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The following are links to the full text of the cases and bills:
U.S. Supreme Court – http://www.supremecourt.gov/opinions/opinions.aspx
Ninth Circuit Court of Appeals - http://www.ca9.uscourts.gov/opinions/
California Courts - http://www.courtinfo.ca.gov/opinions/
Bills - http://www.leginfo.ca.gov

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ENVIRONMENTAL LAW UPDATE

Diane G. Kindermann Henderson, Leslie Z. Walker and Glen C. Hansen

Within this update, abbreviations have the following meanings, unless otherwise noted:

CAA ..... Clean Air Act
CARB ..... California Air Resources Board
CESA ..... California Endangered Species Act
CEQA ..... California Environmental Quality Act
CWA ..... Clean Water Act
DFG ..... California Department of Fish and Game
DWR ..... California Department of Water Resources
EIS ..... Environmental Impact Statement
EPA ..... U.S. Environmental Protection Agency
ESA ..... Endangered Species Act
GHGs ..... Greenhouse Gases
NELs ..... Numeric Effluent Limitations
NEPA ..... National Environmental Policy Act
NMFS ..... National Marine Fisheries Service
NPDES ..... National Pollutant Discharge Elimination System
RWQCB ..... Regional Water Quality Control Board
SWRCB ..... State Water Resources Control Board
USACE ..... U.S. Army Corps of Engineers
USFWS ..... U.S. Fish and Wildlife Service
WDR ..... Waste Discharge Report

1. CALIFORNIA WATER RIGHTS AND SUPPLY

A. Regulatory Framework

- The California Water Code regulates water rights addressing appropriative, riparian and prescriptive rights associated with surface water within the state.

- Water Code jurisdiction over groundwater is limited to "subterranean streams flowing through known and definite channels." (Wat. Code, § 1200.)

- The process for acquiring water rights may include SWRCB determination of all rights for adjudicated surface waters. (Wat. Code, § 2501.)

- The water rights program is administered by SWRCB.

B. Suggested Water Due Diligence Approach

Water issues should be a priority when performing due diligence for certain real property transactions. A proposed outline for commencing water due diligence analysis follows:

Water Requirements

- How much water will the project require?
    - Is the purpose of the water requirement inconsistent with general limitations imposed by state law (rules of beneficial and reasonable use)?

What Is the Status of Your Water Right?

- At SWRCB
    - Search for the names of seller and predecessors-in-interest in the database of holders of appropriative rights and riparian owners who have filed riparian diversion statements (not all riparian holders file the statements).
    - Review maps to determine if there is a record of diversion that could lead to finding a water right.
- Other
    - Review contract documents for direct evidence of water rights and water rights descriptions.
    - Examine the property for actual river diversion or pipelines leading from river diversion, and check for current or abandoned groundwater wells.

- Review seller's documents for assessments and taxes paid to water districts.

- Visit the county courthouse for possible pre-1914 appropriative rights or post-1914 licensed rights.

- Work with an experienced title company to create a water chain of title.

Determine the Validity and Type of the Water Right

- Appropriative Rights

  - If water for the project involves pre-1914 rights, check for historical diversions to support the full amount claimed and determine if the right has been abandoned or forfeited.

  - If water for the project involves post-1914 rights, determine whether the place of diversion, purpose, use, season and quantity allowed under the permit and license is sufficient for the project's needs.

- Riparian Rights

  - Has the stream system been adjudicated?

  - Is the water used within the stream's watershed?

  - Is storage required?

  - If used outside the watershed or if storage required, then an appropriative right must be obtained from SWRCB.

  - Is there sufficient water in the stream, or are correlative cutbacks likely; and what about ESA's impact on the ability to take water?

  - Determine if there are other water uses on the stream, both appropriative and riparian that may have priority of use.

- Percolating Groundwater Rights

- Overlying Rights

  - Groundwater

    - Is there sufficient groundwater?

- Has the basin been adjudicated or is there any other limitation on quantity that can be used (including groundwater management plans)?

- Appropriative Rights
  - Has the basin been adjudicated, and are there any prescriptive rights?
  - Is the water appropriate for the intended use?
  - Determine water suitability for use in the proposed area.
  - Determine if water can be transferred from one location of the project to another.
- Water Quality Issues
  - Is the chemical makeup appropriate for the intended use?
- Other Types of Water
  - Reclaimed Water
    - Consider if secondary treated or tertiary treated wastewater is appropriate for the intended use.
  - Desalinated Water
    - Treatment and use of a brackish groundwater or seawater.

C. Update

1. *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421

By a 53% majority, the Legislature passed amendments to the Water Code in 2003, which amendments included water rights fees pursuant to section 1525. In this case, the California Supreme Court addressed two issues. First, the Court held that the fee provisions in the amendments and section 1525 do not explicitly impose a tax and, therefore, are not facially unconstitutional. However, the Court remanded for further findings as to whether the fees were reasonably apportioned in terms of the regulatory activity's costs and the fees assessed. Second, the Court held that the amendments and their implementing regulations do not facially violate the supremacy clause of the United States Constitution by over assessing the beneficial interests of those who hold contractual rights to delivery of water from the federally administered Central Valley

Project (the "federal contractors"). The Court also remanded for further findings as to whether the implementing regulations fairly assess and apportion the federal contractors' beneficial interests.

2. "Safe, Clean, and Reliable Drinking Water Supply Act of 2012" on November 2012 General Election Ballot

In 2009, the Legislature passed and the Governor signed SBX7 2 (Chapter 3, Stats. 2009), the Safe, Clean, and Reliable Drinking Water Supply Act of 2010. That bill, if also approved by the voters, would authorize the issuance of bonds in the amount of $11.14 billion to finance a safe drinking water and water supply reliability program. This bill provided for the submission of the bond act to the voters at the November 2, 2010, statewide general election. As the Los Angeles Times noted, "more than $1 billion of the money is earmarked for projects that have little or nothing to do with quenching the state's thirst. The bond proposal includes funding for bike paths, museums, visitor centers, tree planting, economic development and the purchase of property from land speculators and oil companies -- all in the districts of lawmakers whose key votes helped it pass the Legislature." (http://articles.latimes.com/2009/nov/18/local/me-pork18.) According to the Legislative Analyst's Office, "The measure prohibits any use of the bond funds to design, construct, operate, or maintain Delta-related facilities to move water directly from the Sacramento River to facilities operated by the SWP or the federal Central Valley Project. (For example, these bond funds could not be used to build a peripheral canal or similar facility.)" (http://www.lao.ca.gov/ballot/2010/18_11_2010.aspx.)

SBX7 2 was amended by Assembly Bill 1265 (Chapter 126, Stats.2010), which made several changes to the bill, including changing the name to the "Safe, Clean, and Reliable Drinking Water Supply Act of 2012." AB 1265 also moved the date of submission to the voters to November 6, 2012, the statewide general election, because of the Governor and the Legislature's concerns that the voters may not approve the measure in light of the state of the economy. (www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1251-1300/ab_1265_bill_20100810_chaptered.html; www.allenmatkins.com/~/media/3F9660C3FBB14A958DB8301186DB500E.ashx.) AB 1265 provided that the ballot summary language to be submitted to the voters states as follows: "To protect water quality and ensure safe, clean drinking water; meet the water supply needs of California residents, farms, businesses, expand water conservation and recycling; restore fish and wildlife habitat; reduce polluted runoff that contaminates rivers, streams, beaches, and bays; and protect the safety of water supplies threatened by earthquakes and other natural disasters; the State of California shall issue bonds totaling eleven billion one hundred forty million dollars ($11,140,000,000) paid from existing state funds subject to independent, annual audits, and citizen oversight."

On January 19, 2011, Assembly Member Kevin Jeffries introduced Assembly Bill 157, which would reduce by 25% the total amount of bonds authorized to be issued pursuant to the Safe, Clean, and Reliable Drinking Water Supply Act of 2012 from $11.14 billion to $8.36 billion, and would require the Secretary of State to include those reductions

when submitting the bond act to the voters at the November 6, 2012, general election. (http://leginfo.ca.gov/pub/11-12/bill/asm/ab_0151-200/ab_157_bill_20110119_introduced.html.) AB 157 would require a two-thirds vote of the Legislature to pass. AB 157 is still pending in the Assembly.

3. California Department of Public Health Issues Draft Groundwater Recharge Regulations

In November 2011, the California Department of Public Health's Drinking Water Program issued draft regulations for replenishing groundwater with recycled municipal wastewater. The draft regulations were issued for informal stakeholder review. They revise the 2008 version and represent a shift toward science-based regulation. The regulations will likely have a substantial impact on potable reuse projects in California. Nearly 20% of California's population is already connected to a water system in which potable reuse is an element of its water supply. The final proposed version of the regulations will proceed through the formal regulation adoption process and will be subject to public review and comment as part of that process.

For more information, see http://www.cdph.ca.gov/healthinfo/environhealth/water/pages/waterrecycling.aspx; http://www.cdph.ca.gov/certlic/drinkingwater/Documents/Recharge/DraftRechargeReg-2011-11-21.pdf; http://www.latimes.com/news/local/la-me-water-reuse-20120111,0,7264084.story?track=rss&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+latimes%2Fnews%2Flocal+%28L.A.+Times+-+California+%7C+Local+News%29.

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2. WATER QUALITY

A. Regulatory Framework

Federal Clean Water Act (33 U.S.C. § 1251 et seq.)

- The purpose of CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters. (33 U.S.C. § 1251(a).)

- Section 301(a) of CWA generally prohibits the discharge of pollutants into waters of the United States except in accordance with the requirements of one of the two permitting programs established under CWA: Section 404, which regulates the discharge of dredged and fill material; or Section 402, which regulates all other pollutants under the NPDES permit program. (Section 404 is discussed in the Wetlands section of these materials.)

- The term "waters of the United States" includes navigable waters, interstate waters and wetlands, impoundments, tributaries, adjacent wetlands, waters from which fish and shellfish are or could be taken, and possibly other waters such as ground water and intrastate wetlands, the use, degradation or destruction of which could affect interstate or foreign commerce. (33 C.F.R. § 328.3.)

Clean Water Act Section 402; National Pollutant Discharge Elimination System ("NPDES") Program

- Section 402 of CWA authorizes states to develop a NPDES program to permit "point source" discharges of pollutants into surface waters of the United States, including:

  - Industrial facilities discharges,

  - Municipal stormwater discharges, and

  - Stormwater discharges associated with construction projects over certain acreage. (33 U.S.C. § 1342(p).)

- According to Section 402, discharge from any point source is unlawful unless the discharge is in compliance with a NPDES permit.

- NPDES permits can be individual (project or activity specific) or general (e.g., California's construction stormwater NPDES permit).

- In California, SWRCB and its RWQCBs are responsible for administering the NPDES permit process. Permits are typically issued for a five-year term.

- Operators disturbing one or more acres during construction must obtain NPDES coverage by filing for a construction general permit. (40 C.F.R. 9, 122-124.) (See Construction General Permit Order 2009-0009-DWQ.)

Clean Water Act Section 401: Federal Action Impact on State Water

- Section 401 of CWA requires each federal agency authorizing an activity that could affect state water quality to obtain state certification that the proposed activity will not violate state and federal water quality standards. (33 U.S.C. § 1341.)
    - Water quality standards include beneficial uses of water, water quality objectives and anti-degradation policy. (33 U.S.C. § 1313.)
    - In California, SWRCB and its RWQCBs are responsible for issuing water quality certification.
- The California Porter-Cologne Water Quality Control Act restricts any person (subject to the jurisdiction of the state) from discharging waste or proposing to discharge wastewater to land or groundwater that could affect the quality of the waters of the state without a permit from RWQCB (known as WDRs). (Wat. Code, § 13264.) (Discussed below.)

    Relevance

    - Section 401 is triggered by any activity that requires a permit from a federal agency for a project that could affect state water quality, including Section 404/Section 10 permits from USACE. (33 U.S.C. § 1341(a).) For example:
        - Initial site development (including, e.g., vineyards, processing facilities and support buildings that are located in waters of the United States).
        - Facility expansion in waters of the United States.
        - Improvements to drainage, reservoir or other water facilities that are in waters of the United States.
    - WDRs are triggered by land discharges from initial site development, facility expansion, and improvements that could affect water quality of waters of the state (not necessarily waters of the United States under USACE jurisdiction (e.g., certain isolated wetlands)).

Clean Water Act Section 303(d); Total Maximum Daily Load ("TMDLs")

- CWA section 303(d) requires states to identify waters that do not meet, or are not expected to meet by the next listing cycle, applicable water quality standards after the application of certain technology-based controls, and schedule such waters for development of Total Maximum Daily Loads ("TMDLs"). (40 C.F.R § 130.7(c) and (d).)

- The states are required to assemble and evaluate all existing and readily available water quality-related data and information to develop the list (40 C.F.R § 130.7(b)(5)) and to provide documentation for listing or not listing a state's waters (40 C.F.R § 130.7(b)(6)).

- Waters shall be placed in this category of the section 303(d) list if it is determined, in accordance with the California Listing Factors that the water quality standard is not attained; the standard's nonattainment is due to toxicity, a pollutant, or pollutants; and remediation of the standard's attainment problem requires one or more TMDLs.

- At a minimum, California's section 303(d) list shall identify waters where standards are not met, pollutants or toxicity contributing to standards exceedance, and the TMDLs completion schedule.

- The water segment listed shall remain in this category of the section 303(d) list until TMDLs for all pollutants have been completed, EPA has approved the TMDLs, and implementation plans have been adopted.

- RWQCBs and SWRCB use several factors to develop the California section 303(d). Among the factors is toxicity.

- Under section 303(c)(2)(B) of CWA, California must adopt numeric criteria for the priority toxic pollutants listed under section 307(a) if those pollutants could be reasonably expected to interfere with the designated uses of state's waters. Priority toxic pollutants are identified in 40 Code of Federal Regulations section 131.36.

- In 1994, a California state court found that the numeric criteria adopted by SWRCB were invalid. As a result, no numeric criteria for priority toxic pollutants existed for California.

- To fill the gap, the EPA promulgated the California Toxics Rule ("CTR") on May 18, 2000. The CTR regulations, codified in 40 Code of Federal Regulations section 131.38, establish numeric criteria for water quality standards for priority toxic pollutants for the State of California. To be able to implement the CTR, SWRCB adopted the State Implementation Plan in 2000.

- The CTR sets the following regulations in California:

    1) Ambient aquatic life criteria for 23 priority toxics;
    2) Ambient human health criteria for 57 priority toxics; and
    3) A compliance schedule provision which authorizes the state to issue schedules of compliance for new or revised NPDES permit limits based on the federal criteria when certain conditions are met.

- Numeric water quality objectives for toxic pollutants, including CTR/National Toxics Rule ("NTR") water quality criteria, are exceeded when the thresholds for toxicity of a pollutant, or pollutants is not met. When this happens waters shall be placed on the section 303(d) list. Remediation of the standards requires one or more TMDLs.

- The State must use the criteria together with the state's existing water quality standards when controlling pollution in inland waters and enclosed bays and estuaries. The numeric water quality criteria contained in CTR are identical to EPA's recommended CWA section 304(a) criteria for these pollutants published in December 1998. (See 63 C.F.R § 68353). For more information, see http://water.epa.gov/lawsregs/rulesregs/ctr/index.cfm.

- In March 2000, SWRCB adopted the state implementation plans ("SIP") for priority toxic pollutant water quality criteria contained in the CTR. The CTR was promulgated by EPA in May 2000. The SIP also implements NTR criteria and applicable priority pollutant objectives in RWQCB's Basin Plans. Together, the CTR and NTR and applicable Basin Plan objectives, existing RWQCB beneficial use designations, and the SIP comprise water quality standards and implementation procedures for priority toxic pollutants in non-ocean surface waters in California.

<u>California Porter-Cologne Act</u> (Wat. Code, § 13000 et seq.)

- The Porter-Cologne Act was used as the basis of CWA. The Porter-Cologne Act entrusts SWRCB and the nine RWQCBs with protecting California's waters. (Wat. Code, § 13001.)

- RWQCBs are responsible for developing Basin Plans and regulating all pollutant or nuisance discharges that may affect either surface water or groundwater in the region's jurisdiction. (Wat. Code, § 13240.) Any person proposing to discharge waste within any region must file a report of waste discharge with the appropriate regional board. (Wat. Code, § 13260.)

- No discharge may take place until a RWQCB issues WDRs or a waiver of the WDRs. (Wat. Code, § 13264.)

WDRs

- Comprehensive program under Porter-Cologne Water Quality Act (Wat. Code, § 13264 et seq.) regulates point and non-point source discharges of waste to state surface and groundwaters.

- "Waste" is broadly defined, and RWQCB assertion of regulatory authority to require WDRs is becoming more expansive (e.g., industrial wastewater fully contained in concrete lined holding tank in the ground is deemed a point source discharge to land, swimming pools are considered a discharge to land).

- Some general waivers from WDRs exist (e.g., agricultural waiver).

- WDRs require reporting and monitoring according to RWQCB and statutory criteria for constituent limits. (Wat. Code, § 13260 et seq.) WDRs can be refused, thus prohibiting the applicant's necessary discharge.

- Examples triggering the need for WDRs include erosion from soil disturbance, and discharge of process wastewater not discharging to a sewer (factories, cooling water, etc.).

B. Update

1. *National Pork Producers Council v. United States EPA* (5th Cir. 2011) 635 F.3d 738

In 2008, the Environmental Protection Agency ("EPA") revised its regulations, implementing the Clean Water Act's ("CWA") oversight of Concentrated Animal Feeding Operations ("CAFOs"). Numerous petitions for review of those regulations were consolidated in the Fifth Circuit, which held that the EPA cannot impose a duty to apply for an NPDES permit on a CAFO that "proposes to discharge" or any CAFO before there is an actual discharge.

2. *United States v. King* (9th Cir. 2011) 660 F.3d 1071

Defendant manager of a large farming and cattle operation in southern Idaho was criminally convicted for injecting fluids into deep wells without a permit from the State of Idaho, in violation of the Safe Drinking Water Act, 42 U.S.C. § 300h-2(b)(2) ("SDWA"). SDWA has two parts. The first part, known as the National Primary Drinking Water Regulations, sets national minimum standards for drinking water quality. The second part regulates underground injections that might adversely affect current and potential underground sources of drinking water. Underground Injection Control Programs are state administered programs under the SDWA that prevent harmful injections into drinking water aquifers. Defendant argued on appeal that if the SDWA is construed to allow a criminal conviction in his case, Congress exceeded its authority under the Commerce Clause. The Ninth Circuit disagreed. The court found that the SDWA, including its permitting process under a state UIC program, regulates activities

that have a substantial relation to interstate commerce. Congress recognized that an effective regulatory scheme protecting drinking water would need to be national in scope, and that a cooperative federal-state program would be an appropriate means of ensuring drinking water safety. Drinking water is an article of commerce. The protection of drinking water — and its converse, the pollution of drinking water — have a direct effect on commerce. Thus, the federal government has the authority under the Commerce Clause to regulate injections broadly, out of an abundance of caution, as a means of providing effective protection of the purity of the nation's drinking water.

