ABBOTT & KINDERMANN, LLP
ATTORNEYS AT LAW

2015 THIRD QUARTER ENVIRONMENTAL LAW UPDATE

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Welcome to Abbott & Kindermann's 2015 Third 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 Rights and 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) Mining / Oil & Gas, and (I) Environmental Enforcement.

A. Water Rights And Supply

1. Pumping water from a river or stream for agricultural purposes requires notification to the Department of Fish and Wildlife under Fish And Wildlife Code Section 1602.

Siskiyou County Farm Bureau v. Dept. of Fish & Wildlife (2015) 237 Cal.App.4th 411: Department of Fish & Wildlife must be notified before water is pumped out of a river or stream for agricultural purposes that substantially diverts the natural flow of the water, even if there is no alteration of or damage to the streambed itself. (**Item 1**.)

2. Tiered water rates may violate Proposition 218.

The Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano (2015) 235 Cal.App.4th 1493: Proposition 218 requires that tiered water rates must correspond to the actual cost of providing service at a given level of usage. (**Item 2**.)

3. State Water Resources Control Board forced to amend its curtailment notices to comply with Due Process requirements.

The Westside Irrigation District v. California State Water Resources Control Board (Sacramento County Superior Court, case no. 34-2015-80002121, Aug. 23, 2015): Curtailment letters did not violate Due Process rights by merely notifying there is insufficient water available for water right priority, but making no assessment of legal status or ordering cessation of water diversion. (**Item 3**.)

4. Water projects gain CEQA exemption in budget bill.

Senate Bill 88 (2015 Stats., Ch. 27): CEQA exemption for drought-related groundwater and recycled water projects. (**Item 4**.)

5. Comment period for Revised Draft Bay Delta Conservation Plan ended October 30, 2015.

Comment period for most recent revisions to the BDCP, along with Draft Recirculated Draft EIR/EIS, closed with much opposition to the project. (**Item 5**.)

B. Water Quality

1. Citizen suit allowed where Government did not assess monetary penalties for CWA violation, which is not diligent prosecution.

Friends of Mariposa Creek v. Mariposa Public Utilities District, 2015 U.S.Dist.LEXIS 128783 (E.D.Ca., case no. 1:15-cv-00583, Sept. 24, 2015): The bar to citizen suit actions where the Government is diligently prosecuting an action is not satisfied where the Government did not assess any monetary penalties. (**Item 1**.)

2. Pre-lawsuit notice of citizen suit action under CWA does not need to contain suggested corrective actions.

California Communities Against Toxics v. Weber Metals, Inc., 2015 U.S.Dist,LEXIS 59519 (C.D.Ca., case no. CV 15-0148, May 4, 2015): Notice must only inform polluter about what it is doing wrong and to allow it an opportunity to correct the problem, but need not contain suggested corrective actions. (**Item 2**.)

C. Wetlands

1. Sixth Circuit Court of Appeals temporarily blocks the new federal rule defining "Waters of the United States."

In re: Environmental Protection Agency and Department of Defense Final Rule; 'Clean Water Rule: Definition of Waters of the United States,' 80 Fed.Reg. 37,054 (June 29, 2015), 2015 U.S. App. LEXIS 17642, 2015 Fed.App. 0246P (6th Cir., case no. 15-3799/3822/3853 /3887, Oct. 9, 2015): New federal "Waters of the U.S." rule is temporarily enjoined because its distance limitations may not have sufficient scientific basis and may not comply with *Rapanos v. United States*, 547 U.S. 715 (2006). (**Item 1**.)

D. Air Quality & Climate Change

1. EPA wrongly deemed cost irrelevant in decision to regulate hazardous air pollutants from stationary sources.

Michigan v. EPA, ___ U.S. ___, 135 S.Ct. 2699 (2015): EPA interpreted Clean Air Act unreasonably when it deemed cost irrelevant to the "appropriate and necessary" decision in regulating power plants. (**Item 1**.)

2. Legislation to further address greenhouse gases and renewable energy moves forward, without provision mandating a 50% reduction in petroleum use in motor vehicles.

Senate Bill 350 (2015 Stats., Ch. 547) – Legislation establishing Renewable Portfolio Standard target of 50 percent 2030 and other GHG matters is approved, as Assembly rejects petroleum use reduction measure. (**Item 2**.)

3. Legislation further limiting greenhouse gas emissions fails to pass Assembly, becomes a two-year bill.

Senate Bill 32 – Facing stiff opposition, bill requiring a statewide GHG emission limit equivalent to 80% below the 1990 level to be achieved by 2050 "based on the best available scientific, technological, and economic assessments" is made into a two-year bill. (**Item 3**.)

4. U.S. EPA adopts oil refinery emission rules.

EPA issued a final rule to control toxic air emissions from major source petroleum refineries and to provide information to the public. (**Item 4**.)

5. U.S. EPA issues new ozone standard, as industry expresses relief and environmental groups voice disappointment.

EPA strengthened the National Ambient Air Quality Standards for ground-level ozone from 75 parts per billion (ppb) to 70 ppb, instead of 60 ppb as environmental groups wanted. (**Item 5**.)

6. Federal agencies propose plans to issue tougher fuel economy standards for heavy-duty vehicles.

EPA and NHTSA propose Phase 2 rules requiring greater fuel efficiency of heavy-duty on-road vehicles, including semi-trucks. (**Item 6**.)

7. California Air Resources Board proposes plan to reduce hcf gases by 40 % by 2030.

CARB released its draft strategy for reducing Short-Lived Climate Pollutants. (**Item 7**.)

E. Endangered Species

1. Notice of intent was sufficient for purposes of a citizen suit under federal ESA related to suction dredge placer mining.

Klamath-Siskiyou Wildlands Center v. MacWhorter, 2015 U.S.App.LEXIS 13952 (9th Cir.2015) - Information provided in ESA notice letter, combined with information to which Forest Service had ready access, was sufficient for ESA consultation. (**Item 1**.)

2. Migratory Bird Treaty Act's ban on "takings" only prohibits intentional acts.

U.S. v. CITGO Petroleum Co., 2015 U.S. App. LEXIS 15865 (5th Cir.2015) - MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds. (**Item 2**.)

3. Citizen suit notice provision under ESA requires strict compliance, including giving notice to the proper federal official

Center For Environmental Science, Accuracy & Reliability v. Cowin, 2015 U.S. Dist.LEXIS 122310 (E.D.Ca.2015) - notice letters sent to the director of the Fish and Wildlife Service, but not to the Secretary of the Interior, did not comply with ESA notice provisions. (**Item 3**.)

4. NMFS' search for documents in response to FOIA request found inadequate and untimely.

Our Children's Earth Foundation v. National Marine Fisheries Service, 2015 U.S. Dist.LEXIS 94997 (N.D.Ca.2015) - U.S. District Court held that NMFS' declaration was vague and therefore insufficient to establish the adequacy of a search under FOIA. (**Item 4**.)

F. Renewable Energy

1. Operation of a renewable energy generation facility exempt from SMARA.

Assembly Bill 1034 (2015 Stats., Ch. 595) - operation of a renewable energy generation facility is made exempt from Surface Mining and Reclamation Act requirements. (**Item 1**.)

G. Hazardous Substance Control and Cleanup

1. Air Toxic Hot Spots Guidance Manual Released.

The Air Toxics Hot Spots Program Guidance Manual for the Preparation of Risk Assessments was released by the Office of Environmental Health Hazard Assessment. (**Item 1**.)

