ABBOTT & KINDERMANN, LLP
ATTORNEYS AT LAW

2016 MID-YEAR ENVIRONMENTAL LAW UPDATE

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Welcome to Abbott & Kindermann's 2016 Mid-Year 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) National Environmental Protection Act, and (I) Mining / Oil & Gas.

A. Water Rights And Supply

1. State Water Resources Control Board Changes Water Conservation Emergency Regulations And Adopts 'Stress Test' Approach.

On February 2, 2016, the State Water Resources Control Board ("Board") adopted an emergency water conservation regulation that set specific water conservation benchmarks at the state level for each urban water supplier. However, due to the improving drought conditions, on May 18, 2016, the Board adopted a statewide water conservation approach that replaced the prior percentage reduction-based water conservation standard with a localized "stress test" approach. The new approach requires that urban water suppliers develop locally developed conservation standards based upon each agency's specific circumstances. Such standards must ensure a three-year supply assuming three more dry years like the ones the state experienced from 2012 to 2015. For example, if a water agency projects it would have a 10 percent supply shortfall, its mandatory conservation standard would be 10 percent. All of the projections and calculations used to determine the new conservation standards will be disclosed publicly. The new regulation keeps in place a number of previous requirements, such as:

- Monthly conservation reporting by urban water suppliers;
- Prohibitions against certain water uses, including watering down a sidewalk with a hose instead of using a broom or a brush, or overwatering a landscape to where water is running off the lawn, over a sidewalk and into the gutter. Prohibitions directed to the hospitality industry also remain in place;
- Prohibitions against home owners associations taking action against homeowners during a declared drought.

The new emergency conservation standards took effect in June 2016 and remain in effect until the end of January 2017.

As directed by Governor Brown on May 9, 2016, in Executive Order B-37-16, the Board will separately take action to make some of the requirements of the regulation permanent. Those practices that will be permanently prohibited include:

- Hosing off sidewalks, driveways and other hardscapes;
- Washing automobiles with hoses not equipped with a shut-off nozzle;
- Using non-recirculated water in a fountain or other decorative water feature;
- Watering lawns in a manner that causes runoff, or within 48 hours after measurable precipitation; and
- Irrigating ornamental turf on public street medians.

For more information:
http://www.waterboards.ca.gov/water_issues/programs/conservation_portal/emergency_regulation.shtml
http://www.swrcb.ca.gov/press_room/press_releases/2016/pr051816_waterconsreg.pdf
https://www.gov.ca.gov/docs/5.9.16_Executive_Order.pdf

2. California Water Commission Approves Regulations to Guide the Sustainable Groundwater Management Plans of California Communities.

On May 18, 2106 the California Water Commission approved regulations that will guide creation of sustainability plans by local groundwater agencies. The Water Commission voted 9-0 to approve the Sustainable Groundwater Management Act (SGMA). SGMA requires local agencies to draft plans to bring groundwater aquifers into balanced levels of pumping and recharge. High and medium priority groundwater basins identified as critically over-drafted must be managed under groundwater management plans by January 31, 2020. All other high and medium priority basins must be managed under a groundwater sustainability plan by January 31, 2022, or an alternative plan by January 1, 2017. The new regulations are found in Sections 350-358.6, of Subchapter 2, of Chapter 1.5, of Division 2, of Title 23, of the California Code of Regulations.

For more information:
https://cwc.ca.gov/Documents/2016/05_May/SGMAApproval_PressRelease.pdf
http://www.water.ca.gov/groundwater/sgm/pdfs/Proposed_GSP_Regs_2016_05_10.pdf

3. "California WaterFix" Begins Lengthy And Contentious Public Administrative Hearings.

"California WaterFix" - the $15.5 billion twin tunnels project of the Bay Delta Conservation Plan in the Sacramento-San Joaquin Delta - began public administrative hearings on July 26, 2016, before the State Water Resources Control Board. The contentious hearings are expected to include more than 50 days of testimony and are scheduled through the end of January 2017. Proponents of the project appear resigned to the reality that the changes to the project made in 2015 will not increase water supplies south of the Delta, as originally hoped by those proponents, but will, at best, maintain the status quo. As it now states on the official website: "The project on average over time is not expected to provide a significant increase in water deliveries from the Delta." In fact, proponents complained on the first day of the hearings that there is the possibility that further environmental regulations could actually decrease water pumping from the Delta, even if the project is completed. That issue is so sensitive, that recent written

comments by two members of the Board in early 2016 that water flows through the Delta after the tunnels project will "be more stringent" caused several water agencies in support of the project to demand not only removal of that language, but also removal of those two members from the Board's decision on the project's water diversion. Those demands, in turn, caused opponents to again argue that the project is intended to "grab" more water from the Delta for agribusiness water districts in San Joaquin Valley. The administrative process is expected to last through much of 2017.

During that process, the issue of water supplies will be front and center because that is the financial foundation behind the water contractors' support for the project in the first place. For example, an economist with the University of the Pacific concluded in August 2016 that the project will likely deliver just 23¢ worth of economic benefit for every $1 spent because of the amount of water that the project will be capable of delivering to areas south of the Delta. But state officials counter that, while water deliveries could diminish somewhat in the future because of increasingly strict environmental regulations, without the project the problems with fish would become worse and water deliveries would be reduced even more.

