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2017 THIRD QUARTER ENVIRONMENTAL LAW UPDATE

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Welcome to Abbott & Kindermann's 2017 Third Quarter Environmental update. This update discusses selected litigation, regulations / administrative guidance and pending legislation, on both the federal and state levels, in the following general areas of environmental law: (A) Water Rights and Supply, (B) Water Quality, (C) Wetlands, (D) Air Quality and Climate Change, (E) Endangered Species, (F) Renewable Energy, (G) Hazardous Substance Control and Cleanup, (H) National Environmental Protection Act, and (I) Mining / Oil & Gas, (J) Streambed Alteration Agreements, (K) Cultural Resources Protection, and (L) Environmental Enforcement.

A. California Water Rights And Supply

1. Department of Water Resources Approves California WaterFix Tunnel Project In The Delta, Followed By Numerous Lawsuits, Water Contractor Doubts, And Financial Uncertainties.

USFWS and NMFS Issue Biological Opinions

On June 23, 2017, the U.S. Fish and Wildlife Service ("USFWS") and the National Marine Fisheries Service ("NMFS") issued biological opinions for the nearly $17 billion twin tunnel project in the Sacramento-San Joaquin Delta known as the "California WaterFix." Under the project, the two 40-foot wide tunnels would divert water from the Sacramento River at Courtland and deliver the water to pumping stations 40 miles to the south near Tracy. The federal biological opinions addressed the effects of the project to 16 federally-listed species and designated critical habitat. The USFWS opinion concluded that the project "is not likely to jeopardize the continued existence of any of these species, and is not likely to destroy or adversely modify designated critical habitat." Those opinions are somewhat of a reversal of prior draft opinions by those agencies. On June 29, 2017, the Natural Resources Defense Council ("NRDC"), Defenders of Wildlife, Bay Institute and the Golder Gate Salmon Association filed two lawsuits against the federal agencies in U.S. District Court in San Francisco (cases 3:17-cv-03739 and 3:17-cv-03742) challenging those biological opinions. According to one staff attorney for the NRDC: "It sure seems like politics is trumping science in the delta again."

DWR Approves WaterFix

On July 21, 2017, the California Department of Water Resources ("DWR") approved the California WaterFix project, along with the CEQA Environmental Impact Report supporting the project. Previously, the project was known as the Bay Delta Conservation Plan or "BDCP." Along with approving the project, DWR also filed a Complaint for Validation on July 21, 2017,

(Sacramento County Superior court, case no. 34-2017-00215965) in order to authorize the WaterFix revenue bonds.

Numerous Lawsuits Filed

Numerous lawsuits were filed against DWR under the California Environmental Quality Act challenging the project, including *City of Antioch v. Dept. of Water Resources* (Sacramento Superior Court, case no. 34-2017-80002664, filed Aug. 17, 2017); and *County of Sacramento and Sacramento County Water Agency v. Dept. of Water Resources* (Sacramento Superior Court, case no. 34-2017-80002666, filed Aug. 17, 2017). In fact, at least 58 groups filed actions against DWR in Superior Courts in several different counties. Petitioners challenging the WaterFix project include the cities of Sacramento, Stockton, Folsom and Roseville, the counties of San Joaquin, Solano and Yolo, the Placer County Water Agency, environmental groups such as North Coast Rivers Alliance and Friends of the River, crab boat owners, and an American Indian tribe. As an example of the claims being made in such lawsuits, the County of Sacramento alleges that "almost 700 acres of county farmland will be rendered unusable" during the 13-year construction period, and the water quality of the Delta will be degraded by the diversion of the Sacramento River to the point that the salinity would continue to move further upstream. The City of Antioch alleges that there will be substantial impacts to the city's water supply from salinity increases, with no mitigation.

As those lawsuits are just beginning, the water contractors of the Federal Central Valley Project and the State Water Project south of the Delta must now decide whether or not to pay for the WaterFix project. The WaterFix Project may benefit the contractors by allowing the Delta pumps to operate with fewer interruptions due to pumping curtailment designed to reduce kills of endangered fish such as the Delta smelt. However, there is no guarantee that the total volume of water deliveries will increase with the completion of the tunnels project. (Delta communities fear that the goal all along has been to increase the flow of water from northern California to central and southern California.) The state has threatened that the benefits of the WaterFix Project will be withheld from water agencies that do not contribute to paying for that project.

Westlands Votes Against WaterFix

On September 19, 2017, the board of Westlands Water District stunned the Brown Administration by voting 7-1 against helping to pay for the project or participating in its benefits. That was the first vote by any primary water contractor on California WaterFix. Westlands was expected to pay for more than $3 billion, or about a fifth of the cost of the project. Westlands' decision was based on the method of funding set by the Bureau of Reclamation that exempted some large agencies from paying for the WaterFix Project to the extent it involves the federal Central Valley Project.

Because of that funding mechanism, the cost of the water that Westlands' approximately 600 customers would have to pay would go from about $200 per acre-foot to more than $600 per acre-foot. One Westlands board member stated: "The number's just too high. It doesn't work for farming." Westlands General Manager added: "There aren't any crops that can be grown in Westlands that would support a cost of $600 an acre-foot."

California Natural Resources Agency Secretary John Laird said: "This vote [by Westlands], while disappointing, in no way signals the end of WaterFix." However, the general manager of the Metropolitan Water District of Southern California said: "Absent Westlands, you don't have a [tunnels] project." A board member of Metropolitan Water District pointed out: "What happens if Central Valley farmers aren't paying their share? Who's going to get stuck with the costs? That's one of the big questions that's out there. And to be honest, that's not been very well-answered."

Other urban water agencies can more easily spread out the cost of the project between many customers. For example, the additional charges to the median single family household in Los Angeles is estimated to be anywhere from $1.73 to more than $7 per month. Agencies such as the Metropolitan, which provides water to Los Angeles, are considering whether to pay for the project. The general manager of the Zone 7 Water Agency, which serves Pleasanton, Livermore, Dublin and San Ramon and gets 80% of its water from the Delta, said: "This project is the result of a dozen years of trying to come up with something that's going to minimize impacts. This is the best we're going to get." Other water agencies, including Metropolitan, are expected to vote on the project beginning October 10, 2017.

State Asserts That Opting Out is Not an Option

Another fight is also brewing as to what happens if an agency decides not to participate in funding the WaterFix Project. The State apparently is taking the position that the agencies would be obligated to pay for the project under their existing contracts because the WaterFix is merely an update of the existing system, and not a new project. According to the Natural Resources Agency ("NRA"), any contractor that decides not to participate must reach another agreement with another water contractor to take on their share of the cost. Opting out of either option "would not affect their existing contracts, but their actual water supplies from the [State Water Project] could become less reliable in the future," according to the NRA. A member of the board for Santa Clara Valley Water District responded: "That's what we're being informed – our contract ends if we don't participate. If they say they'll cut off our allocations if we don't participate, then let the court take it on." A Metropolitan board member also recognized the potential legal battles to come from such a situation: "There's going to be fighting in the future forever between the parties that opted out and the parties that opted in over how much water the parties that opted out ought to get. I guarantee there will be litigation over that."

State Auditor Notes Absence of Evidence Supporting Financial Viability of WaterFix

Adding more fuel to the project's opposition, the State Auditor issued a withering 97-page report on October 5, 2017, that concluded that "the planning phase experienced significant cost increases and schedule delays because of the scale and unexpected complexity of the project. … DWR has not completed either an economic or financial analysis to demonstrate the financial viability of WaterFix. Finally, it has not fully implemented a governance structure for the design and construction phase, and has not maintained important program management documents for WaterFix." That incriminating conclusion could impact the level of participation by the water contractors in the project. As the chairman of the Santa Clara Valley Water District said: "The

audit raises questions that our board needs to evaluate. … We want to be certain that what we do as a board is not going to have a major financial impact on our ratepayers."

For more information:
https://www.fws.gov/cno/newsroom/highlights/2017/calwaterfix/
https://www.fws.gov/sfbaydelta/HabitatConservation/CalWaterFix/documents/Final_California_WaterFix_USFWS_Biological_Opinion_06-23-2017.pdf
https://www.nrdc.org/sites/default/files/the-bay-institute-et-al-v-zinke-complaint.pdf
https://www.nrdc.org/sites/default/files/golden-gate-salmon-association-et-al-v-ross-complaint.pdf
http://touch.latimes.com/#section/-1/article/p2p-93662168/
http://www.mercurynews.com/2017/06/29/environmentalists-fishing-groups-file-lawsuit-to-block-delta-tunnels-plan/
http://www.sacbee.com/news/state/california/water-and-drought/delta/article167992267.html
https://www.scpr.org/news/2017/08/29/75147/how-much-might-ca-water-fix-cost-la/
http://www.sacbee.com/news/state/california/water-and-drought/delta/article168497632.html
http://www.sacbee.com/news/state/california/water-and-drought/delta/article167838422.html
http://www.sacbee.com/news/state/california/water-and-drought/delta/article174229771.html
http://www.sfgate.com/bayarea/article/Big-setback-for-Gov-Brown-s-twin-tunnels-12210949.php
http://www.sacbee.com/news/state/california/water-and-drought/article174021571.html
http://www.sacbee.com/news/state/california/water-and-drought/delta/article174490691.html
http://www.telegraphherald.com/ap/business/article_53cde0ac-6d57-5a28-a060-57037c25d715.html
http://www.sacbee.com/news/state/california/water-and-drought/article174021571.html
http://www.auditor.ca.gov/pdfs/reports/2016-132.pdf
http://www.mercurynews.com/2017/10/05/significant-cost-increases-and-delays-state-auditor-rips-jerry-browns-17-billion-delta-tunnels-project/

2. House Passes H.R. 23, Which Would Put Federal Government In Charge Of More Water Use Decisions In California

On July 12, 2017, the U.S. House of Representatives passed H.R.23 (Valadao, R-Hanford), the "Gaining Responsibility on Water Act," by a vote of 230-190. The bill requires the Central Valley Project ("CVP") and the State Water Project ("SWP") in California to be operated pursuant to the water quality standards and operational constraints described in the "Principles for Agreement on the Bay-Delta Standards Between the State of California and the Federal Government" dated December 15, 1994. Among other things, the bill also provides:

- The Department of the Interior ("Interior") shall cease any action to implement the San Joaquin River Restoration Settlement Act.
- The Bureau of Reclamation shall complete specified feasibility studies for water storage projects in California.
- Interior is directed, in the operation of the CVP, to adhere to California's water rights laws governing water rights priorities and to honor water rights senior to those held by the United States.