H. Mining / Oil & Gas

1. Federal Judge Blocks New Federal Rules On Fracking On Federal Lands.

In *State of Wyoming v. U.S. Dept. of the Interior*, 2015 U.S. Dist. LEXIS 135044 (D.Wy., case no. 2:15-CV-043, Sept. 30, 2015) - New fracking rule is enjoined because "Congress has not authorized or delegated to the BLM authority to regulate hydraulic fracturing." (**Item 2**.)

I. Environmental Enforcement

1. U.S. Government not liable for any CERCLA cleanup at manufacturing facility that produced aircraft and parts for decades for national defense.

TDY Holdings, LLC v. U.S., 2015 U.S.Dist.LEXIS 102490 (S.D.Ca., case no. 3:07-CV-787, July 29, 2015) - although the Government was a past owner of facilities at site used for defense manufacturing, private operator introduced contaminants at site and so is 100% responsible for cleanup. (**Item 1**.)

2. RCRA citizen suite claims cannot be sustained based on speculation, stormwater issues, or "on-site" RCRA violations.

Ecological Rights Foundation v. PG&E, 2015 U.S.Dist.LEXIS 15645 (N.D.Ca., case no. 10-cv-00121, Jan. 30, 2015) – among other things, plaintiff's claim of tire-track contaminants is invalid as it is not based on any data or tests, but on the speculative assertion that "is well-known among practitioners in the storm water pollution prevention field" that pollutants can be tracked off-site by vehicles. (**Item 2**.)

SUMMARIES – SELECT CASE LAW, LEGISLATION & REGULATIONS

A. Water Rights And Supply

1. *Siskiyou County Farm Bureau v. Dept. of Fish & Wildlife* (2015) 237 Cal.App.4th 411 - Pumping Water From A River Or Stream For Agricultural Purposes Requires Notification To Department Of Fish And Wildlife Under Fish And Wildlife Section 1602.

California Fish and Game Code sections 1600 et seq. were adopted in 1961 to ensure that the California Department of Fish and Wildlife ("DFW") was notified for projects that substantially altered a watercourse. Section 1602 requires that an entity or person notify DFW and obtain a Lake and Streambed Alteration Agreement ("Agreement") before that entity or person begins any activity that will "substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any river, stream, or lake …." In 2011, the Siskiyou County Farm Bureau filed a declaratory relief action in Superior Court in Siskiyou in order to clarify the rights and duties of its members under section 1602. In June 2015, the Court of Appeal for the Third Appellate District held that, under section 1602, DFW must be notified before an entity or person pumps water out of a river or stream for agricultural purposes that substantially diverts the natural flow of the water, even if there is no alteration of or damage to the streambed itself. That notification triggers arbitration and adjudication procedures in the event of disagreement over whether a substantial diversion has occurred or will occur. The court's ruling changes the 50-year practice of ranchers and farmers in Siskiyou County who had not provided such notification. DFW's concern over the impact of the current drought on fish populations appears to be the motivating force behind the state's broader enforcement of that statutory notification provision. As the Court of Appeal explained, even if DFW had not previously enforced section 1602 absent streambed alteration, "that is an insufficient basis on which to find the statute precludes it from doing so. In the face of extreme drought and piscatorial peril, the Department now wishes to employ the full measure of the law to substantial dewatering of streams absent physical alteration to the streambeds. Its previous lack of enforcement does not rewrite the statute." The court added: "Quite obviously, a severe drought, which has the effect of further damaging the habitat of an endangered fish species, must be part of the factual matrix considered in determining what is a reasonable use of the water—water which belongs to the people, and only becomes the property of users—riparian or appropriative—after it is lawfully taken from the river or stream. Past practices, no matter how long standing, do not change current reality." The court's opinion certainly endorses renewed governmental efforts to regulate water supplies for environmental purposes during the current drought.

2. *The Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493 - Tiered Water Rates May Violate Proposition 218.

A taxpayers association challenged a city water district's decision to impose a tiered rate that went up progressively in relation to usage and impose charges for recycling within the rate structure. The trial court found that the rates did not comply with Proposition 218 (Cal. Const., art. XIII D.) The Court of Appeal affirmed the judgment in part, reversed in part, and remanded the matter for further proceedings. The trial court erred in holding that Proposition 218 does not allow public water agencies to pass on to their customers the capital costs of improvements to provide additional increments of water—such as building a recycling plant. While Article XIII D, section 6, subdivision (b)(4) precludes fees for a service not immediately available, both recycled water and traditional potable water are part of the same service—water service—which was immediately available to customers. However, the record was unclear whether low-usage customers might be paying for a recycling operation made necessary only because of high-usage customers, which would be inconsistent with section 6(b)(4). In a key holding, the court also held that the trial court did not err in ruling that Proposition 218 requires public water agencies to calculate the actual costs of providing water at various levels of usage. Article XIII D, section 6, subdivision (b)(3) of the California Constitution, provides that water rates must reflect the "'cost of the service attributable'" to a given parcel. While tiered, or inclined rates that go up progressively in relation to usage are perfectly consonant with article XIII D, section 6, subdivision (b)(3), the tiers must still correspond to the actual cost of providing service at a given level of usage. The water agency here did not try to calculate the cost of actually providing water at its various tier levels. It merely allocated all its costs among the price tier levels, based not on costs, but on predetermined usage budgets. Accordingly, the trial court correctly determined the agency had failed to carry the burden imposed on it by another part of Proposition 218 (art. XIII D, § 6, subd. (b)(5)) of showing it had complied with the requirement water fees not exceed the cost of service attributable to a parcel at least without a vote of the electorate.

The California Supreme Court denied a request by the State's Attorney General and Water Resources Control Board to depublish the Court of Appeal's opinion. That decision is therefore being used throughout the State to challenge tiered water rates, including a class-action lawsuit challenging tiered rates in Marin County. Because such challenges may remove one of the most effective ways to encourage people to use less water, the Court of Appeal opinion (and by extension, Proposition 218) have been widely criticized by State officials. Governor Brown said the ruling "put a straitjacket on local government at a time when maximum flexibility is needed" during the drought. The Governor even went so far as to add the following comment to a signing statement in October 2015: "Proposition 218 . . . serves as an obstacle to thoughtful, sustainable water conservation pricing and necessary flood and stormwater system improvements."