Also, the California Supreme Court declined to block the purchase of five islands in the Sacramento-San Joaquin Delta by Metropolitan Water District of Southern California. That sale by the current owner, Delta Wetlands, is being challenged by environmental groups, local water districts and San Joaquin and Contra Costa counties. Those islands could be used by Metropolitan to facilitate the BDCP tunnel project, by allowing the islands to be used as staging areas for tunnel construction equipment. That lawsuit continues. Another legal action is pending over the contract that Delta Wetlands signed that requires future buyers, such as Metropolitan, to adhere to negotiated settlements regarding the use of the properties being sold.

Meanwhile, in July 2016, the Republican-controlled United States House of Representatives added 22 pages of language to the funding provisions for the Interior Department, US Forest Service and other federal agencies that are included in the 2017 budget bill (House Resolution 5538). That language would have significant impacts on water issues in California. For example, the bill would stop funding for the San Joaquin River restoration program and grant the federal Bureau of Reclamation "operational flexibility" in diverting more water to farming communities. Specifically, the Interior Department is instructed to seek to "manage export pumping rates" in the Delta "to achieve a reverse OMR flow rate of -5,000 cubic feet per second." The Democratic representative from Stockton, California, declared: "These provisions would ravage the ecology of the Delta, destroy the local fish and wildlife, and harm communities we serve." The controversial language added to the budget bill will force House and Senate negotiators to address technical water issues in working out a final funding arrangement for the federal government for the year that begins October 1, 2016. The Obama Administration threatened to veto the funding bill because of that language. One Republican representative stated the obvious: "This is an emotional subject." It is expected that resolution of the dispute over that language will not likely occur until after the November 2016 Presidential Election.

http://www.sacbee.com/news/state/california/water-and-drought/delta/article91922802.html
https://www.californiawaterfix.com/
http://touch.latimes.com/#section/-1/article/p2p-86430240/

http://www.sacbee.com/news/state/california/water-and-drought/article89926727.html
http://www.mcclatchydc.com/news/politics-government/congress/article89429592.html
http://www.congress.gov/114/bills/hr5538/BILLS-114hr5538rh.pdf
http://www.sacbee.com/news/state/california/water-and-drought/delta/article97468367.html

B. Water Quality

1. *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc.*, 2016 U.S.Dist,LEXIS 2511 (E.D.Ca., case no. 2:10-cv-01207, Jan. 8, 2016) – Attorneys' Fees Of About $1 Million Denied Where Plaintiff Failed To Provide Sufficient Evidence Of Applicable Local Rates In Sacramento.

Plaintiff California Sportfishing Protection Alliance sought an interim award of $1,270,064.97 in attorneys' fees and costs in a Clean Water Act citizen suit in the U.S. District Court for the Eastern District of California, based in Sacramento, California. Plaintiff argued that it was the prevailing party following a court order that granted in part and denied in part each party's motion for summary judgment. Under 33 U.S.C. §1365(d), attorneys' fees may be awarded to a prevailing party or substantially prevailing party where the award is "appropriate." Here, plaintiff was the prevailing party, and sought rates "based on the prevailing San Francisco Bay Area market rates for [plaintiff's] Bay Area counsel." Thus, the issue was whether local Sacramento counsel was unavailable either because they are unwilling or unable to perform because they lack the degree of experience, expertise, or specialization required to handle properly the case. The court found that the conclusory sworn statement by plaintiff's executive director that no Sacramento counsel would take Clean Water Act cases on a contingency basis was insufficient to satisfy this prerequisite for out-of-forum rates. Furthermore, the statement by an environmental lawyer that "I believe" the rates charged by plaintiff's counsel "are well within the range of market rates charged by attorneys with similar experience and skill in both the San Francisco and the Sacramento areas" failed to assert the requisite personal knowledge of that lawyer. Another statement about Sacramento rates by an environmental lawyer based on "my experience" failed to demonstrate that his referenced "experience" qualified him to opine about the prevailing rates in Sacramento. Thus, the District Court concluded that "[t]hese declarants have not pointedly stated the prevailing rate in this community for a comparable Clean Water Act litigator." Therefore, the court held that plaintiff failed to carry its burden to demonstrate that the requested rates were reasonable, and its motion for about $1 Million in attorneys' fees was denied.

C. Wetlands

1. *United States Army Corps of Eng'rs v. Hawkes Co.*, ___ U.S. ___, 136 S.Ct. 1807 (2016) - Approved Jurisdictional Determinations by USACE Under The Clean Water Act Are Judicially Reviewable As Final Agency Actions.