3. *Northwest Environmental Defense Center v. Brown* (9th Cir. 2011) 640 F.3d 1063

The Ninth Circuit Court of Appeals denied a petition for rehearing en banc of a decision that logging road operators are required to apply for NPDES permits. An environmental group sued various timber companies along with the Oregon State Forester and the individual members of the Oregon Board of Forestry for violations of the Clean Water Act on the grounds they did not obtain permits from the Environmental Protection Agency ("EPA") for stormwater runoff that flows from logging roads into systems of ditches, culverts, and channels, which is eventually discharged into forest streams and rivers. The Ninth Circuit Court of Appeals concluded that such runoff from logging roads is a point source discharge and thus, an NPDES permit is required. Several industry groups and businesses have filed petitions for writ of certiorari with the U.S. Supreme Court. Also, bipartisan bills are pending in Congress to overturn the Ninth Circuit's decision, and restore the 30-year practice of exempting stormwater from forest roads from NPDES permitting. Among the critics of the Ninth Circuit's decision is Oregon Governor John Kitzhaber, who stated that "we are at a point in the history of our management of forests where we need to develop stability, consensus and collaboration, not management by lawsuit." Democratic Senator Ron Wyden of Oregon stated that the decision "would shut down forestry on private, state and tribal lands by subjecting it to the same endless cycle of litigation."

4. *National Mining Association. v. Jackson* (D.D.C. 2011) 768 F.Supp.2d 34

U.S. District Court in District of Columbia held that EPA's June 2009 Enhanced Coordination Process Memoranda, which uses the Multi-Criteria Integrated Resource Assessment, was a final agency action that impermissibly expanded EPA's role in the Section 404 permitting scheme for coal mining operations under the CWA. The court also held that, by implementing its April 2010 Detailed Guidance Memorandum, the EPA overstepped the authority it was granted to determine Section 303 Water Quality Standards. Thus, federal defendants' motion to dismiss was denied.

5. *Ecological Rights Foundation v. PG&E* (N.D.Cal. 2011, No. C 10-0121)

A non-profit environmental group brought an action under the Clean Water Act on the grounds that PG&E's 31 "corporation yards and service centers" in Northern California, at which it allegedly stores vehicles, equipment, materials and supplies, and carried out various activities in support of its primary business as a provider of electricity and natural

gas, were allegedly contaminating storm water without an NPDES permit. Even though PG&E's enterprise as a whole did not need an NPDES permit, the court denied PG&E's motion to dismiss because it could not be conclusively established that those yards and centers were "auxiliaries" of PG&E's enterprise and not facilities engaging in "industrial activity."

6. *Northern California River Watch v. Oakland Maritime Support Services, Inc*. (N.D.Cal. 2011, No. C10-03912)

A corporation operated a maritime transportation support facility near the Port of Oakland, where pollutants were allegedly exposed to rainfall and flow unobstructed to storm drains that discharge into the San Francisco Bay. The District Court held that plaintiffs' pre-lawsuit 60-day notice prior to filing a Clean Water Act citizen suit was sufficient because the notice described "continuous" and "ongoing" violations for which more specific dates are not required, and because the allegations of unlawful discharge of polluted storm waters were accompanied by lists specifying the rain dates in that area.

7. *Ecological Rights Foundation v. PG&E* (N.D.Cal. 2011, No. C 09-03704)

In a citizen suit that alleged that wooden utility and telephone poles are discharging toxic chemical preservatives into the environment, the plaintiff's 60-day pre-lawsuit notice under the Clean Water Act, as well as the plaintiff's 90-day pre-lawsuit notice under the Resource Conservation and Recovery Act, were sufficiently specific to comply with the notice regulations promulgated by the Environmental Protection Agency, even though the notices did not include the location of each pole allegedly leaking chemical contaminants that was at issue in the case.

8. *California Sportfishing Protection Alliance v. Chico Scrap Metal, Inc*. (E.D.Cal. 2011, No. 2:10-cv-01207)

In 2007, the State of California commenced criminal actions against individuals who were violating various state environmental laws when operating their scrap metal facilities under NPDES permits issued by the State. In October 2008, the defendants entered into a global plea agreement that placed defendants on "probation," which required, among other things, compliance with consent orders that mandated compliance with the NPDES permits. In December 2009, state agencies found that storm water runoff from the scrap metal facilities violated the NPDES permits; and in June 2010, defendants were issued a "Notice of Violation." In June 2011, the State filed a "Petition for Violation of Probation" that alleged violation of the probation terms due to the violations of the NPDES permits. Meanwhile, plaintiff California Sportfishing Protection Alliance filed a civil citizen enforcement action in U.S. District Court in May 2010 regarding the defendants' Clean Water Act ("CWA") violations occurring at the scrap metal facilities. The court held plaintiff's civil CWA claims are barred and dismissed for lack of jurisdiction. 33 U.S.C. § 1365(b)(1)(B) prescribes that a federal court is without jurisdiction over a CWA citizen enforcement action if the State has commenced and is diligently prosecuting a criminal action in state court to require compliance with an

effluent standard or limitation. That provision applied here even though some of the defendants in this federal civil lawsuit were not on state probation in the state criminal cases.

9. *California Sportfishing Protection Alliance v. Shamrock Materials, Inc*. (N.D.Cal., 2011, No. C11-2565)

Non-profit environmental and health organizations brought a citizen suit enforcement action under the Clean Water Act against owners of a facility engaged in off-loading, storage, distribution and transportation of gravel and sand along the Petaluma River. The materials are stored at the facility and then loaded and distributed from the facility in diesel-fueled trucks, which distribute the materials to off-site ready mix concrete plants. Defendants own both the facility and the concrete plants. The facility therefore provides support services for the ready-mix concrete plants. Plaintiffs argued that the facility is an "auxiliary" establishment for a single "industrial facility" enterprise for which an NPDES permit is required. Defendants respond that the facility is a distinct and separate establishment that should be characterized based on its own operations. Defendants filed a motion to dismiss. Due to the fact-based determination at issue here, the U.S. District Court denied the motion, and held that it was unable to determine at that stage of the litigation whether or not the facility is or is not an "industrial facility."

10. *Northern California River Watch v. Honeywell Aerospace, Honeywell International, Inc.* (N.D.Cal. 2011, No. C11-03723)

The court held that an intent-to-sue letter from plaintiff was sufficient to give notice to defendant operator of a solvent sales and recycling facility of alleged unlawful discharge of volatile organic compounds in the groundwater under the Clean Water Act, where the letter "identified point sources, how the point sources were allegedly discharging into the waters, defendant's lack of [an NPDES] permit, the regulation defendant supposedly violated, and a range of dates for the allegedly 'continuous' violations."

11. *Voices of the Wetlands v. State Water Resources Control Board* (2011) 52 Cal.4th 499

The Central Coast Regional Water Quality Control Board ("Regional Board") issued an NPDES permit that authorized the Moss Landing Power Plant (then owned by Duke Energy, now owned by Dynegy) to draw cooling water from Moss Landing Harbor and Elkhorn Slough. Plaintiff Voices of the Wetlands challenged the permit raising a number of legal issues, including whether the trial court improperly ordered an interlocutory remand. The appellate court affirmed and the trial court denied the writ. (This case is also discussed in the California Environmental Quality Act section below.)

12. *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538

Where the project did not discharge anything into the groundwater, the city was not required to analyze the project's contribution to cumulative groundwater impact. Additionally, a legal challenge to project's construction impacts on hydrology and water

was moot because the construction had been completed. CEQA dispute with respect to other issues were not moot. (This case is also discussed in the California Environmental Quality Section below.)

For more information, see "No Discharge, No Cumulative Impact" at http://blog.aklandlaw.com.

13. *Cal BIA, et al. v. SWRCB,* Sacramento County Superior Court Case No., 34-2009-80000338)

After several years of debate and litigation, Sacramento Superior Court Judge Lloyd G. Connelly, invalidated Numeric Effluent Limitations ("NELs") in the State's new Construction General Permit issued by the SWRCB for stormwater runoff from construction sites. Adoption of the NELs relied on studies that were characterized by the Court as inconclusive and therefore lacking in substantial evidentiary support.

The Court held that the NELs for turbidity and pH were not supported by substantial evidence. Consequently, the NELs are invalid and unenforceable unless and until the SWRCB produces data supporting a finding that available technologies will actually be able to achieve the NELs.

The Court also found that the NELs were not analyzed with the cost-benefit factors set forth in the Federal CWA for establishing NELs.

The result is that while you must comply with the Best Management Practices in the Construction General Permit, requirements for turbidity and pH NELs have been removed from the GCP and no penalties can be assessed.

For more information, see http://www.swrcb.ca.gov/water_issues/programs/stormwater/construction.shtml.

14. H.R. 2018 – "Clean Water Cooperative Federalism Act of 2011"

This bill passed U.S. House of Representatives on July 13, 2011 and is currently pending in the U.S. Senate. Among other things, H.R. 2018 amends the Clean Water Act to *prohibit* the Administrator of the Environmental Protection Agency ("EPA") from: (1) promulgating a revised or new water quality standard for a pollutant when the Administrator has approved a state water quality standard for such pollutant unless the state concurs with the Administrator's determination that the revised or new standard is necessary to meet the requirements of such Act; (2) taking action to supersede a state's determination that a discharge will comply with effluent limitations, water quality standards, controls on the discharge of pollutants, and toxic and pretreatment effluent standards under such Act; (3) withdrawing approval of a state program under the NPDES program, limiting federal financial assistance for a state NPDES program, or objecting to the issuance of a NPDES permit by a state on the basis that the Administrator disagrees with the state regarding the implementation of an approved water quality standard or the

implementation of any federal guidance that directs the interpretation of such standard; and (4) prohibiting the specification of any defined area as a disposal site for the discharge of dredged or fill material into navigable waters and denying or restricting the use of such area as a disposal site in a permit if the state where the discharge originates does not concur with the Administrator's determination that the discharge will result in an unacceptable adverse effect on municipal water supplies, shellfish beds, and fishery areas. Also, H.R. 2018 requires the Administrator, before issuing a regulation, policy statement, guidance, response to a petition, or other requirement or implementing a new or substantially altered program under this Act, to analyze the impact, disaggregated by state, of such action on employment levels and economic activity. Abbott & Kindermann LLP will continue to monitor the progress and amendments to this bill as it goes through the Senate.

15. SWRCB Proposes New Draft NPDES Permits: Industrial, Phase II Small MS 4, CalTrans

In early 2011, the SWRCB (www.swrcb.com) released three draft statewide NPDES permits for public review and comment. The three draft permits involved revisions to the following currently expired NPDES permits: statewide Phase II small MS4 permit (covering municipalities with populations less than 100,000), statewide Industrial Permit, and a new statewide permit for CalTrans. To say that these permits were not well-received by the regulated community (i.e., small municipalities, CalTrans and industrial business owners) is an understatement. Not only did SWRCB receive numerous comment letters raising concerns over the revised permits, but in a rare intervention by members of the state legislature into the realm of state agencies, the Senate Select Committee on California Job Creation and Retention held an informational hearing on the draft permits on October 6, 2011. The message from the hearing came across loud and clear: time for a do-over.

Although the stated purpose of the hearing on October 6, 2011 was “informational,” the result was a stern talking to by the senators on the committee to SWRCB to start the process over. The main concerns voiced at the hearing both by the senators and representatives of the regulated community were the following:

Money, money, money: It all comes down to dollars and “sense”, as Senator Wright stated. For the draft Phase II small MS4 permit, representatives from Watsonville and Roseville both testified that the estimated increase in cost to municipalities was three fold. For example, the current cost to Roseville is $800,000, which would increase to $3.5 million the first year of implementation and result in average annual costs of $2.9 million. For the statewide Caltrans permit, Caltrans has estimated $900 million in cost to comply with and implement the draft permit. In terms of the Industrial permit, SWRCB has estimated an increase of costs anywhere from 90% to 2000% to the regulated community.

Proposition 218 as a Potential Barrier: The other common concern from municipalities is the limitations imposed by Prop. 218. Stormwater fees are not exempted from the voting

requirements of Prop. 218 like other public facility fees such as sewer and water. If the cities and counties can't impose user type fees, then the additional cost of the Phase II permit will have to come from the general fund, which is already dwindling in the recession.

Numeric Effluent Limits: The permits, if implemented, would mandate the use of numeric effluent limits, instead of continuing to rely on best management practices. According to the regulated community, this would not only increase costs, but would also be nearly impossible under many circumstances.

Lack of Stakeholder Involvement: Outside of cost, the other major concern from the regulated community was the lack of involvement in the process. Instead of being a proactive part of the process, they feel they have had to react to very complex and unclear draft permits without any upfront involvement.

In response to many of the comments received by SWRCB, the Executive Director for SWRCB stated that SWRCB staff already has meetings set up with CalTrans as well as CASQA to discuss revisions to the permit. The director also stated that in light of the costs, he anticipates major revisions to the permits to bring the costs within a reasonable range. The best news for the regulated community from SWRCB is that the decision has already been made to remove the numeric effluent limitations from the Industrial Permit. SWRCB now agrees that there is not enough data to impose these requirements, and any new Industrial Permit will include best management practices, not numeric effluent limitations. As of December 30, 2011, SWRCB has not yet released new versions of the draft permits with the promised revisions. Abbott & Kindermann LLP will continue to monitor the permits and provide updates when more information is known.

For more information, see "Senate Committee Scolds SWRCB in Recent Hearing on Draft Statewide Permits" at http://blog.aklandlaw.com.

16. AB 54 (Chapter 512) – Water Agencies

Allows water agencies to begin construction on ailing systems as soon as an application for state funding is accepted, rather than waiting several months or more for the money to be received. The legislation also would create new assistance and increase transparency of small, community-run mutual water agencies by providing training to board members. It also would require them to provide basic information to regional agencies about their operations.

17. AB 938 (Chapter 514) – Drinking Water Alerts

Requires drinking water alerts to be translated when 10 percent or more of water district customers speak a second language.

18. AB 983 (Chapter 515) – Water Infrustructure Grants

Makes it possible for "severely disadvantaged communities" to obtain 100 percent grant funding for water infrastructure improvement projects. Currently, these communities can qualify only for up to 80 percent in grants and must take out the remaining 20 percent in loans that residents may have difficulty repaying.

19. AB 1221 (Chapter 517) – Cleanup and Abatement Account

Allows state-recognized tribes and nonprofit organizations (such as mutual water agencies) access to the state's Cleanup and Abatement Account to pay for pollution mediation. Although these organizations pay into the account in the form of pollution fines, they do not currently qualify for cleanup money.

20. SB 244 (Chapter 513) – Urban Planning

Requires cities and counties to consider the infrastructure needs - including clean drinking water access - of disadvantaged and unincorporated communities in urban planning efforts, including general plan updates.

21. AB 1194 (Chapter 516) – Drinking Water

Makes adjustments to and clarifies drinking water laws to ensure that state public health laws conform with the federal Safe Drinking Water Act. For example, the California Department of Public Health now will interpret laws involving human consumption of water to include cooking and food preparation. Failure to comply with national drinking water statutes could have resulted in a loss of about130 million in federal funds.

22. AB 1292 (Chapter 518) – Safe Drinking Water

Authorizes the issuance of revenue bonds, which will be deposited into the Safe Drinking Water State Revolving Fund so the state can satisfy federal matching requirements under the Safe Drinking Water Act.

Notes:

3. WETLANDS

A. Regulatory Framework

Clean Water Act Section 404 (33 U.S.C. § 1344)

- Section 404 of CWA restricts the "discharge of dredged or fill material into navigable waters at specified disposal sites" without a permit from USACE. (33 U.S.C. § 1344(a); 33 C.F.R. § 323.2(d)(1).)

- Section 404 authorizes USACE to issue permits for the discharge of dredged or fill material into navigable waters as either standard (individual) or general (nationwide) permits. (33 U.S.C. § 1344(e)(1), (e)(2).)

- Section 10 of the Rivers and Harbors Act restricts activities that could affect the course, location, condition, or capacity of navigable waters, including the construction of structures in, under, or over navigable waters, without a permit from USACE. (33 U.S.C. § 403.)

- Standard (Individual) permits are issued on a project-specific basis, with public notice requirements. Such permits require compliance with the EPA's Section 404(b)(1); Guidelines (33 C.F.R. § 320.4(a)(1)) and, if involving federal actions, NEPA (42 U.S.C. § 4321 et seq.). *Zabel v. Tabb* (5th Cir. 1970) 430 F.2d 199. For specific EPA guidelines, see 40 C.F.R. § 230.10.

- NEPA process may generate consideration of other federal laws including ESA (16 U.S.C. §§ 1531-1534), the Fish and Wildlife Coordination Act (16 U.S.C. § 662), the Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1276), the Antiquities Act (16 U.S.C. § 433), and the Coastal Zone Management Act (16 U.S.C. §§ 1451-1464).

B. Update

1. Sackett v. United States EPA (9th Cir. 2010) 622 F.3d 1139, cert. granted

The Sacketts sought to build a home on a lot several blocks from a lake. They obtained all of the required permits and graded the land. However, they did not get a dredging permit from the EPA or from the Army Corps of Engineers. The Federal Government found out about the development, alleged that the lot contained wetlands and issued a compliance order. Under the order, the Sacketts were required to get a permit, "remove all fill, replace any lost vegetation, and monitor the fenced-off site for three years," and remedy any harms caused by discharging without a permit. If they did not comply, EPA could go to court for an enforcement order, and a federal judge could impose civil penalties up to a maximum of $37,500 a day. (The attorney for the U.S. Government

announced for the first time in its Brief in the Supreme Court that the fines can actually be doubled to $75,000. That took everyone, including the Court, by surprise!)

The Sacketts, in order to avoid the penalties, restored the land to its former state. They tried to argue, to no avail, that the wetlands at issue were not within the government's regulatory jurisdiction. They then filed a lawsuit of their own in federal court, claiming that the lack of an opportunity to challenge the compliance order before they had to obey it violated their constitutional right to due process. A federal district court dismissed their case, concluding that Congress had not intended to allow any pre-enforcement challenge, leaving it to the EPA to start an enforcement proceeding at its option. The Ninth Circuit Court agreed, noting that every federal appeals court that had confronted the issue had agreed that there was a bar to judicial review at the initiative of a targeted violator. Surprisingly, the Supreme Court accepted review to consider two questions: (1) Whether the Sacketts may seek pre-enforcement judicial review of the administrative compliance order pursuant to the Administrative Procedure Act, 5 U.S.C. § 704; and (2) whether, if not, the Sacketts' inability to seek pre-enforcement judicial review of the administrative compliance order violates their rights under the Due Process Clause of the United States Constitution.

In oral arguments before the Court on January 9, 2012, it appeared that the Court is prepared to place some limits on the EPA's enforcement powers, even if all of the other Courts of Appeal that considered the issue refused to allow pre-enforcement review of the EPA's orders. Directing his comments to Deputy U.S. Solicitor General Malcolm L. Stewart, Justice Samuel Alito said: "Mr. Stewart, if you related the facts of this case as they come to us to an ordinary homeowner, don't you think most ordinary homeowners would say this kind of thing can't happen in the United States?" The Court's decision is expected by June 2012.