For more information:
http://www.ocregister.com/articles/water-673362-city-capistrano.html
http://www.foxandhoundsdaily.com/2015/10/governor-browns-attack-on-prop-218-is-a-threat-to-the-middle-class/
http://www.latimes.com/politics/la-pol-sac-jerry-brown-water-rates-california-20151009-story.html

3. *The Westside Irrigation District v. California State Water Resources Control Board* (Sacramento County Superior Court, case no. 34-2015-80002121, Aug. 3, 2015) - State Water Resources Control Board Forced To Amend Its Curtailment Notices

In May and June 2015, the State Water Resources Control Board issued letters to several water districts to stop diverting water under pre-1914 water rights, including a letter entitled "Notice Of Unavailability Of Water And Immediate Curtailment." While those letters were challenged administratively before the Board, several water districts brought an action in the Superior Court in Sacramento County (*The Westside Irrigation District v. California State Water Resources Control Board*, Sacramento County Superior Court, case no. 34-2015-80002121) seeking a temporary restraining order and an order to show cause why a preliminary injunction should not be issued to stay enforcement of the curtailment letters. A Superior Court judge granted that TRO because the curtailment letters were coercive in nature and went beyond an information purpose. Even though the curtailment letters were not enforceable on their own and there were no separate penalties for violating them, the language used in the letters resulted in a command by the Board to stop water diverting activities. The letters were not merely suggesting a voluntary cessation of activities. After issuance of the TRO, but before the hearing on the OSC re Preliminary Injunction, the Board issued another series of letters in July to the petitioners ("July Letter") that partially rescinded the earlier rescission letters. At the hearing on the preliminary injunction, the Superior Court found that the Board had removed the coercive language in the July Letter that was in the original curtailment letters. The July Letter no longer required recipients to cease diverting water or required them to sign a curtailment certification form. The court explained: "While the July Letter does notify the recipient that the Board has information indicating that there is insufficient water available for their water right priority, in and of itself, does not violate Due Process principles, as the July Letter makes no assessment of the recipient's legal status in light of such a determination and no longer commands the recipient to take any action." In short, "[t]he July Letter now rescinds this language of command that the Court found violated Petitioners' Due Process Rights." Accordingly, the court denied the preliminary injunction and the matter continues administratively before the Board.

4. Senate Bill 88 (2015 Stats., Ch. 27) - Water Projects Gain CEQA Exemption In Budget Bill.

Governor Jerry Brown proposed CEQA exemptions for drought-related groundwater and recycled water projects in a trailer bill to the state budget. The exemptions were narrowed, but eventually approved as part of Senate Bill 88. Under SB 88, certain groundwater replenishment projects are exempt from CEQA until January 1, 2017. Also exempt from CEQA until July 1, 2017, are the development and approval of building standards by state agencies for recycled water systems, and the adoption of an ordinance to impose stricter conditions on the issuance of well permits or changes in the intensity of land use that would increase demand on groundwater.

5. Comment Period For Revised Draft Bay Delta Conservation Plan And Its Draft Recirculated Draft EIR/EIS Ended October 30, 2015.

On April 30, 2015, the Brown Administration changed the permitting approach for the plan to build a pair of massive 30-mile-long tunnels to divert water under the Sacramento-San Joaquin Delta. The old plan sought a 50-year habitat restoration plan for conservation to be paid by water agencies, which water users had wanted for long-term pumping rules with less variation over time. But requirements for the 50-year approval could not be met, because BDCP proponents failed to convince Federal biologists that fish and wildlife would be restored under the old plan. The Brown Administration will now decouple the tunnel part of the project from the habitat restoration component and seek short-term permits that could grow stricter as Delta conditions change. The new revisions will bring the costs of the tunnel part of the environmental plan. The new plan will also reduce the restoration of 153,000 acres of habitat land to 30,000 acres, which the Brown administration estimates will cost $300 million. The comment period for the Bay Delta Conservation Plan/California WaterFix Partially Recirculated Draft Environmental Impact Report/Supplemental Draft Environmental Impact Statement was extended to October 30, 2015. The plan faces stiff opposition. For example, an opposition letter signed by several prominent environmental groups and presented during the comment period referred to the 48,000 pages of environmental reports released so far as "conclusory Water Tunnels advocacy," and the project "a huge water grab with some window dressing."

For more information:
http://baydeltaconservationplan.com/2015News.aspx
http://www.sacbee.com/news/state/california/water-and-drought/article28340107.html

B. Water Quality

1. *Friends of Mariposa Creek v. Mariposa Public Utilities District*, 2015 U.S.Dist.LEXIS 128783 (E.D.Ca., case no. 1:15-cv-00583, Sept. 24, 2015) – Citizen Suit Allowed Where Regional Water Board Did Not Assess Monetary Penalties For CWA Violation, Which Is Not Diligent Prosecution.

In 2007, the California Regional Water Quality Board, Central Valley Region (the "Regional Water Board") issued a National Pollutant Discharge Elimination System (NPDES) permit to the Mariposa Public Utilities District (the "District") in December 2007 (the "2007 Permit"). The 2007 Permit limited the amount of daily, weekly, and monthly pollutant emissions the District could discharge into Mariposa Creek. On July 13, 2011, the Regional Water Board issued a Time Schedule Order (the "2011 TSO") to the District, which acknowledged that the District had been unable to comply with effluent limits and set a schedule designed to bring the District into compliance. The 2011 TSO also set interim effluent limits. In 2013, the Regional Water Board served the District with a Notice of Violation and issued an Administrative Civil Liability Complaint (the "Administrative Complaint"). On March 28, 2014, the Regional Water Board issued a new NPDES permit (the "2014 Permit") to the District. Also on that date, the regional Water Board issued a second TSO (the "2014 TSO").

In 2015, Plaintiffs filed a citizen suit under 33 U.S.C. §1365, alleging that neither the EPA nor the State of California had diligently prosecuted any action against the District for violations of the Clean Water Act. In response, the District filed a motion to dismiss for lack of subject matter

jurisdiction and failure to state a claim. Citizen suits under §1365 may be barred by 33 U.S.C. §1319(g)(6)(A), which states that civil actions may not be brought if the State has commenced and is diligently prosecuting an action. The District argued that the TSOs and Administrative Complaint constitute 'diligent prosecution' such that the citizen suit is not permitted. The Ninth Circuit Court of Appeal has previously found a distinction between monetary penalties sought in an administrative penalty action and non-monetary 'penalties' sought in an administrative compliance action. In order to find 'diligent prosecution,' the Ninth Circuit has consistently required monetary penalties. The U.S. District Court here determined that TSOs and Administrative Complaint did not constitute diligent prosecution because they did not assess any monetary penalties on the District. Thus, because there was no evidence of diligent prosecution, the Court did not lose subject matter jurisdiction over the present case.

2. *California Communities Against Toxics v. Weber Metals, Inc*., 2015 U.S.Dist,LEXIS 59519 (C.D.Ca., case no. CV 15-0148, May 4, 2015) – Pre-Lawsuit Notice Of Citizen Suit Action Under CWA Found Sufficient, And Does Not Need To Contain Suggested Corrective Actions.

Plaintiff filed a Clean Water Act ("CWA") citizen suit complaint against Weber Materials ("Weber") for allegedly discharging polluted stormwater and non-stormwater into Los Angeles County's municipal sewer system. The citizen suit provision of CWA requires that written notice be given of the alleged violation at least 60 days before the suit is filed. Plaintiff alleged five causes of action, and Weber moved to dismiss, claiming that Plaintiff failed to provide an adequate pre-lawsuit notice. Weber also argued that specific allegations in the Complaint that were not mentioned in the notice letter should be stricken. Weber further contended that the notice letter did not contain sufficient details about the alleged violations, nor any suggested corrective actions. The Court concluded that the notice contained sufficient information for Weber to find the locations of alleged violations within its own facility. The Court noted that "[t]he objective of the notice requirement is not to prove violations, it is to inform the polluter about what it is doing wrong and to allow it an opportunity to correct the problem." The Court also explained that the notice requirement does not require that the notice to contain suggested corrective actions. As to Weber's motion to strike, the Court reasoned that the allegations in the Complaint simply provided additional detail about the conditions and practices, and that the activities were sufficiently similar to those in the notice as to meet the notice requirement. Thus, the motions to dismiss and strike were denied.