- Interior, in the operation of the Trinity River Division of the CVP, shall not make releases from Lewiston Dam in excess of specified volumes for each water-year type.
- The Bureau of Reclamation is established as the lead agency for purposes of coordinating all reviews, permits, licenses, or other approvals or decisions required under federal law to construct qualifying water projects.
- Interior must convert certain existing water service contracts between the United States and water users' associations to repayment contracts, upon the request of the contractor, to allow for the prepayment of such contracts.
- The bill amends the Reclamation Safety of Dams Act of 1978 to authorize the Department of the Interior to develop additional project benefits through the construction of new or supplementary works.
- Neither Interior nor the Department of Agriculture ("USDA") may condition or withhold issuance or renewal of any land use permit based on federal limitations or encumbrances or otherwise infringe on state water rights.
- Interior and USDA shall recognize: (1) congressional opposition to the violation of private property rights by the California State Water Resources Control Board in its proposal to require a minimum percentage of unimpaired flows in the main tributaries of the San Joaquin River; and (2) the need to provide reliable water supplies to municipal, industrial, and agricultural users across the state.

Republicans believe that the bill will bring more water to famers in the Central Valley. According to House Majority Leader Kevin McCarthy (R-Bakersfield): "This will provide more water …allow more of that water to come through the Valley where it's needed instead of out to the ocean." However, California's two Democratic Senators promised to fight the bill in the Senate on the ground that it diminishes the role that the State of California has in managing water resources in the State. Senators Feinstein and Harris stated: "California's Central Valley feeds the world. It deserves sensible and responsible water solutions – this measure doesn't even come close to meeting that test." Only one California Democrat, Rep. Jim Costa of Fresno, voted for the bill. Many of the provisions of the bill have been approved by the House in the past, only to die in the Senate under the threat of a veto by former President Obama. It remains to be seen what happens in the Senate this year with President Trump in office.

For more information:
https://www.congress.gov/bill/115th-congress/house-bill/23
http://touch.latimes.com/#section/-1/article/p2p-94059365/

3. Update On Formation Of Groundwater Sustainability Agencies Under the Sustainable Groundwater Management Act

On September 16, 2014, Governor Jerry Brown signed a package of bills that collectively established the "Sustainable Groundwater Management Act" ("Act"), a comprehensive groundwater sustainability management program for California. The heart of the Act is the creation of Groundwater Sustainability Agencies ("GSAs"), which will then develop and implement Groundwater Sustainability Plans ("GSPs") to meet the sustainability goal of the basin to ensure that it is operated within its sustainable yield, without causing undesirable results.

The GSAs must include one or more local public agencies with water supply, management or land use responsibilities. The GSAs must be formed by June 30, 2017, for all high and medium priority basins. As of August 14, 2017, 99% of those high and medium priority basis had GSAs in place, and 262 local agencies have posted GSA formation notifications. Only a few of the basins have incomplete coverage. The GSAs must complete GSPs by January 31, 2020, for high and medium priority basins that are subject to critical conditions of overdraft, or January 31, 2022, for all other high and medium priority basins.

Questions still remain how the GSPs will accommodate the priority of federally reserved water rights to groundwater, either owned by the U.S. Government or federally recognized Tribes. That issue has special significance in numerous basins in Southern California.

For more information:
http://sgma.water.ca.gov/portal/#gsa
http://www.water.ca.gov/groundwater/sgm/gsa.cfm

4. California Water Commission Will Decide Funding Of 12 Possible Water Storage Projects By June 2018.

In 2014, during the recent drought, voters in California overwhelmingly approved the Proposition 1 water bond that provided $7.5 billion for water infrastructure. That included $2.7 billion for new water storage projects. Twelve projects applied to the California Water Commission for funding, with a combined cost of $13.1 billion, or five times the available funds.

The list of applicant projects includes:

- Construction of the Sites Reservoir in Colusa County, which would divert water from the Sacramento River and hold 1.8 million acre feet, about the size of San Luis Reservoir near Santa Nella.
- Raise by 55 feet the Los Vaqueros Reservoir south of Brentwood, which would increase the reservoir's storage capacity from 160,000 acre feet to 275,000-acre feet, and which would include water for Central Valley wetland refuges for ducks, geese and other wildlife, in addition to people and farms.
- Construct a new Pacheco Pass Reservoir with a dam up to 300 feet high, holding 130,000 acre-feet of water.
- The U.S. Bureau of Reclamation proposes building the 665-foot-high Temperance Flat dam on the San Joaquin River in the Sierra foothills in Fresno County, creating a reservoir of 1.3 million acre-feet.
- Expansion of the Semitropic groundwater storage facility near Bakersfield.
- The Irvine Ranch Water District in Irvine proposes building a groundwater storage project at the south end of the Kern River.
- The City of San Diego proposes water purification project as part of its goal to produce one-third of its water by 2035 from recycled wastewater

The Water Commission will make its decision on which projects will be funded, and how much funding they will receive from the water bond, by June 2018.

For more information:
http://www.mercurynews.com/2017/08/15/new-dams-coming-to-california-a-dozen-projects-seek-2-7-billion-in-state-funding/
http://www.capradio.org/articles/2017/08/14/sites-reservoir-supporters-want-$16-billion-from-water-bond/
http://www.eastbaytimes.com/2017/08/14/east-bay-reservoir-expansion-plan-wins-support-of-environmental-groups/

B. WATER QUALITY

1. No Federal Court Jurisdiction To Review U.S. EPA's Objection To State-Issued NPDES Permits - *Southern California Alliance of Publicly Owned Treatment Works v. United States EPA*, 853 F.3d 1076 (9th Cir. 2017)

The Clean Water Act prohibits the discharge of any pollutant into navigable waters from any point source without a permit, and permits are issued in accordance with the National Pollutant Discharge Elimination System (NPDES). The U.S. Environmental Protection Agency ("EPA") granted California authority to administer its NPDES permits program. California therefore assumed primary responsibility for issuing NPDES permits. EPA retains supervisory authority over state permitting programs. Here, the Los Angeles Regional Office of the California State Water Resources Control Board prepared the draft NPDES permits for the water reclamation plants in El Monte and Pomona, California. EPA issued an Objection Letter to the draft permits on the grounds of numeric effluent limitations for whole effluent toxicity. EPA also stated in the Objection Letter that if the Los Angeles Board did not submit revised permits addressing EPA's concerns, then EPA would acquire exclusive NPDES authority over the particular discharges. The Los Angeles Board revised the draft permits to meet the terms of the EPA's Objection Letter, and issued the permits.

Petitioners Southern California Alliance of Publicly Owned Treatment Works argued that the draft permits were consistent with the Clean Water Act and that EPA exceeded its authority in the Objection Letter in requiring water quality-based effluent limitations for whole effluent toxicity. However, the Ninth Circuit held that the court did not have subject matter jurisdiction to review the Objection Letter under the Clean Water Act. When a state assumes responsibility for administering the NPDES program, the state becomes the permit-issuing authority, and an EPA objection to a draft permit is merely an interim step in the state permitting process. Thus, the Los Angeles Board retained control of the NPDES permitting process for the plants, and the permits were issued through the State of California, not EPA. Petitioners' remedy in this case would be to seek further administrative review and then judicial review in accordance with state law.

2. Landlords of Industrial Parks Could Potentially Be Liable For Stormwater Runoff Under Clean Water Act - *California Sportfishing Protection Alliance v. The Shiloh Group, LLC*, 2017 U.S. Dist. LEXIS 115209 (N.D.Ca. 2017, case no. 16-cv-06499)

Defendants The Shiloh Group, LLC, and others own and operate a 31-acre industrial park that California Sportfishing Protection Alliance ("CSPA") alleges unlawfully discharges polluted

storm water associated with industrial activities in violation of the Clean Water Act ("CWA"). CSPA alleges that Defendants maintain and control the facility's common infrastructure including its ditches and pipes, and therefore control the discharges of storm water associated with industrial activities that flow from the facility into waters covered by the CWA. Defendants moved to dismiss CSPA's complaint on the ground that, as a matter of law, they cannot be held responsible for storm water discharges under the CWA because they are passive landowners who are not involved in the industrial activities of their tenants. The District Court rejected that argument for two reasons. First, CSPA did not allege in the complaint that Defendants are "passive landlords," but that they "own and operate" and "maintain and control" the Facility, and that Defendants "control the storm water flows from the Facility" and have "knowingly chosen to allow industrial activities to operate in outdoor areas throughout the Facility." Second, in light of those allegations, the proper inquiry for a motion to dismiss is whether Defendants can be liable under the CWA for storm water discharges associated with industrial activities, when Defendants themselves do not engage in industrial activities but instead own, operate, maintain, and control the facility which is leased to tenants who engage in such activities.

The court explained that the CWA bans the discharge of any pollutant by any person regardless of whether that person was the root cause or merely the current superintendent of the discharge. Thus, a party can be held liable for illegal discharges under the CWA if it conveyed the discharge or owned the point source through which the pollutant was discharged, even if the party did not generate or add the pollutant to the discharge. Accordingly, the District Court denied the motion to dismiss.

C. WETLANDS

1. California Ready To Adopt A State Wetland Definition And Procedures For Discharges Of Dredged Or Fill Material To Waters Of The State That Are More Stringent Than The Federal Approach.