2. Update of the "Guidance To Identify Waters Protected By The Clean Water Act" is Suspended

On April 27, 2011, the U.S. Army Corps of Engineers ("USACE") and the U.S. Environmental Protection Agency ("EPA") issued joint draft guidance to identify whether a waterway, water body, or wetland can be deemed "waters of the United States" that are protected by the Clean Water Act. The comment period was open until July 31, 2011. After reviewing the comments, leadership at the USACE and EPA suspended development of the informal guidance, and opted to go forward with a proposed rulemaking instead. EPA presently has the lead on the rulemaking process, and has not yet submitted any proposed rule to the Office of Management and Budget. The differences between the 2008 Guidance and the 2011 Draft Guidance, among other things, are that jurisdiction is now categorically asserted over wetlands that directly abut "relatively permanent waters" (instead of "tributaries" of traditional navigable waters); and jurisdiction is asserted on a fact-specific basis over the "other waters" category of the regulations at 33 C.F.R. §328.3(a)(3). While jurisdiction was generally not asserted under the 2008 Guidance for swales, erosional features and drainage ditches for non permanent

flowing water, under the 2011 Draft Guidance there is generally no jurisdiction over the following waters:

- Wet areas that are not tributaries or open waters and do not meet the agencies' regulatory definition of "wetlands";
- Waters excluded from coverage under the CWA by existing regulations;
- Waters that lack a "significant nexus" where one is required for a water body to be protected by the CWA;
- Artificially irrigated areas that would revert to upland should irrigation cease;
- Artificial lakes or ponds created by excavating and/or diking dry land and used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing;
- Artificial reflecting pools or swimming pools created by excavating and/or diking dry land;
- Small ornamental waters created by excavating and/or diking dry land for primarily aesthetic reasons;
- Water-filled depressions created incidental to construction activity;
- Groundwater drained through subsurface drainage systems;
- Erosional features (gullies and rills), and swales and ditches that are not tributaries or wetlands.

For more information, see: http//water.epa.gov/lawsregs/guidance/wetlands/CWA waters_guidesum.cfm.

3. U.S. Army Corps of Engineers Proposes to Reissue and Modify Nationwide Permits

On February 16, 2011, the U.S. Army Corps of Engineers solicited comments for the reissuance of the existing nationwide permits under section 404 of the Clean Water Act ("NWPs"), general conditions and definitions, with some modifications. Specifically, USACE requested comments on NWP 21, which authorizes discharges of dredged or fill material into waters of the U.S. associated with surface coal mining activities. On November 3, 2011, the proposed final rule was submitted to the Office of Management and Budget, which is reviewing the rule. USACE seeks to promulgate the rule before the existing nationwide permits expire.

For more information, see: http//spn.usace.army.mil/regulatory/newp.html.

4. Implemenation of California Wetland and Riparian Area Protection Policy in 2012

In April 2008, the State Water Resources Board directed that the Wetland and Riparian Area Protection Policy be implemented in three phases, in order to allow for necessary infrastructure and program development. The Board is in the process of such implementation. The current phase 1 effort, called the "Wetland Area Protection Policy and Dredge and Fill Regulations," is designed to protect all waters of the State, including wetlands, from dredge and fill discharges. It includes a wetland definition and associated delineation methods, an assessment framework for collecting and reporting aquatic

resource information, and requirements applicable to discharges of dredged or fill material. A draft environmental impact report will likely be issued in early Spring 2012, which will begin a new public comment period. Phases 2 and 3 are not under consideration at this time.

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

Notes:

4. AIR QUALITY & CLIMATE CHANGE

A. Regulatory Framework

NEPA

- Under the Clean Air Act, the EPA reviews Environmental Assessments and Environmental Impact statements and comments on any matter relating to its duties under the Clean Air Act. (42 USC § 7609.)

- Must analyze impact of greenhouse gas ("GHG") emissions on Climate Change. "Analyzing the impact of GHG emissions on climate change is precisely the kind of cumulative impact analysis that NEPA requires before major federal actions significantly affect the human environment." (*Center for Biological Diversity v. National Highway Traffic Safety Administration* (9th Cir. 2007) 508 F.3d 508.)

- Draft guidance from Counsel on Environmental Quality states that if a proposed action would reasonably be anticipated to cause direct emissions of 25,000 metric tons or more of CO2 equivalent GHG emissions on an annual basis, agencies should consider whether a quantitative or qualitative analysis would be meaningful to decision makers and the public. Where an action analyzed in an Environmental Assessment or Environmental Impact report would be anticipated to emit GHG, the agency should quantify and disclose its estimates of the expected annual direct and indirect GHG emissions, according to the draft guidance. Agencies should also consider the effects of climate change on the proposed actions.

  For more information:
  http://www.whitehouse.gov/sites/default/files/microsites/ceq/20100218-nepa-consideration-effects-ghg-draft-guidance.pdf

Federal Clean Air Act (42 U.S.C. § 7401 et seq.)

- CAA, enacted in 1970, regulates air emissions from area, stationary and mobile sources. This law authorizes the EPA to establish National Ambient Air Quality Standards ("NAAQS") to protect public health and the environment. (42 U.S.C. § 7401(b).)

- The goal of CAA was set to achieve NAAQS in every state by 1975. The setting of maximum pollutant standards was coupled with directing the states to develop state implementation plans ("SIP") applicable to appropriate industrial sources in the state. (42 U.S.C. § 7410.)

- CAA requires states to develop plans and adopt and enforce regulatory programs to attain (by specified deadlines) and to maintain federal ambient air quality standards adopted by the EPA. It was amended in 1977, primarily to set new goals

(dates) for achieving attainment of NAAQS since many areas of the country had failed to meet the deadlines. (42 U.S.C. § 7407.)

- The 1990 amendments to CAA in large part were intended to meet unaddressed or insufficiently addressed problems such as acid rain, ground-level ozone, stratospheric ozone depletion, and air toxics.

- GHGs meet CAA's definition of air pollutants, which the EPA could not avoid regulating, notwithstanding EPA's arguments it would interfere with governmental foreign policy, and the inability of regulations to address a global issue. **(***Massachusetts v. Environmental Protection Agency* (2007) 127 S.Ct. 1438.)

Stationary Sources

- Under CAA's prevention of serious deterioration ("PSD") new and modified facilities that emit more than 100 or 250 tons per year of pollutants must obtain PSD permits ("100/250 Rule"). These facilities are also required to use the best available control technology ("BACT") for each pollutant subject to regulation under CAA. For GHGs however, PSD are required for new construction projects emitting 100,000 tons per year of GHGs and modifications to existing sources that will increase GHG emissions by more than 75,000 tons per year.

- Under CAA's Title V, primary industrial facilities and large commercial operations that emit 100 tons or more per year of a regulated air permit require an operating permit. However, facilities emitting at least 100,000 tons of GHG per year will be required to obtain an operating permit.

- Many stationary sources, including but not limited to, oil refineries, pulp and paper mills, landfills, producers of cement are required to report their GHG emissions pursuant to 40 CFR 98.

Mobile Sources

- Title II of the CAA seeks to force technological changes in motor vehicles and the fuels they use.

<u>California's Air Resources Law and Clean Air Act</u> (Health & Saf. Code, §§ 39000-44563)

- California administers the federal program and clarifies California's air quality goals, planning mechanisms, regulatory strategies and standards of progress. (Health & Saf. Code, §§ 39656-39659.)

- In addition, CAA provides the state with a comprehensive framework for air quality planning regulation and requires attainment of state ambient air quality standards as soon as possible. (Health & Saf. Code, §§ 40919-40930.)

- California Air Resources Board ("CARB") is responsible for promulgating regulations and is also responsible for monitoring the regulatory activity of California's 35 local air districts. (Health & Saf. Code, § 39602.)

- In a non-attainment area, CARB must adopt and implement regulations to reduce emissions from stationary, mobile, indirect and area-wide sources. (Health & Saf. Code, § 39614(b).)

- Constraints are placed upon real estate development by requiring projects to include:

    - Transportation control measures;

    - Commute alternatives; and

    - Transit-oriented development designs.

- Practical considerations for undeveloped property:

    - Know attainment status for specific criteria pollutants in area proposed for purchase, etc., if development is anticipated.

    - Consider project design that will not result in significant impacts to air quality, or ensure adequate mitigation to reduce the impacts to less than significant.

- Regarding developed property, illegal air quality emissions resulting from existing land use can result in criminal or civil enforcement actions against responsible party.

    - Investigate emissions from existing use prior to foreclosure, purchase, or any other transactions.

Global Warming Solutions Act of 2006 (AB 32, Health & Saf. Code, § 38500 et seq.)

- Codifies the state's goal by requiring that the state's global warming emissions be reduced to 1990 levels by 2020. Sets a number of other deadlines for GHG reporting.

- Pursuant to AB 32, CARB developed a scoping plan that contains strategies to reduce GHGs, including regulations, alternative compliance mechanisms, monetary and non-monetary incentives, and voluntary actions.

For more information, see
http://www.arb.ca.gov/cc/scopingplan/scopingplan.htm.

CEQA

- Direct Impacts to Air Quality - mitigated by the local air quality management district rules.

- Indirect Impacts to Air Quality - Operator is less able to control - can be used as a bargaining chip by project opponents to try to impose limitations on operations; e.g., hours of operation, number of vehicles and vehicle trips, or to extract additional offsetting measures. Operator should be prepared to have a plan to negotiate these items.

- ***State of California v. County of San Bernardino***
  (Superior Court of Bernardino County, 2008, No. CNCIVSS0700329)

  Settlement between the California Attorney General and the County of San Bernardino requires the county to amend its General Plan within 30 months to include an inventory of all known, or reasonably discoverable, sources of GHG in the county. Because definitive data sources for this inventory did not yet exist, the parties agreed that the measurements will be estimates, but the estimates will be supported by substantial evidence and will represent the county's best efforts. The agreement provides that the county will inventory past emissions for 1990, the current year, and will project emissions for 2020. In addition, the county will create a target for the reduction of sources of emissions reasonably attributable to the county's discretionary land use decisions.

- **SB 97 (Chapter 185, Statutes 2007) - CEQA: Greenhouse Gas Emissions**

  SB 97 required that by July 1, 2009, the Governor's Office of Planning and Research ("OPR") prepare and transmit to the Resources Agency CEQA guidelines for the mitigation of GHG emissions. The Resources Agency must then certify and adopt the guidelines by January 1, 2010.

- **Guidelines**

  Lead agencies shall consider feasible means, supported by substantial evidence and subject to monitoring and reporting, of mitigating the significant effects of greenhouse gas emissions including:

  1. Measures in an existing plan or mitigation program;
  2. Reductions in emissions from the project through measures such as those in Appendix F (Energy Conservation);
  3. Off-site measures;
  4. Sequestration;

5. In the case of the adoption of a plan, mitigation may include identification of specific measures that may be implemented on a project-by-project basis. (Guidelines, § 15126.4(c).)

Such plan may include a plan for the reduction of greenhouse gas emissions and may be used in a cumulative impact analysis. (Guidelines, § 15130(b)(1).)

Significant effects of GHG may be analyzed at a programmatic level.

GHG may be analyzed and mitigated in a plan for the reduction of GHG which:

1. Quantifies greenhouse gas emissions;
2. Establishes a threshold of significance
3. Identifies and analyzes the greenhouse gas emissions resulting from specific actions;
4. Specifies measures or that would collectively achieve the specified emissions level;
5. Establishes a mechanism to monitor the plan's progress;
6. Is adopted in a public process following environmental review.

Appendix G thresholds: Would the project a) Generate greenhouse gas emissions, either directly or indirectly, that may have a significant impact on the environment; or b) Conflict with an applicable plan, policy or regulation adopted for the purpose of reducing the emissions of greenhouse gases?

- **Thresholds of Significance**

Bay Area Air Quality Management District: Project Level - Compliance with GHG Reduction Strategy, or 1,1000 MT CO2e per years or 4.6 MT CO2e per service population per year; Plan Level – Compliance with Qualified GHG Reduction Strategy or 6.6 MT CO2e per service population per year

San Joaquin Air Quality Management District: Best Performance Standards

Sacramento County Air Quality Management District: Related to AB 32 reduction goals

SB 375 (Chapter 728, Statutes 2008) – Transportation Planning: Travel Demand Models: Sustainable Communities Strategy

Regional Transportation Plans are expanded to include a sustainable communities' strategy, for the purposes of achieving GHG reduction targets by coordinating land use and transportation planning. Sacramento Area Council of Governments targets are 7% reduction by 2020; 16% reduction by 2035. San Joaquin County MPOs have a placeholder target of 5% reduction by 2020 and 10% reduction by 2035.

Local governments now have three or possibly four years to rezone property to accommodate regional housing needs. Failure to timely do so, alone, is not sufficient reason to deny or condition a development project.

Transit priority projects are exempt from CEQA if the project can satisfy a number of requirements under the statute.

B. Update

1. *American Electric Power Co. v. Connecticut* (2011) 131 S. Ct. 2527

The United States Supreme Court held that several States (including California), the City of New York, and three private land trusts cannot maintain federal common law public nuisance claims against carbon-dioxide emitters (four private power companies and the federal Tennessee Valley Authority). The plaintiffs sought a decree setting carbon-dioxide emissions for each defendant at an initial cap, to be further reduced annually. However, the Court held that the Clean Air Act ("CAA"), and the U.S. EPA action to regulate carbon-dioxide emissions that is authorized under the CAA, displace the claims the plaintiffs sought to pursue. In 2012, the EPA is expected to issue its new regulations to reduce power plants' emission of carbon dioxide.

2. *Pacific Merchant Shipping Association v. Goldstene* (9th Cir. 2011) 639 F.3d 1154

The Ninth Circuit Court of Appeal affirmed the district court's denial of Plaintiff Pacific Merchant Shipping Association's ("PMSA") motion for summary judgment. PMSA challenged the California Air Resources Board's adoption and implementation of the Vessel Fuel Rules which mandate that vessel operators "use cleaner marine fuels in diesel and diesel electric engines, main propulsion engines, and auxiliary boilers on vessels operating within twenty-four nautical miles off the California coastline." (Cal. Code Regs. tit 13 § 2299.2(a).) PMSA claimed the Vessel Fuel Rules were preempted by the Submerged Lands Act (43 USC § 1301 et seq.). The Ninth Circuit affirmed the decision of the district court, applying a presumption against pre-emption and finding that the state regulations implicate the prevention and control of air pollution, an area typically within the purview of the state's police power.

3. *Natural Resources Defense Council v. U.S. EPA* (9th Cir. 2011) 638 F.3d 1183

California's State Implementation Plan contained motor vehicle emissions budgets for PM 2.5 for only milestone years, and not attainment years. Petitioners argued EPA violated both the conformity rule (40 CFR 93.118(e)(4)) and the PM-2.5 Implementation Rules (40 CFR §§ 51.1007- 51.1009) in so doing. The court upheld the EPA's interpretation, emphasizing the deference due to the EPA's interpretation of the regulations. For the purposes of the Conformity Rule, the court stated, "The plain-text meaning of the rule is clear: for budgets concerning milestone years, reasonable further progress requirements are relevant; for budgets concerning the attainment year, attainment requirements are relevant; and for budgets concerning maintenance years,

maintenance requirements are relevant." With respect to the PM-2.5 Implementation Rules, the court stated, "nothing in those rules mandates that the EPA consider attainment data when determining the adequacy of milestone-year budgets. Indeed, as the calculation method detailed in § 51.1009(f) makes clear, to calculate a given milestone-year budget, the only information related to attainment that the EPA needs is the target attainment-year emissions level (described in the regulation as the "full implementation inventory…"

4. *Association of Irritated Residents v. United States Environmental Protection Agency* (9th Cir. 2011) 632 F.3d 584

In 2003, California proposed revisions to its 1997/1999 State Implementation Plan ("SIP") in response to new modeling which demonstrated that the existing SIP underestimated vehicle pollution in the South Coast Area. The 2003 SIP contained, among other things, a revised attainment plan and a determination that transportation control measures required to offset any growth in emissions from growth in vehicle miles traveled and to attain reduction in motor vehicle emissions as necessary" pursuant to 42 U.S.C. § 7511a (d)(1)(A) were not required because aggregate motor vehicle emissions would decrease despite the 30 percent increase in vehicle miles traveled. The EPA determined that a portion of the attainment plan was adequate, but did not make final decision as to the full attainment plan. The EPA also concluded that the determination that transportation control measures were not required was correct.

Petitioners challenged these actions, claiming, among other things, that the EPA abused its discretion in failing to require California to submit a revised attainment plan for South Coast after it disapproved the 2003 attainment plan, and in failing to require transportation control measures. The court agreed and held that EPA had a duty under the Clean Air Act to request a new SIP in light of the evidence presented in 2003 showing the existing SIP likely was inadequate. The court further held that EPA's interpretation of the CAA to not require control measures if aggregate motor vehicle emissions will decrease was an abuse of discretion as the statute was clear that transportation control measures were required to "offset any growth in emission from growth in vehicle miles traveled or numbers of vehicle trips in such area ["VMT"] and to attain reduction in motor vehicle emissions as necessary … to comply with [the CAA requirements pertaining to emission reduction requirements]."

5. *Jensen Family Farms, Inc. v. Monterey Bay Unified Air Pollution Control District* (9th Cir. 2011) 644 F.3d 934

Petitioner challenged the Monterey Bay Unified Air Pollution Control District's diesel powered engine regulations (Rules 220, 310, and 1010) as pre-empted by the Clean Air Act. Rules 220 and 310 require registration and payment of a registration fee for the operation of any 50 bhp or larger diesel engine or engines. The court held Rules 220 and 310 were not preempted by the provision of the CAA prohibiting any state from enforcing any "standard or other requirement relating to the control of emissions . . . from engines which are . . . used in farm equipment or vehicles and which are smaller than 175 horsepower" (42 USC 7543(e)(1)) because they do not directly control emissions. Rule 1010 sets emissions standards for stationary diesel engines and thus Rule

1010 is not pre-empted by the CAA because the CAA leaves direct regulation of stationary sources to the states. The court also rejected petitioner's claims that the District rules were preempted by state regulations, violated due process, and presented an illegal tax.

6. ***Rocky Mountain Farmers Union et al. v. Goldstene et al.*** **(E.D.Cal., Dec. 29, 2011, Nos. CV-F-09-2234 LJO GSA, CV-F-10-163 LJO DLB)**

The California Air Resources Board adopted Low Carbon Fuel Standard (Cal. Code Regs tit. 17, §§ 95480-95490, LCFS) to implement the provisions of AB 32, the Global Warming Solutions Act of 2006. Plaintiffs challenged the LCFS, alleging the LCFS violates the dormant commerce clause and conflicts with Section 211(o) of the Clean Air Act (42 U.S.C. 7545(o)), as modified by the Energy Independence and Security Act of 2007. Defendants sought summary judgment on the grounds that Section 211(c)(4)(B) of the Clean Air Act immunized them from scrutiny under the Commerce Clause and preemption by Section 211(o). Plaintiffs sought summary judgment on the grounds that the LCFS fails as a matter of law because it violates the Dormant Commerce Clause. Plaintiffs sought a preliminary injunction to enjoin defendants from further enforcing the LCFS. The court found the LCFS violated the dormant commerce clause, granted Plaintiffs' summary judgment motion, and enjoined implementation of the LCFS during the pendency of the litigation.