C. <u>Wetlands</u>

1. *In re: Environmental Protection Agency and Department of Defense Final Rule; 'Clean Water Rule: Definition of Waters of the United States,' 80 Fed.Reg. 37,054 (June 29, 2015),* 2015 U.S. App. LEXIS 17642, 2015 Fed.App. 0246P (6th Cir., case no. 15-3799/3822/3853/3887, Oct. 9, 2015) - Sixth Circuit Court of Appeals Temporarily Blocks The New Rule By EPA And USACE Defining "Waters of the United States" Under The Clean Water Act.

On May 26, 2015, the United States Environmental Protection Agency and the United States Army Corps of Engineers issued a final and long-awaited rule on defining the meaning and extent of "Waters of the United States" for purposes of establishing federal jurisdiction under the Clean Water Act ("CWA"). According to the EPA and USACE, an estimated 3 percent more waterways would be covered by the CWA under the new rule, although the scope of jurisdiction under the rule "is narrower than that under the existing regulation." The definition in the rule will be relied on by CWA programs such as section 402 NPDES permits, section 404 discharge permits, and section 311 oil spill prevention and response programs.

A number of lawsuits were filed around the country in different U.S. District courts by at least eighteen States challenging the new rule. Those cases were consolidated into case no. EPA-HQ-OW-2011, Judicial Panel on Multi-District Litigation, No. 135, before the United States Court of Appeals for the Sixth Circuit. On October 9, 2015, by a vote of 2-1, a panel of the Sixth Circuit issued an order that stayed the new rule nationwide pending determination of the court's review of its own subject matter jurisdiction in the matter. The majority concluded that the "status quo" to be maintained is the "pre-Rule regime of federal-state collaboration that has been in place for several years, following the Supreme Court's decision in *Rapanos v. United States*, 547 U.S. 715 (2006)." Furthermore, the majority noted that "petitioners have demonstrated a substantial possibility of success on the merits of their claims" because "it is far from clear that the new Rule's distance limitations are harmonious with the instruction" of Justice Kennedy in the *Rapanos* case. In addition, the court indicated that "the rulemaking process by which the distance limitations were adopted is facially suspect," as the petitioners adequately demonstrated that the administrative record is devoid of specific scientific support for the distance locations that were included in the final rule.

Meanwhile, the House of Representatives passed a bill (H.R. 1732) on May 12, 2015, which would withdraw the rule and have the agencies reconsider it after additional consultation with the states and industries. According to House Speaker John Boehner, the new rule will send "landowners, small businesses, farmers and manufacturers on the road to a regulatory and economic hell." The legislation is pending in the U.S. Senate.

For more information:
http://www.ca6.uscourts.gov/opinions.pdf/15a0246p-06.pdf
http://www2.epa.gov/sites/production/files/2015-05/documents/rule_preamble_web_version.pdf
http://www.desmoinesregister.com/story/money/agriculture/2015/05/27/epa-water-rules-iowa/28038957/
http://www.politico.com/story/2015/05/epa-waterways-wetlands-rule-118319.html
http://www.myfoxchicago.com/story/29203369/gop-attack-on-water-rule-part-of-wider-bid-to-rein-in-epa

D. Air Quality & Climate Change

8. *Michigan v. EPA*, ___ U.S. ___, 135 S.Ct. 2699 (2015) – EPA Wrongly Deemed Cost Irrelevant In Decision To Regulate Hazardous Air Pollutants From Stationary Sources.

The Clean Air Act directs the U.S. Environmental Protection Agency ("EPA") to regulate emissions of hazardous air pollutants from certain stationary sources (such as refineries and factories). The EPA may regulate power plants under this program only if it concludes that "regulation is appropriate and necessary" after studying hazards to public health posed by power-plant emissions. (42 U.S.C., §7412(n)(1)(A).) The EPA found that power-plant regulation "appropriate" because the plants' emissions pose risks to public health and the environment and because controls capable of reducing these emissions were available. It found regulation "necessary" because the imposition of other Clean Air Act requirements did not eliminate those risks. The Agency refused to consider cost when making its decision. It estimated, however, that the cost of its regulations to power plants would be $9.6 billion a year, but the quantifiable benefits from the resulting reduction in hazardous-air-pollutant emissions would be $4 to $6 million a year. Petitioners (including 23 States) sought review of EPA's rule in the D. C. Circuit, which upheld EPA's refusal to consider costs in its decision to regulate. The Supreme Court held that EPA interpreted §7412(n)(1)(A) unreasonably when it deemed cost irrelevant to the decision to regulate power plants. EPA strayed well beyond the bounds of reasonable interpretation in concluding that cost is not a factor relevant to the appropriateness of regulating power plants. It was not rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. Section 7412(n)(1) required EPA to conduct three studies, including one that reflects concern about cost, and EPA agreed that the term "appropriate and necessary" must be interpreted in light of all three studies. Furthermore, the possibility of considering cost at a later stage, when deciding how much to regulate power plants, does not establish its irrelevance at this stage. EPA must consider cost--including cost of compliance--before deciding whether regulation is appropriate and necessary.

9. Senate Bill 350 (2015 Stats., Ch. 547) – Provision Mandating A 50% Reduction In Petroleum Use In Motor Vehicles by January 1, 2030 Fails To Pass, As Other Measures Addressing Greenhouse Gases And Renewable Energy Are Signed Into Law.

In its original form, as passed by the Senate, Senate Bill 350 (de León) would have directed the California Air Resources Board to adopt and implement motor vehicle emissions standards, in-use performance standards, and motor vehicle fuel specifications in furtherance of achieving a 50% reduction in petroleum use in motor vehicles by January 1, 2030. Assembly amendments removed petroleum reduction goals from the bill in their entirety. Supporters of the legislation blamed heavy opposition lobbying by the oil industry, as one industry group labeled the legislation "an attempt to essentially put oil companies out of business." As passed by the Legislature and signed by the Governor, SB 350 does the following, among other things:

(1) Establishes a Renewable Portfolio Standard target of 50 percent by December 31, 2030;
(2) Includes provisions in furtherance of doubling the energy efficiency savings in electricity and natural gas end uses by 2030;
(3) Requires CARB to identify and adopt appropriate policies to remove regulatory disincentives facing retail sellers from facilitating the achievement of greenhouse gas (GHG) emission reductions in other sectors through increased investments in

transportation electrification, including an allocation of GHG emissions allowances to retail sellers to account for increased emissions in the electric sector from transportation electrification;

(4) Requires the CPUC to direct Investor Owned Utilities to propose multiyear programs and investments to accelerate widespread transportation electrification to reduce dependence on petroleum, meet air quality standards, achieve the goals set forth in the Charge Ahead California Initiative, and reduce emissions of greenhouse gases to 40 percent below 1990 levels by 2030 and to 80 percent below 1990 levels by 2050. Requires the CPUC to approve programs and investments that deploy charging infrastructure as distribution system costs;

(5) Requires the CPUC to permit community choice aggregators (CCAs) to submit proposals for satisfying their portion of the renewable integration need;

(6) Requires the CEC to study barriers for low-income customers to access solar photovoltaic, other renewable energy, energy efficiency, and weatherization investments;

(7) Requires ARB to study barriers for low-income customers to access zero-emission and near zero-emission transportation options; and

(8) Amends the public works provision of the Labor Code to specify that construction, alteration, demolition, installation, or repair work on the electric transmission system located in California constitutes a public works project, subjecting these projects to prevailing wage.