Since adopting Resolution No. 2008-0026, the State has been pressing forward on the development of a policy and program to protect Waters of the State. Now, nine (9) years and several draft revisions later, the State Water Resources Control Board ("Board") is proposing a State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State ("Procedures") (formerly known as the "Wetland Riparian Area Protection Policy"). Those Procedures will be included in the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays and Estuaries and Ocean Waters of California. The Procedures consist of four major elements: (1) a wetland definition; (2) a framework for determining if a feature that meets the wetland delineation is a water of the state; (3) wetland delineation procedures; and (4) procedures for application submittal, and the review and approval of Water Quality Certifications and Waste Discharge Requirements for dredged or fill activities. The Board states that is has developed the Procedures because "[t]here is a need to strengthen protection of waters of the state that are no longer protected under the Clean Water Act (CWA) due to U.S. Supreme Court decisions, since the Water Boards have historically relied on CWA protections in dredged or fill discharge permitting practices." The Board also points out that there are inconsistencies across the Water Boards in California in the requirements for discharges of dredged or fill material into waters of the state, including wetlands, because there is no single accepted

definition of wetlands at the state level. Furthermore, the Board believes that "current regulations have not been adequate to prevent losses in the quantity and quality of wetlands in California, where there have been especially profound historical losses of wetlands."

The impact may be particularly substantial for the agricultural industry and large-scale infrastructure projects in California that will almost certainly be subjected to additional permitting obligations and exposed to additional third-party litigation.

The extended public comment period on the proposed Procedures ended on September 18, 2017, and the comments are available online. The Board expects to adopt the final Procedures by the end of 2017.

For more information:
http://www.waterboards.ca.gov/water_issues/programs/cwa401/wrapp.shtml
http://www.waterboards.ca.gov/water_issues/programs/cwa401/docs/official_Doc_timeline/procedures_clean.pdf
http://www.sacbee.com/news/local/article164240607.html

D. AIR QUALITY & CLIMATE CHANGE

1. Litigation On California's Nonroad Engine Pollution Control Standards Waiver Is On Hold, As The Trump Administration Reconsiders The Waiver - *Dalton Trucking, Inc. v. U.S. Environmental Protection Agency* (9th Cir., case no. 13-74019)

The Federal Clean Air Act ("CAA") preempts individual states from regulating motor vehicle emissions. However, California is allowed to have motor vehicle emission standards that are different from the federal standards if the state applies to the U.S. Environmental Protection Agency ("EPA") for a waiver from federal preemption. On March 1, 2012, the California Air Resources Board ("CARB") requested that the EPA grant such a waiver for CARB's emissions regulations, including reductions of emissions of small particulate matter of oxides of nitrogen from in-use nonroad diesel fueled vehicles with a maximum horsepower of 25 hp or greater. The regulations cover vehicle fleets and engines like those on tractors, lawnmowers, bulldozers, cranes, locomotives and marine craft. On September 20, 2013, EPA granted CARB's waiver requests for those nonroad engine regulations. On November 19, 2013, several trucking and construction companies and trade groups filed a petition with the Ninth Circuit Court of Appeals that challenged EPA's waiver decision. While the purpose of the lawsuit was to protect the livelihoods of small business operators who use such equipment and have financial difficulty complying with regulations, the legal basis of the action was that EPA used an incorrect legal standard under the CAA when it made the waiver decision in 2013.

As it has for many years, EPA interprets the CAA as allowing a waiver for California if the state demonstrates the need for its motor vehicle regulatory program as a whole. Petitioners disagreed and alleged that the CAA requires that the state seek a waiver for *each* nonroad mobile source emission standard (and not the regulatory program as a whole), and that the state must demonstrate that there are "compelling and extraordinary conditions" necessitating the standards

for which a waiver was sought. Petitioners further alleged that such a showing was never made here by CARB.

The case was fully briefed as of January 2017, and the Ninth Circuit set the matter for oral argument on May 18, 2017. However, after the Trump Administration and the new EPA Administrator took office, they moved the court to indefinitely continue the oral argument "to give the appropriate officials adequate time to fully review the Off-Road Diesel Decision." CARB vigorously opposed the motion in its capacity as an Intervenor, in part because "delaying this case would harm [CARB] by perpetuating indefinitely the cloud of uncertainty this appeal has cast over its regulatory program since 2013."

On May 10, 2017, the Ninth Circuit panel granted the motion and ordered that "[o]ral argument will be rescheduled by a subsequent order if and when appropriate," and that EPA must file a "status report concerning its review within 90 days of the date of this order and every 90 days thereafter until directed otherwise." On August 7, 2017, EPA filed such a status report, in which it stated that "EPA is continuing to review its Off-Road Diesel Decision to determine whether it should be maintained, modified, or otherwise reconsidered."

How the EPA concludes that review, and whether the Ninth Circuit ever hears the case and agrees with the Petitioners' interpretation of the CAA waiver standards, will not only impact the off-road diesel emission regulations at stake in the litigation, but also on the state's vehicle emission program in general. That includes CARB's current regulatory effort to restrict greenhouse gas vehicle emissions.

For more information:
http://inewsource.org/2017/04/11/contractors-sue-epa-over-california-diesel/

2. Federal Ozone Standards Promulgated In 2015 Still Being Litigated, Even As Congress Seeks To Overturn Those Standards - *Murray Energy Corp. v. U.S. EPA* (D.C.Cir., case no. 15-1385)

In October 2015, the U.S. Environmental Protection Agency promulgated new National Ambient Air Quality Standards ("NAAQS") for ozone ("2015 Standards"). The standard tightened the emission to 70 parts per billion. At the time, the EPA estimated that the $1.4 billion it would cost to meet the stricter standards would be far outweighed by billions saved in reduced health care costs and public health gains. Five states, including Oklahoma, immediately filed a lawsuit in the Court of Appeals for the D.C. Circuit against the U.S. EPA regarding the 2015 Standards on the grounds that the standards were overly burdensome to industry. Other lawsuits challenging the 2015 Standards as too strict or too lenient followed. The cases were consolidated. Oral argument was scheduled for February 16, 2017, and then delayed by the Court until April 2017 due to the new officials that took office at the EPA following the change in Administrations. In early April 2017, the EPA requested that the D.C. Circuit delay oral argument in the consolidated cases. The Court granted the request and ordered the consolidated cases held in abeyance to provide the U.S. EPA with time to review the 2015 Standard and determine whether it should be maintained, modified or otherwise reconsidered. The Court ordered EPA to file status reports on the agency's review at 90-day intervals. Oral argument was scheduled for September 14, 2017.

Additional litigation arose out of the delay in implementing the 2015 Standards. On June 28, 2017, EPA Administrator (and former Oklahoma Attorney General) Scott Pruitt extended by one year the deadline to promulgate the initial area designations for the ozone NAAQS, which otherwise was supposed to be promulgated by October 1, 2017. (82 Fed.Reg. 29,246.) Administrator Pruitt expressed the agency's intent to "effectively implement the ozone standard in a manner that is supportive of air quality improvement efforts without interfering with local decisions or impeding economic growth." However, on August 1, 2017, 15 states (including California) filed a new Petition for Review with the D.C. Circuit that challenged the authority to extend those deadlines. In response to that petition, Administrator Pruitt announced on August 3 that the agency would reverse course and not delay the area designations.

Meanwhile, the U.S. House of Representatives passed HR 806, the "Ozone Standards Implementation Act of 2017," on July 18, 2017. HR 806 would amend the Clean Air Act by revising the NAAQS program, including: (1) delaying the implementation of the ozone NAAQS that were published in 2015; (2) changing the review cycle for criteria pollutant NAAQS from a 5-year review cycle to a 10-year review cycle; and (3) prohibiting the EPA from completing its next review of ozone NAAQS before October 26, 2025. Under HR 806,

- The EPA may consider, as a secondary consideration, likely technological feasibility in establishing and revising NAAQS for a pollutant if a range of air quality levels for such pollutant are requisite to protect public health with an adequate margin of safety;
- EPA must publish regulations and guidance for implementing NAAQS concurrently with the issuance of a new or revised standard, and that new or revised NAAQS may not apply to preconstruction permits for constructing or modifying a stationary source of air pollutants until those regulations and guidance have been published;
- In extreme ozone nonattainment areas, contingency measures are not required to be included in nonattainment plans.
- Technological achievability and economic feasibility must be taken into consideration in plan revisions for milestones for particulate matter nonattainment areas.

HR 806 is co-sponsored by several Central Valley members of Congress, and the bill is supported by the San Joaquin Valley Air Pollution Control District. The District's Executive Director alleges that local businesses in the Central Valley will be prevented from expanding and that big highway projects will be forfeited under Clean Air Act sanctions even though the District has done everything it could to control pollution. State air regulators dispute those arguments.

For more information:
https://www.nytimes.com/2017/06/06/us/politics/ozone-trump-obama-climate-change.html
https://apnews.com/8bfa8070c99b48dd8ac2f849519b499f
https://www.eenews.net/assets/2017/07/19/document_gw_01.pdf
https://ag.ny.gov/sites/default/files/8-1-17_state_of_ny_v_us_epa.pdf
https://www.nytimes.com/2017/08/03/climate/epa-reverses-course-on-ozone-rule.html?mcubz=0
https://www.congress.gov/bill/115th-congress/house-bill/806

http://www.latimes.com/politics/la-na-pol-smog-republicans-20170803-story.html

3. Cap-and-Trade Held "*Not A Tax*." California Chamber Reverses Course, Seeks A Deal To Preserve Cap-And-Trade Post-2020 - *California Chamber of Commerce v. State Air Resources Board* (2017) 10 Cal.App.5th 604

The California Chamber of Commerce, National Association of Manufacturers, and Morning Star Packing Company (collectively the "Chamber"), filed suit challenging the legality of the California Air Resources Board's ("CARB") implementation of the "Cap-and-Trade" program, a program that sets carbon dioxide (CO2) emissions allowances that a regulated emitter may release from its operations, and issues "credits" (some are available for free and others are sold at an auction held quarterly by CARB) to offset a regulated emitter's CO2 emissions that exceed the current emissions allowance. Once purchased from CARB, the owner of the credits is able to sell any unused credits on a secondary market. Revenues generated by the auction are used by CARB to fund other programs or projects that are designed to reduce greenhouse gas emissions. The Chamber challenged the programs under two claims: (1) CARB was not authorized by the Legislature to establish the Cap-and-Trade program; and (2) Cap-and-Trade is an unlawful tax that did not receive the required 2/3 vote in the Legislature. The trial court rejected the petition and the Chamber appealed.