The Clean Water Act ("CWA") regulates the discharge of pollutants into "the waters of the United States." (33 U. S. C. §§1311(a), 1362(7), (12).) Because it can be difficult to determine

whether a particular parcel of property contains such waters, the U. S. Army Corps of Engineers ("Corps") will issue to property owners an "approved jurisdictional determination" ("JD") stating the agency's definitive view on that matter. In *United States Army Corps of Engineers v. Hawkes Co., Inc*., ___ U.S. ___, 136 S.Ct. 1807, 2016 U.S. LEXIS 3489 (2016), three companies engaged in mining peat on property that the Corps found in a JD to be waters of the U.S. due to "significant nexus" to a river 120 miles away. Taking a "pragmatic approach" to the "finality" doctrine for agency action, the United States Supreme Court unanimously held that a JD is a final agency action that is judicially reviewable under the Administrative Procedure Act. (5 U. S. C. §704.) There are important consequences when property contains waters of the U.S., in that the CWA imposes substantial criminal and civil penalties for discharging any pollutant into such waters without a permit, and the costs of obtaining such a permit are significant. JDs are defined by regulation to constitute a "final agency action" by the Corps, and JDs give rise to "direct and appreciable legal consequences." The Corps argued that there were adequate alternatives for challenging the JD in court, in that petitioners could either discharge fill material without a permit and risk an EPA enforcement action in which they could argue that no permit was required, or petitioners could apply for a permit and seek judicial review if dissatisfied with the results. The court rejected that argument because those alternatives were inadequate. "As we have long held, parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties. … Respondents need not assume such risks while waiting for EPA to 'drop the hammer' in order to have their day in court." Furthermore, "the permitting process can be arduous, expensive, and long"; and "[t]he permitting process adds nothing to the JD." Thus, the *Hawkes* decision adds to the judicial options that property owners now have regarding CWA jurisdictional issues. That decision builds on the Court's holding in *Sackett* v. EPA, 566 U.S. ___, 132 S.Ct. 1367 (2012), that a civil action could be brought under the Administrative Procedures Act to challenge the issuance of a compliance order issued by the EPA before the Government sought to enforce that order.

2. *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),* 817 F.3d 261 (6th Cir., 2016) - Sixth Circuit Court of Appeals Holds That It Has Jurisdiction To Review 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 rule ("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"). 80 Fed.Reg. 37,054 (June 29, 2015). A number of lawsuits were filed around the country in different U.S. District courts by at least eighteen States challenging the 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 February 22, 2016, the Sixth Circuit denied all motions to dismiss by multiple petitioners and held that it had jurisdiction to review the Rule. The Clean Water Act provides that certain specified actions of the EPA Administrator are reviewable directly in the U.S. Circuit Courts of Appeal. Taking a "functional" approach over a "formalistic" one, the court held that "Congress'

manifest purposes are best fulfilled by our exercise of jurisdiction to review the instant petitions for review of the Clean Water Rule."

D. Air Quality & Climate Change

1. *Juliana v. U.S.*, 2016 U.S. Dist. LEXIS 52940 (D. Or., case no. 6:15-cv-1517, April 8, 2016) – U.S. Magistrate Judge Does Not Dismiss Sweeping Climate Change Lawsuit Based On The Public Doctrine And Other Constitutional Doctrines.

Dr. James Hansen, on behalf of a group of young individuals (aged 8-19) filed a lawsuit in the U.S. District Court in Oregon to challenge the Federal Government's actions and inactions that they assert are a substantial cause in the scope and severity of climate change and will lead to substantial harm to "future generations." The claims rely on the Equal Protection and Due Process clauses of the Fifth Amendment and the implicit right to a stable climate and a violation of the public trust doctrine, both arising from the Ninth Amendment. Both the government and representatives for the coal, oil and gas industries moved to dismiss the suit under several theories: (1) lack of standing; (2) political question; (3) failure to assert a valid substantive due process claim; and (4) failure to plead a valid claim under the public trust doctrine.

U.S. Magistrate Judge Thomas M. Coffin denied the defendants' motions, finding it premature to throw out the case and, instead, that the record needed to be further developed. Judge Coffin walked carefully through the complaint, applying it the applicable standards to find that "accepting the allegations as true" that the plaintiffs sufficiently alleged (1) a concrete, particularized and imminent injury resulting from climate change; (2) an adequate causal connection between the government's actions and inactions to address the harms of carbon pollution in the U.S. and the failure to reduce carbon emissions; and (3) that the harm is redressable by the court, due to the U.S. outsized contribution to global CO2 emissions. Judge Coffin dismissed the "political question" issue, pointing to the court's ability to order agencies to craft regulations, particularly when the complaint raises issues of whether the government is violating the Constitution. Finding it too soon to determine plaintiffs' substantive due process claim when the focus is solely on the face of the complaint, Judge Coffin denied the motion to dismiss because there is not yet any evidentiary record to determine whether the government's "action, or inaction in the face of a duty to act, shocks the conscience…." Finally, Judge Coffin found that at this early stage of the proceeding, "the court cannot say that the public trust doctrine does not provide at least some…protections for some plaintiffs within the navigable water areas of Oregon."

The order must now be reviewed by U.S. District Court Judge Ann Aiken to determine whether to uphold or modify Judge Coffin's order.

2. Legislative Counsel Opines Governor Brown Exceeded His Authority In Establishing 40% GHG Reduction Target By 2030—Administration Disputes Conclusions.

AB 32, or the Global Warming Solutions Act of 2006, established a statewide greenhouse gas ("GHG") emissions reduction to 1990 levels by 2020. There has been considerable speculation, however, over what happens with AB 32 after 2020. In late April of 2015, Governor Brown issued an executive order (E.O. B-30-15) setting the interim 2030 target of 40% below 1990 levels designed to help the state achieve the overall goal of 80% below 1990 levels in 2050. Concurrently, new legislation proposed by Senator Pavley extending the State's climate change law ("SB 32") beyond 2020 ran into stiff political challenges. The bill would have set new reduction targets of 40% below 1990 levels by 2030 and 80% below 1990 levels by 2050. The current version of the bill sitting in the Assembly Appropriations Committee now seeks to only establish the 2030 target.

