of the Clean Water Act ("CWA"), 33 U.S.C. § 1344, because the project required filling in several acres of wetland. The Corps was required to comply with the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.,* as part of the permitting process. The Corps prepared an Environmental Assessment ("EA"), issued a "Finding of No Significant Impact" ("FONSI") in lieu of preparing a full Environmental Impact Statement ("EIS"), and issued the requested Section 404 permit ("Permit"). The Bandon Woodlands Community Association and other plaintiffs (collectively "Woodlands") challenged several aspects of the EA and FONSI. Specifically, Woodlands claim that (1) the EA was deficient because it did not adequately examine the risks associated with the potential generation of toxic hexavalent chromium (Cr+6) as a result of the proposed mining; (2) the FONSI was arbitrary and capricious because of "significant uncertainty" surrounding the likelihood and impact of Cr+6 generation; and (3) the grant of the Permit was arbitrary and capricious because the Corps did not conduct an adequate "alternatives analysis." The U.S. District Court granted summary judgment to the Corps. The Ninth Circuit Court of Appeals rejected Woodlands' arguments and affirmed the summary judgment.

The Ninth Circuit held that the Corps complied with NEPA in four challenged areas. First, although NEPA documents are inadequate if they contain only narratives of expert opinions, an agency may incorporate data underlying an EA by reference, as the Corps did here with publically-available data provided by ORC and discussed in an expert memorandum that studied the issues surrounding Cr+6 generation. Second, an EIS is not required anytime there is some uncertainty, but only where the effects of the project are highly uncertain, and here three separate agencies concluded that the risk of Cr+6 generation was minimal. Third, while the Corps cannot rely on monitoring and mitigation alone in reaching a FONSI, here the Corps relied in part on the expert conclusion that Cr+6 generation due to ORC's mining project was *unlikely* given the site conditions, and the long-term monitoring of the site did not serve to dismiss the risk of Cr+6 generation, or to obtain data necessary to make a well informed environmental impact analysis, but merely to confirm that Cr+6 generation is behaving as the site

conditions suggest that it will. Fourth, whereas NEPA requires an agency to consider the cumulative impacts of a project, that only includes the cumulative effects of projects that the applicant is already proposing, and here ORC's plans to widen the scope of mining in the future were speculative and had not been reduced to specific proposals.

As for Woodlands' challenge under the CWA, the Ninth Circuit held that the Corps did not violate the requirement in the CWA that the Corps conduct an analysis of alternative sites and project designs. After taking into consideration the cost, existing technology, and logistics of alternative sites, the Corps found that such alternative sites were not practicable for the overall project purpose of extracting sufficient resources to support the specific type of mining activity at issue here.

2. *Center for Biological Diversity v. Salazar*, 706 F.3d 1085 (9th Cir. 2013).

The Ninth Circuit Court of Appeals held that the Bureau of Land Management ("BLM") did not violate the National Environmental Policy Act ("NEPA"), Federal Land Policy and Management Act ("FLPMA"), or its own mining regulation (43 C.F.R. §§ 3809 et seq.) by allowing mining operations to resume following a 17-year period of inactivity. The decision is favorable for mining projects whose initial commencement of mining operations was previously subject to NEPA review and federal agency approval.

The case involved a uranium mine located in Mohave County, Arizona, approximately six and a half miles north of Grand Canyon National Park. The mine, known as the Arizona 1 Mine, was approved for exploration and development of mining claims by BLM in 1984. Importantly, the approved plan of operations included provisions in the event of an extended period of non-operation prior to completion of mining activities. The mine was actively worked until 1992 when the mine was placed on standby status. While the mine was inactive, ownership changed through sales and mergers. During the period of inactivity, the owners maintained the buildings, property, bonds, and taxes pursuant to the approved plan of operations.
In 2007, the mine owner notified BLM of its intent to resume mining operations. BLM directed the owner to obtain new air and water permits from state agencies, update its financial guarantee covering mine reclamation, and obtain various approvals from Mohave County. Before full mining operations began, environmental groups filed suit claiming that the 17 year period of inactivity rendered the approved plan obsolete and that NEPA requires BLM to supplement its prior Environmental Assessment.