The appellate court first considered whether CARB had the legislative authority to establish the auction program. Assembly Bill 32 ("AB 32"), signed into law in 2006, authorized CARB to "adopt…a system of market-based declining annual aggregate emission limits…." The Chamber argued that the law failed to provide CARB with the authority to create the auction, because: (1) AB 32 did not explicitly authorize an auction, nor discuss one in the legislative history; (2) after enactment, CARB had mostly distributed allowances for free; (3) the auction arguably rendered the administrative fee provision in AB 32 surplusage; (4) there was no guidance about how to spend the auction revenues; and (5) a bill proposed in 2009 that explicitly authorized the auction was not enacted. The court rejected each of these theories, finding that the act provided broad discretion to CARB to fashion a program to implement the law, including the authority to set up an auction program. It reasoned that the silence in the statutory language and the legislative history "…does not demonstrate ambiguity. It demonstrates breadth." It further reasoned that the statutory language does nothing to *preclude* establishment of an auction program because the act does not actually mandate any specific type of program. As for the administrative fee provision, the court held it was irrelevant because it "is a pedestrian measure to pay for the costs of implementing the Act" unrelated to the substantive question of achieving the goals of AB 32. Lastly, the court found that regardless of the vague intentions of the Legislature when enacting AB 32 in 2006, subsequent legislation adopted in 2012 directing how the auction money should be spent ratified CARB's decision to establish the auction program and cured any defects in the adoption of AB 32.

The court next addressed the question of whether the auction program was a tax that required a 2/3 vote of the Legislature. The Chamber argued that *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866 ("*Sinclair Paint*"), requires "any 'revenue generating measure'" to determine whether the exaction was a regulatory fee that must "bear a reasonable relationship to the payor's burdens on or benefits from the regulatory activity" or a tax which

requires a 2/3 vote under Proposition 13. The court rejected this premise, reasoning that it need not apply *Sinclair Paint*, because the auction of allowances was "a different system entirely" than a regulatory fee on polluters. Moving to evaluate whether the program was simply a tax, the court found it was not because it was neither compulsory, nor did it grant any special benefit to the payor. It reasoned that choosing to participate in the auction was voluntary, because the need to purchase extra allowances is driven by the regulated entities' decision to pollute beyond a certain level, not compelled by government. The court further distinguished the auction from a tax by noting that unlike taxes, the purchase of an allowance provides the buyer with a valuable asset that can be bought and sold on a secondary market. The court affirmed the judgment and the Chamber petitioned for review by the California Supreme Court which was rejected.

While Cap-and-Trade auction revenues had been lackluster at best while the lawsuit was making its way through the courts, revenues from the first auction after the court's decision rebounded dramatically. More than 90% of the credits were sold and more than $1 billion in revenue was generated. Hoping to stave off more restrictive regulations, the Chamber reversed course and returned to the Legislature and the Governor to seek a compromise.

For more information:
http://www.sacbee.com/news/business/article152407344.html
http://www.latimes.com/politics/essential/la-pol-ca-essential-politics-updates-california-cap-trade-chamber-1494514033-htmlstory.html

4. Local Coastal Jurisdictions Bring Novel Lawsuits Against Global Fossil Fuel Companies To Recover Damages Feared From Sea Level Rise Allegedly Caused By Fossil Fuel Created Climate Change – *County of San Mateo v. Chevron Corp., et al.* (Sup.Ct., San Mateo County, case no. 17CIV03222); *County of Marin v. Chevron Corp., et al.* (Sup.Ct., Marin County, case no. CIV1702586); *City of Imperial Beach v. Chevron Corp., et al.* (Sup.Ct., Contra Costa County, case no. C17-01227)

The Counties of Marin and San Mateo, along with the City of Imperial Beach in San Diego County (collectively, "Plaintiffs"), filed nearly identical lawsuits against 37 "major corporate members of the fossil fuel industry" ("Defendants") on July 17, 2017, in the Superior Courts in several Bay Area Counties, in order to recover compensatory damages, equitable relief, punitive damages and disgorgement of profits arising out of "injuries and damages because of sea level rise" resulting from climate change that is allegedly caused by the Oil Companies' activities over the last 50 years in extracting, refining, formulation, using, and promoting fossil fuel products. Plaintiffs allege that the Defendants:

> "…have known for nearly a half century that unrestricted production and use of their fossil fuel products create greenhouse gas pollution that warms the planet and changes our climate. They have known for decades that those impacts could be catastrophic and that only a narrow window existed to take action before the consequences would not be reversible. They have nevertheless engaged in a coordinated, multi-front effort to conceal and deny their own knowledge of those threats, discredit the growing body of publicly available scientific evidence, and

> persistently create doubt in the minds of customers, consumers, regulators, the media, journalists, teachers, and the public about the reality and consequences of the impacts of their fossil fuel pollution. At the same time, Defendants have promoted and profited from a massive increase in the extraction and consumption of oil, coal, and natural gas, which has in turn caused an enormous, foreseeable, and avoidable increase in global greenhouse gas pollution and a concordant increase in the concentration of greenhouse gases, particularly carbon dioxide ("CO_2") and methane, in the Earth's atmosphere. Those disruptions of the Earth's otherwise balanced carbon cycle have substantially contributed to a wide range of dire climate-related effects, including global warming, rising atmospheric and ocean temperatures, ocean acidification, melting polar ice caps and glaciers, more extreme and volatile weather, and sea level rise."

The lawsuits are based on the following allegations:

- "[P]ollution from the production and use of Defendants' fossil fuel products plays a direct and substantial role in the unprecedented rise in emissions of greenhouse gas pollution and increased atmospheric CO2 concentrations since the mid-20th century";
- Such increase in atmospheric carbon dioxide and other greenhouse gases "is the main driver of the gravely dangerous changes occurring to the global climate";
- Such "greenhouse gas pollution … is far and away the dominant cause of global warming and sea level rise";
- The "primary source of this pollution" is "fossil fuel products";
- "Defendants embarked on a decades-long campaign designed to maximize continued dependence on their products and undermine national and international efforts like the Kyoto Protocol to rein in greenhouse gas emissions";
- "[E]ach Defendant's conduct has contributed substantially to the buildup of CO2 in the environment that drives sea level rise";
- "Defendants are directly responsible for a substantial portion of committed sea level rise … because of the consumption of their fossil fuel products";
- "Defendants took affirmative steps to conceal, from Plaintiffs and the general public, the foreseeable impacts of the use of their fossil fuel products on the Earth's climate and associated harms to people and communities";
- "Defendants have actually and proximately caused the sea levels to rise, increased the destructive impacts of storm surges, increased coastal erosion, exacerbated the onshore impact of regular tidal ebb and flow, caused saltwater intrusion, and caused consequent social and economic injuries associated with the aforementioned physical and environmental impacts, among other impacts, resulting in inundation, destruction, and/or interference with Plaintiffs' property and citizenry."

In the lawsuits, Plaintiffs allege claims against Defendants on the legal theories of public nuisance, strict liability for failure to warn, strict liability for design defect, private nuisance, negligence, negligent failure to warn and trespass. Purportedly, the purpose of the lawsuits are to "ensure that the parties responsible for sea level rise bear the costs of its impact" on the

Plaintiffs. For example, Marin County officials estimated that damages to business and homes under extreme sea level rise conditions could cost more than $16 billion by 2100. Imperial Beach alleges that it does not have the financial resources to adapt to worst-case scenarios of sea-level rise. The complaints also seek attorneys' fees, and the cases are being taken on a contingency basis by the outside counsel representing the Plaintiffs.

In describing the litigation, one law professor said: "I don't think this is crazy, but it's a long shot." Another law school official added: "The lawyers have done a very good job. The courts will have to take this seriously."

The lawsuits are part of a larger global effort to use litigation to not only assign liability for climate change, but also to force governments to take more action to address climate change. (*See e.g.*, http://climatejustice.org.au/wp-content/uploads/2017/05/Report-Climate-Justice-2016.pdf .) As one editorial in the Guardian newspaper stated in support of such litigation: "Legal warfare has a two-fold aim: to overhaul transgressors' business models so that they are in line with the global commitment to phase out fossil fuels and limit temperature rises to 1.5°C; and to get them to pay for damages resulting from global warming. Climate litigation is the inevitable result of a failure of two decades of talks. But it is also an important way of reframing the climate crisis as a human rights emergency." Even with those public policy goals, a key unanswered question that will likely be raised in such lawsuits is how much responsibility consumers (including the local agencies that are plaintiffs in those lawsuits) must bear for using fossil-fuel based products and services, even when such consumers have been told that such products and services contribute to climate change.

For more information:
http://www.mercurynews.com/2017/07/17/two-bay-area-counties-file-complaint-against-oil-companies-over-sea-rise/
http://www.sandiegouniontribune.com/news/environment/sd-me-climate-lawsuits-20170717-story.html
https://www.theguardian.com/commentisfree/2017/sep/10/the-guardian-view-on-climate-change-see-you-in-court
http://www.sfchronicle.com/news/article/Advocates-blame-oil-giants-for-climate-change-12192858.php&cmpid=twitter-premium

5. Governor Brown and California Legislature Reaches Deal to Re-Authorize Cap-and-Trade Program. Some Conservative Groups and Environmentalists Cry Foul.

In July 2017, Governor Brown signed a package of bills which extended the California Air Resources Board's ("CARB") authority to operate the state's Cap-and-Trade program through 2030. The centerpiece was Assembly Bill 398 ("AB 398"), which, in addition to extending the program, included a number of provisions to address industry concerns while achieving the 2030 greenhouse gas ("GHG") reduction target of 40% below 1990 levels set by the adoption of Senate Bill 32 in 2016, including:

- An increase in the availability of free allowances for regulated emitters;

- Requiring at least 50% of carbon offsets to be in California;
- Precluding local air districts from setting rules on GHG emissions outside of the Cap-and-Trade program;
- Suspension of the fire prevention fee charged to property owners in high-fire-risk areas of the state;
- Extending an existing sales tax break for manufacturers and research and development companies related to electric power generation, production, distribution and storage; and
- Eliminating sales and use tax for energy companies that purchase renewable energy projects.

