ABBOTT & KINDERMANN, LLP
ATTORNEYS AT LAW

2015 MID-YEAR ENVIRONMENTAL LAW UPDATE

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

A. Water Rights And Supply

1. Court holds that tiered water rates must reasonably reflect the cost of service attributable to each parcel, potentially impacting water conservation efforts.

In *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* (2015) 235 Cal.App.4th 1493, a taxpayers association challenged a decision by the City of San Juan Capistrano to impose a tiered rate that went up progressively in relation to usage and charges for recycling within the rate structure. The Court of Appeal for the Fourth Appellate District held that water rate fees to fund the costs of capital-intensive operations to produce more or new water, such as the recycling plant at issue, was allowed under Article XIII D, section 6, subdivision (b)(4), of the California Constitution (Proposition 218). That section provides that no fees "may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question." While that provision 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, subdivision (b)(4). The Court also held that the agency did not meet its burden to show that the tiered rate complied with the requirement that fees not exceed the cost of service attributable to a parcel, as required by section 6, subdivision (b)(3). The agency did not try to calculate the cost of actually providing water at its various tier levels and merely allocated all its costs among the price tier levels based on pre-determined usage budgets. Tiered water rate structures and Proposition 218 are compatible so long as those rates reasonably reflect the cost of service attributable to each parcel. Public water agencies must calculate the actual costs of providing water at various levels of usage.

The ruling could have huge implications statewide. A 2014 study at the University of California, Riverside, estimated that tiered rate structures similar to the one used in San Juan Capistrano reduce water use over time by up to 15 percent. Governor Brown stated that "[t]he practical

effect of the court's decision is to put a straitjacket on local government at a time when maximum flexibility is needed." Tim Quinn, executive director of the Association of California Water Agencies, called the ruling a potentially major blow to water conservation efforts in California. However, the attorney for taxpayer advocates who filed the lawsuit, responded that promoting water savings and meeting the court's standards are not at odds with each other: "The court simply invalidated 'arbitrary' tiered rates."

For more information:
http://www.sacbee.com/news/politics-government/capitol-alert/article19098585.html
http://www.kpbs.org/news/2015/apr/20/californias-tiered-water-rates-thrown-question-cou/

2. State Water Board Curtails Pre-1914 Water Rights, And Gets Hit With A Lawsuit Challenging That Authority.

On June 12, 2015, the State Water Resources Control Board ("Board") ordered curtailment of 276 senior appropriative pre-1914 water rights in the San Joaquin River watershed held by 114 right holders. The curtailment does not affect any riparian right holders. (The Board explained that "senior water right holders with priority dates earlier than 1903 in the affected watersheds can continue to divert water in accordance with their water right.") Violators of the new curtailment rule could face fines of $1,000 a day and $2,500 for each unauthorized acre-foot of water they draw. The action by the Board is very controversial. "This is our water," says Steve Knell, general manager of Oakdale Irrigation District. "We believe firmly in that fact and we are very vested in protecting that right." Mr. Knell explained: "Most of our water rights go back to the mid-1800s. So the state having authority over something that we developed long before the state got into this business is the legal question we will be asking a judge." Indeed, the Board decision was immediately challenged. On June 19, 2015, the Patterson Irrigation District filed a writ of mandamus action against the Board in Stanislaus County Superior Court (case no. 2015307). A petition hearing in that case is set for July 22, 2015.

For more information:
http://www.swrcb.ca.gov/press_room/press_releases/2015/pr061215_sr_curtailmentsfnl.pdf
http://www.usnews.com/news/us/articles/2015/05/21/q-a-california-farmers-with-oldest-water-rights-face-cuts
http://www.sacbee.com/news/state/california/water-and-drought/article25022413.html

3. Governor Issues Executive Order Restricting Water Use.

On April 1, 2015, Governor Brown issued Executive Order B-29-15. The order directs cities and towns across California to cut water use by 25 percent through a set of mandatory restrictions. The order represents the first statewide mandatory water restrictions and comes following Governor Brown's declaration of a continued state of emergency in 2014. The categories of actions under the order include save water, increase enforcement against water waste, invest in new technologies, and streamline government response. The 'save water' actions would include replacing lawns and ornamental turf with drought-tolerant landscaping, incentives for using water-efficient fixtures and appliances, restrictions on commercial and institutional uses, prohibiting use of potable water on public street medians, prohibition of new construction that

does not use drip or microspray irrigation, and development of water rate structures designed to maximize water conservation. (That last element could be affected by the *Capistrano* decision, above.) The 'increase enforcement' actions would include monthly reporting requirements, inspections, updates to the State Model Water Efficient Landscape Ordinance, and drought management plans for agricultural suppliers. This element also requires local water agencies in high and medium priority groundwater basins to immediately implement all requirements of the California Statewide Groundwater Elevation Monitoring Program.