For more information:
http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0301-0350/sb_350_cfa_20150911_211234_sen_floor.html
http://thinkprogress.org/climate/2015/09/10/3700145/california-drops-petroleum-measure-sb-350/

10. Senate Bill 32 - Legislation Further Limiting Greenhouse Gas Emissions Fails To Pass Assembly, But Stays Alive In The Senate As A Two-Year Bill.

The California Global Warming Solutions Act of 2006, generally known as AB 32, mandated that the California Air Resources Board (CARB) adopt both statewide greenhouse gas (GHG) emissions limits equivalent to the statewide GHG emission level in 1990 and rules and regulations to achieve maximum, technologically feasible, and cost-effective GHG emissions reductions by 2020. In 2015, Senate Bill 32 (Pavley) would have required CARB to adopt a statewide GHG emission limit equivalent to 80% below the 1990 level to be achieved by 2050 "based on the best available scientific, technological, and economic assessments." SB 32 would have also authorized CARB to adopt interim GHG emission level targets for 2030 and 2040. SB 32 passed the Senate, but failed to pass the Assembly with 15 abstentions, and so the bill was referred back to committee as a two-year bill.

For more information:
http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0001-0050/sb_32_cfa_20150904_170421_asm_floor.html

http://www.latimes.com/opinion/editorials/la-ed-climate-change-20150911-story.html

11. U.S. EPA Adopts Oil Refinery Emission Rules.

On September 29, 2015, the U.S. Environmental Protection Agency ("EPA") issued a final rule that will further control toxic air emissions from "major source" petroleum refineries and provide important information about refinery emissions to the public and neighboring communities. This rule will virtually eliminate smoking flare emissions and upset emission events. The new rule is the first national rule requiring refineries to monitor emissions at key emission sources within their facilities and around their fencelines. Under this new rule, refineries will have to install one or two dozen canisters that continuously sample the air for benzene. Because the fenceline monitoring devices will not provide real-time air quality readings, refiners will need to locate the pollution source if the devices record benzene concentrations over the EPA's limit of 9 micrograms per cubic meter. Benzene is a carcinogen that is also considered to be an indicator of other harmful pollutants. It is estimated that this new rule will result in a reduction of 5,200 tons per year of toxic air pollutants, and 50,000 tons per year of volatile organic compounds (VOC). Because low-income families and minorities are twice as likely as the general population to live near refinery fencelines, the new rule is an important environmental justice measure.

For additional information:
http://www3.epa.gov/airtoxics/petref.html

12. U.S. EPA Issues New Ozone Standard, As Industry Expresses Relief And Environmental Groups Voice Disappointment.

On October 1, 2015, the U.S. Environmental Protection Agency ("EPA") strengthened the National Ambient Air Quality Standards (NAAQS) for ground-level ozone from 75 parts per billion (ppb) to 70 ppb. Ozone is a smog-causing gas that often forms on hot, sunny days when chemical emissions from power plants, factories, and vehicles mix in the air. Studies have linked smog to asthma, heart and lung disease, and premature death. The EPA's scientific panel recommended setting the ozone limit between 60 ppb and 70 ppb. In late 2014, the EPA published the draft rule setting the limit between 65 ppb and 70 ppb, but sought public comment on tightening restrictions down to 60 ppb. Ultimately, the EPA finalized the rule at the upper end of the recommended range at 70 ppb. Industry representatives expressed disappointment that the regulations were strengthened at all, but relieved that that the rule was set at the least stringent option recommended by the scientific panel. Environmental groups were disappointed that the rule was not set near 60 ppb.

For more information:
http://www3.epa.gov/ozonepollution/actions.html
http://www.nytimes.com/2015/10/02/us/politics/epa-to-unveil-new-limit-for-smog-causing-ozone-emissions.html?_r=0

13. Federal Agencies Propose Rules To Issue Tougher Fuel Economy Standards For Heavy-Duty Vehicles.

In June 2015, the U.S. Environmental Protection Agency and Department of Transportation's National Highway Traffic Safety Administration published Phase 2 to significantly reduce carbon emissions and improve the fuel efficiency of heavy-duty vehicles, helping to address the challenges of global climate change and energy security. The proposed rules were published in the Federal Register on July 13, 2015. The comment period for the proposed rules was extended to October 1, 2015. The proposed Phase 2 standards would apply to a wide range of on-road vehicles, from the largest pickup trucks and vans to semi-trucks - and for the first time, would also include trailers. The specific fuel standards would vary based on vehicle size and class, but the estimated overall fuel consumption would improve by approximately 24 percent. The proposed rules for trailers include requiring manufacturers to use light-weight materials and more aerodynamic designs to improve fuel economy.

For more information:
http://www3.epa.gov/otaq/climate/regs-heavy-duty.htm

14. California Air Resources Board Proposes Plan To Reduce HCF Gases By 40 % By 2030

On September 30, 2015, the California Air Resources Board ("CARB") released its draft strategy for reducing Short-Lived Climate Pollutants ("SLCPs"). SLCPs black carbon (soot), methane (CH_4), and fluorinated gases (F-gases, including hydrofluorocarbons, or HFCs). They are powerful climate forcers and dangerous air pollutants that remain in the atmosphere for a much shorter period of time than longer-lived climate pollutants, such as CO_2, and are estimated to be responsible for about 40 percent of current net climate forcing. While the climate impacts of CO_2 reductions take decades or more to materialize, cutting emissions of SLCPs can immediately slow global warming and reduce the impacts of climate change. The goal of the strategy is to cut SLCPs by 40 percent by 2030. Methods for reducing these gases include eliminating organic waste from landfills, regulating methane emissions from oil and gas production, and requiring dairies to avoid or recapture methane released by cows. The comment period for the draft strategy ended October 30, 2015.

For more information:
http://www.arb.ca.gov/cc/shortlived/shortlived.htm

E. Endangered Species

1. *Klamath-Siskiyou Wildlands Center v. MacWhorter*, 797 F.3d 645 (9th Cir.2015) – Notice of Intent Was Sufficient For Purposes Of A Citizen Suit Under Federal ESA Related To Suction Dredge Placer Mining.

Under the General Mining Law of 1872 and the Organic Administration Act of 1897, if a mining operation "might cause significant disturbance of surface resources," the miner must submit to

the Forest Service a notice of intent to operate ("NOI"). After receiving the NOI, the Forest Service has fifteen days to notify the miner if the planned operation will likely cause significant disturbance of surface resources, which would require the miner to submit a more detailed plan of operations. A plan of operations must be approved by the Forest Service before mining may take place. In *Karuk Tribe of California v. U.S. Forest Service*, 681 F.3d 1006 (9th Cir. 2012), the Ninth Circuit held, *en banc*, that the Forest Service's review of NOIs constituted agency action subject to the consultation requirement of Section 7 of the federal Endangered Species Act ("ESA").

Following that decision, Klamath-Siskiyou Wildlands Center ("KS Wild") sent the Forest Service a letter as a notice of intent to sue under the ESA. The KS Wild letter alleged that the Forest Service had permitted suction dredge mining in the Rogue River-Siskiyou National Forest ("the National Forest"), which provides designated critical habitat for coho salmon, without consulting with NMFS, in violation of Section 7. The letter alleged generally:

> The Forest Service and its officials have authorized, approved, or otherwise acquiesced to suction dredge placer mining operations in rivers, streams, and other waters on the forest that provide habitat for fish listed under the ESA, including coho salmon of the Oregon Coast Evolutionarily Significant Unit ("ESU") and coho salmon of the southern Oregon/northern California ("SONC") [sic] ESU.