Fast forward to April of 2016, when, in response to a request from the Senate Republican Leader, the Chief Counsel for the Legislature issued an opinion stating that the Governor exceeded his authority when he issued the E.O., because AB 32 does not authorize the Governor to impose reduction requirements that are stricter than those that were adopted into law. Unsurprisingly, the California Air Resources Board ("CARB") challenged the opinion, pointing to language in the law that states that its intent to "maintain and continue reductions in emissions of greenhouse gases beyond 2020."

Since then CARB has moved full steam ahead, releasing draft amendments to the state's Cap-and-Trade program, extending it through 2030 and making several changes to how it applies to regulated industries and potential linkages to programs in other states and countries. Given the significant legal cloud hanging over this administrative action, it is all but certain that legal challenges will be forthcoming once these draft regulations are adopted.

The final draft of the proposed amendments was released on August 2, 2016, and the public comment period will extend until September 19, 2016. Public hearings before the Air Board are currently scheduled to follow on September 22-23, 2016, with final adoption in late March of 2017.

For more information:
https://www.gov.ca.gov/news.php?id=18938
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB32
http://www.capitalpress.com/California/20160422/california-governors-greenhouse-gas-cuts-scrutinized
http://www.arb.ca.gov/regact/2016/capandtrade16/capandtrade16.htm
http://www.arb.ca.gov/regact/2016/capandtrade16/appa.pdf

3. Cap-and-Trade Under Assault – Legally, Politically & Financially

The State's Cap-and-Trade program, authorized under AB 32, is under significant pressure in 2016. Not only is it facing legal challenges from the California Chamber of Commerce and other aligned interests in state court, it continues to face wavering political support in the Legislature and recently suffered significant practical and structural challenges as a result.

As discussed above, there are serious questions as to its legal status beyond 2020 and the Legislature does not yet appear ready to address the issue in the near future. Senate Bill 32, which would extend the state's climate-change programs to 2030, does not specifically address cap-and-trade, and the Legislature explicitly decided to exclude cap-and-trade language in SB 32. Other possible hurdles, including court actions such as the U.S. Supreme Court's delay to the implementation of the Obama Administration's Clean Power Plan and ongoing litigation from CalChamber discussed further below, have called into question the value of future carbon credits if these litigation strategies are successful. In addition, others suggest that regulated industries and speculators may be holding on to a surplus of emissions credits and buyers overestimating the credits they would need. As a consequence of this uncertainty and possibly other factors, such as the possibility that a surplus of credits is due to the state's overall reduced demand for carbon allowances, the May 2016 auction only sold about 11% of the credits offered for sale, equating to about only $2.5 million of the projected $150 million CARB had expected. The August 2016 auction sold only 32% of the credits available.

Meanwhile, the litigation strategy pursued by CalChamber continues to slowly wind its way through the courts. After the trial court upheld the validity of the State's Cap-and-Trade program, the petitioners filed an appeal in the Third District Court of Appeals (California Chamber of Commerce et al. v. State Air Resources Board et al., case no. C075930). In April 2016, after receiving initial briefings from all parties and amici, the appellate court requested supplemental briefing on several additional issues, including:

1) What is the rationale for and purpose of regulations stating the auction credits confer no property right? (See Cal. Code Regs., tit. 17, §§ 95802(a)(299); 95820(c).)

2) Describe the relationship, if any, between the probable environmental impacts caused by covered entities and the revenue generated from the auctions, and whether the record shows the Board established a reasonable relationship between the two.

3) Can the auction system be defended against the Proposition 13 challenge on the ground it is akin to a development fee? Address what standards apply when assessing the legality of such fees and how the auction system does or does not meet them.

4) Can the auction system be defended against the Proposition 13 challenge on the ground it essentially sells to covered entities the privilege to pollute?

5) Although the current petitions do not seek to invalidate any particular expenditures of the auction revenue, the record shows the revenue is used for a wide variety of programs. The plaintiffs suggest that the auction proceeds--at least in part--are being used to replace what otherwise would be general fund expenditures.

a. How directly must a particular expenditure of auction revenue be related to the goal of reducing greenhouse gases?

b. What standards should the judiciary apply in reviewing expenditures that are alleged to be replacements for general revenue expenditures?

c. What, as a practical matter, would be the remedy, if, under the applicable standards a court finds a particular program is not sufficiently tethered to the goals of Assembly Bill No. 32?

6) Address the proper test for voluntariness in the context of determining whether a payment is or is not voluntary for purposes of deciding whether it is a compulsory exaction or freely-entered transaction. Apply the test to explain whether or not the auction payments are voluntary. As part of the discussion, assume for purposes of argument only that the trial court credited the Rabo declaration, and that Morning Star (purely as a hypothetical case) will be forced out of business due to the lack of feasible, affordable, technology to reduce its greenhouse gas emissions, if it must continue to obtain emissions credits in order to operate its tomato processing facilities.

7) If this court finds the auction is deemed to be an invalid tax, what is the remedy regarding the regulations, other than a declaration invalidating the auction component?