The district court ruled in favor of BLM, finding that the operations plan was not ineffective and that BLM need not prepare supplemental NEPA documentation. The district court ruled in BLM's favor on CBD's other claims as well. CBD appealed.

The Ninth Circuit affirmed the lower court's decision, holding that although approval of the 1988 operations plan was a "major Federal action" triggering NEPA review, the action was completed at the time the plan was approved. As such, the operational plan was not part of an ongoing major Federal action and no supplemental review was needed because NEPA review had been completed and the action approved. CBD argued that

BLM's requirement that the mine operator seek new air and water permits and other local approvals converted the mining operations to an ongoing action, but the Court disagreed.

This case is important for confirming that an agency cannot be required to perform supplemental NEPA review with respect to project approval decisions that have already been finalized, even where new information surfaces regarding the project's environmental impacts. Also notable in the opinion is the holding that updating a financial guarantee is a ministerial action rather than a major Federal action triggering NEPA review. Finally, the opinion recognizes that a lead agency may use a Categorical Exclusion ("CE") for actions that may fall within the CE guidelines and need only examine whether "extraordinary circumstances" exist that would prevent the use of a CE. Thus, this case furthers the efficiency of utilizing NEPA CE's where available.

For more information:
http://cdn.ca9.uscourts.gov/datastore/opinions/2013/02/04/11-17843.pdf

3. Draft Handbook for Joint NEPA/CEQA Review Released

In March 2013, the Governor's Office of Planning and Research and the White House Council on Environmental Quality released for public review a draft handbook for integrating NEPA and CEQA review. The document, *NEPA & CEQA: Integrating Federal and State Environmental Review*, was developed jointly by State and Federal agencies to improve the process when a project is required to meet the requirements of both statutes.

The handbook discusses the similarities and differences between NEPA and CEQA, acknowledging that the conflicts often result in confusion, delay, and legal vulnerability. The handbook also contains a section of common questions and answers, a framework for coordinating among multiple agencies, and specific guidance regarding projects seeking license from the California Energy Commission.

For more information:
http://opr.ca.gov/docs/NEPA_CEQA_Draft_Handbook_March_2013.pdf
http://www.whitehouse.gov/sites/default/files/nepa_and_ceqa_draft_handbook.pdf

I. Mining

1. *Center for Biological Diversity v. Bureau of Land Management*, 937 F.Supp.2d 1140 (N.D.Cal. 2013).

In *Center for Biological Diversity v. Bureau of Land Management*, the U.S. District Court for the Northern District of California held on March 31, 2013, that the U.S. Bureau of Land Management ("BLM") violated the National Environmental Policy Act when the BLM decided to sell four oil and gas leases for approximately 2,700 acres of federal land in Monterey and Fresno Counties without first preparing an Environmental Impact Statement. On cross-motions for summary judgment, the court found that the

Environmental Assessment of the leases conducted by BLM in 2011 ("EA") was erroneous as a matter of law because the BLM unreasonably relied on a 2006 proposed resource management plan/final environmental impact statement to arrive at a conclusion that no more than one exploratory well would be drilled in the total area of the leases. The court found that such a projection was not reasonable in light of the dramatically increased fracking activities in shale oil areas that even the BLM observed. The court noted, "The evidence before BLM showed that the scale of fracking in shale-area drilling today involves risks and concerns that were not addressed by the [2006] general analysis of oil and drilling development in the area." While the EA briefly discussed fracking, the BLM improperly reserved its analysis of the impacts of fracking until applications for a permit to drill were submitted in the future. The court explained: "[I]t was unreasonable for BLM not to at least consider reasonable projections of drilling in the area that include fracking operations …." Furthermore, the possible health risks from the chemicals involved in fracking, combined with the leased parcels' proximity to important water resources, "should have been properly considered" by the BLM. The court concluded: "BLM argues that the effects of fracking on the parcels at issue are largely unknown. The court agrees. But this is precisely why proper investigation was so crucial in this case. BLM's dismissal of any development scenario involving fracking as 'outside of its jurisdiction' simply did not provide the 'hard look' at the issue that NEPA requires." In September 2013 the parties reached a tentative settlement under which the Federal Government agreed to conduct a California-wide study on the effects of fracking on water and wildlife.