The companion bills included Assembly Constitutional Amendment 1 ("ACA 1"), which, if approved by voters, will redirect auction revenue beginning in 2024 to a special reserve fund that could only be used with a 2/3 vote of the Legislature. Republicans see the measure as another opportunity to kill the high-speed rail project, despised by most of their members, once-and-for-all. To address concerns raised by certain Democrats, Assembly Bill 617 ("AB 617"), strengthened pollution control programs, particularly in disadvantaged communities most affected by air pollution.

The deal was lauded by Governor Brown, legislative leaders and major business interests as a triumph of bipartisanship to tackle climate change, something the Governor called "essential for the survival of civilization." Not everyone was pleased. Conservative groups called the program nothing more than a tax on Californians that "would have absolutely no effect on the global climate." Frustration from the right ultimately led to the ouster of Republican Leader Chad Mayes as head of the Assembly Republican Caucus. On the other end of the spectrum, environmental groups expressed frustration with what they believed were giveaways to polluters, such as oil refineries and other stationary sources of GHG emissions. They believe the deal will undermine the state's ability to achieve its 2030 GHG reduction target and make it more difficult to combat air pollution in communities near sources of pollution. Despite the new law's limitations on local air districts, environmentalists have not given up. They note that the new law still authorizes air districts to regulate criteria pollutants, air toxics, and particulate matter, and are evaluating whether or not it impinges on air district's authority to cap refinery emissions, such as has been proposed by the Bay Area Air Quality Management District.

Within days after Governor Brown signed the legislation, CARB adopted a resolution that included a guarantee of the maximum amount of free allowances to assist all covered industries through 2020. The previously established assistance program is based upon a formula for allocating free allowances that includes consideration of the likelihood that a category of businesses could leave the state as a result of the financial impacts from state regulations. Businesses are grouped into high-, medium- or low-risk of moving out of state. Regulators had been considering reducing that assistance starting next year, but the change will now mean full assistance through 2030 because AB 398 already guaranteed it from 2021 to 2030. The benefit to regulated industries is estimated at $300 million over the next three years for oil refineries and tens of millions of dollars for other industries. Some CARB board members expressed skepticism of the need to increase the number of free allowances, but AB 398's author

"acknowledged it was a necessary concession" to secure enough votes for the Cap-and-Trade deal.

For more information:
http://www.latimes.com/politics/essential/la-pol-ca-cap-and-trade-reactions-20170712-story.html
https://www.apnews.com/6baa76c740b8407eb003745c0c2681ae/Brown,-lawmakers-celebrate-bipartisan-cap-and-trade-victory
http://www.sacbee.com/news/politics-government/capitol-alert/article161905653.html
http://www.mercurynews.com/2017/07/17/judgment-day-for-california-climate-change-program/
http://www.sfchronicle.com/bayarea/article/Brown-s-cap-and-trade-deal-could-eventually-11303901.php
https://www.eastbayexpress.com/oakland/climate-change-activists-not-deterred-by-californias-industry-friendly-law/Content?oid=8743356
https://www.arb.ca.gov/newsrel/newsrelease.php?id=945
https://calmatters.org/articles/california-climate-deal-net-big-bucks-polluters/

6. New Legislation Targets Air Pollution From Neighborhood Nonvehicle Sources In Disadvantaged Communities-AB 617 (Stats. 2017, ch. 136)

On July 26, 2017, Governor Brown signed Assembly Bill 617 (Garcia), which is designed to address air pollution from neighborhood nonvehicle sources in disadvantaged communities. Specifically, AB 617 does the following:

- Requires the California Air Resources Board ("CARB") to develop a uniform statewide system of annual reporting of emissions of criteria air pollutants and toxic air contaminants for use by certain categories of stationary sources.
- Requires CARB, by October 1, 2018, to prepare a monitoring plan regarding technologies for monitoring criteria air pollutants and toxic air contaminants and the need for and benefits of additional community air monitoring systems, as defined. CARB must select the highest priority locations in the state for the deployment of community air monitoring systems.
- Requires CARB, by October 1, 2018, to prepare and update, at least once every 5 years, a statewide strategy to reduce emissions of toxic air contaminants and criteria pollutants in communities affected by a high cumulative exposure burden. The bill would require the state board to select locations around the state for the preparation of community emissions reduction programs, and to provide grants to community-based organizations for technical assistance and to support community participation in the programs.
- Require an air district that is in nonattainment for one or more air pollutants to adopt an expedited schedule for the implementation of best available retrofit control technology, as specified.
- The bill would require the schedule to apply to each industrial source that, as of January 1, 2017, was subject to a specified market-based compliance mechanism and give highest priority to those permitted units that have not modified emissions-related permit conditions for the greatest period of time.

- Require CARB to establish and maintain a statewide clearinghouse that identifies the best available control technology, best available retrofit control technology for criteria air pollutants, and related technologies for the control of toxic air contaminants.
- Increases the maximum for the generally applicable criminal and civil penalties for any person for violations of air pollution laws from nonvehicle sources from $1,000 to $5,000, with annual adjustments based on the California Consumer Price Index.

Some environmental justice advocates felt AB 617 fell short because air quality improvements are not mandated: "[AB 617] lacks the teeth and specificity needed to ensure that it will lead to improved health and air quality in our communities." However, legislators noted the significance of how the air quality legislation in AB 617 was addressed in tandem with the Legislature's overall climate change legislation in 2017.

For more information:
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB617
http://www.latimes.com/local/lanow/la-me-ln-air-pollution-law-20170725-story.html

E. ENDANGERED SPECIES

1. Department of Water Resources Approves California WaterFix Tunnel Project In The Delta, Followed By Numerous Lawsuits, Water Contractor Doubts, And Financial Uncertainties.

See California Water Rights and Supply, Item No. 1, at page 8, regarding issuance of biological opinions.

F. RENEWABLE ENERGY

1. The Cautionary Story Of A Utility Scale Renewable Energy Project - *Sierra Club v. County of San Benito* (March 22, 2017, case no. H042915), unreported decision, 2017 Cal.App.Unpub.LEXIS 1987.

In 2010, the County of San Benito granted a conditional use permit for a solar project to the Panoche Valley Solar, LLC. The project was a 3,200 acre, 399-magawatt solar generation facility involving up to 4 million solar panels in the Panoche Valley, a semiarid open space and range land west of Interstate 5 in San Benito County. The approved project would have become one of the largest solar farms in the world and could have powered over 100,000 homes. The project would have given the County $5.4 million in sales tax from the purchase of the solar panels. In August 2011, the San Benito County Superior Court denied a legal challenge under the California Environmental Quality Act and the Williamson Act. The trial court's judgment was affirmed by the Court of Appeal in a published decision. (*Save Panoche Valley v. San Benito County* (2013) 217 Cal.App.4th 503.)

In 2014, the project applicant sought to modify the conditional use permit. The revised project was for a 247-megawatt, 2,506-acre solar electric generation facility, including an additional 24,176 acres for habitat conservation (which is more than the original project.) The County's expected to receive approximately $2.5 million in sales tax revenue from that revised project. The County approved a revised use permit and certified the Final Supplemental Environmental Impact Report (SEIR) in 2015. The SEIR addressed the project's impact and mitigation measures for the certain animal and plant species, including the San Joaquin kit fox, giant kangaroo rat, and blunt-nosed leopard lizard, and numerous bird species. However, the Sierra Club and Santa Clara Valley Audubon Society again filed a writ of mandate action and challenged the Final SEIR. The trial court rejected that challenge as well. This year, in an unpublished opinion, the Court of Appeal for the Sixth District again affirmed the trial court judgment. (*Sierra Club v. County of San Benito* (March 22, 2017, case no. H042915), unreported decision, 2017 Cal.App.Unpub.LEXIS 1987.)

The project construction already began in the Fall of 2016 and is scheduled to be completed in 2018. But those two fully litigated lawsuits, and that ongoing construction, are not the end of the story.

In July 2017, just 3 months after the latest Court of Appeal decision, the company that took over the project, Con Edison Development, reached an agreement with Sierra Club, Santa Clara Valley Audubon Society, Defenders of Wildlife and the California State Department of Fish and Wildlife. That agreement dramatically reduced the project to 130 megawatts, about 1/3 the size of the original project. According to a Con Edison official, the company signed the agreement because, even though the environmental groups had repeatedly lost in court, they purportedly still had cases they could appeal that could have slowed or killed the project, which is already under construction. The environmental groups are hailing the agreement as a "win-win." A Sierra Club spokesperson stated: "As we work toward lowering carbon pollution, it's critical that new clean energy development is not done at the expense of endangered animals and their habitat." Incidentally, Con Edison also plans on building another utility-scale solar project in Southern California of about 100 megawatts and the environmental groups have indicated that they will not oppose that project.

However, the San Benito County Board of Supervisors, who approved the original and the modified project, and who were the prevailing parties in both lawsuits, were never included in those settlement talks or made a party to that agreement. The Supervisors are reacting because the County will lose out on millions of dollars in taxes that they were promised when they originally approved the larger project in 2010. According to the County's clerk-auditor-recorder, the County would not be receiving any sales tax from the project because Con Edison had purchased the panels in a way that made San Francisco the recipient rather than San Benito County. The smaller project will also generate less property tax revenue than planned. The County is now considering filing a lawsuit against Con Edison, on the grounds that the company violated the project's original 2010 development agreement with the county.