For more information:
http://gov.ca.gov/docs/4.1.15_Executive_Order.pdf
http://gov.ca.gov/news.php?id=18910

4. Legislature Passes Emergency Drought Aid.

As California faces its fourth straight drought year, the California legislature delivered to Governor Brown two bills that would provide approximately $1.1 billion in drought relief aid. Assembly Bills 91 and 92 were passed by the legislature and approved by Governor Brown in March 2015. Key provisions of the aid package include $660 million for flood control projects, $273 million for water recycling and drinking water quality programs, and $75 million for programs such as emergency food aid for farmworkers displaced by the drought. Republican legislators were concerned about AB 92's provisions authorizing fines for those who engage in unauthorized stream diversion or harm fish passage. Violators may be fined up to $8,000 per day, and each day that a violation continues without a good faith effort to correct constitutes a separate violation. A major of goal of AB 92 is to combat illegal water diversions.

For more information:
http://gov.ca.gov/news.php?id=18906
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB91&search_keywords=
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB92&search_keywords=

5. Senior Water Rights Holders In Delta Reach Agreement With State To Reduce Water Use By 25%.

The California Water Resources Control Board agreed to a proposal made by farmers with riparian water rights in the Sacramento-San Joaquin River Delta to voluntarily reduce water usage by 25%, or alternatively to fallow 25% of their fields, from June through September 2015. The agreement avoids a very contentious legal battle over whether the State has the legal right to curtail water diversion by some of the oldest and most senior water rights holders in California. Those rights have never been challenged before. The State had threatened curtailment of even such senior riparian water rights because, in the words of the State-appointed "water master" for water rights in the Delta: "Curtailment of more senior water rights are virtually inevitable because there's less water in the system than there are demands at even pretty senior-water-rights levels." In light of that agreement, the Board will use its enforcement discretion to honor the

voluntary reductions. The agreement follows the State's recent curtailment of junior waters holders in the Sacrament and San Joaquin river basins.

For more information:
http://www.sacbee.com/news/state/california/water-and-drought/article21701118.html;
http://www.latimes.com/local/lanow/la-me-ln-water-rights-20150522-story.html
http://ww2.kqed.org/science/2015/06/15/court-battles-loom-over-challenge-to-state-water-rights/

6. Groundwater Basin Prioritization Completed, As First Stage Of Implementing New Groundwater Regulations.

The Sustainable Groundwater Management Act (SGMA) revised the California Water Code to direct the Department of Water Resources (DWR) to develop the initial groundwater basin priority by January 31, 2015. DWR finalized the basin prioritization in June 2014, and the prioritization went into effect on January 1, 2015. The next milestone for SGMA is the requirement of the formation of locally-controlled Groundwater Sustainability Agencies (GSAs) which must develop Groundwater Sustainability Plans (GSPs) in basins determined to be of high or medium priority.

For more information:
http://www.water.ca.gov/groundwater/casgem/basin_prioritization.cfm
http://www.water.ca.gov/groundwater/sgm/gsa.cfm

7. Bay Delta Conservation Plan Significantly Changed, And The Governor Tells Critics To "Shut Up".

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 plan down from $25 billion to $17 billion, eliminating the $8 billion for the original 50-year 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 Governor called the changes "a step forward because it's a concrete action," while the former plan "was more a desire." However, the reduced environmental protection in the new plan has drawn widespread criticism from the environmental community. Those groups point out that nearly all the 30,000 acres were already included in the restoration agreement with the federal government dating back to 2010, and the cost will likely be twice what the Governor has predicted. The water agencies have been relatively quiet so far on the new plan.

Frustrated with the hours spent planning the project so far, and the growing opposition to the plan, Governor Brown recently told opponents: "Until you put a million hours into it, shut up! Cause you don't know what the hell you're talking about!" More than ever the outcome is uncertain, as environmental groups, including Restore the Delta, have promised legal challenges when the plan is finalized.