7. ***U.S. v. Pacific Gas & Electric*** **(N.D.Cal. 2011) 776 F.Supp.2d 1007**

In an action by the U.S. EPA against PG&E that alleged violations of the New Source Review program of the Clean Air Act at the Gateway Generating Station power plant near Antioch, California, the U.S. District Court for the Northern District held that a non-profit environmental group may not intervene as a matter of right to file a complaint against the EPA alleging claims under the Endangered Species Act relating to the impacts the power plant may have on an endangered butterfly.

8. ***Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*** **(2011) 197 Cal.App.4th 327**

This case involved a challenge to the adoption of a mitigated negative declaration on the grounds that air quality and climate change impacts analysis were improper was denied but writ was granted on other grounds. (See the California Environmental Quality Act section below for further discussion.)

9. ***Citizens for Responsible Equitable Environmental Development v. City of San Diego*** **(2011) 196 Cal.App.4th 515**

This case held that a challenge to the adoption of an addendum to an EIR prepared in 1994 was improper because, among other things, Petitioner failed to exhaust its administrative remedies on the issues of climate change. Information about greenhouse gases was not new information requiring a supplemental EIR because information about

greenhouse gas has been available since the late 1970s. (See the California Environmental Quality Act section below for further discussion.)

10. *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042

Petitioner challenged the City of Santa Clarita's approval of a Master Plan claiming the city failed to provide substantial evidence or analysis to support its conclusion that the Project's impact on climate change could not be fully mitigated. Specifically, the organization had submitted a list from the Attorney General of potential GHG mitigation measures without indicating which of the mitigation measures might be appropriate for the project. The court found it was unreasonable to impose on the city an obligation to explore each and every mitigation measure in the Attorney General's list because Petitioner did not single out any specific suggestions from the numerous potential mitigation measures in the list, and the Petitioner's letter stated that "the measures cited may not be appropriate for every project." (See the California Environmental Quality Act section below for further discussion.)

11. *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455

The court considered the argument that the EIR was required to address sea level rise impacts on the project, as well as the project's contribution to sea level rise on surrounding areas. The appellate court, suggesting that Guidelines section 15126.2(a) overstepped the statute, rejected the argument that the EIR was required to study the impact of the environment on the project, citing earlier decisions reaching similar conclusions. (See the California Environmental Quality Act section below for further discussion.)

12. *California Building Industry Association v. Bay Area Air Quality Management District,* Alameda Superior Court Case No. RG10548693

The Alameda Superior Court ruled this week that the Bay Area Air Quality Management District's CEQA thresholds of significance for GHG were themselves a CEQA "project" requiring environmental impact review and granted petitioner's writ of mandate.

13. *Cleveland National Forest Foundation v. San Diego Association of Governments,* San Diego Superior Court Case No. 37-2011-00101593-CU-TT-CTL

In October, 2011, the San Diego Association of Governments ("SANDAG") was the first Metropolitan Planning Organization to adopt a Regional Transportation Plan that included a Sustainable Communities Strategy, as required by Senate Bill 375 passed in 2008. The targets set by CARB for the San Diego Region were seven percent reduction in GHG emissions by 2020 and 13 percent by 2035. On November 18, 2011, the CARB signed an Executive Order accepting SANDAG's determination that it would meet the reduction targets. The Cleveland National Forest Association and the Center for

Biological Diversity filed suit claiming SANDAG's environmental impact report was inadequate.

14. Extension of Mandatory Reporting Deadline for Selected Industries

On November 9, 2011, the U.S. Environmental Protection Agency finalized corrections to 40 CFR part 98, requiring GHG reporting. In addition, EPA has provided a one-time extension of the reporting deadline to September 28, 2012 for various industries including: Electronics Manufacturing; Fluorinated Gas Production; Magnesium Production; Petroleum and Natural Gas Systems; Use of Electric Transmission and Distribution Equipment; Underground Coal Mines; Industrial Wastewater Treatment; Manufacture of Electric Transmission and Distribution; Industrial Waste Landfills. (76 Fed. Reg. 73886.)

For more information, see http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.

15. Deferral for CO2 Emissions from Bioenergy and Other Biogenic Sources under Prevention of Significant Deterioration and Title V Programs

Prevention of Significant Deterioration ("PSD") is a preconstruction review and permitting program applicable to "new major stationary sources" and "major modifications" at existing major stationary sources. The Title V permit program establishes operating permit requirements that are intended to improve sources' compliance with other CAA requirements. Both programs are applicable to emitters of GHG. This final action defers, for a period of three years, the application of PSD and Title V permitting requirements to CO2 emissions from bioenergy and other biogenic sources to give the EPA time to further study biogenic emissions and how the EPA should account for them. (76 Fed. Reg 15249.)

For more information, see http://www.epa.gov/climatechange/emissions/biogenic_emissions.html.

16. Revision to State Implementation Plan

On June 14, 2011, the U.S. EPA approved the California Regional Haze Plan to improve visibility in the 29 Class I areas (i.e. national parks and memorial parks, wilderness areas) to comply with rules promulgated by the EPA to address regional haze. The Regional Haze Plan is a revision to the State Implementation Plan. The U.S. EPA also approved the majority of the PM 2.5 air quality plan for the South Coast and San Joaquin Valley areas, extending the deadline for attaining the 1997 PM2.5 standards to 2015. The revisions include: the In-Use Diesel Truck and Bus rule, the Drayage Truck rule and the Ocean Going Vessels Clean Fuels rule. The rule took effect on November 30, 2011. In addition, the EPA approved the 8-hour ozone air quality plans for the same areas which will help those areas reach the 0.08 parts per million standard by 2024. The rule will take effect on January 14, 2012. (40 CFR § 52.)

For more information, see http://epa.gov/Region9/air/actions/ca.html#sjv.

17. SBX1 2 (Chapter 1) - Renewable Energy Resources

Existing law expresses the intent of the California legislature, in establishing the California Renewables Portfolio Standard Program ("RPS program"), to increase the amount of electricity generated per year from eligible renewable energy resources to at least 20% of the total electricity sold to retail customers in California per year by December 31, 2010. SBX1 2 modifies the Public Resources Code and Public Utilities Code to require investor-owned utilities, electric service providers, and community choice aggregators to increase procurement from eligible renewable energy resources to 33% of procurement by 2020.

18. Cap and Trade Regulations

On December 13, 2011, the Office of Administrative Law ("OAL") approved and transmitted to the Secretary of State the regulations for the California Cap on Greenhouse Gas Emissions and Market-Based Compliance Mechanisms (Cal. Code Regs., tit 17, §§ 95800 et seq.) ("Cap and Trade Regulations") including Compliance Offset Protocols ("Offset Protocol"). One day later, OAL approved and filed with the Secretary of State revisions to Mandatory Reporting Requirements initially enacted in 2007.

The Cap and Trade Regulations are part of the AB 32 Scoping Plan intended to reduce GHG to 1990 levels by 2020. The Cap and Trade Regulations place a declining aggregate cap on GHG emissions from covered entities, comprised of major GHG emitting sources including but not limited to electricity generation, and large stationary sources such as refineries, cement production facilities, and oil and gas production facilities, that emit 25,000 MTCO2e per year, as well as natural gas and propane fuel providers and transportation fuel providers. Starting in 2013, the Cap and Trade Regulations apply to facility operators and first deliverers of electricity emitting more than 25,000 MTCO2e per year. In 2015, the program will expand to include fuel distributors.

The Cap and Trade Regulations allow covered entities to use offset credits to meet their emission caps, so long as the offset credits are developed using CARB-adopted compliance offset protocols and the offset credits are used to meet no more than eight percent of the entity's total compliance obligation during a compliance period. As part of the Cap and Trade rulemaking, CARB approved Compliance Offset Protocol for the following categories of projects: Livestock, Ozone Depleting Substances, Urban Forest, and other Forest.

For more information, see http://www.arb.ca.gov/cc/capandtrade/capandtrade.htm.

19. Diesel Particulate Matter in Trucks and Buses

Beginning January 1, 2012, fleets that operate in California are required to reduce diesel truck and bus emissions by retrofitting or replacing existing engines. For all vehicles with a Gross Vehicle Rating greater than 26,000 pounds, excluding schools buses, fleets must do one of the following: 1) follow a staggered implementation schedule that requires 1996-1999 model year engines to be retrofitted with PM filter by January 1, 2012 (13 Cal. Code Regs. 2025 (g)); or (2) follow a phase-in option between 2012 and 2020, whereafter they will comply with the requirements of 2025(i).

For more information, see http://www.arb.ca.gov/truckstop.

20. San Joaquin Valley Unified Air Pollution Control District Rule 2301

The San Joaquin Valley Unified Air Pollution Control District has proposed a revision to Rule 2301 – a GHG emission reduction banking registry, a district administered mechanism to allow facilities to bank GHG emissions reductions generated within the San Joaquin Valley Air Basin.

For more information, see http://www.valleyair.org/Workshops/public_workshops_idx.htm.

Notes:

5. ENDANGERED SPECIES

A. Regulatory Framework

Federal Endangered Species Act (16 U.S.C. § 1531 et seq.)

- The purpose of ESA is to provide a means whereby endangered and threatened species and the ecosystems upon which they depend may be conserved. (16 U.S.C. § 1531(b).)

Section 7

- Section 7 of ESA requires all federal agencies to ensure, in consultation with USFWS and NMFS that their actions do not jeopardize the continued existence of a listed species or adversely modify or destroy critical habitat. (16 U.S.C. § 1536(a)(2).)

- Any federal action triggers the Section 7 consultation process. Examples include: the granting of permits, licenses, leases, granting of federal funds, and easements.

- A species list is required to determine if there are listed species in the project area that may be affected by the agency action. (16 U.S.C. § 1533(a)(2)(A).)

- A Biological Assessment is required where the action may affect a listed species to determine if the action would adversely affect the listed species. (16 U.S.C. § 1536(c).)

- Formal consultation, with a Biological Opinion from USFWS and NMFS, is required if the action would adversely affect the listed species or adversely modify or destroy critical habitat.

- The Biological Opinion must state whether it is a jeopardy or no jeopardy opinion. In most cases, a no jeopardy opinion results and it will include any conditions governing an incidental take statement granted under Section 7. (16 U.S.C. § 1536(b)(3).)

Section 9

- Section 9 of ESA prohibits the "take" of a species listed as endangered. (16 U.S.C. § 1538.)

- Species listed as threatened receive protections under ESA through special rules called 4(d) rules. (16 U.S.C. § 1533(d).)

- "Take" is defined as the act or attempt to hunt, harm, harass, pursue, wound, capture, kill, trap or collect. (16 U.S.C. § 1532(19).) "Harm" is defined as any act that kills or injures a species, including significant habitat modification. "Harass" is defined as any act creating the likelihood of injury to a species, including significant disruption of normal behavior patterns. (50 U.S.C. § 17.3.)

Section 10

- Section 10 of ESA authorizes the Secretary of Interior via USFWS and Secretary of Commerce via NMFS to permit the incidental take of listed fish and wildlife species, where no incidental take authorization was issued to a federal agency through the Section 7 process. (16 U.S.C. § 1539(a)(1)(B).)

- A Section 10 incidental take permit is cumbersome and requires preparation of a Habitat Conservation Plan ("HCP") specifying the activities to be pursued and the measures to mitigate any take. (16 U.S.C. § 1539(a)(2)(A).)

California Endangered Species Act ("CESA") (Fish & G. Code, § 2050 et seq.)

- Section 2080 of CESA prohibits the unauthorized take of state endangered or threatened species. (Fish & G. Code, § 2080.)

- "Take" is defined as the act or attempt to hunt, pursue, catch, capture or kill a state-listed species. (Fish & G. Code, § 86.)

- Take of state-listed species may be authorized by DFG under section 2080.1 or 2081.

- Section 2080.1 addresses the process for those species listed under both ESA and CESA. Section 2080.1 provides for "consistency determinations." CESA allows an applicant who has obtained a federal incidental take statement under Section 7 or a Section 10 incidental take permit to notify DFG that it has a federal permit and apply for a consistency determination.

- Section 2081 allows an incidental take permit for state listed-species only if specific criteria are met. CESA requires DFG to make findings regarding no jeopardy and that impacts of take are minimized and fully mitigated.

- No incidental take permit is available under section 2081 for "fully protected" species and "specified birds." (Fish & G. Code, §§ 3505, 3511, 4700, 5050, 5515 and 5517.) For example, the California condor is a fully protected species and therefore no take permits will be issued for it.

- If a project is planned in an area where a fully protected species or specified bird occurs, and applicant must design the project to avoid all "take"; DFG cannot provide take authorization under CESA.

- Natural Communities Conservation Planning Act ("NCCP") process authorizes DFG to enter into agreements to allow for the take of state-listed species in conjunction with a regional multi-species conservation plan. (Fish & G. Code, § 2835.)

- An NCCP identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity. It is the California counterpart to the federal HCP program.

B. Update

1. *San Luis & Delta-Mendota Water Authority v. Salazar* (9th Cir. 2011) 638 F.3d 1163

Pursuant to the Endangered Species Act ("ESA"), the U.S. Fish and Wildlife Service issued a Biological Opinion regarding the Central Valley Project and the State Water Project that concluded that the proposed coordinated operations of the projects are likely to jeopardize the continued existence of the delta smelt, and that the water flows to and in the San Francisco/Sacramento-San Joaquin Delta should be controlled to reduce entrainment and other taking of the smelt during critical times of the year. Implementation of that recommendation resulted in substantially reduced water deliveries to nut growers. The growers sued on the grounds that sections 7 and 9 of the ESA to the California delta smelt violates the Commerce Clause in the United States Constitution because the smelt is a purely intrastate species. The Ninth Circuit held there was no violation of the Commerce Clause. The court found that the ESA bears a substantial relation to commerce, even as applied to a purely intrastate species such as the delta smelt, because (a) a species might become threatened or endangered precisely because of overutilization for commercial purposes; (b) the ESA protects endangered or threatened species, in part, by prohibiting all interstate and foreign commerce in those species; (c) the ESA protects the future and unanticipated interstate-commerce value of species; (d) regeneration of a threatened or endangered species might allow future commercial utilization of the species; (e) interstate travelers stimulate interstate commerce through recreational observation and scientific study of endangered or threatened species; and (f) the genetic diversity provided by endangered or threatened species improves agriculture and aquaculture, which clearly affect interstate commerce.

2. *Sierra Forest Legacy v. Sherman* (9th Cir. 2011) 646 F.3d 1161

The Ninth Circuit Court of Appeals issued four separate opinions that, collectively, affirmed a ruling by the U.S. District Court for the Eastern District of California that the supplemental environmental impact statement ("SEIS") for the 2004 Sierra Nevada Forest Plan Amendment and related Basin Project ("2004 Framework") issued by the U.S. Forest Service did not violate the National Environmental Policy Act. The SEIS adequately addressed short-term impacts of the 2004 Framework to old forest wildlife and adequately disclosed and rebutted expert opposition regarding those impacts. However, when it applied a 2007 amendment to the 2004 Framework retroactively, the District Court failed to properly determine whether the 2004 Framework violated the

National Forest Management Act ("NFMA"). The NFMA claims were remanded for further consideration.

3. *San Luis Unit Food Producers v. United States* (E.D.Cal. 2011, No. 1:09-CV-01871)

Plaintiffs, including owners, operators and managers of agricultural land in the San Luis Unit of the Central Valley Project ("CVP"), sued the U.S. Bureau of Reclamation on the ground that the Bureau violated various provisions of U.S. reclamation law by not providing plaintiffs with a sufficient volume of irrigation water from the CVP. On cross-motions for summary judgment, the U.S. District Court rejected all of the claims. Even though it was undisputed that the Bureau's delivery of water to plaintiffs had been reduced in recent years, no statutory violations occurred. When it enacted the Central Valley Project Improvement Act in 1992, Congress established mitigation, protection and restoration of fish and wildlife as a co-equal priority of the CVP with providing irrigation water service: "Congress was aware of the possibility that use of the San Luis Unit [of the CVP] might have to be curtailed at certain times of the year to serve fish and wildlife purposes. This proviso nowhere imposes any absolute obligation of full utilization for irrigation." According to the court, solutions to the "adverse effects of environmental and species protection and restoration mandated by the CVPIA" lie in "the legislature, not the courts, which lack authority to rewrite the law."

4. *Coalition for a Sustainable Delta v. McCamman* (E.D.Cal. 2011, No. 1:08-cv-00397)

U.S. District Court for the Eastern District of California granted a motion to approve a settlement agreement between plaintiff water districts and others, and the defendant California Department of Fish & Game, which resolved a lawsuit that alleged that the State's striped bass sport fishing regulations caused a higher than natural population of striped bass, thereby causing a 'take' of listed species of fish, in violation of the Endangered Species Act. The settlement provides for a stay of the litigation and the development of a regulatory proposal that would reduce striped bass predation on the listed species.

5. *Center for Sierra Nevada Conservation v. U.S. Forest Service* (E.D.Cal. 2011, No. S-90-2523)

The U.S. District Court held that, when it adopted its "Public Wheeled Motorized Travel Management Decision" for the El Dorado National Forest, the U.S. Forest Service violated its obligation under section 7(a)(2) of the Endangered Species Act to consult with the U.S. Fish and Wildlife Service. Furthermore, the decision designates specific roads and trails through meadows in apparent violation of provisions of the governing forest plan, thereby violating the National Forest Management Act.

6. *Coalition for a Sustainable Delta v. FEMA* (E.D.Cal. 2011, No. 1:09-cv-02024)

Plaintiffs, the Coalition for a Sustainable Delta and Kern County Water Agency, alleged that Federal Emergency Management Agency's ("FEMA") implementation of the National Flood Insurance Program ("NFIP") in the Sacramento-San Joaquin Delta ("Delta") provides incentives for development within the Delta that might otherwise not occur and therefore requires consultation under Section 7 of the Endangered Species Act ("ESA"). FEMA's challenged actions included issuance, administration, and enforcement of minimum flood plain management criteria; issuance of Letters of Map Changes ("LOMCs"); and providing flood insurance to property owners within participating communities. Plaintiffs argued those actions caused more development in the flood-prone areas of the Delta, which harms species listed under the ESA, namely Sacramento River winter-run Chinook salmon, the Central Valley spring-run Chinook salmon, the Central Valley Steelhead, and the Delta smelt. On defendant federal agencies' motion for summary judgment, the court held, (1) the six year statute of limitations does not bar the challenge to FEMA's ongoing mapping activities under the NFIA; (2) the issue of whether or not FEMA's mapping activities in the Delta actually do encourage filling and leveeing activities is a disputed material fact that cannot be resolved on summary judgment; (3) whether FEMA's issuance of LOMCs and related mapping activities actually impacts the listed species is a disputed issue of fact that cannot be resolved on summary judgment; and (4) FEMA's issuance of flood insurance is not subject to Section 7 consultation because, once the minimum eligibility requirements are satisfied, FEMA is required to issue flood insurance to the eligible party and retains no discretion to further modify the terms and conditions of the policies.