For more information:
http://www.mercurynews.com/2017/07/21/giant-solar-project-reduced-due-to-environmentalists-opposition/

https://benitolink.com/news/construction-panoche-solar-farm-continues
https://benitolink.com/news/supes-demand-cancellation-solar-project-threaten-litigation-against-conedison

2. Senate Bill 100 Aims To Set Goal Of 100% Renewable Energy Use In California By 2045.

Senate Bill 100 (De León), passed by the California Senate on May 31, 2017, and pending before an Assembly committee, is designed to accelerate the renewable energy use requirements in California. According to its author, "this bill sets a new clean renewable target for California by 2045 and directs our climate and energy agencies to use this new target to ensure our state's energy grid is 100% clean before the middle of the century." SB 100 not only mandates an increase in the 2030 Renewable Portfolio Standard ("RPS") target from 50% to 60%, but it also establishes a state goal of having renewable energy resources and zero-carbon resources supply *all* electricity used in the state as of 2045. Specifically, the bill:

- Requires retail sellers to procure 60% of their retail electricity sales from eligible renewable energy resources by 2030 and thereafter, including new interim targets of 44% by 2024, and 52% by 2027.
- Establishes state policy that renewable energy resources and zero-carbon resources supply all electricity procured to serve California end-use customers and the State Water Project (SWP) no later than December 31, 2045.
- States that the transition to zero-carbon electric system for California shall not increase carbon emissions elsewhere in the western grid and shall not allow resource shuffling.
- Requires the California Public Utilities Commission ("PUC"), the California Energy Commission ("CEC"), the Department of Water Resources ("DWR"), and the California Air Resources Board ("ARB") to incorporate this policy into all relevant planning, and use existing programs to achieve this policy.
- Requires the PUC, CEC, and ARB in consultation with the Independent System Operators and other balancing authorities to prepare a joint report to the legislature by February 1, 2019, and every two years after to identify progress and barriers to achieving the policy.

Scientists hotly dispute whether moving beyond an 80% renewable energy standard is financially feasible. As for the 100% renewable energy policy, one Stanford University scientist concludes: "We could do it. It would just be very expensive." PG&E commented that if California's energy goals are not affordable to customers, "it's not sustainable."

Senate Bill 100 was held in an Assembly committee at the end of the legislative session in September 2017. Therefore, it will likely be pursued again in early 2018 as a two-year bill.

For more information:
http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB100
http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=201720180SB100

https://ww2.kqed.org/science/2017/09/08/can-california-really-go-100-percent-renewable-energy/
http://www.pnas.org/content/114/26/6722.full

G. HAZARDOUS SUBSTANCE CONTROL AND CLEANUP

1. Fresno County Superior Court Rules In Favor Of State's Ability To List Glyphosate (i.e., Roundup™) On California's Proposition 65 List Of Hazardous Substances– *Monsanto Co. v. California's Office of Environmental Health Hazard Assessment* (Sup. Ct. Fresno County, case no. 16CECG00183)

As the lead agency for the implementation of Proposition 65, California's Office of Environmental Health Hazard Assessment ("OEHHA") determines whether a chemical's listing is required by Proposition 65. Under Health and Safety Code section 25249.8(a), California Labor Code section 6382(b)(1) established a listing mechanism for certain chemicals into the Proposition 65 list. Labor Code section 6382, subdivision (a), provides: "The director shall prepare and amend the list of hazardous substances according to the following procedure: Any substance designated in any of the following listings in subdivision (b) shall be presumed by the director to be potentially hazardous and shall be included on the list …." Subdivision (b)(1) provides the following listing: "Substances listed as human or animal carcinogens by the International Agency for Research on Cancer (IARC)." Monsanto Company alleges that "OEHHA has described listings under the Labor Code listing mechanism as a 'ministerial' and essentially automatic process."

On September 4, 2015, OEHHA determined that "glyphosate" met the requirements "for listing as known to the state to cause cancer for purposes of Proposition 65." Glyphosate is a widely used herbicide and is marketed under a number of trade names by Monsanto and others, including the name "Roundup™". OEHHA based that determination on the fact that "IARC concludes that … glyphosate [is] classified in Group 2A ("probably carcinogenic to humans") …. IARC concludes that there is sufficient evidence of carcinogenicity in experimental animals for … glyphosate …."

On January 21, 2016, the Monsanto Company filed a writ of mandamus action in the Superior Court in Fresno County (case no. 16CECG00183) that challenges the OEHHA determination regarding glyphosate. In its complaint, Monsanto seeks, among other things, (1) a peremptory writ of mandate that enjoins OEHHA from adding glyphosate to the Proposition 65 list of carcinogens pursuant to the Labor Code listing mechanism; and (2) a judicial declaration that the Labor Code listing mechanism and OEHHA's regulations implementing the Labor Code listing mechanism set forth at Cal. Code Regs., tit. 27, § 25904, as applied to the proposed listing of glyphosate under Proposition 65, violate the California and United States Constitutions. On March 10, 2017, Judge Kristi Culver Kapetan affirmed a Tentative Ruling that sustained the State's demurrers, without leave to amend, and motion for judgment on the pleadings. Judge Kapetan rejected every claim raised by Monsanto and Plaintiff-in-Intervention California Citrus Mutual in the litigation. On March 28, 2017, Monsanto filed a Notice of Appeal in the Court of Appeal for the Fifth District.

Also on March 28, 2017, OEHHA posted a notice on its website that glyphosate (CAS No. 1071-83-6) would be added to the list of chemicals known to the state to cause cancer for purposes of Proposition 65 with a delayed effective date due to the pending lawsuit. After the Court of Appeal denied Monsanto's "Petition for Writ of Supersedeas and Other Extraordinary Relief and Request for Stay" on June 15, 2017, and after the California Supreme Court denied Monsanto's Petition for Review and Application for Stay on June 22, 2017, OEHHA went ahead and added glyphosate to the Proposition 65 list effective July 7, 2017. However, OEHHA has not yet determined whether there is a high enough amount of the chemical in Roundup™ to pose a risk to human health that warrants a health warning label.
The appeal is currently being briefed in the Court of Appeal.

For more information:
https://oehha.ca.gov/proposition-65/crnr/glyphosate-listed-effective-july-7-2017-known-state-california-cause-cancer
https://www.usatoday.com/story/news/2017/06/27/roundup-ingredient-cancerous-list-monsanto-california/103222928/
https://www.cbsnews.com/news/monsanto-roundup-weed-killer-glyphosate-potential-cancer-chemical/

2. California Considers Listing Chlorpyrifos As A Hazardous Chemical Under Proposition 65, While U.S. EPA Declines To Ban The Pesticide.

On August 25, 2017, the Office of Environmental Health Hazard Assessment's ("OEHHA") announced that at a public meeting on November 29, 2017, the pesticide chlorpyrifos will be considered for listing under Proposition 65 by the Developmental and Reproductive Toxicant Identification Committee ("DARTIC"), a committee of OEHHA's Science Advisory Board and the state's qualified experts regarding findings of reproductive toxicity for purposes of Proposition 65. At that meeting, DARTIC will discuss whether or not chlorpyrifos has been "clearly shown by scientifically valid testing according to generally accepted principles to cause developmental toxicity." The chemical is extensively used on more than 60 crops in California.

DARTIC considered chlorpyrifos in 2008 but did not add it to the Proposition 65 list at that time. However, OEHHA states that "[s]ubstantial new, relevant data on developmental toxicity have become available since the chemical was previously considered for listing." According to a state EPA official, "While chlorpyrifos has been protecting crops for more than 50 years, new information in the scientific community leads us to believe the level of risk it poses is greater than previously known."

Meanwhile, on April 5, 2017, the U.S. Environmental Protection Agency reversed a ban on the use of chlorpyrifos that had been proposed by the Obama Administration. Specifically, the federal agency denied a petition requesting that EPA revoke all tolerances for chlorpyrifos under section 408(d) of the Federal Food, Drug, and Cosmetic Act and cancel all chlorpyrifos registrations under the Federal Insecticide, Fungicide and Rodenticide Act. Despite that order rejecting an outright ban, the EPA nevertheless issued a revised human health risk assessment of the chemical on April 26, 2017, which found: "Based on current labeled uses, the revised

analysis indicates that expected residues of chlorpyrifos on food crops exceed the safety standard under the Federal Food, Drug, and Cosmetic Act (FFDCA). In addition, the majority of estimated drinking water exposure from currently registered uses, including water exposure from non-food uses, continues to exceed safe levels, even taking into account more refined drinking water exposure. This assessment also shows risks to workers who mix, load and apply chlorpyrifos pesticide products."

For more information:
https://oehha.ca.gov/proposition-65/crnr/hazard-identification-materials-consideration-developmental-toxicity
www.latimes.com/business/la-fi-pesticide-restrictions-20170818-story.html
https://www.regulations.gov/document?D=EPA-HQ-OPP-2007-1005-0100
http://www.capradio.org/articles/2017/07/12/activists-urge-state-to-ban-pesticide-after-epa-reverses-ruling/
https://www.epa.gov/ingredients-used-pesticide-products/order-denying-petition-revoke-all-tolerances-pesticide
https://www.epa.gov/ingredients-used-pesticide-products/revised-human-health-risk-assessment-chlorpyrifos

H. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

1. Ninth Circuit Finds Navy's Failure To Disclose Safety Board's Opposition To Project As Harmless Error Under NEPA – *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of the Navy*, 860 F.3d 1244 (9th Cir. 2017)

At the Naval Base Kitsap in Washington State ("Kitsap"), the United States Navy maintains its operating hub for the Pacific fleet of its TRIDENT submarine program. TRIDENT submarines, armed with nuclear missiles, are brought to Kitsap for maintenance of those missiles, which includes an Explosives Handling Wharf that performs such maintenance. The Navy considered the possibility of building another such wharf to expand its maintenance capabilities. In order to comply with the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the Navy prepared and published an Environmental Impact Statement ("EIS"). The EIS discussed environmental impacts arising during the construction of a second wharf, explosives requirements that impact the project, as well as alternatives to the project (which did not include another location because there were no other viable sites for the proposed wharf according to the Navy). While the EIS referenced appendices, three of them were redacted in their entirety in the publicly released version of the EIS because the Navy claimed that they contained Unclassified Controlled Nuclear Information ("UCNI") that the Navy deemed unfit for public dissemination.

After the final EIS was released and a Record of Decision was issued, Ground Zero Center for Nonviolent Action, Washington Physicians for Social Responsibility, and peace activist Glen Milner filed an action against the Navy in United States District Court, alleging that the Navy had not fully complied with NEPA's disclosure requirements. During this litigation, the Navy revealed significant information that was not fully disclosed in the EIS. One such group of undisclosed documents indicated that the Safety Board had rejected the proposal chosen by the Navy, but that the Secretary of the Navy gave the approval despite the Safety Board concerns.