For more information:
http://www.sacbee.com/news/politics-government/gov-jerry-brown/article18304880.html
http://www.sacbee.com/opinion/editorials/article18794649.html
http://www.capradio.org/47634
http://latimes.com/local/la-me-delta-tunnels-20150404-story.html
http://www.contracostatimes.com/breaking-news/ci_28023070/brown-unveils-new-17-billion-delta-tunnels-plan
http://www.latimes.com/local/lanow/la-me-ln-brown-delta-plan-20150430-story.html
http://www.latimes.com/local/california/la-me-cap-delta-tunnels-20150511-column.html

B. Wetlands

1. EPA And USACE Issue New Controversial Rule Defining "Waters of the United States" Under Clean Water Act, As Congress Seeks To Block Its Implementation.

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. The rule will take effect 60 days after it is published in the Federal Register.

On May 12, 2015, the House of Representatives passed a bill (H.R. 1732), 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 Senate is considering a similar measure that is awaiting a vote in the Environment and Public Works Committee. Also, litigation against the new rule is expected by agricultural interests and industries.

For more information:
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://thomas.loc.gov/cgi-bin/bdquery/D?d114:1:./temp/~bdqSkb:@@@L&summ2=m&|/home/LegislativeData.php
http://www.myfoxchicago.com/story/29203369/gop-attack-on-water-rule-part-of-wider-bid-to-rein-in-epa

2. EPA Withdraws Interpretive Rule Regarding Agricultural Conservation Practices.

On March 25, 2014, the U.S. Environmental Protection Agency (EPA) and the U.S. Department of the Army signed an interpretive rule, "Interpretive Rule Regarding Applicability of the Exemption from Permitting under Section 404(f)(1)(A) of the Clean Water Act to Certain Agricultural Conservation Practices," that addressed applicability of the permitting exemption provided under section 404(f)(1)(A) of the CWA to discharges of dredged or fill material associated with certain agricultural conservation practices. In late 2014, Congress directed the agencies to withdraw the interpretive rule. On January 29, 2015, the agencies published a memorandum withdrawing the interpretive rule.

For more information:

http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/cwa_guide/memo_withdrawing_ir.pdf
http://www.cochran.senate.gov/public/_cache/files/dfd0b876-aa10-4f83-b348-e5dc24c5c004/WOTUS-Ag-Interpretive-Rule-Letter.pdf

C. Air Quality & Climate Change

1. CEQA Lawsuits Challenge Phillips 66's Propane Recovery Project In Contra Costa County As Inappropriate "Piecemeal" Part Of Allegedly Larger Plan In State To Ship Tar Sands Crude Oil By Rail Into California For Refining.

In early February 2015, the Board of Supervisors for Contra Costa County approved the "Phillips 66 Propane Recovery Project" and the related Recirculated Final environmental Impact Report for that project. According to the County staff, the project proposes "refinery processing equipment improvements to recover for sale propane and butane from refinery fuel gas (RFG) and other process streams; and to decrease sulfur dioxide (SO2) emissions from the refinery as a result of removing sulfur compounds from RFG streams at the Phillips 55 Rodeo refinery in Contra Costa County." That project requires compliance with CEQA.

Communities for a Better Environment ("CBE") filed a writ of mandate and declaratory relief action against the County and Phillips 66 in the Contra Costa Superior Court on March 4, 2015 (case no. MSN15-0301), alleging that the project is part of a larger project to refine tar sands crude oil that will come to California by rail, and therefore the County failed to analyze the cumulative impacts on air quality.

Rodeo Citizens Association ("RCA") filed a writ of mandate action against the County on March 5, 2015 (case no. MSN15-0345), similarly alleging that the County failed to consider the project as being linked to the heavy tar sands crude oil refining operations at Phillips 66's refinery in Santa Maria in San Luis Obispo County. RCA alleged: "The Project will also enable Phillips to refine heavier crude oil that it plans to import to its Santa Maria Facility, which is connected by a pipeline to the Rodeo Facility." On that basis, RCA alleged, among other things, that the County conducted insufficient analysis of the impacts under CEQA, even though the Project will allegedly "contribute to increased emissions of criteria air pollutants and greenhouse gases in the Project vicinity and throughout California and will force nearby residents to accept a heightened risk of accidents from train derailments."