7. *In re Consolidated Delta Smelt Cases* (E.D. Cal., Nos. 1:09-CV-00407 OWW DLB,1:09-cv-00480-OWW-GSA,1:09-cv-00422-OWW-GSA,1:09-cv-00631-OWW-DLB,1:09-cv-00892-OWW-DLB)

In 2008, the United States Fish and Wildlife Service ("FWS") issued a biological opinion ("BiOp") under section 7 of the Endangered Species Act that addressed the impacts of the coordinated operations of the federal Central Valley Project ("CVP") and State Water Project ("SWP") on a threatened fish known as the California delta smelt in the Sacramento San Joaquin Delta. The BiOp concluded that "the coordinated operations of the CVP and SWP, as proposed, are likely to jeopardize the continued existence of the delta smelt" and "adversely modify delta smelt critical habitat."

In November 2009, the U.S. District Court for the Eastern District of California held that the federal agencies violated NEPA when they implemented the BiOp without conducting the required NEPA analysis. (*Delta Smelt Consol. Cases v. Salazar* (E.D.Cal. 2009) 686 F.Supp.2d 1026.)

In December 2010, the District Court for the Eastern District ruled, in part, that the Reasonable and Prudent Alternative ("RPA") Component 3, Action 4 (the "Fall X2 Action") of the BiOp violated the Administrative Procedure Act's and FWS' own Consultation Handbook implementing the ESA. The RPA was purportedly designed to

improve habitat for delta smelt growth and rearing, and required sufficient Delta outflow to maintain a monthly average location of two parts per thousand salinity ("X2") no greater (more eastward) than 74 kilometers from the Golden Gate Bridge in "wet" water years and 81 kilometers from the Golden Gate Bridge in "above normal" water years. The average monthly location of X2 in the fall must be maintained in September and October (in November, the Fall X2 Action requires the Projects to adjust their upstream reservoir releases to prevent the storage of inflow). The court held that FWS failed to explain why it is essential to maintain X2 at 74 km and 81 km respectively, as opposed to any other specific location: "The public cannot afford sloppy science and uni-directional prescriptions that ignore California's water needs." (*Delta Smelt Consol. Cases v. Salazar* (E.D. Cal. 2010) 760 F.Supp.2d 855, 969.)

Despite that ruling by the District Court in December 2010, the federal agencies nevertheless intended to implement the Fall X2 Action beginning on September 1, 2011. Plaintiff water agencies and water contractors' therefore moved for post-judgment injunctive relief. The district court granted that motion in August 2011 and enjoined the BiOp's Fall X2 Action to prevent implementation of the 74 km X2 target. The court explained that, even if an injunction may not issue under the ESA based on economic harm, there is no such restriction in a NEPA case; and where the evidence indicates that the ESA will not be violated by injunctive relief issued under NEPA (which the court found to be true in this case), the presence of a NEPA claim permits consideration of economic harm evidence. On that legal authority, and balancing the hardships, the court held that X2 not be allowed to shift east of the confluence of the Sacramento San Joaquin Rivers, and positioning X2 at 80 km or 79 km accomplished that goal, as well as reduced the water supply impact of the Fall X2 Action. In support of that holding, the court found, among other things, (1) the BiOp "relies almost exclusively" on work by a Bureau of Reclamation scientist, about whom the court stated, "His scientific objectivity is compromised by inconsistency," and whose life cycle model and implementation the court found to "represent relevant but scientifically compromised findings regarding the relationship of Fall X2 to smelt abundance"; (2) the FWS violated NEPA, which resulted in the issuance and implementation of a "one-sided, single purpose RPA that inflicts drastic consequences on California water users, a situation NEPA prohibits"; (3) "detrimental effects would be visited on the quality of the human environment by implementation of the BiOp's RPA Actions, which impose substantial restrictions on the water supply to California, solely to protect the delta smelt"; (4) position of the Fall X2 Action would have likely caused "a negative 300,000 acre feet water supply impact to SWP contractors," which would have impacted long-term water supply reliability for both domestic and agricultural users, including "impacts to groundwater recharge programs, with resulting direct environmental impacts to groundwater levels, groundwater quality, and energy use," as well as water supply reductions that "will cause economic impacts to farmers and may have socioeconomic impacts on agricultural communities" (although such economic and socioeconomic impacts were unclear in this "wet" year); and (5) the scientific evidence in support of imposing any Fall X2 action "is manifestly equivocal" because "[t]here is essentially no biological evidence to support the necessity of the specific 74 km requirement set to be triggered in this 'wet' water year," and because "[t]he agencies still 'don't get it.' They continue to believe their 'right

to be mistaken' excuses precise and competent scientific analysis for actions they know will wreak havoc on California's water supply." In oral statements from the bench, U.S. District Court Judge Oliver W. Wanger stated that one of the Fish and wildlife Service's experts "has not been honest in this court. I find her to be incredible as a witness. I find her testimony to be that of a zealot. And I'm not overstating the case. I'm not being histrionic. I'm not being dramatic. I've never seen anything like it. And I've seen a few witnesses testify." Those statements reflect the opinions of the trial judge, Oliver W. Wanger. He is no longer on the bench and the matter was reassigned to District Judge Lawrence J. O'Neill on October 12, 2011. Also, this case was appealed to the Ninth Circuit Court of Appeal (case no. 11-17143).

Furthermore, on December 14, 2011, the U.S. Fish & Wildlife Service transmitted to the U.S. Bureau of Reclamation a draft revised biological opinion on the effects of the Central Valley Project and State Water Project operations on the delta smelt.

8. ***The Consolidated Salmonid Cases*** **(E.D. Cal. 2011) 791 F.Supp.2d 802**

On June 4, 2009, the United States National Marine Fisheries Service ("NMFS") issued a Biological Opinion ("BiOp") that addressed the impacts of the coordinated operations of the federal Central Valley Project ("CVP") and State Water Project ("SWP") on several species listed as endangered or threatened under the Endangered Species Act ("ESA"). Those species included the Sacramento River winter-run Chinook salmon, Central Valley spring-run Chinook salmon, Central Valley steelhead, Southern Distinct Population Segment of North American green sturgeon, and Southern Resident killer whales. Numerous water contractors and water agencies filed several lawsuits against a variety of federal agencies on the grounds that provisions of the BiOp and its Reasonable and Prudent Alternative ("RPA") violated the ESA and the Administrative Procedures Act. The cases were consolidated in a single proceeding in the United States District Court for the Eastern District of California, where the court heard cross-motions for summary judgment. On September 20, 2011, the court granted some portions of the summary judgment motions, and denied others. The court held that certain portions of the BiOp and its RPA were arbitrary, capricious and unlawful, and were remanded to NMFS. The court said: "Some of NMFS's analyses rely upon equivocal or bad science to impose [actions under the RPA] without clearly explaining or otherwise demonstrating why the specific measures imposed are essential to avoid jeopardy and/or adverse modification. Given the potential serious impacts of these measures, the agency must do more to comply with the law." Those impacts include changes to water flows in the Sacramento and San Joaquin Rivers, and changes to the amount of water pumped through the CVP and SWP, which impacts the amount of water available to municipalities and farms in Central and Southern California.

Note: Federal Judge Oliver W. Wanger, who presided over all of the water supply and ESA cases involving the Delta retired in September 2011. However, in November 2011, it became known that Judge Wanger was in private practice representing the Westlands Water District, one of the most active parties in many of those cases. Under public pressure, he has since stepped away from that job. It remains to be seen what impact, if

any, his new employment has on the way the Ninth Circuit Court of Appeals will look at the pending appeals of cases that Judge Wanger ruled on prior to his retirement.

9. *Californians for Alternatives to Toxics v. United States Fish and Wildlife Service* (E.D.Cal. 2011, No. CIV. S-10-1477)

Federal and state authorities authorized the Paiute Cutthroat Trout Restoration Project in Silver King Creek, located in the Carson-Iceberg Wilderness in Alpine County, California. The project will restore the Paiute cutthroat trout ("PCT") to its historic range in Silver King Creek by eradicating non-native trout in the creek with the pesticide rotenone and restocking the treated area with pure PCT from donor streams. According to the agencies, the project is a critical and necessary step towards removing the PCT from the Endangered Species Act's ("ESA") threatened species list and preventing its extinction. The Environmental Impact Statement/Environmental Impact Report was jointly prepared by federal and state agencies to authorize the project under the federal Wilderness Act, as well as NEPA, ESA, CWA, CEQA and the federal Administrative Procedures Act. On granting plaintiffs' motion for summary judgment, in part, the court held that there was no NEPA violation, but a violation of the Wilderness Act was shown because in choosing one competing value (the conservation of the PCT) over another value (preservation of the wilderness character), the agencies left native sensitive macroinvertebrate species out of the balance – they would be killed and recolonization will not occur for some species - and thus the agencies improperly concluded that authorization of motorized equipment to be used in the project will comply with the Wilderness Act by achieving the purpose of preserving wilderness character.

10. *Center for Biological Diversity v. California Dept. Fish & Game* (2011) 195 Cal.App.4th 128

The Court of Appeal, First Appellate District, held that, where an administrative agency was ordered to reconsider a matter because it might possibly have applied an incorrect standard of review, and where the agency reconsidered the matter and reiterated its earlier decision, the plaintiff is not entitled to attorneys fees under Code of Civil Procedure section 1021.5. The First Appellate District applied its own rule, articulated last year in *Karuk Tribe of Northern California v. California Regional Water Quality Control Bd., North Coast Region* (2010) 183 Cal.App.4th 330, that section 1021.5 would not support an award of attorney fees for a remand to an administrative agency to reconsider a previously decided matter, when the remand was for a perceived procedural defect and resulted in no demonstrable substantive change in the agency's position.

11. *Mulryan Properties, LLLP v. California Coastal Commission* (Los Angeles County Superior Court, No. BS 133269) - Coastal Commission Sued By U2 Guitarist for Denial of Mansions Project in Malibu

On June 16, 2011, the California Coastal Commission voted 8-4 to reject a controversial project that proposed the construction of five mansions on the hills of the Sweetwater Mesa area above Malibu, California. The project was proposed by U2 guitarist the Edge,

whose real name is David Evans. Evans had promoted the development as environmentally friendly, using recycled and renewable materials, rainwater catchment systems, solar panels and native landscaping. However, according to the Commission's executive director: "In 38 years of this commission's existence, this is one of the three worst projects that I've seen in terms of environmental devastation." Twice the Commission's staff had recommended the project be rejected due to disturbance of sensitive habitat and scarring of a scenic hilltop visible from much of the Malibu coast. "In August 2011, Evans and four other owners filed separate actions against the Commission on the ground that the project denial constituted an unconstitutional taking of property without compensation. Those cases were consolidated in *Mulryan Properties, LLLP v. California Coastal Commission*, Los Angeles County Superior Court case no. BS 133269.

12. SB 16 (Chapter 311) - Expedited CESA Review on Renewable Energy Projects

Under the California Endangered Species Act, the Department of Fish and Game ("DFG") is required to review project applications for incidental take permits. SB 16 requires DFG within 45 days after it receives an application for an incidental take permit for a renewable energy project under the Renewables Portfolio Standard, to determine whether the application is complete and notify the applicant. SB 16 also requires DFG to approve or reject an incidental take permit application for an eligible renewable energy project within 60 days or less from the date the application is deemed complete (instead of the usual 90-120 days).

13. Federal Agencies Announce Draft Policy To Interpret Definitions of "Endangered Species" and "Threatened Species"

The federal Endangered Species Act ("ESA") defines an "endangered species" as "any species which is in danger of extinction throughout all or a *significant portion of its range*." A "threatened species" is defined by the ESA as "any species which is likely to become an endangered species within the foreseeable future throughout all or a *significant portion of its range*." The United States Fish and Wildlife Service and the National Marine Fisheries Service (collectively, "Services") announced on December 9, 2011, a draft policy to provide their interpretation of the phrase "significant portion of its range" in those definitions. In the draft policy, the Services make four conclusions: (1) If a species is found to be endangered or threatened in only a significant portion of its range, the entire species is listed as endangered or threatened, respectively, and the Act's protections apply across the species' entire range; (2) a portion of the range of a species is "significant" if its contribution to the viability of the species is so important that, without that portion, the species would be in danger of extinction; (3) the range of a species is considered to be the general geographical area within which that species can be found at the time the Services makes any particular status determination; and (4) if the species is not endangered or threatened throughout all of its range, but it is endangered or threatened within a significant portion of its range, and the population in that significant portion is a valid "distinct population segment," the Services will list the "distinct

population segment" rather than the entire taxonomic species or subspecies. The Services seek public comments on the draft policy through February 7, 2010.

For more information, see http://www.endangeredspecieslawandpolicy.com/uploads/file/76%20Fed%20Reg%2076987%20Dec%209%202011%20-%20USFWS%20Federal%20Register%20NOA%20Draft%20SPR%20Policy.pdf; http://www.endangeredspecieslawandpolicy.com/uploads/file/SPR_draft_policy_FAQs_FINAL_12-7-11.pdf.

Notes:

6. RENEWABLE ENERGY

A. Regulatory Framework

- **Renewables Portfolio Standard**.

  Established in 2002 under Senate Bill 1078 (Chap. 516, Stats. 2002), California's Renewables Portfolio Standard ("RPS") was accelerated in 2006 under Senate Bill 107 (Chap. 464, Stats. 2006) by requiring that 20 percent of electricity retail sales be served by renewable energy resources by 2010. In November 2008, Governor Arnold Schwarzenegger signed Executive Order S-14-08 requiring that "...[a]ll retail sellers of electricity shall serve 33 percent of their load with renewable energy by 2020." The following year, Executive Order S-21-09 directed the California Air Resources Board, under its Assembly Bill 32 authority, to enact regulations to achieve the goal of 33 percent renewables by 2020. In the ongoing effort to codify the ambitious 33 percent by 2020 goal, Senate Bill X1-2 (Chap. 1, Stats. 2011) was signed by Governor Edmund G. Brown, Jr., in April 2011. This new RPS preempts the California Air Resources Boards' 33 percent Renewable Electricity Standard and applies to all electricity retailers in the state including publicly owned utilities ("POUs"), investor-owned utilities ("IOUs"), electricity service providers ("ESPs"), and community choice aggregators ("CCAs"). All of these entities must adopt the new RPS goals of 20 percent of retails sales from renewables by the end of 2013, 25 percent by the end of 2016, and the 33 percent requirement being met by the end of 2020.

  For more information, see http://www.cpuc.ca.gov/PUC/energy/Renewables/overview.htm; http://www.energy.ca.gov/portfolio/index.html.

- **California Solar Initiative ("CSI").**

  In January 2007, California began a $3.3 billion effort to install 3,000 megawatts of new solar over the next decade. The California Public Utilities Commission portion of the solar effort is known as the CSI program. The CSI offers solar incentives to energy users (except new homes) in investor-owned utility territories in California (Pacific Gas and Electric, Southern California Edison, San Diego Gas & Electric). The CSI program has a goal to install 1,940 MW of new solar by 2017.

  For more information, see http://www.cpuc.ca.gov/PUC/energy/Solar

- **California Solar Rights Act (Civ. Code, § 714)**

  The California Solar Rights Act (Civ. Code §714), enacted in 1978, bars restrictions by homeowners associations on the installation of solar-energy systems, but originally did not specifically apply to cities, counties, municipalities

or other public entities. The Act was amended in September 2003 to prohibit a public entity from receiving state grant funding or loans for solar-energy programs if the entity prohibits or places unreasonable restrictions on the installation of solar-energy systems. A public entity is required to certify that it is not placing unreasonable restrictions on the procurement of solar-energy systems when applying for state-sponsored grants and loans. The Act was amended again in September 2004 by extending its prohibition on restrictions to all public entities. Additional key changes minimize aesthetic solar restrictions to those that cost less than $2,000 and limits building official's review of solar installations only to those items that relate to specific health and safety requirements of local, state and federal law. In 2008, Assembly Bill 1892 (Chap. 40, Stats. 2008) further amended the civil code to nullify any restrictions relating to solar energy systems contained in the governing documents of a common interest development.

B. Update

1. *Save Panoche Valley v. San Benito County* (6th Dist., No. H037599) - One Of The World's Largest Solar Farms Located In San Benito County Survives Initial CEQA Challenge

In August 2011, the San Benito County Superior Court denied a legal challenge under the California Environmental Quality Act and the Williamson Act to a 3,200 acre, 399-magawatt solar generation project 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. While the original 10,000 acre project was reduced in size by the Board of Supervisors, the approved project will become one of the largest solar farms in the world. After approval, the Santa Clara Audubon Society, the Sierra Club and a group of local residents brought an action under CEQA, among other things, due to the alleged impacts on several endangered species in the project area. However, the judge held that the County Board of Supervisors properly followed CEQA especially since the developers of the project agreed to purchase 23,000 acres of adjacent land and place them in permanent conservation easements. The judge also found substantial evidence to support the County's decision to cancel the Williamson Act contract based on the finding that "a significant public concern in creating renewable energy substantially outweighed the objectives of the Act." On November 16, 2011, the petitioners filed a notice of appeal in the Court of Appeal for the Sixth Appellate District. A similar CEQA lawsuit was filed in May 2011 against the 250-megawatt photovoltaic solar power plant known as "California Valley Solar Ranch" being developed by SunPower Corp. in the Carrizo Plain in San Luis Obispo County. Abbott & Kindermann LLP will continue to track both of these cases.

2. *California Farm Bureau Federation v. County of Fresno* (Fresno County Superior Court, No. 11 CECG03780) - Challenge To Decision To Allow Williamson Act Contract To Be Cancelled For Solar Farm On Prime Agricultural Land

In October 2011, the California Farm Bureau Federation filed a lawsuit in Fresno County Superior Court that alleges that the Fresno County Board of Supervisors violated its authority when it voted to cancel a Williamson Act farmland-conservation contract and authorized construction of a utility-scale solar power project on 90 acres of prime farmland. California Farm Bureau President Paul Wenger stated: "[P]ressure to build utility-scale solar plants has touched off a land rush that threatens thousands of acres of prime farmland. There are millions of acres of marginal land in California. That's where these power plants should go, so we can conserve prime farmland to grow the crops that sustain our state and nation." Similar disputes over the compatibility of photovoltaic solar farms on lands covered by Williamson Act contracts are occurring throughout the State.