These questions have put even more pressure on the program, suggesting the court may be open to at least some of the arguments in support of CalChamber's position. As of the day of this writing, oral arguments have not yet been set, but are anticipated for later this year.

http://www.capradio.org/articles/2016/04/18/california-appeals-court-questions-dont-bode-well-for-cap-and-trade/
http://www.sacbee.com/news/politics-government/capitol-alert/article97380457.html
http://www.sacbee.com/news/local/environment/article88972202.html
http://www.sacbee.com/news/politics-government/capitol-alert/article96689072.html
http://www.latimes.com/politics/la-pol-sac-climate-change-challenges-20160614-snap-story.html
http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=3&doc_id=2071010&doc_no=C075930

E. Endangered Species Act

1. *Center For Environmental Science, Accuracy & Reliability v. Sacramento Regional County Sanitation District,* 2016 U.S.Dist.LEXIS 72840 (E.D.Ca., case no. 1:15-cv-01103, June 3, 2016) – Strict Mail Requirement For Notice Of Action Under ESA Upheld.

The United States District Court for the Eastern District of California dismissed plaintiff's citizen suit that alleged that the Sacramento Regional County Sanitation District violated the federal Endangered Species Act ("Act"). Plaintiff alleged that the District discharged wastewater containing ammonia into the Sacramento San Joaquin Delta, which allegedly was an illegal "take" of the threatened delta smelt fish. The citizen suit provision in the ESA requires that "no action may be commenced … prior to sixty days after written notice of the violation has been given to the Secretary [of the Interior] …." The courts have held that "strict compliance" with the notice requirements in ESA is required. Here, plaintiff placed a copy of such a notice in the U.S. mail addressed to the Secretary. But there was competent and undisputed evidence that the Secretary never actually received a copy of the notice letter. Therefore, the notice was not "given" to the Secretary. The court held that, "[b]ecause Plaintiff fails to provide evidence showing that such notice was given, it also fails 'to satisfy its burden of establishing subject matter jurisdiction'" in this case.

2. *Center For Environmental Science, Accuracy & Reliability v. Cowin*, 2016 U.S.Dist. LEXIS 29016 (E.D.Ca., case no. 1:15-cv-01852, March 4, 2016), U.S.Dist.LEXIS 44242 (E.D.Ca., case no. 1:15-cv-01852, March 31, 2016) – Case Challenging Salinity Barriers Erected in Sacramento Delta is Dismissed as Moot

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 in June 2015. 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. The case was dismissed for failure to comply with ESA's 60-day notice requirements. After sending the required notice, CESAR re-filed the suit on November 19, 2015. Defendant Cowin, director of DWR, filed another motion to dismiss, this time arguing that: (1) the U.S. District Court lacked jurisdiction over the case because CESAR did not include a copy of the written notices as an attachment to the complaint; (2) the case was now moot because the barriers were already removed; and (3) the court should abstain from adjudicating the claim pursuant to the abstention doctrine in *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 817 (1976)("*Colorado River*"). The District Court denied the motion to dismiss as to the first and third grounds, but requested supplemental briefing on the second. As to the first

grounds, it held that CESAR was only required to sufficiently allege that proper notice was given, and that there is no requirement to physically attach the notice to the complaint. As to the third grounds, the court looked to the eight factors articulated in *Colorado River* and subsequent Ninth Circuit case law, focusing on two factors weighing against abstention: (1) the state court proceedings would not resolve all issues before the federal court, given that a related state court case was already dismissed; and (2) due to the federal claims, CESAR was unlikely to obtain relief in state court, since the ESA establishes the federal courts as the proper forum to allege violations.

Regarding the second grounds for dismissal, that the case was moot since the barrier was already removed, the court evaluated the two factors that the court must evaluate when deciding whether to grant an exception for prospective relief. First, the court considered whether the duration of the challenged action was too short to allow for complete litigation of the action, holding that there was insufficient time to fully litigate an ESA claim, given that the current barrier project only lasted from May through November. The second factor proved more challenging for the court—whether there is a reasonable expectation that the same controversy could happen again in the future. While the facts indicated the relevant agencies were anticipating the need to construct the barrier again in 2016 and future years, the court requested supplemental briefing because there were insufficient facts to determine whether the agencies were intending to again pursue the emergency ESA approval procedures that were the crux of the claimed violations. About four weeks later, the court dismissed the case as moot, citing the agencies' statement that DWR "will not build a salinity barrier in 2016" due to changes in hydrologic conditions, and that they intend to use the standard Section 7 consultation process for a programmatic permit for future years.

3. *Conservation Congress v. U.S. Forest Service,* 2016 U.S.Dist.LEXIS 22657 (E.D.Ca., case no. CIV no. 2:15-00249, Feb. 24, 2016) – Summary Judgment Granted in Favor of Forest Service's Approval of Forest Management Plan in Shasta-Trinity National Forest.