For more information:
http://www.sfgate.com/science/article/Study-of-hydraulic-fracturing-in-state-puts-off-4822735.php

2. U.S. Bureau of Land Management Postpones Oil/Gas Lease Auctions Over Fracking Concerns, And Proposes New Fracking Rules For Federal Public And Tribal Lands.

In May 2013, the U.S. Bureau of Land Management announced that it would postpone all oil and gas lease auctions in California. Although the official reasons cited for the postponement include budgetary issues, a key reason is likely the court's ruling in the *Center for Biological Diversity* case, above. Furthermore, the BLM issued a revised proposed rule on May 16, 2013, regarding fracking on federal and Indian lands for oil and gas production in response to over 177,000 public comments to the original proposed rule issued in 2012. Among other things, the revised rule provides more guidance on the disclosure of the chemicals used in the fracking process, and the trade secret protections for chemical compositions of the fracking fluids.

For more information:
http://bigstory.ap.org/article/blm-postpones-oil-gas-lease-auctions-calif
http://www.blm.gov/wo/st/en/info/newsroom/2013/may/nr_05_16_2013.html
http://online.wsj.com/article/SB10001424127887324767004578488821344316236.html?mod=rss_opinion_main

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/public_affairs/hydraulicfracturing.Par.91723.File.tmp/HydFrac_SupProposal.pdf

3. U.S. Environmental Protection Agency Studying Impacts Of "Fracking" On Drinking Water and Groundwater.

At the request of Congress, the U.S. Environmental Protection Agency is conducting a study to better understand any potential impacts of fracking on drinking water and ground water. The first progress report was released in December 2012. The EPA extended its deadline for the public to submit data and scientific literature to inform EPA's research until November 15, 2013. A final draft report is expected to be released for public comment in 2014.

For more information:
http://www2.epa.gov/hfstudy

4. "Fracking" Regulation Included In Pending Legislation In U.S. Senate

United States Senators Bernard Sanders and Barbara Boxer introduced Senate Bill 332 ("Climate Protection Act of 2013") on February 14, 2013. Included in that bill is Section 301, which would require that, both before and after fracking operations are conducted, the person conducting the fracking operations must disclose to the applicable state a list of chemicals that are intended to be/have been used in any underground injection during the fracking operations. The bill presently lies with the Senate Committee on Environment and Public Works.

For more information:
http://beta.congress.gov/bill/113th-congress/senate-bill/332
http://thomas.loc.gov/cgi-bin/bdquery/D?d113:1:./temp/~bd33Pi:@@@X|/home/LegislativeData.php|

5. SB 4 (ch. 313): "Fracking" Regulated In California.

Several bills related to fracking were introduced in the California Legislature in 2013. On May 30, 2013, the Assembly rejected Assembly Bill 1323, which would have placed a moratorium on fracking in the state until regulations adopted by DOGGR take effect. The only piece of fracking legislation that survived was Senate Bill 4, which the Legislature approved and the Governor signed on September 20, 2013.