For more information, see http://www.cfbf.com/news/showPR.cfm?rec=D709F38EF758B5066EF31B18039B8CE5&PRID=370; http://www.law.berkeley.edu/files/HarvestingCleanEnergy.pdf; http://blogs.kqed.org/climatewatch/2012/01/03/can-solar-and-farming-make-good-neighbors/

3. H.R. 2599: Proposed Bill In Congress Seeks To Revive "Property Assessed Clean Energy Program"

Under the Property Assessed Clean Energy program, numerous local governments across the country provided funding for home improvements such as installations of energy-efficient solar panels, insulation and water conservation systems. Homeowners paid back the funds over a period of time through surcharges on their annual property taxes. However, in 2010, the Federal Housing Finance Agency ("Agency"), which oversees Fannie Mae and Freddie Mac, warned that the component of the PACE program that required PACE funds to be paid before the mortgage in the event of foreclosure caused the program to have "unusual and difficult" financial risks for lenders. That compelled lenders to inform homeowners that participation in the program could be a violation of the terms of the mortgages and grounds for foreclosure, which in turn made local governments back away from the program. In July 2011, a bipartisan group of Members of Congress introduced HR 2599, which would force the Agency to rescind its warning, and would create more stringent qualifications to participate in the program in order to address the Agency's concerns. The legislation is pending, and Abbott & Kindermann LLP will continue to monitor its progress.

For more information, see http://thomas.loc.gov/cgi-bin/query/D?c112:1:./temp/~c112EMrNLb.

4. SB 618 (Chapter 596) - Allows Cancellation Of Williamson Act Contracts For Solar Energy Projects

Governor Jerry Brown signed Senate Bill 618, which authorizes a city or county and a landowner to rescind a Williamson Act contract on agricultural lands of limited agriculture value and enter into a solar-use easement that restricts the use of land to photovoltaic solar facilities for 20 years, unless the landowner request a shorter term that may not be less than 10 years. The lands must either consist predominately of soil with significantly reduced agriculture productivity for agriculture activities, or have severely adverse soil conditions that are detrimental to agricultural activities and production. Also, the parcel must not be located on prime farmland, unique farmland, or land of statewide importance as determined by the Farmland Mapping and Monitoring Program of the California Natural Resources Agency, unless the California Department of Conservation determines that the parcel is eligible for a photovoltaic easement based on circumstances that cause limited agricultural use for the parcel. The bill's author, State Senator Lois Wolk, takes the position that the bill's provisions would apply to good quality farmland that lacks an adequate water supply, at the discretion of the Department of Conservation. (This bill is also discussed in the Planning, Zoning and Development section below.)

5. SB 585 (Chapter 312) - Expansion of California Solar Initiative

The California Solar Initiative ("CSI"), created in 2007, called for the installation of 3,000 megawatts of new, solar-powered electricity by 2016. The CSI, which originally cost $3.4 billion, is funded by ratepayers for the purpose of providing incentives for the installation of solar photovoltaic systems for customers of the state's investor-owned utilities and publicly owned utilities. According to the Public Utilities Commission, "the CSI program is a key component in the State's ability to achieve reduced greenhouse gas emissions through the use of clean, distributed technology." However, the CSI incurred a budget shortfall. SB 585 authorizes the state to increase the total cost limit of the CSI to $3.6 billion from $3.4 billion, and authorizes the state to raise $200 million more from utility rate-payers to subsidize the installation of photovoltaic solar panels on homes and small businesses. SB 585 also requires Public Utilities Commission to impose cost caps on residential and non-residential projects under CSI, using national and state installed costs. The California Chamber of Commerce opposed SB 585 on the ground that "extending this tax on ratepayers could be harmful for businesses and industries that use large amounts of electricity and that may not benefit from the programs that the tax would finance," and on the ground that "this 'charge' on electricity ratepayers subsidizes one specific group and does not come back to all who pay into it."

6. SB 16 (Chapter 311) - Expedites California Endangered Species Act Review On Renewable Energy Projects

Under the California Endangered Species Act, the Department of Fish and Game ("DFG") is required to review project applications for incidental take permits. SB 16 requires DFG within 45 days after it receives an application for an incidental take permit for a renewable energy project under the Renewables Portfolio Standard, to determine

whether the application is complete and notify the applicant. SB 16 also requires DFG to approve or reject an incidental take permit application for an eligible renewable energy project within 60 days or less from the date the application is deemed complete (instead of the usual 90-120 days). (This bill is also discussed in the Endangered Species Act section above.)

7. AB 900 (Chapter 354) - Expedites CEQA Process On Renewable Energy And Other "Environmental Leadership Development Projects" Valued Over $100 Million

This bill provides expedited judicial review for projects certified by the Governor as leadership projects. The types of projects that may qualify include LEED development projects, clean renewable energy projects, and clean energy manufacturing projects. (This bill is also discussed in the California Environmental Quality Act section below.)

8. SB 790 (Chapter 599) - Establishing Code Of Conduct For Community Choice Aggregation

Cities and counties have become increasingly involved in implementing energy efficiency programs, advocating for their communities in power plant and transmission line citing cases, and developing distributed generation and renewable resource energy supplies. A 2002 law allows cities and counties to procure and sell electricity within their community via a direct access arrangement called community choice aggregation ("CCA"). Emphasis on CCAs could result in municipalities building their own, smaller, power renewable energy power plants. While that law required electric utilities to cooperate fully with the implementation of CCA programs, investor owned utilities have, on occasion, opposed their formation. Among other things, SB 790 requires that, by March 2012, the Public Utilities Commission establish a code of conduct to ensure that an electrical corporation does not market against a CCA except through an independent marketing division.

9. Obama Administration Creates "Solar Energy Zones" In Desert Areas

On October 27, 2011, U.S. Secretary of the Interior Ken Salazar announced a supplement to the federal plan to facilitate utility-scale solar projects on public lands in six western states, including California. The Bureau of Land Management's Supplement to the Draft Programmatic Environmental Impact Statement for Solar Energy Development ("Supplement") assesses the creation 17 "solar energy zones" totaling about 285,000 acres potentially available for development within the zones. It also establishes a variance process that will allow development of well-sited projects outside of solar energy zones on an additional 20 million acres of public land, primarily in the Mojave Desert. The zones were intended to maximize electricity generation while minimizing conflicts with wildlife, cultural and historic resources. The Supplement makes clear that Interior's solar program will incorporate other, state-based planning efforts to establish additional solar energy zones, such as the California Desert Renewable Energy Conservation Plan. As of October 2011, the Interior Department had 79 applications for solar projects on public lands pending and expected to approve as many as 14 in 2012. The Federal Register

Notice of Availability for the Supplement began a 90-day public comment period, after which Bureau will prepare a Final Programmatic Environmental Impact Statement and Record of Decision.

For more information, see http://www.doi.gov/news/pressreleases/ Interior-Releases-Updated-Roadmap-for-Solar-Energy-Development.cfm.

10. United States Senate Committee on Energy and Natural Resources Considers Legislation on Federal Clean Energy Standard

In his State of the Union address in January 2011, President Obama proposed a national Clean Energy Standard ("CES") to require that 80 percent of the nation's electricity come from clean energy technologies by 2035. The United States Senate Committee on Energy and Natural Resources issued a White Paper On A Clean Energy Standard on March 21, 2011, in order to invite public comments as to what the general goals for the electric sector should be, whether a CES would most effectively achieve them, and what the CES should be if that is deemed to be the most effective policy. Presently, the Committee is reviewing the comments it received and studies from the Energy Information Administration of the Department of Energy. There is no pending draft legislation at this time.

For more information, see
http://energy.senate.gov/public/index.cfm?FuseAction=IssueItems.View&IssueItem_ID=7b61e406-3e17-4927-b3f4-d909394d46de;
http://energy.senate.gov/public/_files/CESWhitePaper.pdf;
http://energy.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=cdc9b28d-0ca0-4084-870d-cba67a489b76&Month=3&Year=2011&Party=0.

11. Model Local Solar Ordinance Nearing Completion

The California County Planning Directors Association ("CCPDA"), a statewide coalition of planning directors, is in the process of drafting a model solar ordinance that counties could adopt. The model ordinance describes where and how solar projects can be built. The purpose is to avoid disputes like those in Yolo County between those people who seek to protect prime farmland, on the one side, and developers and renewable energy advocates in the City of Davis, on the other side, that seek to build solar generation projects on hundreds of acres near Interstate 80 and the Yolo Causeway. As Yolo County Supervisor Mike McGowan said: "Yeah, solar is good. But if we're not a mono(theistic) religion in Yolo County, at least the big god is preservation of ag. land. All the other deities sort of bow down to that one." The model ordinance is designed to address conflicting land uses, such as the 220-megawatt solar production facility in Placer County that is proposed for an area that is supposed to include open space for wildlife. The model ordinance will be presented to the CCPDA membership for approval in February 2012. What remains to be seen is whether the rush of new state laws, such as Senate Bill 618 (Chap. 596, Stats. 2011), discussed above, will preempt the local land use decisions even under the model ordinance.

For more information, see http://www.ccpda.org/; http://www.ccpda.org/en/component/content/article/141-2012-cepda-annual-conference.

12. South Coast Air Quality Management District Adopts Energy Policy

The South Coast AQMD adopted a final Air Quality-Related Energy Policy on September 9, 2011. That policy seeks to integrate air quality, energy, and climate change issues in a coordinated and consolidated manner. The policy document first presents an overall view of energy consumption within the relevant area in 2008 and the related NOx, air toxics, and CO2 emissions contributed by energy type. Among other things, it was found that the electricity generation capacity in the area was 85 percent from fossil fuels and less than 2 percent from renewable energy. Ten air quality-related energy policies to guide and coordinate AQMD efforts are presented, including (1) promoting zero and near-zero emission technologies through ultra clean energy strategies, to meet air quality, energy security, and climate change objectives followed by ten actions to support the policies; and (2) promoting diversification of electricity generation technologies to provide reliable, feasible, affordable, sustainable, and zero or near-zero emission electricity supply for the Basin in partnership with local power producers.

For more information, see http://www.aqmd.gov/prdas/climate-change/EnergyPolicy.html.

13. Study Shows that Achieving 80% GHG Reductions By 2050 Under AB 32 Will Require Electrification of Entire Economy

An article published in the online version of the journal *Science* describes how the State of California will be able to reach the goal in AB 32 of 80% greenhouse gas reductions below 1990 levels by 2050. (James H. Williams, Andrew DeBenedictis, Rebecca Ghanadan, Amber Mahone, Jack Moore, William R. Morrow III, Snuller Price, Margaret S. Torn, "The Technology Path to Deep Greenhouse Gas Emissions Cuts by 2050: The Pivotal Role of Electricity," Science (Nov. 24, 2011).) The researchers from UC Berkeley, the Lawrence Berkeley National Laboratory and the consulting firm of Energy and Environmental Economics who authored that paper stated that "technically feasible levels of energy efficiency and decarbonized energy supply are not sufficient." Rather, "widespread electrification of transportation and other sectors is required." Even after other emission reduction measures were employed to the maximum feasible extent, "there was no alternative to widespread switching of direct fuel uses (e.g., gasoline in cars) to electricity in order to achieve the reduction target." However, reaching those goals "will depend substantially on technologies that are not yet commercialized." The researchers found that 100% of future electricity requirements cannot be met with renewable energy alone, but that 26% of a future electricity generation will have to come from "non-renewable generation, from nuclear, natural gas, and hydro, plus high storage capacity to maintain operability." No single generation technology can be used to decarbonize all electricity; "a mixed generation portfolio is required." The researchers assumed that "over the long run California would not 'go it alone' in pursuing deep GHG

reductions, and thus that neighboring states decarbonized their generation such that the carbon intensity of imports was comparable to California instate generation." The research model was based on several unknowns: (1) that while the understanding of long-term mitigation of non-energy CO2 (e.g., from cement manufacturing) and non-CO2 GHGs (e.g., methane and nitrous oxide from agriculture and waste treatment) is "poorly developed," it is clear that "if these emissions were not abated, the 2050 target could not be met"; and (2) that electrification of direct fuel uses will increase costs, but "much of the required technology and infrastructure for the energy-system transformation is not yet commercialized, comparative lifecycle costs are highly uncertain." The researchers calculated the cumulative net cost of $1.4 trillion for the transition discussed in the paper, with cumulative investment costs of $400-500 billion for electricity generation capacity, against which there would be mitigating factors such as saved gas and diesel costs, for a net mitigation cost by 2050 of $65 billion, or $1,200 per capita.

For more information, see
http://www.sciencemag.org/content/early/2011/11/22/science.1208365.

Notes:

7. HAZARDOUS SUBSTANCE CONTROL AND CLEANUP

A. Regulatory Framework

Carpenter-Presley-Tanner Hazardous Substance Account Act (Health & Saf. Code, §§ 25300-25395)

- California counterpart to CERCLA (see below) creates a fund to finance cleanup of releases of hazardous substances.
- Definitions of hazardous waste, responsible party, et al., similar to CERCLA but more expansive.
- Single-family residence special rules - Owner of less than five (5) acres not liable unless:
    - Contamination occurred after acquisition; or
    - Contamination occurred prior to ownership, but owner knew or had reason to know of contamination.
- Priority list of sites established.
- Cost recovery actions are similar to CERCLA for contribution and indemnity.
- Liability is limited to actual causation, and can be apportioned according to fault, a type of comparative fault idea. *Fireman's Ins. Fund v. City of Lodi* (1992) 302 F.3d 928.

Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") (42 U.S.C. §§ 9601 et seq.)

- Under CERCLA, owners and operators of property may be held liable for the full costs of cleaning up contaminated property, even though they may have not actually caused the contamination.
- CERCLA also creates a Superfund, financed through a combination of appropriations, industry taxes and judgments, to pay for cleanup costs.
- Empowers state and federal governments to clean up hazardous substance releases, recover costs of cleanup from responsible parties (i.e., owners and operators), and order abatement actions if imminent and substantial endangerment to the public health, welfare or the environment.
- Under CERCLA, any other person may clean up the hazardous substance release and recover costs of the cleanup from responsible parties.

- CERCLA provides for strict liability, meaning that a responsible party is liable even if no fault is involved.

- Responsible party or owner and operator are broadly defined. This includes a lender who acquired property from its mortgagee at a foreclosure sale.

- Secured Creditor's Exemption:

    - When a secured creditor holds indicia of ownership primarily to protect security interest in property and does not participate in the management of the property, then it is not liable under the exemption.

    - A secured creditor may be an owner and operator. There is potential for lender liability finding that a secured lender participates in management of facility when it participates in management to a degree indicating a capacity to influence the corporations' treatment of hazardous waste. *United States v. Fleet Factors* (11th Cir. 1990) 901 F.2d 1550.

    - To be held liable, a secured creditor must actually manage the facility. *In re Bergsoe Metal Corporation* (9th Cir. 1990) 910 F.2d 668.

    - There is a "safe harbor" rule for lenders in flux.

Safer Consumer Products (Green Chemistry Regulations) (Health and Saf. Code, §§ 25252-25253 and Cal. Code Regs., Div. 4.5 Title 22, Chapter 55, Safer Consumer Products Sections 69501 et seq.)

- In 2008, the Department of Toxic Substance Control ("DTSC") was statutorily authorized to: (1) identify and prioritize chemicals of concern, evaluate alternatives as well as specify regulatory responses; and (2) establish an online Toxics Information Clearinghouse to provide public access to information on the toxicity of chemicals. In September 2010, DTSC issued regulations in response to that legislation. However, in December 2010, DTSC agreed to take additional time to revisit the proposed regulations.

B. Update

1. *Chico Service Station, Inc. v. Sol Puerto Rico Ltd.* (1st Cir. 2011) 633 F.3d 20

The U.S. Court of Appeals for the First Circuit held that the *Burford* abstention doctrine required a federal court to abstain from hearing a citizen suit under the Resource Conservation and Recovery Act regarding a leaking underground storage tank, even though there was an ongoing state administrative proceeding involving the cleanup of the contamination, because (1) timely and adequate state-court review was not available; (2) there was little if any potential that federal court jurisdiction over the suit would interfere

with state administrative policymaking; and (3) it was unlikely that the federal case would conflict with the state proceedings.

2. *City of Los Angeles v. San Pedro Boat Works* (9th Cir. 2011) 635 F.3d 440

The Ninth Circuit held that the holder of a revocable permit to use real property is not an "owner" of that property for purposes of imposing liability under CERCLA for the clean-up of hazardous substances disposed on that property by others. "'[O]wner' liability under CERCLA does not extend to holders of mere possessory interests in land, such as permittees, easement holders, or licensees, whose possessory interests have been conveyed to them by the owners of real property, which owners continued to retain power to control the permittee's use of the real property."

3. *Sullins v. Exxon/Mobil Corp*. (N.D.Cal. Jan. 26, 2011, No. 08-04927)

A defendant oil company that caused hydrocarbon contamination in the soil and groundwater from leaking underground storage tanks used on plaintiffs' property in the 1950s and 60s was entitled to judgment on plaintiffs' claim under the Resource Conservation and Recovery Act, because there was no evidence that someone or something may be exposed to a risk of harm by the contamination if remedial action was not taken and therefore the contamination did not pose a substantial and imminent endangerment to health or the environment, even though the contamination exceeded the state regulatory standards, and even though the groundwater on the property potentially may be, at some unknown time in the future, a source of drinking water.

4. *City of Colton v. American Promotional Events, Inc*. (C.D.Cal. 2011, No. CV 09-1864)

Connecticut state law, which provides that dissolved corporations exist indefinitely for purposes of winding up business and are capable of being sued for three years after notice of dissolution, does not govern claims by the United States under CERCLA and RCRA against dissolved corporation. Such claims are governed by the statute of limitations provided in those federal statutes.

5. *Enns Pontiac, Buick & GMC Truck v. Flores* (E.D.Cal., 2011, No. 1:07-cv-01043)

The District Court denied plaintiffs' motion to add claims under the citizen suit provision in the Resource Conservation and Recovery Act because the 90-day pre-lawsuit notices were mere "boilerplate and conclusory."

6. *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891

The Court of Appeal for the Fifth Appellate District held that a local enforcement agency violated the due process rights of a property owner when it failed to provide adequate notice of the nature of an administrative appeal hearing where an administrative law judge recalculated a civil penalty in the amount of $1,148,200, where the penalty amount stated in the original enforcement order that the owner appealed from was $137,778. The

enforcement order's description of the appeal rights gave the misleading notion that the hearing, if requested, would be limited to the factual issues set forth in the enforcement order; and nothing in the order alerted the owner to the fact that if he requested a hearing, it would reopen the civil penalty issue and allow the administrative judge to determine anew, without any limitation to the amount set forth in the enforcement order, the total assessment of civil penalties. (This case is also referenced in the Local Government section below.)

7. Green Chemistry Rulemaking

On October 31, 2011, DTSC issued informal regulations pursuant to Health and Safety Code, §§ 25252-25253 and California Code Regulations, Title 22, § 69501 and initiated an informal comment period that ended December 31, 2011. DTSC expects to submit formal regulations to the Office of Administrative Law by February 2012 in order to begin a new formal rule-making process. Formal regulations are expected to be issued in the later part of 2012. These regulations are a cornerstone of California's groundbreaking Green Chemistry Initiative signed into law in 2008. DTSC's Safer Consumer Products regulations will require manufacturers of selected products sold in California to identify safer alternatives to a potential range of 3,000 chemicals known to be harmful to public health and the environment.