Safe Fuel and Energy Resources of California ("SFERC") has similarly complained that the County improperly "piecemealed" its review of the project from other projects undertaken by Phillips 66 designed to bring in tar sands crude from out of state. SFERC raised that same issue in connection with a request by Phillips 66 to obtain approval by San Luis Obispo County to modify an existing rail spur at its Santa Maria Refinery ("SMR") and to construct a new offloading facility to accommodate up to 547,500,000 gallons (13,035,714 billion barrels of annual crude oil shipments by rail to the SMR for processing at the SMR. In comments opposing the Draft Environmental Impact Report ("DEIR") for that project in San Luis Obispo County, SFERC argued:

> The SMR and the Phillips 66 Rodeo Refinery are linked by a 200-mile pipeline, and are collectively referred to in the DEIR as the "San Francisco Refinery." The Rodeo Refinery is located in Contra Costa County. In addition to being physically linked, the SMR and the Rodeo Refinery have integrated refining operations. The SMR processes heavy crude oil, and semirefined liquid products are sent by pipeline from the SMR to the Rodeo Refinery for upgrading into finished petroleum products, such as butane and propane. The finished petroleum products are then shipped by rail to third party purchasers.

Thus, the same issue may be raised in future litigation in San Luis Obispo County.

For more information:
http://ca-contracostacounty2.civicplus.com/DocumentCenter/View/35130
http://ca-contracostacounty2.civicplus.com/4729/Phillips-66-Propane-Recovery-Project
http://www.contracostatimes.com/breaking-news/ci_27452207/martinez-supervisors-approve-rodeo-refinerys-propane-and-butane
http://www.contracostatimes.com/breaking-news/ci_27655191/rodeo-phillips-66-project-faces-additional-lawsuits
http://www.cbecal.org/wp-content/uploads/2015/03/WarningShots.pdf
http://www.slocounty.ca.gov/Assets/PL/Santa+Maria+Refinery+Rail+Project/Comments+on+the+Draft+EIR/Organizations+and+Schools/Adams+Broadwell.pdf

2. Legislation Further Limiting Greenhouse Gas Emissions: Senate Bill 32 (Pavley) and AB 21 (Perea)

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. Senate Bill 32 (Pavley) would require 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." Furthermore, the bill calls for "complementary policies" that ensure that such long-term emissions reductions advance all of the following public policies:

(1) Job growth and local economic benefits in California;
(2) Public health benefits for California residents, particularly in disadvantaged communities;
(3) Innovation in technology and energy, water, and resource management practices;
(4) Regional and international collaboration to adopt similar greenhouse gas emissions reduction policies.

SB 32 also authorizes CARB to adopt interim GHG emission level targets for 2030 and 2040. SB 32 is currently being considered by the Senate Committee on Environmental Quality. SB 32 passed out of the Senate on June 3, 2015, by a vote of 24-15.

Assembly Bill 21 (Perea) would require CARB to determine by January 1, 2018, a statewide GHG reductions target for 2030 to be achieved in a "cost-effective manner." AB 21 also adds "energy efficiency" and "facilitation of the electrification of the transportation sector" to the list of energy-related matters that CARB must consult with other relevant state agencies when preparing the AB 32 Scoping Plan. AB 21 passed out of the Assembly on May 18, 2015 on a vote of 73-0.

For more information:
http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_32&sess=CUR
http://www.leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB21

3. Legislation mandating a 50% reduction in petroleum use in motor vehicles by January 1, 2030.

Senate Bill 350 (de León) directs 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. The bill also provides that in pursuing the least environmental and economic cost strategy, it is the policy of the state to exploit all practicable and cost-effective conservation and improvements in the efficiency of energy use and distribution and to achieve energy security, diversity of supply sources, and competitiveness of transportation energy markets based on the least environmental and economic cost and in furtherance of reducing petroleum use in the transportation sector by 50% by January 1, 2030. SB 350 further directs the California Energy Commission, by January 1, 2017, and at least once every three years thereafter, to adopt

an update to its comprehensive program for achieving greater energy savings in the state's existing residential and nonresidential building stock in order to achieve a doubling of the energy efficiency of existing buildings by January 1, 2030. Finally, the bill directs the Public Utilities Commission and the California Energy Commission to implement the Renewable Portfolio Standard to obtain the target of generating 50% of total retail electricity sales from renewable energy resources by December 31, 2030. Environmental activist Tom Steyer testified that the bill "dramatically reshapes California's economy." While Steyer said the bill "is good for California jobs," the California Chamber of Commerce called it a "job killer," and the Western States Petroleum Association stated that it will raise costs for California drivers. SB 350 passed out of the Senate on June 3, 2015, after a contentious debate and a vote of 24-14.