Also, the administrative record in the litigation was less redacted than the publically-issued EIS as to documents containing UCNI because, on closer look during litigation, the Navy deemed such documents to contain less UCNI than determined earlier, such as explosives safety arcs for the existing and proposed wharfs. Plaintiffs argued that these newly released documents demonstrated that the Navy had violated NEPA by not adequately disclosing the risks of the proposed wharf, by not disclosing the Safety Board's lack of approval for the site; by not disclosing the appendices more completely during the EIS process; and by not engaging in a reasonably thorough analysis. The District Court disagreed and granted the Navy summary judgment. The Ninth Circuit affirmed.

The Ninth Circuit agreed with Plaintiffs that the Navy's failure to disclose the later-produced appendix information violated NEPA. Also, "the combination of the affirmative reliance on the Safety Board requirements and the failure to disclose the Safety Board's disapproval of the Navy's risk assessment was inconsistent with the responsibility NEPA imposed to disclose the results of consultation with expert agencies." But the Court held such errors to be harmless. The "harmless error" analysis examines "whether the error caused the agency not to be fully aware of the environmental consequences of the proposed action, thereby precluding informed decisionmaking and public participation, or otherwise materially affected the substance of the agency's decision." Plaintiffs failed to demonstrate that such goals were materially impeded. Plaintiffs argued that releasing the limited explosion analysis "would have increased pressure for meaningful study." But the Ninth Circuit found that contention unpersuasive. Also, the opposing viewpoint of the Safety Board "was fully considered in the internal decisionmaking process, even though its result was not fully disclosed to the public."

The case also addressed a novel issue of inadvertent disclosure of classified or controlled information. During the litigation, counsel for the Navy informed the District Court that documents containing Classified Information and/or Unclassified Controlled Nuclear Information had been inadvertently disclosed for a period of time. The District Court issued an order ("Order") that restricted Plaintiffs' use and disclosure of such documents, and put such documents under seal. Plaintiffs argued that the Order violated due process and the First Amendment. The Ninth Circuit found that, because the Navy filed the contested documents on the public docket, to impose a restriction on Plaintiffs' further public disclosure of them, the Navy must meet a stricter standard than the showing of good cause necessary to obtain a protective order in the typical discovery context. The Court held that, to impose continuing restrictions on Plaintiffs' public dissemination of such documents, the trial court must identify "a compelling reason [to impose the restriction] and articulate the factual basis for its ruling, without relying on hypothesis or conjecture." Because the District Court had not made such specific findings, the Ninth Circuit vacated the Order and remanded for further proceedings consistent with the Court's opinion.

2. Trump Administration Rescinds Climate Change Guidance For NEPA That Was Issued By Obama Administration.

On August 1, 2016, the Council of Environmental Quality ("CEQ") issued guidance to assist Federal agencies in their consideration of the effects of greenhouse gas ("GHG") emissions and climate change when evaluating proposed Federal actions in accordance with the National Environmental Policy Act ("NEPA") and the CEQ Regulations Implementing the Procedural Provisions of NEPA ("CEQ Regulations"). The stated purpose of the guidance was to provide Federal agencies a "common approach" for assessing their proposed action, and to provide for "greater clarity and more consistency" in how agencies address climate change in the scoping, alternatives, impacts and mitigation analysis of the NEPA process." One environmental group called the guidance a "game-changer."

However, in Section 3(c) of Executive Order 13783, issued on March 28, 2017, President Trump rescinded that guidance, effective April 5, 2017. That Executive Order was based on the premise that "[i]t is in the national interest to promote clean and safe development of our Nation's vast energy resources, while at the same time avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." The Executive Order stated that "it is the policy of the United States that executive departments and agencies (agencies) immediately review existing regulations that potentially burden the development or use of domestically produced energy resources and appropriately suspend, revise, or rescind those that unduly burden the development of domestic energy resources beyond the degree necessary to protect the public interest or otherwise comply with the law." Despite that rescission, GHG and climate change analysis is still required in NEPA analysis. (See e.g., *AquAlliance v. United States Bureau of Reclamation*, 2017 U.S. Dist. LEXIS 109849 (E.D.Ca., July 14, 2017, case no. 1:15-CV-754).)

One of the likely consequences of that Executive Order rescinding the guidance, however, is that there is less certainty as to how, and to what degree, Federal agencies will address GHGs and climate change in the context of NEPA review. According to the former Managing Director of CEQ that originally issued the guidance in the Obama Administration: "Now, every agency will decide for themselves how they want to incorporate climate change, which is very confusing for companies, because there is no uniform approach to presenting the analysis. … Now, we're back to where you're going to get completely inconsistent approaches across the federal government. And when people decide not to look at climate change, it will increase litigation risk, which slows down projects as well."

For more information:
https://obamawhitehouse.archives.gov/administration/eop/ceq/initiatives/nepa/ghg-guidance
https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/nepa_final_ghg_guidance.pdf
https://www.federalregister.gov/documents/2017/04/05/2017-06770/withdrawal-of-final-guidance-for-federal-departments-and-agencies-on-consideration-of-greenhouse-gas
https://www.federalregister.gov/documents/2017/03/31/2017-06576/promoting-energy-independence-and-economic-growth

https://thinkprogress.org/government-agencies-must-consider-the-climate-white-house-says-8a9cfe5d5bed/

3. President Trump Announces Streamlining Changes To Permitting Regulations For Federal Infrastructure Projects.

On August 15, 2017, President Trump an issued Executive Order entitled "Establishing Discipline And Accountability In The Environmental Review And Permitting Process For Infrastructure Projects." The Order is designed to address the problem that "[i]nefficiencies in current infrastructure project decisions, including management of environmental reviews and permit decisions or authorizations, have delayed infrastructure investments, increased project costs, and blocked the American people from enjoying improved infrastructure that would benefit our economy, society, and environment." Among other things, the Order seeks to establish a "more unified environmental review" process under the National Environmental Policy Act ("NEPA") through a "One Federal Decision" procedure. Specifically, the Order provides in Section 5(b):

> (i) Each major infrastructure project shall have a lead Federal agency, which shall be responsible for navigating the project through the Federal environmental review and authorization process, including the identification of a primary Federal point of contact at each Federal agency. All Federal cooperating and participating agencies shall identify points of contact for each project, cooperate with the lead Federal agency point of contact, and respond to all reasonable requests for information from the lead Federal agency in a timely manner.
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> (ii) With respect to the applicability of NEPA to a major infrastructure project, the Federal lead, cooperating, and participating agencies for each major infrastructure project shall all record any individual agency decision in one Record of Decision (ROD), which shall be coordinated by the lead Federal agency unless the project sponsor requests that agencies issue separate NEPA documents, the NEPA obligations of a cooperating or participating agency have already been satisfied, or the lead Federal agency determines that a single ROD would not best promote completion of the project's environmental review and authorization process. The Federal lead, cooperating, and participating agencies shall all agree to a permitting timetable that includes the completion dates for the ROD and the federally required authorizations for the project.
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> (iii) All Federal authorization decisions for the construction of a major infrastructure project shall be completed within 90 days of the issuance of a ROD by the lead Federal agency, provided that the final EIS includes an adequate level of detail to inform agency decisions pursuant to their specific statutory authority and requirements. The lead Federal agency may extend the 90-day deadline if the lead Federal agency determines that Federal law prohibits the agency from issuing its approval or permit within the 90-day period, the project sponsor requests that the permit or approval follow a different timeline, or the lead Federal agency determines that an extension would better promote completion of the project's environmental review and authorization process.

(iv) The Council on Environmental Quality (CEQ) and OMB shall develop the framework for implementing One Federal Decision ….

One of the goals of the Order is to have federal agencies process environmental reviews for major projects within two years.

For more information:
https://www.whitehouse.gov/the-press-office/2017/08/15/presidential-executive-order-establishing-discipline-and-accountability
https://www.nytimes.com/2017/08/15/climate/flooding-infrastructure-climate-change-trump-obama.html?mcubz=0

I. MINING, OIL AND GAS

1. Trump Administration To Rescind BLM Fracking Regulation, So Federal Circuit Court Dismisses Lawsuit Against The Regulation - *Wyoming v. Zinke*, ___ Fd.3d ____, 2017 U.S. App. LEXIS 18275 (10th Cir., Sept. 21, 2017, case no. 16-8068)

In 2015, the federal Bureau of Land Management ("BLM") promulgated a regulation governing hydraulic fracturing (fracking) on lands owned or held in trust by the United States. (43 C.F.R. §3162.3-3 (2015).) The regulation imposed new well construction and testing requirements, new flowback storage requirements, new chemical disclosure requirements, and also generally increases BLM's oversight of fracking. The regulation would impact an estimated 2,800-3,800 fracking operations per year.

Shortly before the fracking regulation was to take effect, the Independent Petroleum Association of America and the Western Energy Alliance filed a Petition for Review of Final Agency Action under the Administrative Procedure Act. The States of Wyoming and Colorado filed separate Petitions six days later, and the cases were consolidated. North Dakota, Utah, and the Ute Indian Tribe intervened, opposing the new regulation, multiple citizen groups also intervened to defend the regulation.

The U.S. District Court for the District of Wyoming invalidated the fracking regulation as exceeding the BLM's statutory authority. (*Wyoming v. United States Dept. of the Interior*, Nos. 2:15-CV-041-SWS, 2:15-CV-043-SWS, 2016 U.S. Dist. LEXIS 82132, (D. Wyo. June 21, 2016.) The District Court concluded that the Secretary of the Interior was authorized to regulate activities that disturb the surface of federal lands, but that the fracking regulation purports to regulate the fracking process beyond any surface activities. The BLM appealed. While the appeal was pending, President Trump was elected. Under the new Administration, the BLM began the process of rescinding the fracking regulation. President Trump's Executive Order No. 13,771 required the Department of the Interior to review its regulations "for consistency with the policies and priorities of the new Administration," and Executive Order No. 13,783 directed the Secretary of the Interior to "publish for notice and comment proposed rules suspending, revising, or rescinding" the fracking regulation. Such notices of intended rescission were given in June and July 2017, on the grounds that the regulation "unnecessarily burdens industry with

compliance costs and information requirements that are duplicative of regulatory programs of many states and some tribes." In light of those changed and changing circumstances, the Tenth Circuit held that the appeals were prudentially unripe. As a result, the Tenth Circuit dismissed the appeals and remanded with directions to vacate the District Court's opinion and dismiss the action without prejudice.