The plaintiff, Conservation Congress, filed suit challenging the U.S. Forest Services' ("USFS") adoption of the Harris Vegetation Management Project ("Project") claiming violations of the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA"), among others, related to adverse impacts on the threatened northern spotted owl and the endangered gray wolf. Both parties filed cross-motions for summary judgment on all counts. As to NEPA, the plaintiff claimed the USFS failed to take the requisite "hard look" at the impacts to the spotted owl and that the agency failed to adequately address and respond to opposing scientific views. The court disagreed, finding the USFS had met its burden under NEPA. Citing the voluminous pages in the biological assessment and the environmental impact statement ("EIS") addressing the very issues raised by the plaintiff, the court held that USFS adequately "explain[ed] its reasoning and there appears to be a rational connection between the facts found…and the conclusions…." The court also held that the USFS' response to the late submission of the plaintiff's scientific report was sufficient, because it adequately concluded that the research did not contradict the prior analysis in the EIS, thus no Supplemental EIS was required. USFS had found that the plaintiff's study's conclusions did not contradict the project's analysis, because the findings of the short-term effectiveness (up to fourteen years) of the

proposed fuel-reduction activities were similar in both analyses and the Project was only designed as a ten-year project.

As for the ESA, the plaintiff claimed that: (1) the USFS' determination that a Project alternative would not affect the gray wolf; and (2) USFS failed to consider impacts on northern spotted owl from degrading foraging habitat and did not comply with the northern spotted owl Recovery Plan. The court first dismissed the gray wolf claim as moot, because the USFS had already re-initiated ESA section 7 consultation which addressed the disputed issues. The court then disagreed with the plaintiff's argument that USFS failed to address how the loss of an additional 17 acres of spotted owl habitat could exacerbate adverse effects on an already spatially-deficient home range, because the analysis showed that the habitat would not actually be lost. Instead, it showed that the acreage would only be "temporarily degraded," in the short-term of 15-20 years, but will continue to function as habitat. Finally, the court held that the Project adequately incorporated the northern spotted owl Recovery Plan, because (1) USFS aimed to remove stressors in the short-term to contribute to its resilience as habitat in the long-term; (2) the court is required by law to defer to USFS's scientific judgments, despite plaintiff's disagreement as to the long-term benefits of the Project; (3) the court determined that USFS' reliance on several scientific surveys to conclude the Project would not likely adversely affect the northern spotted owl was sufficient to conclude USFS used the best scientific data available; and (4) USFS adequately protected both currently occupied and historically occupied habitat through its methods of avoidance and minimization when spotted owls are detected with a quarter-mile of any proposed activities to implement the Project.

4. Federal Agencies Finalize Revisions To ESA Critical Habitat Rules (81 Fed. Reg. 7214, 7226, 7414 (Feb. 11, 2016)).

In February 2016, the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (collectively, "Services") finalized a policy and two rules that revises the process for designating critical habitat under the federal Endangered Species Act. The effective date was March 14, 2016. The administrative purpose for the regulations was to "clarify expectations and provide for credible and predictable designation and consultation processes." The purpose of critical habitat is to require federal agencies to consult with the Services to ensure that any actions they authorize, fund or carry out are not likely to result in the "destruction or adverse modification" of designated critical habitat. One rule revises the definition of "destruction or adverse modification," was had been invalidated by the courts in 2004. The other rule clarifies the procedures and standards used for designating critical habitat, making minor changes to the regulations describing the scope and purpose of critical habitat, and clarify the criteria for designating critical habitat. The new policy addresses how the Services consider exclusion of areas from critical habitat designations. Private property owners have opposed the regulations on the ground that they will result in increased designation of property as critical habitat, which in turn would lead to greater restrictions on use of the property, and/or greater burdens and costs on property owners who propose projects that require federal permit authorizations or licenses.

For more information:
http://www.fws.gov/endangered/improving_ESA/AM.html

http://www.fws.gov/news/ShowNews.cfm?ref=federal-agencies-finalize-revised-rules-to-improve-implementation-of-the-&_ID=35459
http://www.fws.gov/endangered/improving_ESA/pdf/Adverse%20Modification-2016-02675-02112015.pdf
http://www.nmfs.noaa.gov/mediacenter/2016/02_February/05_02_fwscriticalhabitat.html

F. Renewable Energy

1. Utilities Challenge The Public Utilities Commission's New "Net Metering" Policy.

Assembly Bill 327, signed into law on October 2013, directed the Public Utilities Commission under Public Utilities Code section 2827.1 to develop a standard tariff or contract for eligible customer-generators with a renewable electrical generation facility. In response, the Commission adopted regulations in July 2014 to develop a successor to existing Net Energy Metering ("NEM") tariffs. Essentially, that tariff pays rooftop solar customers for the excess electricity their systems send back to the electrical grid. By a 3-2 vote on January 28, 2016, the CPUC approved Decision 16-01-044 ("Decision"), which adopted a NEM successor tariff that continues the existing NEM structure while making adjustments to align the costs of NEM successor customers more closely with those of non-NEM customers. The changes to the NEM tariff are only for customers that interconnect under the new NEM successor tariff and not to existing NEM customers. New elements to the NEM successor tariff made by the Decision include:

- New one-time interconnection fee: Requires NEM successor customers with systems under 1 MW to pay a reasonable, pre-approved interconnection fee.
  - Utilities will propose the fee via Advice Letter based on actual historical interconnection costs. Likely to be approximately $75-$150.
  - Customers larger than 1 MW will pay all interconnection fees and upgrade costs.

- Non-bypassable charges: NEM successor customers will pay non-bypassable charges on each kilowatt-hour (kWh) of electricity they consume from the grid.
  - Non-bypassable charges fund important programs such as low income and efficiency programs.
  - All utility customers, except current NEM customers, pay non-bypassable charges on all energy they consume from the gird. Current NEM customers only pay on usage from the grid after NEM exports are subtracted.
  - Non-bypassable charges are equivalent to approximately 2-3 cents per kWh.