SB 4 is designed to directly regulate fracking in California. The legislation has been described by an industry trade association as "the most stringent and farthest reaching regulations of hydraulic fracturing and other oil and natural gas production technologies anywhere in the country and probably the world." Among other things, SB 4 requires the following: (1) the Secretary of the Natural Resources Agency muse complete an independent scientific study on well stimulation treatments, including acid well stimulation and hydraulic fracturing treatments, by January 1, 2015; (2) an owner or

operator of a well must record and include all data on acid treatments and well stimulation treatments; (3) the California Department of Conservation's Division of Oil, Gas and Geothermal Resources ("Division") must adopt rules and regulations specific to well stimulation by January 1, 2015; (4) a well operator must apply for a permit prior to performing a well stimulation treatment; (5) the Division must perform random periodic spot check inspections during well stimulation treatments; (6) the Secretary of the Natural Resources Agency must notify various legislative committees on the progress of the independent scientific study on well stimulation and related activities until the study is completed and peer reviewed by independent scientific experts; (7) the well operator must provide a copy of the approved well stimulation treatment permit to specified tenants and property owners at least 30 days prior to commencing a well stimulation treatment; (8) the well operator must provide notice to the Division at least 72 hours prior to the actual start of a well stimulation treatment in order for the Division to witness the treatment; (9) the supplier of the well stimulation treatment must provide to the well operator, within 30 days following the conclusion of the treatment, certain information regarding the well stimulation fluid; (10) the well operator, within 60 days of the cessation of a well stimulation treatment, must post on an Internet Web site accessible to the public specified information on the well stimulation fluid; (11) the Division must commence a process to develop an Internet Web site for operators to report specific information related to well stimulation treatments, and that web site must be operational by January 1, 2016; (12) the Division's rules and regulations will apply even where the Division shares jurisdiction over a well with a federal entity; (13) a supplier claiming trade secret protection for the chemical composition of additives used in a well stimulation treatment must disclose the composition to the Division, which would generally be prohibited from disclosing that information; (14) persons who violate provisions relating to well stimulation treatments are subject to a civil penalty of not less than $10,000 and not to exceed $25,000 per day per violation; (15) on or before July 1, 2015, the State Water Resources Control Board must develop a groundwater monitoring model criteria to be implemented either on a well-by-well basis or on a regional scale, on how to conduct appropriate monitoring on individual oil and gas wells subject to a well stimulation treatment in order to protect all waters designated for beneficial uses and prioritize the monitoring of groundwater that is or has the potential to be a source of drinking water. In light of the passage of SB4, the "discussion draft" fracking regulations that the Division had been in the process of promulgating will probably be rendered moot, and the Division will begin the process of formulating the new regulations required under SB4.

For more information:
http://blogs.sacbee.com/capitolalertlatest/2013/06/single-fracking-bill-remains-before-california-legislature.html
http://www.conservation.ca.gov/dog/general_information/Documents/121712NarrativeforHFregs.pdf
https://www.wspa.org/blog/post/looking-forward-hydraulic-fracturing-california

6. SB 447 (ch. 417): Legislation Giving Greater Flexibility For AB 3098 List.

Senate Bill 447 modifies the Office of Mine Reclamation's ("OMR") authority to list or delist a mine from its list of "good mines" under California Public Resources Code Section 2717 (more commonly referred to as the AB 3098 List). Mines on the AB 3098 List are eligible to sell to public agencies. This new law allows mines to remain on the AB 3098 List while correcting violations pursuant to an order to comply. The existing law requires compliance with state reclamation and financial assurance standards, but does not specifically address situations where mines are actively working to resolve violations.

For more information:
http://www.leginfo.ca.gov/cgi-bin/postquery

7. Public Resources Code Section 2775(a).

In 2013, Plaintiff's attorneys have started challenging surface mining approvals in "areas of statewide or regional significance" (usually MRZ) utilizing a provision only used once (in 1983) previously. Public Resources Code Section 2775 (a) allows "… any person who is aggrieved by the granting of a permit to conduct surface mining… may appeal to the board ". If taken to the extreme (as many plaintiff's attorneys are known to do) this could be disastrous for the mining community seeking discretionary approvals. It could also suggest that counties or cities supporting mining in their jurisdiction, not seek designation of any lands as "areas of statewide or regional significance" or even have that designation removed. The appeal must be taken within 15 days of exhausting one's right to appeal per the lead agency procedures.