For more information:
http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0301-0350/sb_350_cfa_20150427_162040_sen_comm.html
http://www.capradio.org/articles/2015/04/07/california-considers-stricter-carbon-standards/
http://www.latimes.com/local/political/la-me-pc-climate-change-steyer-20150407-story.html

4. Air Toxic Hot Spots Guidance Manual Adopted.

Following an extended public comment period that closed in August 2014, the Office of Environmental Health Hazard Assessment (OEHHA) adopted The Air Toxics Hot Spots Program Guidance Manual for Preparation of Health Risk Assessments on March 6, 2015. This Guidance Manual has been developed by OEHHA, in conjunction with the California Air Resources Board (CARB), for use in implementing the Air Toxics Hot Spots Program (Health and Safety Code Section 44360). This version replaces the 2003 version, and reflects advances in the field of risk assessment along with explicit consideration of infants and children.

The information presented in the manual is compiled from three technical support documents (TSDs) released by OEHHA for the Hot Spots Program: the Technical Support Document for the Derivation of Noncancer Reference Exposure Levels (June, 2008); the Technical Support Document for Cancer Potency Factors (May 2009); and the Technical Support Document for Exposure Assessment and Stochastic Analysis (June 2012). There is relatively little new information in the Guidance Manual since the adoption of the TSDs.

The manual contains example calculations and an outline for a modeling protocol and a health risk assessment (HRA) report. CARB developed a software program in consultation with OEHHA, the Hot Spots Analysis and Reporting Program (HARP). The HARP software, which is being updated with the new exposure variates and health values, is the recommended model for calculating and presenting HRA results for the Hot Spots Program. The intent of the Guidance Manual and the HARP software is to incorporate children's health concerns, update risk assessment practices, and to provide consistent risk assessment procedures.

For more information:
http://oehha.ca.gov/air/hot_spots/hotspots2015.html
http://www.arb.ca.gov/toxics/harp/harp.htm

5. Obama Administration Notifies United Nations Of U.S. Commitment To Lower National Total Carbon Emissions By 26-28% By 2025.

On March 31, 2015, the Obama Administration filed with the United Nations documents that committed the United States to achieving an "economy-wide target of reducing its greenhouse gas emissions by 26-28 per cent below its 2005 and to make best efforts to reduce its emissions by 28%." According to the submission, "[t]he target reflects a planning process that examined opportunities under existing regulatory authorities to reduce emissions in 2025 of all greenhouse gases from all sources in every economic sector. A number of existing laws, regulations, and other domestically mandatory measures are relevant to the implementation of the target, which we detail in the information provided." The Administration specifically noted the following regulatory efforts to meet that GHG reduction goal:

> Several U.S. laws, as well as existing and proposed regulations thereunder, are relevant to the implementation of the U.S. target, including the Clean Air Act (42 U.S.C. §7401 et seq.), the Energy Policy Act (42 U.S.C. §13201 et seq.), and the Energy Independence and Security Act (42 U.S.C. § 17001 et seq.). Since 2009, the United States has completed the following regulatory actions:
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> - Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency adopted fuel economy standards for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018.
> - Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy has finalized multiple measures addressing buildings sector emissions including energy conservation standards for 29 categories of appliances and equipment as well as a building code determination for commercial buildings.
> - Under the Clean Air Act, the United States Environmental Protection Agency has approved the use of specific alternatives to high-GWP HFCs in certain applications through the Significant New Alternatives Policy program.
>
> At this time:
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> - Under the Clean Air Act, the United States Environmental Protection Agency is moving to finalize by summer 2015 regulations to cut carbon pollution from new and existing power plants.
> - Under the Clean Air Act, the United States Department of Transportation and the United States Environmental Protection Agency are moving to promulgate post-2018 fuel economy standards for heavy-duty vehicles.
> - Under the Clean Air Act, the United States Environmental Protection Agency is developing standards to address methane emissions from landfills and the oil and gas sector.
> - Under the Clean Air Act, the United States Environmental Protection Agency is moving to reduce the use and emissions of high-GWP HFCs through the Significant New Alternatives Policy program.

- Under the Energy Policy Act and the Energy Independence and Security Act, the United States Department of Energy is continuing to reduce buildings sector emissions including by promulgating energy conservation standards for a broad range of appliances and equipment, as well as a building code determination for residential buildings.

In addition, since 2008 the United States has reduced greenhouse gas emissions from Federal Government operations by 17 percent and, under Executive Order 13693 issued on March 25th 2015, has set a new target to reduce these emissions 40 percent below 2005 levels by 2025.