- Time-of-use (TOU) rate: Residential NEM successor customers to take service on a TOU rate.

On February 29, 2016, Pacific Gas & Electric, Southern California Edison and San Diego Gas & Electric Utilities filed "Advice Letters" with the CPUC that challenge the new NEM requirements. On March 7, 2016, those Utilities filed rehearing applications that asked the PUC

to vacate or modify the Decision. Those Advice Letters and rehearing applications are currently under review by the Energy Division Staff of the PUC.

For more information:
http://www.cpuc.ca.gov/General.aspx?id=3934
http://www.latimes.com/business/la-fi-puc-solar-ruling-20160309-story.html

G. Hazardous Substance Control and Cleanup

1. Congress Passes National Reform Of Toxic Substances Control Act.

In June 2015, the House of Representatives passed H.R.2576 ("Frank R. Lautenberg Chemical Safety for the 21st Century Act"), a bill that reformed the national Toxic Substances Control Act ("TSCA"), originally enacted in 1976. In December 2015, the Senate passed the bill with an amendment. The reforms enhance the ability of the U.S. Environmental Protection Agency ("EPA") to regulate dangerous chemicals. For example, H.R. 2576 does the following:

- Revise the scope of TSCA by requiring the EPA to regulate chemicals so that they no longer present unreasonable risks of injury to health or environment instead of requiring the EPA to provide adequate protection against those risks using the least burdensome requirements;
- Require the EPA to conduct and publish a risk evaluation for a chemical if: (1) the EPA determines it may present an unreasonable risk of injury to health or the environment, or (2) a manufacturer of a chemical requests an evaluation
- If an evaluation determines a chemical will pose an unreasonable risk, the EPA must issue a risk management rule for the chemical
- Allows the EPA to grant exemptions from risk management requirements for a specific use of a chemical if: (1) the requirement is not cost-effective with respect to that use; and (2) the specific use is a critical or essential use, or the requirement would significantly disrupt the national economy, national security, or critical infrastructure;
- Requires the EPA to do the following: (1) publish a list of certain persistent, bioaccumulative, and toxic (PBT) chemicals; (2) designate certain chemicals as PBT chemicals of concern; and (3) promulgate rules with respect to those designated PBTs to reduce likely exposure to the extent practicable.

On May 6, 2016, Senator James Inhofe (OK), Chairman of the Senate Environment and Public Works Committee, and Senator Barbara Boxer (CA), the Ranking Member of the Committee, announced that they had reached an agreement on amendments regarding key sticking points of the legislation. Specifically, the two Senators agreed on a "pre-emption" provision that would have otherwise blocked states such as California from regulating chemicals that the EPA had chosen not to regulate. On May 24, 2016, the House voted 403-12 to concur with the Senate Amendments to H.R. 2576, clearing the path for the President's signature.

For more information:
https://www.congress.gov/bill/114th-congress/house-bill/2576/actions

http://www.epw.senate.gov/public/index.cfm/2016/5/senators-inhofe-and-boxer-issue-statement-on-tsca-reform-bill
https://morningconsult.com/2016/05/10/lawmakers-aim-deal-toxic-chemical-regulations-week/
https://morningconsult.com/2016/05/09/boxer-toxic-substances-deal-gives-room-states/
https://www.congress.gov/114/crpt/hrpt176/CRPT-114hrpt176.pdf

2. Office of Environmental Health Hazard Assessment Proposes Changes To Regulations Governing Proposition 65 Clear And Reasonable Warnings.

On May 16, 2016, the Office of Environmental Health Hazard Assessment (OEHHA) proposed to repeal and replace regulations regarding Proposition 65 Clear and Reasonable Warnings that are contained in Article 6 in Title 27 of the California Code of Regulations. Those new regulations will address specific exposure situations, and will address the following issues, among others:

- If a party to a court-ordered settlement or judgement complies with the order requiring a particular method or content for a warning, the warnings provided are clear and reasonable as a matter of law.
- Businesses are free to provide a warning that is different from the safe harbor methods and content specified in Subarticle 2 as long as the warning complies with Section 25249.6.
- Additional exceptions to the definition of "consumer information" are added.
- The sources of exposure that should be identified in an environmental exposure warning are clarified.
- The regulation does not impose any new testing or burden of proof requirements for a business; the regulation only applies where a business has already decided to provide a warning; it does not determine when a warning is required.
- The circumstances under which a warning must be provided in a language other than English were clarified.
- Consistency was made regarding the terms "label", "warning labels", "warning materials" and "warning information".
- The uniform resource locators (URLs) for the general warning content were shortened to "WWW.P65Warnings.ca.gov" for simplicity and consistency with the existing structure of the warnings website.
- A business is allowed to provide a consumer product warning for a single chemical exposure, by allowing the business to delete the words "chemicals including" from the safe harbor warning content.
- Consistency was made in the format, structure and requirements for environmental warnings.
- The text of a compliant warning was revised for readability and clarity.

The comment period on the proposed changes lasted from May 16, 2016, until June 6, 2016.