The letter then described the ESA consultation requirement, noted that NMFS has designated critical coho salmon habitat within the National Forest, and described the effect of suction dredge mining on coho salmon and their critical habitat. KS Wild later filed an amended complaint against the Forest Service. The Forest Service moved to dismiss the amended complaint for want of subject matter jurisdiction, arguing, among other things, that KS Wild's notice letter was insufficient. The U.S. District Court agreed, and the Ninth Circuit reversed.

ESA requires that plaintiffs provide notice of a violation at least sixty days prior to filing suit. (While the ESA notice provision contains language similar to citizen suit notice provisions in other environmental statutes, the ESA's notice provision has no implementing regulation.) To provide proper notice of an alleged violation, a would-be plaintiff must at a minimum provide sufficient information so that the [notified parties] could identify and attempt to abate the violation. A citizen is not required to list every specific aspect or detail of every alleged violation. Nor is the citizen required to describe every ramification of a violation. Rather, the analysis turns on the overall sufficiency of the notice. Here, KS Wild's notice was sufficient because it did not merely generally allege violations of the ESA; it specifically alleged a geographically and temporally limited violation of the ESA. It alleged that the Forest Service approved NOIs to engage in suction dredge mining in the Rogue River-Siskiyou National Forest during a specified three-year period, and that the Forest Service had not consulted as required under Section 7 of the ESA for NOIs proposing mining in critical coho habitat. The court explained: "When it combined the information provided in KS Wild's notice letter with the information to which it had ready access, the Forest Service had all the information necessary to determine whether, and in what instances, it had approved NOIs for which consultation was required under Section 7. The Forest Service knew, much better than KS Wild, what NOIs it had

approved in the National Forest; and it knew or was in a position to know, much better than KS Wild, what waters within the National Forest provided critical coho salmon habitat." Thus, the Ninth Circuit concluded that the notice letter was sufficient notice under the citizen suit notice provision of the ESA, and that there was subject matter jurisdiction in the district court over KS Wild's suit to enforce the Forest Service's obligations under Section 7.

2. *U.S. v. CITGO Petroleum Co.*, 2015 U.S. App. LEXIS 15865 (5th Cir., case no. 14-40128, Sept. 4, 2015) - Migratory Bird Treaty Act's Ban On "Takings" Only Prohibits Intentional Acts (Not Omissions) That Directly (Not Indirectly Or Accidentally) Kill Migratory Birds.

Citgo Petroleum Corporation and Citgo Refining and Chemicals Company (collectively "Citgo") were convicted of multiple violations of the Clean Air Act and the Migratory Bird Treaty Act of 1918 ("MBTA"). Citgo appealed, contending, among other things, that the district court misinterpreted the MBTA. Citgo's conviction resulted from a surprise inspection in March 2002 wherein inspectors found large amounts of oil floating atop the uncovered equalization tanks. Because the government suspected that birds had died in the uncovered tanks, Citgo was charged and convicted with an illegal "take" of migratory birds. The MBTA makes it "unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird." On appeal, Citgo challenged the MBTA conviction on the ground that unintentional bird deaths did not constitute a "take" under the MBTA. Citgo argued that illegal "take" involves only affirmative conduct intentionally directed at the birds, but does not include unintentional or indirectly caused bird deaths. The Fifth Circuit Court of Appeals compared the MBTA with the Endangered Species Act ("ESA") and the Marine Mammal Protection Act ("MMPA"). The court noted that Congress defined "take" under the ESA and MMPA to include "harm" and "harass," two terms that are missing in the MBTA. The Court reasoned that Congress deviated from the common law definition of "take" for ESA and MMPA in order to specifically cover negligent acts or omissions. If Congress wanted to include unintentional migratory bird deaths as "take" in the MBTA, it could have included language similar to the ESA and MMPA. The court held that "MBTA's ban on 'takings' only prohibits intentional acts (not omissions) that directly (not indirectly or accidentally) kill migratory birds." Thus, the Fifth Circuit overturned Citgo's MBTA conviction.

3. *Center For Environmental Science, Accuracy & Reliability v. Cowin*, 2015 U.S. Dist.LEXIS 122310 (E.D.Ca., case no. 1:15-cv-00884, Sept. 14, 2015) –Citizen Suit Notice Provision Under ESA Requires Strict Compliance, Including Giving Notice To The Proper Federal Official.

In 2014, the California Department of Water Resources ("DWR") proposed to build three different rock barriers in the Delta in order to deflect the tidal push of salt water into the Delta. The Center of Environmental Science, Accuracy & Reliability ("CESAR") threatened to sue, and DWR withdrew its proposal. In 2015, DWR conducted a study of the potential environmental impacts of the three barriers and applied for a Clean Water Act ("CWA") permit from the U.S. Army Corps of Engineers ("Corps"). On April 17, 2015, DWR requested approval to build a single barrier, and on May 4, 2015, DWR approved the project. Pursuant to the federal Endangered Species Act ("ESA"), the U.S. Army Corps of Engineers ("Corps") conducted

emergency consultation with the U.S. Fish and Wildlife Service ("FWS") regarding the salinity barrier's potential to alter conditions discussed in the 2008 Biological Opinion on the Coordinated Operations of the Central Valley Project and State Water Project (the "2008 BiOp"). On May 5, 2015, the Corps issued the CWA permit and construction began two days later. CESAR first filed suit in the Superior Court of California for Sacramento County, and then filed a complaint in the U.S. District Court for the Eastern District of California. CESAR argued that construction and operation of the salinity barrier violated Section 9 of the ESA because it causes the unlawful "take" of delta smelt. CESAR also argued that FWS violated Section 7 of the ESA by failing to initiate or reinitiate formal biological consultation on the 2008 BiOp. Defendant Cowin, director of DWR, filed a motion to dismiss, arguing that the U.S. District Court lacked jurisdiction over the case because CESAR did not comply with requirement in the ESA that written notice be given to the Secretary of the Interior at least 60 days prior to commencing a suit under the ESA. CESAR provided evidence that its notice letters were sent to the director of the FWS, but not to the Secretary of the Interior, and argued that the Secretary delegated much of its authority to regulate the ESA to the FWS. Based on this delegation, CESAR argued that the FWS director was the proper official to receive notification, and that notification to the Secretary was not required. The District Court recognized that case law has repeatedly upheld strict adherence to the notice requirement. Therefore, the court found that CESAR's assertion that the FWS director was the proper official to receive notice was flatly contradicted by statutory language. Because CESAR failed to provide notice as required, the District Court lacked jurisdiction to hear the case, and the motion to dismiss was granted.

4. *Our Children's Earth Foundation v. National Marine Fisheries Service*, 2015 U.S. Dist.LEXIS 94997 (N.D.Ca., case nos. 14-4365, 14-1130, July 20, 2015) –U.S. District Court Finds That NMFS' Search For Documents In Response To FOIA Request Is Inadequate And Untimely.