Many of those efforts outlined by the Administration in that filing with the UN are currently being challenged in Congress and/or in the courts. As Senate Majority Leader Mitch McConnell stated: "Considering that two-thirds of the U.S. federal government hasn't even signed off on the clean-power plan and 13 states have already pledged to fight it, our international partners should proceed with caution before entering into a binding, unattainable deal."

For more information:
http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx
http://www.washingtonpost.com/news/energy-environment/wp/2015/03/31/obama-administration-citing-climate-risks-plans-steep-cuts-in-greenhouse-gas-pollution/

D. Endangered Species Act

1. Bay Delta Conservation Plan Significantly Changed.

See write-up in Water Rights and Supply, item 6, above.

E. Renewable Energy

1. Controversial Draft Desert Renewable Energy Conservation Plan Is Changed To Address Public Lands First, And Then Deal With Private Lands On A County-By-County Basis.

In 2014, federal and state officials issued a draft "Desert Renewable Energy Conservation Plan" ("Draft DRECP") and its supporting environmental impact report/environmental impact statement ("EIR/EIS"). The Draft DRECP is designed to provide renewable project developers with permit timing and cost certainty for the next 25 years under the federal and California Endangered Species Acts, while at the same time preserving, restoring and enhancing natural communities and related ecosystems. The Draft DRECP plan area covers approximately 22.5 million acres of federal and non-federal desert lands and adjacent lands of seven California counties - Imperial, Inyo, Kern, Los Angeles, Riverside, San Bernardino, and San Diego. The major planning components of the Draft DRECP were (1) a federal BLM Land Use Plan Amendment covering nearly 10 million acres of BLM-administered lands; (2) a General Conservation Plan ("GCP") covering nearly 5.5 million acres of nonfederal lands (the GCP

provides a programmatic framework for streamlining the incidental take permitting process under the Endangered Species Act for renewable energy and transmission on nonfederal lands; the Draft DRECP includes incidental take permit applications from the California Energy Commission and California State Lands Commission); and (3) a Conceptual Plan-Wide Natural Community Conservation Plan ("NCCP") that encompasses the entire DRECP plan area.

Numerous tough comments were received from the Counties that would be affected by the Draft DRECP. The agencies responsible for the DRECP noted that those comments requested "additional time and closer coordination with state and federal agencies to ensure better alignment between county planning renewable energy, conservation and the objectives of the DRECP." The Los Angeles Times was more explicit, and described those Counties' worries "that the plan conflicts with existing environmental programs and with areas they have already designated for renewable energy in their regions. Some are concerned about losing tax revenues, given that state tax exemptions for solar projects on private lands, originally scheduled to end in 2016, were recently extended through 2025. … [San Bernardino County officials complained] that its designation of certain land as conservation zones would restrict moneymaking land uses, including mining."

In response, the federal and state agencies responsible for drafting the DRECP announced on March 2015 that they are adjusting the planning process and will use a phased approach to first focus on the 10 million acres of public lands:

> The agencies will start by completing the BLM component of the DRECP that designates development focus areas and conservation areas on public lands while providing additional time for the state and federal agencies to work with counties and other stakeholders to address issues and concerns with the General Conservation Plan and the Natural Community Conservation Plan components, including the proposed permitting processes.
> Continued engagement with the counties will help determine the best options and timing for proceeding with the private land components and better align renewable energy development and conservation at the local, state and federal level. It will also allow the agencies to explore opportunities for a tailored, county-by-county approach that fits with the DRECP plan.

For more information:
http://www.latimes.com/local/california/la-me-0311-desert-20150311-story.html
http://www.drecp.org/documents/docs/2015-03-10_DRECP_Path_Forward_News_Release.pdf

2. Legislation mandating a 50% reduction in petroleum use in motor vehicles by January 1, 2030.

See Air Quality and Climate Change, item 3, above.

F. Hazardous Substance Control and Cleanup

1. Legislative changes To Proposition 65 Regulations (Assembly Bill 543)

Assembly Bill 543 (Quirk) seeks to modify California's Safe Drinking Water and Toxic Enforcement Act of 1986, commonly known as Proposition 65, by focusing on the scientific evidence needed before an exposure warning is mandated. Proposition 65 prohibits any business from knowingly and intentionally exposing any individual to a chemical known to the State of California to cause cancer or reproductive toxicity without giving a specified warning.