J. Cultural Resources Protection

1. *Quechan Tribe of the Fort Yuma Indian Reservation v. United States Department of the Interior et al.*,927 F.Supp. 2d 921 (S.D.Cal. 2013).

The U.S. District Court for the Southern District of California rejected the Quechan Tribe's suit challenging the proposed Ocotillo Wind Energy Facility ("OWEF") Project. The Tribe brought suit in 2012 claiming that the Bureau of Land Management's ("BLM") approval of a Record of Decision ("ROD") for the project violated the National Historic Preservation Act ("HNPA"), Federal Land Policy and Management Act ("FLPMA"), and the National Environmental Quality Act ("NEPA").

In its NHPA claim, the Tribe alleged that BLM failed to identify all historic resources prior to approval of the ROD, and failed to consult the Tribe. The court reviewed the administrative record and determined that archaeological surveys were conducted in the area of direct impact, thus satisfying the requirement for identifying historical resources. The court also found that BLM sought to engage the Tribe throughout the development process. In fact, the Tribe was invited to and participated in archaeological surveys.

The Tribe's FLPMA claim alleged that the OWEF Project does not comply with the limited use designation within the California Desert Conservation Area ("CDCA") Plan, violates the Visual Resource Management ("VRM") standards, and will result in unnecessary and undue degradation of public land. The court rejected these claims finding that the Tribe failed to demonstrate that the OWEF Project would significantly impact sensitive resources. The court considered that numerous mitigation measures, a reduction in the number of turbines, and the small project footprint all contributed to the basis of BLM's decision to adopt the ROD.
The Tribe alleged that BLM was required to analyze six energy projects planned for the CDCA within a single environmental impact statement ("EIS"). The court held that the Tribe failed to show sufficient connection between the project that would support the need for combined analysis. Finally, the court held that BLM's analyses and conclusions were not arbitrary, capricious, or an abuse of discretion.

On February 27, 2013, the U.S. District Court similarly dismissed *Desert Protective Council v. U.S. Department of the Interior*, No. 12cv1281-GPC(PCL) (S.D. Cal. Feb. 27, 2013), a companion case to the *Quechan Tribe* lawsuit. The Plaintiffs, an environmental group and a labor union, alleged violations of NEPA, FLPMA, and the Bald and Golden Eagle Protection Act ("BGEPA"). The Plaintiffs challenged the availability and adequacy of scientific studies that supported BLM's decision.
The court rejected the Plaintiffs' arguments deferring to BLM's scientific methodology. Citing the BLM's robust and comprehensive administrative record of the agency's studies and actions, the court deferred to BLM's expertise in the subject matter.

K. Environmental Enforcement

1. *Voggenthaler v. Maryland Square LLC*, 724 F.3d 1050 (9th Cir. 2013).

Homeowners and the Nevada Department of Environmental Protection ("NDEP") filed suit against developer Maryland Square LLC after the developer demolished a building that included previous use as a dry cleaning business. The dry cleaning business operated on the site from 1969 till 2000 and was responsible for tetrachloroethylene ("PCE") contamination. PCE is a hazardous substance as defined by Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") and the Nevada Administrative Code. Maryland Square purchased the property in 2005, knowing that the property was contaminated but that the magnitude of the contamination was not yet fully known. The Ninth Circuit rejected the developer's argument that contamination occurring completely within one state (Nevada) should not be subject to CERCLA because it would violate the Commerce Clause.

If you have any questions about this article, contact Diane Kindermann, William Abbott, Glen Hansen or Katherine Hart. The information presented in this article should not be construed to be formal legal advice by Abbott & Kindermann, LLP, nor the formation of a lawyer/client relationship. Because of the changing nature of this area of the law and the importance of individual facts, readers are encouraged to seek independent counsel for advice regarding their individual legal issues.