For more information:
http://oehha.ca.gov/proposition-65/events/comment-period-modification-text-proposed-regulation-proposed-repeal-article-0

H. National Environmental Protection Act ("NEPA")

1. *Conservation Congress v. U.S. Forest Service*, 2016 U.S.Dist.LEXIS 22657 (E.D.Ca., case no. CIV no. 2:15-00249, Feb. 24, 2016) – Forest Service Did A "Hard Look" On Impacts of Vegetation Management Project On Northern Spotted Owl.

Plaintiff Conservation Congress brought this action against the United States Forest Service ("Forest Service") and the United States Fish and Wildlife Service ("FWS"), alleging that defendants violated the National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA"), the National Forest Management Act of 1976 ("NFMA"), and the Administrative Procedure Act ("APA"), in approving the Harris Vegetation Management Project ("Harris Project") in the Shasta-Trinity National Forest. Plaintiff alleged that the Forest Service violated NEPA because it failed to take a "hard look" at the impacts of the Harris Project on the northern spotted owl. However, the court found that there did appear to be a rational connection between the facts found about the northern spotted owl foraging and dispersal habitat and the conclusions regarding thinning and species composition in those areas. Given the highly deferential standard of review under the APA, the court found that the Forest Service fulfilled its obligation to take a "hard look" at the impacts of the Harris Project on the northern spotted owl.

I. Mining / Oil & Gas

1. Major Changes Made To The Surface Mining and Reclamation Act.

In a signing statement in 2013, Governor Brown called for a top-to-bottom review of Surface Mining and Reclamation Act ("SMARA"). A year-long stakeholder process was convened by the Governor in 2015 for that SMARA review. Assembly Bill 1142 and Senate Bill 209 were the product of the Governor's stakeholder process. The Legislature passed AB 1142 and SB 209 and Governor Brown signed both bills on April 18, 2016. The changes that were made to SMARA under the bills were described by the Department of Conservation ("DOC") Director David Blum as "a significant overhaul of an important bill for the next generation."

AB 1142 makes the following changes to SMARA:

1) Requires DOC to provide an accounting of how mining fee revenue is spent.

2) Defines "reclamation" and "financial assurances."

3) Allows DOC to appeal financial assurance approvals that they believe are inadequate to theCalifornia State Mining and Geology Board ("Board").

4) Clarifies the financial assurance and reclamation plan appeal process to the Board, establishes time frames for hearings, specifies issues that need to be considered, and clarifies under what circumstances the Board can decline to hear appeals.

5) Clarifies what must be included in a reclamation plan, including requiring maps, diagrams, and calculations in the reclamation plan be done by appropriately licensed professionals.

6) Requires lead agencies to certify that the proposed reclamation plan is complete and compliant with applicable statutes and regulations.

7) Allows DOC to make a determination of incompleteness and remand the reclamation plan back to the lead agency for improvements prior to approval. Sets a deadline of 30 days for DOC to notify a lead agency and the operator that a reclamation plan is incomplete. Sets deadline of 30 days for DOC to prepare written comments on the reclamation plan after notifying that a reclamation plan is incomplete.

8) Prohibits a financial assurance mechanism shall not be released without the consent of the lead agency and DOC.

9) Clarifies how a lead agency may cause the forfeiture of financial assurance mechanism when an operator is financially incapable of completing reclamation in accordance with its approved reclamation plan.

10) Requires the Board to develop a form for submission of financial assurances.

11) Establishes a formal process for review of financial assurance cost estimate (FACE) by DOC, and includes the ability of the DOC to require consultations with lead agencies when they do not agree with the DOC's assessment of the FACE. Requires lead agencies to explain in writing why the lead agency is not modifying the FACE pursuant to comments made by the DOC.

12) Allows a lead agency employee, under specified conditions, to conduct inspections of surface mining operations conducted by the lead agency.

13) Specifies that if the operator does not request an inspection date or the lead agency is unable to inspect on the requested date, the lead agency must provide a minimum five days written notice of a pending inspection or a date that is agreed upon by the operator. Deletes the requirement for a lead agency to conduct an inspection within 6 months of receipt of the report and instead requires inspections at 12-month intervals.

14) Requires that DOC to establish an inspection training program that all inspectors must complete by July 1, 2020. Requires inspectors to retake the training at least every five years.

15) Requires inspection reports to be submitted to the DOC within 90 days and specify what is to be included in the reports.

16) Requires lead agency to outline intended plan of action to remedy violations noted in inspection report.

17) Allows DOC or the Board to apply to the small claims court or superior court to collect unpaid administrative fees. Allows the lead agency or DOC to assess administrative penalties on operators who do not pay annual reporting fees.

SB 209 does the following:

1) Increases, by agreement with industry, the maximum reporting fee for any single mining operation from $4,000 to $10,000 and caps the overall reporting fees at $8 million annually.

2) Commits the fees paid by industry to the review of reclamation plans, financial assurances, and the training of local government mine inspectors that is authorized in AB 1142.

3) Contains new, flexible provisions for local governments to inspect county-owned borrow pits every two years instead of each year.

For more information:
http://www.conservation.ca.gov/index/Documents/2016-08%20Governor%20Brown%20Signs%20Major%20Reforms%20to%20Mining%20Law.pdf
http://www.leginfo.ca.gov/pub/15-16/bill/asm/ab_1101-1150/ab_1142_cfa_20160408_123901_asm_comm.html
http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_209_cfa_20160330_153129_sen_floor.html

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.