AB 543 would provide that a person, in the course of doing business, does not knowingly and intentionally expose an individual to a chemical known to the state to cause cancer or reproductive toxicity if there exists an exposure assessment that meets three specified requirements. The three requirements are as follows:

1) "It has been conducted by, or under the direction of, a qualified scientist in accordance with the implementing regulations adopted by the Office of Environmental Health Hazard Assessment that are relevant to the alleged exposure.
2) It evaluates the same chemical in or from the relevant source that is the subject of the alleged exposure and concludes that the person in the course of doing business is not exposing an individual to the chemical at a level that requires a warning.
3) It is documented, in writing, and has been approved and signed by the qualified scientist before the person in the course of doing business receives a written notice of an alleged exposure pursuant to Section 25249.7."

The proposed bill goes on to define "qualified scientist" and other terms relevant to the requirements. While the bill was passed out of the Assembly Committee On Environmental Safety And Toxic Materials, it remains to be seen if it will be passed by the full Assembly.

For more information:
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160AB543
http://www.jdsupra.com/legalnews/a-sane-tweak-to-proposition-65-09199/?utm_source=JD-Supra-eMail-Digests

G. Mining / Oil & Gas

1. Mining Legislation Moves Forward in California Legislature.

Three bills have been proposed in the 2015-2016 legislative session relating to mining issues.

Senate Bill 209 (Pavley) provides that a lead agency may not use a lead agency employee to inspect a lead agency-operated surface mining operation (i.e., "self-inspect") unless the employee is a "certified" inspector. The bill also requires the Department of Conservation to provide a certification training program. SB 209 passed out of the Senate on May 28, 2015, by a vote of 25-13.

Assembly Bill 1034 (Obernolte) would add the operation of a renewable energy generation facility to the existing statutory list of activities exempt from SMARA. The exemption would

include related, approved land improvements. AB 1034 passed out of the Assembly on May 26, 2015, on a vote of 76-0.

Assembly Bill 1142 (Gray) addresses concerns that SMARA's administrative requirements are not being properly and fully implemented by all local lead agencies including proper inspections and annual reviews. AB 1142 passed out of the Assembly on June 4, 2015, on a vote of 73-1. The bill includes the following provisions:

- require operators on their existing annual report to request an inspection date and enable local agencies to reschedule those dates;
- create a new "Annual Financial Assurance Review" Process;
- require that inspections are performed by licensed professionals or a local lead agency employee that is a Qualified Mine Inspector;
- require the State, lead agencies, and State Mining and Geology Board to consider the impact of any enforcement action on local construction jobs; and,
- maintain that administrative costs be borne by operators, which is consistent with current law.

For more information:
http://leginfo.ca.gov/pub/15-16/bill/sen/sb_0201-0250/sb_209_cfa_20150320_123837_sen_comm.html;
http://leginfo.ca.gov/pub/15-16/bill/asm/ab_1001-1050/ab_1034_cfa_20150424_133232_asm_comm.html;
http://leginfo.ca.gov/pub/15-16/bill/asm/ab_1101-1150/ab_1142_cfa_20150424_133309_asm_comm.html

2. U.S. EPA Draft Assessment Finds No Widespread Harm To Drinking Water From Fracking.

On June 4, 2015, the U.S. Environmental Protection Agency issued a draft assessment on the potential impacts to drinking water resources from hydraulic fracturing (or "fracking") activities. The draft assessment, ordered by Congress, "shows that while hydraulic fracturing activities in the U.S. are carried out in a way that have not led to widespread, systemic impacts on drinking water resources, there are potential vulnerabilities in the water lifecycle that could impact drinking water." Thomas Burke, deputy assistant administrator of the EPA's office of research and development, explained: "Hydraulic fracturing activities in the U.S. are carried out in a way that have not led to widespread, systematic impact on drinking water resources …. In fact, the number of documented impacts to drinking water is relatively low when compared to the number of fractured wells." However, the EPA assessment stated that there were a small number of contaminated drinking wells, and it highlighted potential vulnerabilities, including:

- Water withdrawals in areas with low water availability;
- Fracking conducted directly into formations containing drinking water resources;
- Inadequately cased or cemented wells resulting in below ground migration of gases and liquids;
- Inadequately treated wastewater discharged into drinking water resources; and
- Spills of hydraulic fluids and hydraulic fracturing wastewater, including flowback and produced water.