8. US EPA and DTSC Sign MOU Regarding Toxic Chemicals In Consumer Products

On January 12, 2012, The U.S. EPA and DTSC signed a landmark MOU that outlines principles by which DTSC and the U.S. EPA will cooperate to reduce toxic chemicals in consumer products, create new business opportunities in the emerging consumer products economy and reduce the burden on consumers and businesses struggling to identify what is contained in the products they buy for their families and customers. The MOU recognizes that the U.S. EPA is a leader in performing scientific evaluations that lead to safer alternatives. It promotes research, development and implementation of innovative chemical technologies that accomplish pollution prevention in a scientifically sound and cost effective manner. To accomplish these goals, the Green Chemistry Program promotes chemical technologies that reduce or eliminate the use or general application of hazardous substances during the design, manufacture and use of chemical products and processes.

Notes:

8. NATIONAL ENVIRONMENTAL POLICY ACT ("NEPA")

A. Regulatory Framework

- The National Environmental Policy Act of 1970 ("NEPA") (42 U.S.C. § 4321 et seq.) was the first of the modern federal environmental statutes. NEPA is the nation's basic charter for environmental responsibility. Unlike CWA or CAA, NEPA is often referred to as a "procedural statute," establishing a process by which federal agencies must study the environmental effects of their actions. It requires the federal government to prepare and publish information about the environmental effects of and alternatives to actions that the government may take.

- NEPA process is outlined in NEPA's Section 102(2)(C) (42 U.S.C. § 4332(2)(C)) and is fully described in the Whitehouse Council on Environmental Quality ("CEQ") NEPA implementing regulations (40 C.F.R. Parts 1500-1508). NEPA process includes efforts to inform and seek comments from the public, state and local agencies, Native American tribes, and other federal agencies.

- There are three potential findings that a federal agency can make under NEPA:

  (1) Categorical Exemption/Exclusion – The project falls under those sets of projects that have been pre-determined to not have a significant impact on the environment, known as categorical exemptions or exclusions. (CEQ NEPA Guidance, § 1508.4.)

  (2) Environmental Assessment ("EA") – If it is determined that the project may have a significant impact, an EA is completed. If the EA shows that the project will not have a significant impact on the environment, then the agency may issue a finding of no significant impact based on the EA. (CEQ NEPA Guidance, §§ 1508.9, 1508.13.)

  (3) Environmental Impact Statement ("EIS") – If it is determined that a project will have a significant impact on the environment, then an EIS is required. (CEQ NEPA Guidance, § 1508.11.)

B. Update

1. *The Wilderness Society v. U.S. Forest Service* (9th Cir. 2011) 630 F.3d 1173

The Ninth Circuit abandoned its "federal defendant" rule that categorically prohibited private parties from intervening of right on the merits of claims brought under the National Environmental Policy Act, and adopted for such cases the standard four-part test for intervention as of right under Federal Rule of Civil Procedure 24(a)(2). The elements under that test are (1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the

action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action.

Notes:

9. MINING

A. Regulatory Framework

Surface Mining and Reclamation Act ("SMARA")

- The Surface Mining and Reclamation Act ("SMARA") (Pub. Resources Code, § 2710 et seq.) was enacted by the California Legislature in 1975 to address the need for a continuing supply of mineral resources, and to prevent or minimize the negative impacts of surface mining to public health, property and the environment.

- The California Department of Conservation oversees SMARA at the state level. Within the California Department of Conservation are three offices each with a different responsibility. They are the Office of Mine Reclamation, the State Mining and Geology Board ("SMGB"), and the Division of Mines and Geology.

- The Office of Mine Reclamation renders technical assistance, maintains a database of all mines in California, and regulates compliance statewide.

- The SMGB promulgates regulations, sets California policy regarding mining issues, and conducts the Appeals Board in disputed issues.

- The Division of Mines and Geology is an information resource. They maintain the Mineral Resource Library, publish the California Geology magazine and classify all identified mineral resource land in California.

- SMARA applies to anyone, including government agencies, engaged in surface mining operations within the state which disturb more than one acre or remove more than 1,000 cubic yards of material.

- The local city or county's "lead agency" adopts ordinances for land use permitting and reclamation procedures which provide the regulatory framework under which local mining and reclamation activities are conducted.

- The SMGB reviews these lead agency ordinances to determine whether they meet or exceed SMARA requirements. If the SMGB determines that the lead agency is not in compliance with SMARA, the SMGB has the authority to step in and exercise the powers of the lead agency, except for permitting authority.

B. Update

1. U.S. Army Corps of Engineers Proposal to Reissue and Modify Nationwide Permits

On February 16, 2011, the U.S. Army Corps of Engineers solicited comments for the reissuance of the existing nationwide permits under section 404 of the Clean Water Act ("NWPs"), general conditions and definitions, with some modifications. Specifically, the Corps requested comments on NWP 21, which authorizes discharges of dredged or fill material into waters of the U.S. associated with surface coal mining activities. On November 3, 2011, the proposed final rule was submitted to the Office of Management and Budget, which is reviewing the rule. USACE seeks to promulgate the rule before the existing nationwide permits expire. (This proposal is also discussed in the Water Quality section above.)

For more information, see: http//spn.usace.army.mil/regulatory/newp.html

2. *National Mining Assn. v. Jackson* (D.D.C. 2011) 768 F.Supp.2d 34

U.S. District Court in District of Columbia held that EPA's June 2009 Enhanced Coordination Process Memoranda, which uses the Multi-Criteria Integrated Resource Assessment, was a final agency action that impermissibly expanded EPA's role in the Section 404 permitting scheme for coal mining operations under the CWA. The court also held that, by implementing its April 2010 Detailed Guidance Memorandum, the EPA overstepped the authority it was granted to determine Section 303 Water Quality Standards. Thus, federal defendants' motion to dismiss was denied. (This case is also discussed in the Water Quality section above.)

3. Senate Bill 108 (Chapter 491) - Interim Management Plans Under SMARA

The Surface Mining and Reclamation Act of 1975, with exceptions, prohibits a person from conducting a surface mining operation unless, among other things, a reclamation plan has been submitted to and approved by the lead agency for the operation. SB 108 requires an operator, within 90 days of a surface mining operation becoming idle, to submit to the lead agency for review and approval, an interim management plan. SMARA previously defined idle to mean a curtailment for a period of one year or more of surface mining operations by more than 90% of the operation's previous maximum annual mineral production, with the intent to resume those surface mining operations at a future date. SB 108 instead defines idle to mean that an operator of a surface mining operation has curtailed production at the surface mining operation, with the intent to resume the surface mining operation at a future date, for a period of one year or more by more than 90% of its maximum annual mineral production within any of the last 5 years during which an interim management plan has not been approved.

SMARA previously authorized an interim management plan to remain in effect for a period not to exceed 5 years, after which, the lead agency is authorized to take certain actions, including renewing the interim management plan for another period not to

exceed 5 years, if the lead agency finds that the surface mining operator has complied fully with the interim management plan. SB 108 authorizes the lead agency to renew the interim management plan for additional 5-year periods, if the lead agency finds that the surface mining operator has complied fully with the interim management plan.

SMARA previously required the owner or operator of a mining operation to forward to the Director of Conservation an annual report that identifies certain things about the mining operation including the mining operation's status and the type and total amount of commodities produced. SB 108 authorizes a mine operator who has failed to properly report mineral production or status in any year prior to January 1, 2012, to attach corrected annual reports to the 2012 annual report so long as the corrected report is submitted on or before July 1, 2013, among other things. SB 108 also authorizes a mine to return to idle status after being considered abandoned prior to January 1, 2013, if an interim management plan is approved by July 1, 2013, and upon lead agency verification of compliance with the above provisions. SB 108 further authorizes the Office of Mine Reclamation to enter any mine site for which a mine operator has requested a correction of mine status in order to conduct an inspection, as provided, and requires the mine operator to be responsible for the reasonable cost of this inspection.

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10. STREAMBED ALTERATION AGREEMENTS

A. Regulatory Framework

Streambed Alteration Agreements or Permits

- California Fish and Game Code sections 1600-1616 authorize DFG to enter into agreements for activities that will divert, obstruct, or change the natural flow of, or substantially change or use any material from the bed, channel, or bank of any river, stream, or lake or deposit or dispose of debris, waste, or other material containing crumbled, flaked, or ground pavement where it may pass into any such body of water.

- There is no longer a distinction between agreements with public entities (formerly section 1601) and private entities (formerly section 1603). All agreements are now issued under section 1602.

- Fish and Game Code section 1602 requires any person, state or local governmental agency, or public utility to notify DFG before beginning any activity that will substantially modify the bed, bank or channel of a river, stream or lake.

B. No Updates

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11. OAK WOODLANDS LAW AND POLICY

A. Regulatory Framework

1. State Statutes

Oak Woodlands Mitigation Under CEQA (Pub. Resources Code, § 21083.4)

- Section 21083.4 requires a county to determine if a project will result in a conversion of oak woodlands that will have a significant effect on the environment. (Pub. Resources Code, § 21083.4(b).)

- The statute defines oak as: I) a native tree species in the genus Quercus; II) not designated as Group A or Group B commercial species pursuant to the regulations of the State Board of Forestry & Fire Protection section 4526; and III) five inches or more in diameter at breast height. (Pub. Resources Code, § 21083.4(a).) However, "oak woodlands" is not defined in the statute or in any regulations. The Department of Forestry & Fire Protection appears to use the definition provided in the Oak Woodlands Conservation Act (Fish & G. Code, § 1363(a)), but this is subject to change.

- If the project will have a significant impact on the environment through the conversion of oak woodlands, the impact must be mitigated in one or more of the following ways (Pub. Resources Code, § 21083.4(b)(1)-(4)):

  a) Conserve oak woodlands through conservation easements;

  b) Plant appropriate number of trees, but this can only account for up to half of the mitigation requirement;

  c) Contribute funds to the Oak Woodlands Conservation Fund; and

  d) Other mitigation measures developed by the county.

Professional Foresters Law (Pub. Resources Code, § 750 et seq.)

- Developers must also be wary of the Professional Foresters Law requiring that only Registered Professional Foresters engage in the practice of forestry defined as the practice of managing forested landscapes and the treatment of the forest cover in general. Exceptions to this requirement include certain professions that have an expertise in the area such as geologists. Although it is not explicitly stated in the oak woodlands mitigation statute (Pub. Resources Code, § 21083.4), the Professional Foresters Law might apply to the project, requiring a Registered

Professional Forester to be involved in the mitigation process. (Pub. Resources Code, § 750 et seq.)

<u>Oak Woodlands Conservation Act</u> (Fish & G. Code, § 1360 et seq.)

- The Oak Woodlands Conservation Act established the Oak Woodlands Conservation Fund in order to promote the conservation of oak trees and the habitat they sustain. (Fish & G. Code, § 1363(a).)

- Oak woodlands are defined as an oak stand with a greater than ten percent canopy cover or that may have historically supported greater than ten percent canopy cover. (Fish & G. Code, § 136(h).)

- The funds may be used as grants for the purchase of oak woodlands conservation easements, grants for land improvement, cost-sharing incentive payments to private landowners who enter into long-term conservation agreements, public education and outreach on the subject of oak woodlands, and technical assistance consistent with the purpose of preserving oak woodlands. (Fish & G. Code, § 1363(d)(1)-(6).)

- The funds may be granted to local government entities, park and open-space districts, resource conservation districts, private landowners, and nonprofit organizations. (Fish & G. Code, § 1364.) In order to qualify and receive the funds, the county or city in which the money would be spent must prepare an oak woodlands management plan that includes a description of all the oak species within the county's or city's jurisdiction. (Fish & G. Code, § 1366(a).) The plan must protect and restore oak woodlands above and beyond what the law in the jurisdiction already requires.

- The funds may be granted to local government entities, park and open-space districts, resource conservation districts, private landowners, and nonprofit organizations. (Fish & G. Code, § 1364.) In order to qualify and receive the funds, the county or city in which the money would be spent must prepare an oak woodlands management plan that includes a description of all the oak species within the county's or city's jurisdiction. (Fish & G. Code, § 1366(a).)

<u>Z'berg-Nejedly Forest Practice Act of 1973</u> (Pub. Resources Code, § 4511 et seq.)

- In order to harvest timber, the owner or lessee of the property must submit a timber harvest plan ("THP") prepared by a Registered Professional Forester. The THP should include a description of the land and the means by which the timber will be harvested, along with other detailed requirements. (Pub. Resources Code, §§ 4581, 4582.)

- Many subdivision developments are not required to submit a THP, because they are exempted under Public Resources Code section 4628. This section exempts all subdivision projects where the city or county has approved a tentative subdivision map and granted a subdivision use permit, as long as the site is not within a timberland production zone.

2. Local Ordinances

- Many of the regulations concerning the conservation of oak woodlands will be found at the local level, instead of the state level. Both cities and counties may have more or less stringent requirements than the state. (See http://danr.ucop.edu/ihrmp/county/for chart of county regulations.)

- **Examples:**

  a) El Dorado County: In May of 2008, the Board of Supervisors adopted an Oak Woodlands Mitigation Plan which addresses oak woodland mitigation standards, the use of conservation easements to offset woodland losses, payment of mitigation fees, and establishing detailed guidelines to uphold the County's 2:1 mitigation ratio for large projects. The plan includes:
  - Thresholds of significance for the loss of oak woodlands;
  - Requirements for tree surveys and mitigation plans for discretionary projects;
  - Replanting and replacement standards;
  - Heritage/landmark tree protection standards; and
  - An oak tree preservation ordinance. (See http://www.co.el-dorado.ca.us/Planning/GeneralPlanOakWoodlands.htm.)

  b) Contra Costa County: As of 2005, the County requires a three-to-one ratio of replacement for any tree removed. The replacement tree must be of the same or similar species as the tree that was removed. (For more information, see http://www.co.contra-costa.ca.us/.)

3. State Policy

State policy is advisory, but may be used by consultants in determining impacts and mitigation for CEQA and planning documents such as general plans. State policy cited by private groups may also be used.

Joint Policy on Hardwoods, Departments of Forestry & Fire Protection and Fish & Game (1994) (http://www.fire.ca.gov/CDFBOFDB/pdfs/hdwjoint.pdf)

- Under the joint policy, both departments are charged with promoting and upholding the conservation of hardwood rangelands. Specifically, DFG is charged with studying the effects of the distribution and densities of hardwoods on terrestrial and aquatic vertebrates, reviewing timber harvesting activities and recommending measures that will mitigate significant adverse impacts, and acting as liaison with the Range Management Advisory Committee. The Department of Forestry & Fire Protection is charged with administering programs consistent with the joint policy, implementing the Integrated Hardwood Range Management Program, supporting research and development on hardwood utilization, and providing staff support to the Range Management Advisory Committee.

4. Private Conservation Groups

- Various conservation groups are greatly concerned with the depletion of oak woodlands in California. Many of these groups have developed their own strategies on conservation and compliance with these policies is a potential decision for a project applicant. These groups may influence political units as well as litigate issues of mitigation and conservation generally. The following are examples of these groups:

  a) California Oak Foundation ("COF") (www.californiaoaks.org)

  b) Sierra Club (www.sierraclub.org)

  c) International Oak Society (www.saintmarys.edu/~rjensen/ios.html)

- **Sample Language for Proposed General Plan Provisions for an Oak Woodlands Mitigation Plan, California Oak Foundation** (http://www.californiaoaks.org/ExtAssets/OakWdlandMitigationProg.pdf)

  The California Oak Foundation has created sample provisions based on Tuolumne County's Oak Woodlands Mitigation Plan that it believes will effectively preserve oak woodlands. The policy provisions include:

  a) Protecting and extending the diversity of oak woodlands and associate habitats through site design and land use regulations;

  b) Reducing in scale, redesigning, or modifying any project which cannot sufficiently mitigate significant adverse impacts on oak woodlands;

c) Encouraging property owners to establish Open Space Easements or deed restrictions;

d) Encouraging concentration of development on minimum number of acres (density exemptions) in exchange for maximizing long term open space; and

e) As a mitigation option, allowing restoration of any area of oak woodland which is in a degraded condition.

5. Other Sources

Integrated Hardwood Range Management Program ("IHRMP"), UC Division of Agriculture and Natural Resources (2005)
(http://danr.ucop.edu/ihrmp)

- IHRMP was established in 1986 by the legislature and the Department of Forestry & Fire Protection and DFG in order to respond to rising concern over the depletion of hardwood rangeland, which consists mostly of oak woodlands. The mission of the IHRMP is to "maintain, and where possible, increase acreage of California's hardwood range resources to provide wildlife habitat, recreational opportunities, wood and livestock products, high quality water supply, and aesthetic value." IHRMP strives to fulfill its mission through research and education. Although IHRMP's policies and guidelines are not binding, they are the major source for information on proper oak woodlands management.

  For interactive list of 41 counties' oak mitigation policies, visit http://danr.ucop.edu/ihrmp/county/.

Guidelines for Managing California Hardwood Rangelands, IHRMP, Department of Fish and Game, Department of Forestry & Fire Protection (1996)

- This booklet provides advice and suggestions for property owners and managers of hardwood ranges on how to create effective management plans that balance a property owner's economic goals with the value of conservation. The authors emphasize that many different management plans will lead to a good balance of profitability and conservation.

A Planner's Guide to Oak Woodlands, 2nd Edition, Gregory A. Giusti, Douglas D. McCreary and Richard B. Standiford (2005)

- The authors of this book intended it to be used as a guide for professional planners, consultants, and landscape artists when confronted with oak woodlands during their projects. The book provides a science-based

approach to the preservation of oak woodlands and was the first book of its kind back in 1992. IHRMP recommends its use during the planning process.

Oak Woodlands Impact Decision Matrix 2008-A Guide for Planners to Determine Significant Impacts on Oaks as Required by SB 1334, IHRMP, UC Division of Agriculture and Natural Resources (2008)

- In response to numerous inquiries from county planners, developers and concerned citizens on how to implement this new provision of CEQA, the IHRMP convened a working group comprised of the California DFG, the California Department of Forestry and Fire Protection and the Wildlife Conservation Board ("WCB"). The purpose of the working group was to develop information to assist county planners with the process of determining project significance including, what types of projects fall under the purview of the law, what constitutes a "significant impact", compliance standards, effective strategies to conserve oak woodlands and how to determine suitable, appropriate mitigation. Their analysis and the results were published.

  For more information, see http://danr.ucop.edu/ihrmp/OakWoodlandImpactDecisionMatrix.pdf.

Oaks 2040-The Status and Future of Oaks in California, Tom Gaman and Jeffrey Firman (2008) California Oaks Foundation

- This re-publication is designed to provide various stakeholders involved in developing or updating their Oak Woodlands Management Plans with current information on 48 of the 58 counties that contain significant oak resources. The report contains a discussion of planning resources and implementation of available tools for conservation and mitigation efforts. For more information, see http://www.californiaoaks.org/.

B. No Updates

Notes:

12. CULTURAL RESOURCES PROTECTION

A. Regulatory Framework

National Historic Preservation Act of 1966 ("NHPA") (16 U.S.C. § 470)

- The NHPA review process is designed to ensure that historic properties are considered during federal project planning and execution.
- The Advisory Council on Historic Preservation reviews and comments upon permit applications, which could have an effect upon historic properties listed on the National Register of Historic Places, or those eligible for listing.
- If the proposed activity will alter terrain so that significant historical or archeological data is threatened, the Secretary of Interior may take action necessary to recover and preserve the data prior to commencement of the project.
- USACE's guidelines on its duties under the NHPA are found in 33 C.F.R. Part 325, Appendix C.
- Obtaining the required cultural resource approvals can be a very complex and time consuming process and may require extensive cultural resource surveys.