Plaintiff Our Children's Earth Foundation filed four Freedom of Information Act ("FOIA") requests to obtain information from the National Marine Fisheries Services ("NMFS") and the U.S. Army Corps of Engineers ("Corps") regarding the Central California Coast Steelhead and a dam and water system owned by Stanford University. Plaintiff alleges that NMFS failed to adequately search for the requested records as required under the FOIA. Defendant NMFS submitted a declaration from its San Francisco Branch Chief that stated that NMFS staff searched hard copy and electronic files. However, the U.S. District Court for the Northern District of California held that the declaration was vague and therefore insufficient to establish the adequacy of the search. Plaintiff also alleged that NMFS improperly redacted or withheld relevant documents. The District Court weighed the need for the protection of documents part of the deliberative process or protected by attorney-client privilege with the public's interest in full disclosure. The court concluded that some documents were properly withheld, while others were not. Plaintiff further alleged that the redaction of names in an investigative report hindered their ability to investigate possible negligence by NMFS enforcement officers. The District Court reviewed the investigative report to determine whether the redaction of names was properly done to protect privacy, and determined that NMFS properly redacted names in the report. In addition, Plaintiff requested declaratory and injunctive relief for failure to timely respond to the FOIA requests. The District Court noted that NMFS repeatedly and routinely violated FOIA's

statutory timelines, and that future requests were likely to bring the same violations. Therefore, while the court denied injunctive relief, the court granted declaratory judgment against NMFS and ordered NMFS to comply with FOIA and its deadline.

5. Bay Delta Conservation Plan Significantly Changed.

See write-up in Water Rights and Supply, item 5, above.

F. Renewable Energy

1. Assembly Bill 1034 (2015 Stats., Ch. 595) - Operation Of A Renewable Energy Generation Facility Exempt From SMARA.

Assembly Bill 1034 (Obernolte), Chapter 595, was passed (almost unanimously) by the Legislature and signed by the Governor. AB 1034 adds the operation of a renewable energy generation facility to the existing statutory list of activities exempt from the Surface Mining and Reclamation Act of 1975 ("SMARA") The bill requires a lead agency to consider the construction and operation of a renewable energy generation facility on disturbed mined lands to be an interim use and would prohibit a lead agency from requiring an amendment to an approved reclamation plan if specified criteria are met. That criteria includes: (1)The permit conditions for the energy facility will not adversely affect the ultimate reclamation of the mined lands or any ongoing mining operation; (2) the energy facility has a separate closure and decommissioning plan and a separate financial assurance mechanism to ensure that the removal of the renewable energy facility; (3) the closure and decommissioning will occur either before the use permit of the mine expires or before the mine reclamation process is completed; and (4)all local land use entitlements have been obtained and applicable provisions of state law have been complied with.

2. Senate Bill 350 (2015 Stats., Ch. 547) – Provision Mandating A 50% Reduction In Petroleum Use In Motor Vehicles by January 1, 2030 Fails To Pass, As Other Measures Addressing Greenhouse Gases And Renewable Energy Moves Forward.

See write-up in Air Quality and climate change, item 9, above.

G. Hazardous Substance Control and Cleanup

1. Air Toxic Hot Spots Guidance Manual Released.

The Office of Environmental Health Hazard Assessment ("OEHHA") released the final Air Toxics Hot Spots Program Guidance Manual for the Preparation of Risk Assessments ("Guidance Manual") in February 2015. The Guidance Manual was developed by the Office and the California Air Resources Board for use in conducting health risk assessments and in otherwise implementing the Air Toxics Hot Spots Program (Health and Safety Code Section 44360 *et. seq.*). (**Item 1**.)

For more information:

http://oehha.ca.gov/air/hot_spots/hotspots2015.html
http://oehha.ca.gov/air/hot_spots/2015/2015GuidanceManual.pdf

H. Mining / Oil & Gas

1. *Klamath-Siskiyou Wildlands Center v. MacWhorter*, 797 F.3d 645 (9th Cir.2015) – Notice of Intent Was Sufficient For Purposes Of A Citizen Suit Under Federal ESA Related To Suction Dredge Placer Mining.

See write-up in Endangered Species Act, item 1, above.

2. *State of Wyoming v. U.S. Dept. of the Interior*, 2015 U.S. Dist. LEXIS 135044 (D.Wy., Sept. 30, 2015, case no. 2:15-CV-043) - Federal Judge Blocks New Federal Rule On Fracking On Federal Lands.

For the better part of the last decade, oil and natural gas production from domestic wells has increased steadily. Most of this increased production has come through the application of the well stimulation technique known as hydraulic fracturing (or "fracking"). That procedure involves the injection of water, sand, and certain chemicals into tight-rock formations (typically shale) to create fissures in the rock and allow oil and gas to escape for collection in a well. Hydraulic fracturing has been used to stimulate wells in the United States for at least 60 years. More recently, hydraulic fracturing has been coupled with relatively new horizontal drilling technology in larger-scale operations that have allowed greatly increased access to shale oil and gas resources across the country, sometimes in areas that have not previously or recently experienced significant oil and gas development.

Purportedly in response to "public concern about whether fracturing can lead to or cause the contamination of underground water sources," and "increased calls for stronger regulation and safety protocols," the federal Bureau of Land Management ("BLM") undertook rulemaking to implement "additional regulatory effort and oversight" of this practice. The BLM reportedly received over 1.35 million comments on the supplemental proposed rule. On March 26, 2015, BLM issued the final version of its regulations applying to hydraulic fracturing on federal and Indian lands ("Fracking Rule"). The Fracking Rule's focus is on three aspects of oil and gas development that are already subject to comprehensive regulations under existing federal and state law. The rule was scheduled to take effect on June 24, 2015.

The States of Wyoming and Colorado and industry groups filed separate Petitions for Review of Final Agency Action in the U.S. District Court of Wyoming in March 2015 seeking judicial review of the Fracking Rule under the federal Administrative Procedure Act. The States of North Dakota and Utah, and the Ute Indian Tribe of the Uintah and Ouray Reservation, later intervened in the States' action, and the District Court granted the parties' motion to consolidate the two separate actions. Petitioners and Intervenor-Petitioners requested a preliminary injunction enjoining the BLM from applying the Fracking Rule pending the resolution of the litigation. The District Court granted that motion. In finding that the elements of such a motion were present, the court held, among other things, that (1) "[a]t this point, the Court does not believe Congress has granted or delegated to the BLM authority to regulate fracking"; (2) because there is a

"paucity of evidentiary support for the Rule," and "[b]ecause the BLM has failed to 'examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts and the choice made,' the Fracking Rule is likely arbitrary"; (3) there is merit in the Ute Indian Tribe's argument that the BLM failed to consult with the Tribe on a government-to-government basis; and (4) "[t]he Fracking rule creates an overlapping federal regime, in the absence of Congressional authority to do so, which interferes with the States' sovereign interest in, and public policies related to, regulation of hydraulic fracturing." In short, the District Court held: "Congress has not authorized or delegated to the BLM authority to regulate hydraulic fracturing and, under our constitutional structure, it is only through Congressional action that the BLM can acquire this authority."

3. Assembly Bill 1034 (2015 Stats., Ch. 595) - Operation Of A Renewable Energy Generation Facility Exempt From SMARA.

See write-up in Renewable Energy, item ____, above.

4. Mining Reform Legislation Stalls In The Assembly At The End Of The Legislative Session.

Several bills related to mining reform passed the house of origin during 2015, but failed to ultimately pass out of the Legislature. Those bills sought to include recommendations from the stakeholder process that was conducted within the Governor's Office.