Erik Milito, an executive with the American Petroleum Institute, commented that "[h]ydraulic fracturing is being done safely under the strong environmental stewardship of state regulators and industry best practices."

In California, the draft assessment will likely reinforce the current approach taken under Senate Bill 4 to allow fracking under heavy regulatory oversight. Also, the new draft assessment is likely to impact studies such as the one the Federal Government agreed to conduct on fracking in California as part of the September 2013 settlement with the Center for Biological Diversity to resolve litigation involving federal oil and gas lease sales in the state.

For more information:
http://yosemite.epa.gov/opa/admpress.nsf/21b8983ffa5d0e4685257dd4006b85e2/b542d827055a839585257e5a005a796b!OpenDocument
http://www.wsj.com/articles/fracking-has-had-no-widespread-impact-on-drinking-water-epa-finds-1433433850
http://www.sfgate.com/science/article/Study-of-hydraulic-fracturing-in-state-puts-off-4822735.php

H. Environmental Enforcement

1. *AmeriPride Services v. Texas Eastern Overseas, Inc.,* 782 F.3d 474 (9th Cir. 2015).

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) is a statutory scheme giving the federal government broad authority to require responsible parties to clean up contaminated soil and groundwater. Section 9607(a) of C ERCLA states that any enumerated responsible party, including any person who is a current owner or operator of contaminated property, is liable for "any . . . necessary costs of response incurred by any other person consistent with the national contingency plan" "Response" costs are limited to cleanup, enforcement, and related security costs. The national contingency plan (NCP) is a national plan promulgated by the federal government to guide federal and state response actions. A private person who has incurred "necessary costs of response" that are consistent with the NCP may bring an action to recover such costs, including "interest on the amounts recoverable." In addition to allowing private parties to sue for cost recovery under § 9607(a), CERCLA also authorizes a responsible party who has incurred liability under § 9607(a) to bring an action for contribution under § 9613(f)(1) against any other potentially responsible party. "Contribution" is not defined in CERCLA, but is interpreted to mean "the tortfeasor's right to collect from others responsible for the same tort after the tortfeasor has paid more than his or her proportionate share, the shares being determined as a percentage of fault." The Ninth Circuit held that in allocating liability to a nonsettling defendant in a CERCLA contribution action, the District Court is not required to apply either the proportionate share approach of the Uniform Comparative Fault Act or the pro tanto approach of the Uniform Contribution Among Tortfeasors Act, but rather has discretion to determine the most equitable method of accounting for settlements between private parties. The court also held that a party can seek contribution under § 9613(f)(1) only for settlement costs that were for necessary response costs consistent with the NCP.

2. *Arizona* v. *City of Tucson*, 761 F. 3d 1005 (9th Cir., 2014)

In a case regarding future liability under CERCLA, the Ninth Circuit determined that the district court had an obligation to independently scrutinize settlement agreements entered into by the State's environmental agency. Following testimony from a witness with extensive knowledge of the site, the Arizona Department of Environmental Quality (ADEQ) entered into settlement agreements with 22 parties. The parties sought these early agreements to protect themselves against additional liability under the CERCLA and its Arizona counterpart, the Arizona Water Quality Assurance Revolving Funds (WQARF). Ultimately, the State reached 18 agreements with 22 parties under which the settling parties would pay specified damages to the State in exchange for release of liability under CERCLA and WQARF. The agreements required judicial approval through consent decrees. The State's motion to enter the consent decrees included explanation that the total estimated cost of remediation would be $75 million. The liability of the settling parties would be *de minimus*, totaling 0.1% to 0.2% of that total. A number of non-settling parties filed objections to the agreements, and moved to intervene in the action. The district court granted the consent decrees, approving the settlement agreements.

The Ninth Circuit noted that almost all cases of consent decrees involve the U.S. Environmental Protection Agency (EPA). Where the EPA is party to a consent decree, courts give much deference to the EPA's expertise because courts refrain from second-guessing an executive branch agency's construction of the statutory scheme it is entrusted to administer. In the present case, the EPA was not involved, but rather the State of Arizona. As such, the Ninth Circuit determined that the district court gave too much deference to ADEQ's interpretation of CERCLA and failed to sufficiently scrutinize the terms of the consent decrees. While the Court stated that state agencies are not to be afforded the same deference given to the EPA's implementation of CERCLA, the Court failed to further discuss the amount of deference that should be given to the state agency. The case was affirmed in part, reversed in part, and remanded for further proceedings.

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.