2. 19th Century Federal Mining Patents Do Not Preclude SMARA Permitting - *Hardesty v. State Mining & Geology Board* (April 17, 2017, case no. C079617) 11 Cal.App.5th 790, ordered depublished (Aug. 9, 2017) 2017 Cal. LEXIS 6156.

Owners of property known as the Big Cut Mine in El Dorado County challenged the findings by the State Mining and Geology Board (Board) pursuant to the Surface Mining and Reclamation Act of 1975 ("SMARA") (Pub. Resources Code, § 2710 *et seq*.) that there are no vested rights to surface mine at the Mine. The findings effectively denied the Owners a "grandfather" exemption from the need to obtain a mining permit from the County of El Dorado. The trial court denied the Owners' mandamus petition and the Court of Appeal affirmed. The Owners argued that the 19th-Century federal mining patents for the Mine established a vested right to surface mine after the passage of SMARA without the need to prove the owner of the Mine was surface mining on SMARA's operative date of January 1, 1976. The Court rejected that argument and held that the federal mining patents had no effect on the application of state regulation of mining.

In the recent case of *People v. Rinehart* (2016) 1 Cal.5th 652, the California Supreme Court rejected the view that state laws that make mining more difficult or even impracticable necessarily conflict with the congressional intent of encouraging ongoing mineral exploration in the federal Mining Law of 1872. In other words, according to the Hardesty court: "[T]he fact that mines were worked on the property years ago does not necessarily mean any surface or other mining existed when SMARA took effect, such that any right to surface mine was grandfathered." Furthermore, the Court agreed with the trial court that there was a clear manifestation of intent to discontinue mine operations during the period from the 1940s until the early 1990s: "[T]he evidence of abandonment was overwhelming." The Court explained: "[A] person's subjective 'hope' is not enough to preserve rights; a desire to mine when a land-use law [i.e., SMARA] takes effect is 'measured by objective manifestations and not by subjective intent.'"

3. California Department of Conservation About To Issue New Changes To The Guidance Document For Surface Mine Inspectors.

Assembly Bill 1142 and Senate Bill 1142, signed by Governor Brown on April 18, 2016, require, among other things, that the Department of Conservation ("DOC"), through the Division of Mine Reclamation ("DMR"), develop and establish an Inspector Training Program for all surface mine inspectors by December 31, 2017. The Inspector Training Program includes a guidance document providing instructions and recommendations to surface mine inspectors. DMR proposes to adopt §3504.6 of Article 1 of the California Code of Regulations, Title 14, Division 2, Chapter 8, Subchapter 1 and incorporate by reference a Guidance Document for Surface Mine Inspectors. The proposed regulatory action was published in the California Regulatory Notice

Register, No. 17-Z (File Number: Z2017-0718-03) on July 28, 2017. The formal comment period for the rulemaking action ran from July 28 – September 12, 2017.

For more information:
http://www.conservation.ca.gov/dmr/lawsandregulations/Pages/Rulemaking.aspx

J. STREAMBED ALTERATION AGREEMENTS

1. California Department of Fish and Wildlife's Deviations From Established Processes to Determine "Bed, Channel or Bank" Spur Legislation for Finite Methodology to Define "Streams" Under Fish and Game Code Section 1600 et seq. - *Assembly Bill 947*

On February 16, 2017, Assembly Member Gallagher introduced AB 947 to amend section 1601 of the Fish and Game Code relating to Fish and Wildlife. AB 947 is intended to ensure consistency in the enforcement of the California Department of Fish and Wildlife's ("CDFW") Lake and Streambed Alteration Program. Generally, CDFW jurisdiction over private land and development projects historically has been based upon Fish and Game Code Section 1602 (a), which states:

> an entity shall not substantially divert or obstruct the natural flow of, or substantially change or use any material from the bed, channel, or bank of, any river, stream, or lake, or deposit or dispose of debris, waste, or any other material containing crumbled, flaked, or ground pavement were it may pass into any river, stream, or lake…

Additionally, section 1603 requires notification to the CDFW prior to commencing any activity that may do one or more of the following:

> 1. Substantially divert or obstruct the natural flow of any river, stream or lake;
> 2. Substantially change or use any material from the bed, channel or bank of any river, stream, or lake; or
> 3. Deposit debris, waste or other materials that could pass into any river, stream or lake.

Recently CDFW has been deviating from established process for determining what constitutes a "bed, channel or bank" by using the controversial "Mapping Episodic Stream Activity" ("MESA") report and other internal reports when determining its jurisdiction and scope under section 1600 of the California Fish and Game Code. The regulated community views the use of these reports as inappropriate because the reports have not been subject to public comment, nor have they been widely published or vetted by the scientific community. AB 947 would codify established standards by defining "bed, channel, or bank" thereby preventing unfair and unnecessary punitive actions and ensuring consistent enforcement.

The CDFW has admitted that it does not have a written policy for making section 1602 determinations. Moreover, in addition to the lack of criteria for stream determinations, CDFW staff also is not implementing clear and consistent direction for the mitigation of project impacts to jurisdictional streams. Therefore in addition to not being able to determine the extent of CDFW jurisdiction, the regulated community also cannot understand the basis for the CDFW's requested mitigation.

AB 947 was amended in the Assembly on March 27, 2017, went through several committees were it was minimally modified, and was referred to the Appropriations Committee in May 2017 where it was scheduled for hearing, but the hearing was postponed. No new date for hearing AB947 has been scheduled.

For more information:
http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB947

K. CULTURAL RESOURCES PROTECTION

1. *Governor's Office of Planning and Research ("OPR") Issues AB52 Technical* **Advisory.**

Technical Advisory: AB 52 And Tribal Cultural Resources In CEQA (June 2017)

In June 2017, the Governor's Office of Planning Research released a "Technical Advisory: AB 52 And Tribal Cultural Resources In CEQA." The technical advisory brings together all of the relevant statutes added to the Public Resources Code by AB 52 into one convenient location and includes easy-to-understand descriptions of the requirements of each statutory section. The advisory also includes a timeline and consultation processing flowchart to help practitioners ensure compliance with the law's requirements.

L. ENVIRONMENTAL ENFORCEMENT

1. Ninth Circuit Holds That CERCLA Contribution Claim May Be Based On A "Corrective Measure" Under RCRA – *Asarco LLC v. Atlantic Richfield Co*., 2017 U.S. App. LEXIS 14781(9th Cir., Aug. 10, 2017, case no. 14-35723)

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") allows persons who have taken actions to clean up hazardous waste sites to seek monetary contribution from other parties who are also responsible for the contamination. (42 U.S.C. § 9613(f)(3)(B).) Specifically, a person that has "resolved its liability" for "some or all of a response action or for some or all of the costs of such action" pursuant to a settlement agreement with the government "may seek contribution from any person who is not party to a settlement." CERCLA imposes a three-year statute of limitations after entry of a judicially approved settlement, during which a party may bring a contribution action. (42 U.S.C. § 9613(g)(3).) In this case, Asarco LLC ("Asarco") entered into 1998 settlement agreement under

Resource Conservation and Recovery Act ("RCRA") with the United States ("1998 RCRA Decree") regarding the East Helena Superfund Site. That site had been used for industrial production for more than a century, which resulted in decades of hazardous waste releases. The 1998 RCRA Decree was approved and entered by a federal district court. However, Asarco failed to meet its cleanup obligations under that decree, and in 2005 Asarco filed for Chapter 11 bankruptcy protection.

In 2009, the bankruptcy court entered a new consent decree under CERCLA between Asarco, the U.S., and the State of Montana that "fully resolved and satisfied" the obligations of Asarco under the 1998 RCRA Decree ("2009 BK Agreement"). In 2012, Asarco brought a contribution action against Atlantic Richfield Company ("Atlantic Richfield"). This case presented three issues of first impression in the Ninth Circuit. First, the court considered whether a settlement agreement entered into under an authority other than CERCLA may give rise to a CERCLA contribution action. Recognizing the split of authority among the circuits on that issue, the panel answered in the affirmative. Second, the court considered whether a "corrective measure" under RCRA, a different environmental statute than CERCLA, qualified as a "response" action under CERCLA. The panel also answered that question in the affirmative. Third, the court considered what it meant for a party to "resolve[] its liability" in a settlement agreement, which is a prerequisite to bringing a contribution action under CERCLA. The panel held that Asarco did not resolve its liability under the 1998 RCRA Decree, but did so under the 2009 BK Agreement. Because Asarco filed this action based on that 2009 BK Agreement and within the three-years after entry of that agreement, its contribution claims against Atlantic Richfield were timely under the applicable CERCLA statute of limitations.

2. The California Attorney General Hiring Attorneys to Challenge President Trump's Environmental Policies

Challenging President Trump's environmental actions has become a line item in California Attorney General Xavier Becerra's budget to fund nineteen (19) additional attorneys and twelve (12) legal secretaries. It totals $6.5 million for "Legal Resources for Federal Actions." Governor Brown said that this money will give Attorney General Becerra more "latitude" to battle the U.S. Government on topics such as the environment and immigration.

In Becerra's only eight (8) months into his tenure as Attorney General he has directly sued the U.S. Government at least a dozen (12) times, in addition to filing amicus briefs in actions filed by other state attorneys general, a minimum of twenty-six (26) times.

Republicans in the legislature have objected to this focus on fighting President Trump instead of taking care of the business at hand to protect 38 million Californians. They are also concerned about jeopardizing the state's share of federal funding.

For more information:
Malcolm Maclachlan, *California Hiring Lawyers to Battle Against US Government*, Sept. 28, 2017, Vol. 110, The Daily Rec., p. 1.)