Senate Bill 209 (Pavley) was intended to make significant revisions to the Surface Mining and Reclamation Act of 1975 ("SMARA"). Such revisions included renaming the Office of Mine Reclamation to the Division of Mines; creating the Supervisor of Mines and Reclamation to direct the Division; increasing the maximum reporting fee for any single mining operation; allowing the director of the Department of Conservation to appeal a lead agency's approval of a financial assurance cost estimate to the California State Mining and Geology Board; specifying the level of detail a reclamation plan map must have and requiring maps to be prepared by specific licensed professionals; exempting a borrow pit surface mining operation, owned or operated by the lead agency solely for use by the lead agency from certain requirements that apply to idle mines; requiring, under certain circumstances, the lead agency to provide the operator with a minimum five day written notice of a pending inspection; allowing a lead agency employee to inspect surface mining operations that are owned by the local agency; and requiring the Department of Conservation to establish a training program for all surface mine inspectors and requiring all mine inspectors to complete an inspection workshop. While SB209 passed out of the Senate on a vote of 25-13, it was placed on the inactive file in the Assembly at the end of the legislative session.

Assembly Bill 1142 (Gray) was linked to SB209 and addressed concerns that SMARA's administrative requirements are not being properly and fully implemented by all local lead agencies. This bill contained several major amendments to SMARA regarding annual mine inspections, financial assurances and the approval of financial surety documents, reclamation plans, enforcement, the role of the State Mining and Geology Board including appeals, and other

technical changes. AB1142 was passed 73-1 out of the Assembly but stalled in the Senate and placed on the inactive file.

I. Environmental Enforcement

1. *TDY Holdings, LLC v. U.S.*, 2015 U.S.Dist.LEXIS 102490 (S.D.Ca., case no. 3:07-CV-787, July 29, 2015) - U.S. Government Not Liabile For Any CERCLA Cleanup At Aeronautics Manufacturing Facility That Produced Aircraft And Parts For Decades For National Defense.

Plaintiffs TDY Holdings, LLC and TDY Industries, LLC (collectively "TDY") filed a complaint under CERCLA against defendants the United States of America, the United States Department of Defense, and the Secretary of Defense (collectively "the Government") seeking an equitable allocation of the response costs TDY has incurred, and will incur, for the cleanup of a 44-plus acre manufacturing site in San Diego (the "Site"). For decades, aircraft and aircraft parts were manufactured at the Site, primarily to fulfill military contracts for the Government. During the decades of manufacturing operations, the Site became contaminated with hazardous substances. The court was careful to point out: "This is not a case about willful disposal of hazardous wastes in disregard of the safety of the environment or in violation of the law. It is about general manufacturing processes and 'housekeeping' practices that allowed what came to be recognized as hazardous substances to accumulate in the ground and flow into the storm systems." CERCLA requires statutorily defined potentially responsible parties ("PRPs") to pay their equitable share of costs associated with the cleanup of a contaminated site. TDY has acknowledged its responsibility for the costs incurred to investigate and remediate the Site (see 42 U.S.C. § 9607(a)) and has paid substantial expenses to do so. TDY sought contribution from the Government, as an "owner of facilities" at the Site, pursuant to 42 U.S.C. § 9613(f), for the Government's equitable share of those expenses. The Government counterclaimed pursuant to 42 U.S.C. § 9613(f)(1), and requests that TDY's claim for relief be denied in its entirety or alternatively, that any equitable apportionment appropriately reflect TDY's liability.

In resolving contribution claims under CERCLA, a court may allocate response costs among liable parties using such equitable factors as the court determines appropriate. Here, the court found that the Government owned equipment at the Site that was used in the manufacture, assembly and testing of the products made at the Site that is related to the contamination, but what tools and equipment the Government owned, and when, and how they related to the contamination, remained an incomplete picture. However, the court did not afford much weight to the simple fact of ownership of "facilities" in assessing responsibility because it was not the equipment itself that caused contamination: "Rather it was the manner in which equipment was operated and/or maintained that resulted in hazardous substances being introduced to the environment." Furthermore, although TDY demonstrated that the overwhelming majority of the products it manufactured during the life of the plant were the products of defense contracts or subcontracts, made to exacting government specifications, the evidence was not persuasive that the Government managed or directed the operation of the Site, particularly with regard to operations having to do with the leakage or disposal of hazardous waste. Government personnel present on the Site did not supervise the plant management or have responsibility for plant maintenance or waste management. How chemicals were managed, contained and disposed of

during operations at the Site was TDY's responsibility. Accordingly, the court held that TDY was liable under CERCLA as an owner of facilities and the operator of the Site for the contamination and the associated response costs; that although the Government was a past owner of facilities at the site, it was not the responsible party for the introduction of the contaminants of concern into the Site's soil, sediment and water that necessitated the remediation efforts; that 100% of the past and future response costs for the remediation at the Site was allocated to TDY.

2. *Ecological Rights Foundation v. PG&E*, 2015 U.S.Dist.LEXIS 15645 (N.D.Ca., case no. 10-cv-00121, Jan. 30, 2015) – RCRA Citizen Suite Claims Cannot Be Sustained Based On Speculation, Stormwater Issues, Or "On-Site" RCRA Violations.

Defendant Pacific Gas and Electric Company ("PG&E") handles and stores utility poles treated with preservatives at its corporation and service yards. Used poles are classified as "Treated Wood Waste" ("TWW") and are brought to these facilities for processing and disposal. PG&E places TWW and any sawdust generated from them in uncovered waste bins until they can be transported for permanent disposal in landfills. Plaintiff Ecological Rights Foundation ("ERF") brought claims against PG&E alleging violations of the Clean Water Act ("CWA") and the Resource Conservation and Recovery Act ("RCRA"). ERF alleged that the stormwater is polluted by the preservatives on the poles and TWW bins and contaminates off-site into the San Francisco and Humboldt Bays. As a secondary transmission method, ERF alleges that PG&E vehicles track polluted sediment from the corporation and service yards onto adjoin streets, where the contamination enters municipal stormwater systems that eventually pollute the San Francisco and Humboldt Bays. Prior cross-motions for summary judgment resolved the CWA claims in PG&E's favor, so the remaining issue was the RCRA claim. To succeed on a RCRA claim, a plaintiff must establish two elements: (1) the disposal of solid or hazardous waste; and (2) an imminent and substantial endangerment to health or the environment. Regarding the tire-track contaminants, the Court recognized that ERF did not collect any data or conduct any tests. Rather, ERF relied on its statement that it "is well-known among practitioners in the storm water pollution prevention field" that pollutants can be tracked off-site by vehicles. The Court found that such speculation was not sufficient to sustain ERF's RCRA claim. Regarding ERF's stormwater claims, the Court determined that such claims were regulated only under the CWA, not RCRA, and that summary judgment had already been granted in PG&E's favor and PG&E was not required to obtain permits for its facilities. ERF argued that TWW sawdust left on the ground qualified as a "solid waste" but the Court reasoned that ERF lacked standing to bring such a claim because ERF lacked standing to pursue an "on-site" RCRA violation. Thus, PG&E's motion for summary judgment on the RCRA claim was granted.

If you have any questions about these court decisions, contact Diane Kindermann or Glen Hansen. 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.