The California Register; Public Resources Code section 5024.1; 14 California Code of Regulations Section 4850 et seq.

- The California Register includes resources listed in, or formally determined eligible for listing on, the National Register of Historic Places, and/or California State Landmarks and Points of Historical Interest.
- Properties of local significance that have been designated under a local preservation ordinance (local landmarks or landmark districts) or that have been identified in a local historical resources inventory may be eligible for listing in the California Register and are presumed to be significant resources for purposes of CEQA unless a preponderance of evidence indicates otherwise (Pub. Resources Code, § 5024.1, 14 C.C.R. § 4850.)
- A resource does not need to have been identified previously either through listing or survey to be considered significant under CEQA. Lead agencies have a responsibility to evaluate them against the California Register criteria prior to making a finding as to a proposed project's impacts to historical resources (Pub. Resources Code, § 21084.1, 14 C.C.R. § 15064.5(3).)
- An archeological site may be considered a historical resource if it is significant in the architectural, engineering, scientific, economic, agricultural, educational, social, political, military or cultural annals of California (Pub. Resources Code, §

5020.1(j)) or if it meets the criteria for listing on the California Register. (14 C.C.R. § 4850.)

Archeological Sites and CEQA

- CEQA provides conflicting direction regarding the evaluation and treatment of archaeological sites. Amendments to CEQA Guidelines try to resolve this ambiguity by directing the lead agencies to first evaluate an archeological site as a historical resource (i.e., listed or eligible for listing in the California Register); potential adverse impacts to it must be considered, just as for any other historical resource. (Pub. Resources Code, §§ 21084.1, 21083.2(l).)

- If an archeological site is not a historical resource, but meets the definition of a "unique archeological resource" as defined in Public Resources Code section 21083.2, then it should be treated in accordance with the provisions of that section.

- "Substantial Adverse Change" includes demolition, destruction, relocation, or alteration such that the significance of a historical resource would be impaired. (Pub. Resources Code, § 5020.1(q).)

- CEQA Guidelines provide that a project that demolishes or alters those physical characteristics of a historical resource that convey its historical significance (i.e., its character-defined features) can be considered to materially impair the resource's significance.

- "Substantial Adverse Change" can be avoided or mitigated by mitigation of significant impacts and must lessen or eliminate the physical impact that the project will have on the historical resource.

- Relocation of a historical resource may constitute an adverse impact to the resource.

- In most cases, the use of drawings, photographs, and/or displays does not mitigate the physical impact on the environment caused by demolition or destruction of a historical resource. (14 C.C.R. § 15126.4(b).) However, CEQA requires that all feasible mitigation be undertaken even if it does not mitigate below a level of significance. In this context, recordation serves a legitimate archival purpose.

- Avoidance and preservation in place are the preferable forms of mitigation for archeological sites.

- When avoidance is infeasible, a data recovery plan should be prepared which adequately provides for recovering scientifically consequential information from the site.

- Merely recovering artifacts and storing them does not mitigate impacts below a level of significance.

B. Update

1. *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200

A lead agency can (and must) withhold sensitive information regarding cultural resources from full disclosure through the CEQA process. (This case is also discussed in the California Environmental Quality Act section below.)

For more information, see "Balancing CEQA's Full Disclosure Requirements with the Protection of Cultural Resources" at http://blog.aklandlaw.com.

2. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48

The court affirmed the ruling in *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 that the lead agency does not have authority to select a future, post-approval date for purposes of baseline. The appellate court found that a water supply assessment done in conjunction with an EIR "deprived the public of a full disclosure of the uncertainties related to the project's water supply." The court did not determine whether the conclusion of the assessment was faulty, only that it failed to provide adequate information to the public. The court addressed two issues relating to cultural resources, ruling that a mitigation measure requiring "verification" that a site was a historical resource, where the EIR already concluded that the site was a historical resource, violates CEQA and that although "preservation in place" is not mandatory, "feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts." The EIR should also include the justification for not adopting "preservation in place" as mitigation. In addition to the substantive issues discussed above, this case involved numerous issues relating to augmenting the administrative record and admission of extra record evidence. (This case is also discussed in the California Environmental Quality Act section below.)

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13. ENVIRONMENTAL ENFORCEMENT

A. Regulatory Framework

- Federal, state and local environmental laws provide enforcement mechanisms for ensuring compliance with the various statutory schemes that protect the environment. The various agencies work together to ensure compliance and pursue enforcement.

- Violations of state and local laws can also be referred to the Attorney General or local district attorney for civil penalties or criminal charges. (See Wat. Code, § 1052; Fish & G. Code, § 5650.)

- Citizen Enforcement Actions under section 505 of CWA are increasingly popular for discharges to waters of the United States. (33 U.S.C. §1365.) While some claims proceed to trial, many businesses end up settling frivolous suits to avoid the expense of litigation.

B. Update

1. *Padres Hacia Una Vida Mejor v. Jackson* (E.D.Cal. 2011, No. 1:11-cv-1094)

Community groups in Kettleman City and Buttonwillow filed an action in the United States District Court for the Eastern District of California on the grounds that the U.S. Environmental Protection Agency ("EPA") failed to comply with a regulatory deadline for processing an administrative complaint that the groups filed against the California Department of Toxic Substances Control ("DTSC") in 1994. That complaint arose out of the location of the toxic waste dumps in low-income and predominantly Latino cities, which plaintiffs claimed violated Title VI of the 1964 Civil Rights Act. The group alleged that DTSC had a pattern and practice of racially discriminatory permitting and enforcement of toxic waste laws. EPA filed a motion to dismiss based on the applicable 6-year statute of limitations and on the ground that the plaintiffs impermissibly seek broad relief from an alleged "pattern and practice" of delay on the part of the EPA. The court took that motion under submission on October 31, 2011, and a ruling on the motion is pending.

2. Clean Air Act Violations

Biomass power plants in Chowchilla and El Nido were fined $835,000 for excess emissions of nitrogen oxides, sulfur dioxide, and carbon monoxide; failing to perform timely source testing to measure emissions; failing to properly install and operate emissions control systems for nitrogen oxides; and failing to certify the continuous emissions monitoring system; and violating district requirements for emission control plans.

A major Portland cement and building materials manufacturer agreed to pay $1.425 million and install pollution controls to reduce emissions of nitrogen oxides and sulfur dioxide, to resolve alleged violations of the Clean Air Act at its cement plan in Mojave, California.

For more information, see http://www.epa.gov/region9/annualreport/11/air-sanjoaquin.html.and http://www.epa.gov/compliance/resources/cases/civil/caa/calportland.html.

Notes:

B. REAL ESTATE AND EASEMENTS UPDATE

Glen C. Hansen

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1. REAL ESTATE

A. Update

1. *Monterey/Santa Cruz County Bldg. & Constr. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500

This case addressed the issue of prevailing wages. It is discussed in more detail in the Local Government section.

2. *Templo Calvario Spanish Assembly of God v. Gardner Construction Corp*. (2011) 198 Cal.App.4th 509

A church and a construction company entered into a contract for the construction of a church building. The parties had a dispute and eventually agreed to submit the matter to arbitration under the terms of an arbitration provision in the contract. Because the contractor was unlicensed, the arbitrator ruled that the contractor must disgorge the entire $160,213.00 the church had paid to the contractor. The superior court granted the contractor's motion to vacate the award, but the Court of Appeal reversed. Entering into a contract with a contractor who is later shown to be unlicensed at the time of execution of the contract does not automatically render the contract void, and therefore the arbitration clause was not part of an illegal or void contract. The prohibition against suits to collect compensation for work performed while a contractor was unlicensed (Bus. & Prof. Code, § 7031, subd. (a)) does not mandate that a consumer cannot proceed to arbitrate its dispute with a contractor simply because the contractor was unlicensed at the time of signing the construction contract. That conclusion is supported by the public policy favoring arbitration of this type of dispute.

3. *Gramercy Investment Trust v. Lakemont Homes Nevada, Inc*. (2011) 198 Cal.App.4th 903

Plaintiff/lender lent $35 million for the development of land in Riverside County. After the borrower's default, lender filed a complaint for judicial foreclosure against the borrower and the guarantors of that loan. Lender then exercised its right to foreclose on the property by means of a trustee sale, at which sale the property was sold for $5.75 million by credit bid to the lender's assignee to the deed of trust. Lender then sought, in the litigation, to recover the unpaid balance of the loan. The trial court granted the lender's motion for summary judgment against the guarantors for the full balance of the unpaid loan ($33,537,994.65) plus costs, without adjusting for the fair market value of the property. The Court of Appeal affirmed. In calculating the judgment, the trial court properly applied California law instead of following the New York choice of law provision in the loan and guaranty agreements. Under New York anti-deficiency law, the judgment would be limited to the difference between the sale price and the fair market value of the property at the time of the trustee's sale. However, guarantors were estopped from benefiting from New York's anti-deficiency protections (1) because the New York anti-deficiency statute is inapplicable to judicial foreclosure proceedings involving

property located in California; and (2) because of the clear and unequivocal language in the guaranty agreement in spite of the choice of law provision in the agreements; which follows the provisions of Civil Code section 2856 — that demonstrates the guarantors' intention to waive any rights and defenses including any rights or defenses based on California's anti-deficiency provisions in Code of Civil Procedure sections 580a, 580b, 580d, or 726.

4. *Hacienda Ranch Homes, Inc. v. Superior Court* (2011) 198 Cal.App.4th 1122

In 1985, Hacienda Ranch Homes, Inc. ("Hacienda") acquired an undivided 50 percent interest in undeveloped property in Tracy, California. Defendants Stanley and Geurtje Boersma ("Boersmas") owned the other undivided 50 percent interest. Later, Hacienda transferred 49 percent of its interest (or 24.5 percent of the total) to Helen Tyler, leaving Hacienda with an undivided 25.5 percent interest in the property. In 1999, Real Parties in Interest Roger and Annette Elissagaray ("Elissagarays") purchased the undivided 24.5 percent interest in the property at a tax sale noticed by San Joaquin County. In 2005, the Elissagarays filed a complaint seeking a quiet title judgment that affirmed them as fee simple owners of 100% of the property, including the remaining undivided 75.5 percent interest in the property on the basis of adverse possession. The trial court denied a motion for summary judgment filed by Hacienda on the ground that there were triable issues of material fact as to whether the Elissagarays established adverse possession of the property under a claim of right. At Hacienda's request, the Court of Appeal issued a peremptory writ and directed the trial court to grant summary judgment to Hacienda. The court held that the Elissagarays' acquisition of an interest in the property by tax deed made them cotenants with others who owned interests in the property. "Before title may be acquired by adverse possession as between cotenants, the occupying tenant must bring home or impart notice to the tenant out of possession, by acts of ownership of the most open, notorious and unequivocal character, that he intends to oust the latter of his interest in the common property." The Elissagarays' acts did not meet that standard: They never told the cotenants to stay off the property; they never put up a fence or barrier prohibiting entry on the property; they never excluded the cotenants from the property; their discing the property two or three times a year could be construed as routine maintenance for the benefit of all cotenants, rather than as cultivation or improvement (Code Civ. Proc., § 325); and neither their posting a "for sale" sign near the property nor their introducing themselves as owners of the property at a meeting clearly notified the cotenants of an unequivocal and hostile claim to the cotenants' ownership interests in the property. Also, the law does not impose a requirement that cotenants attempt to enter or use the property in order to preserve their property interest in the absence of open, notorious and unequivocal notice of ouster.

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2. COMMON INTEREST DEVELOPMENTS

A. Regulatory Framework

- Common interest developments are governed by the Davis-Stirling Act (Civil Code §§1350-1378). That Act applies only if the membership in the community association is mandatory.

- Community associations are usually incorporated and governed under the Nonprofit Mutual Benefit Corporation Act (Corp. Code §§7110-8910).

B. Update

1. *Pinnacle Museum Tower Assn. v. Pinnacle Market Development (UC), LLC* (2010) 187 Cal.App.4th 24; *Villa Vicenza Homeowners Assn. v. Nobel Court Development, LLC* (2011) 191 Cal.App.4th 963; *Promenade at Playa Vista Homeowners Assn. v. Western Pacific Housing, Inc.* (2011) 200 Cal.App.4th 849

The California Supreme Court is currently reviewing the issue of whether, in response to a construction defect action brought by a condominium homeowners association, the developer can compel binding arbitration of the litigation pursuant to an arbitration provision in the CC&R's. A split of opinion exists in the Court of Appeals on that issue. That issue is raised in several cases either pending before the Supreme Court, or likely to be granted review by the Supreme Court.

For more information, see "Supreme Court To Decide If A Developer Can Compel Arbitration Of A Condominium Homeowners Association's Construction Defect Claim Under The CC&R's" at http://blog.aklandlaw.com.

2. *Tesoro del Valle Master Homeowners Assn. v. Griffin* (2011) 200 Cal.App.4th 619

The Court of Appeal for the Second Appellate District affirmed a judgment following a jury verdict that found that a homeowners' association ("HOA") complied with the California Solar Rights Act (Civ. Code, § 714) when it denied the application of property owners to install solar panels on a slope adjacent to their residence for the following reasons: (1) where the CC&Rs and Design guidelines for the HOA expressly incorporated the requirements of section 714; (2) where the homeowners failed to satisfy their burden to submit an application to the HOA that was complete and that addressed the HOA's concerns about location, safety and aesthetics; and (3) where expert testimony at trial demonstrated that an alternative solar energy system of comparable costs and efficiency could be installed that did not significantly increase the cost or decrease the efficiency of the system sought by Defendants.

For more information, see "Homeowners' Association Complies With Solar Rights Act When It Reasonably Denies The Installation Of Solar Panels At Residence In the Development" at http://blog.aklandlaw.com.

Notes:

3. EASEMENTS

A. Regulatory Framework

Source of Law

The law of easements is governed by both the Civil Code (§§801-813) and case law.

Definition

- Easements are essentially property rights that do not rise to the level of complete ownership of property. Generally, an easement allows one person to undertake a specified activity on the property of another. The most common type of easement is the right to travel over another person's land. In addition, easements are used for the placement and maintenance of utility poles, utility trenches, and water or sewer lines.

- The owner of property that is subject to an easement is said to be "burdened" with the easement, because he or she is not allowed to interfere with its use. The property on which the easement is located is called the “servient” estate, while adjoining property that has the benefit of the use is considered the “dominant” estate. Easements run with the land, meaning that subsequent property owners receive the burdens and benefits of an existing easement when they are deeded the property.

- Most easements are considered non-possessory, meaning that the easement owner cannot exclude others from the easement unless they are interfering with her use. However, in some cases an exclusive easement can be created, in which the easement owner can exclude everyone to the extent of his allowed use. There are many types of easements recognized in California. (Civ. Code, § 801 et seq.)

Creation

Easements can be created in a number of ways. The most common modes of easement creation are:

- Easements by deed - easements created in this manner are generally defined by the terms of the easement contained in the grant. Generally, they cannot be enlarged past the intended use contained in the language of the grant. Generally these types of easements must be recorded. These types of easements must meet all deed formalities to be valid.

- Easements by implication - An implied easement can be created only when the grantor conveys a portion of the real estate he owns or when he divides a larger tract among separate grantees.

- Easements by necessity - When property is divided in a way that leaves a part of the property without access to a road (i.e., landlocked), an easement of ingress and egress

is implied across the other part(s). An easement by necessity exists only as long as the need exists. If the landlocked property later has direct access to another public road, the prior implied easement by necessity would go away.

- Easements by prescription - implied easements that give the easement holder a right to use another person's property for the purpose the easement holder has previously used the property. Prescriptive easements must be hostile to the underlying property owner's right of ownership and the use by the easement holder must be continuous for the five year statutory period. Prescriptive easements do not convey the title to the property in question, only the right to utilize the property for a particular purpose.

- Easements by dedication - this type of easement generally occurs when a property owner or sub-divider dedicates a parcel to the local responsible agency, usually the county or city government. The acceptance of the easement can be expressly made by the governmental agency, or it can occur through "implied acceptance" by the public's use at large.

- Equitable easements - Where a structure lies over the property line and on the neighboring residential property, courts may allow the structure to exist, even though it is an encroachment, on equitable grounds if (1) the owner of the structure is innocent; (2) the neighboring owner's injury caused by the encroachment is less than irreparable; and (3) the cost of removing the encroachment is greatly disproportionate to the neighboring owner's injury caused by the encroachment. (*See generally*, Glen C. Hansen, "'The Court Let Me Keep My Fence On Your Land': Neighborhood Boundary Encroachments And Exclusive Easements," 29 CALIF. REAL PROPERTY JOURNAL 10 (2011).)

Permitted Scope of Easements and Responsibilities

- The scope of an easement is most often determined by how the easement was created. The general rule is that an easement extends only as far as its grant, and can never be increased from what was contemplated by the original easement grantor. Reasonable steps can be taken to maintain and provide continuing access to the easement. Many times, cost-sharing agreements between owners demand additional financial responsibility for maintenance costs.

Termination of Easements

- Unity of ownership/merger of property.

- Valid written release by the owner of the dominant estate.

- Abandonment; must be affirmative and for a prescriptive period.

- Lapse of time for easements limited in duration (such as a temporary construction easement).

- End of necessity; access to public road created in another area.

- By eminent domain.

Determining Rights and Liabilities

- Identify whether easement benefits or burdens the property, or both. Visual inspection of real property should always be done before a purchase-sale agreement is signed.

- Identify the type/nature of the easement. Check deed history, obtain title report, due diligence.

- Determine the location and description of the easement.

- Identify if maintenance obligations exist, if any.

- Identify whether there are any costs/payment obligations that come with the easement.

- Identify if there is any way to remove a burdensome easement or obtain third party relief.

B. Update

1. *Main Street Plaza v. Cartwright & Main, LLC* (2011) 194 Cal.App.4th 1044

A prescriptive easement claimant does not have to show that claimant paid the taxes on a separately assessed railway easement that ran along the same land as the prescriptive easement because the two easements were not coextensive in use.

For more information, see "Payment of Taxes May Be Required For A Prescriptive Easement, But Only If Defendant Can Prove the Easement Has Been Separately Assessed" at http://blog.aklandlaw.com.

2. *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003

The Court of Appeal has now recognized that a plaintiff owner of an encroaching structure may be able to assert the doctrine of “equitable easements” (also known as “relative hardship”) as a “sword” through the use of a declaratory relief cause of action. In Tashakori, the Court of Appeal for the Second Appellate District held that a trial court did not abuse its discretion, in the context of plaintiff’s declaratory relief claim, in creating an equitable easement for plaintiff property owners for ingress and egress over a driveway on defendants’ neighboring property.

For more information, see "Court Recognizes That A Property Owner May Be Able To Wield A "Sword" To Establish A Right To Maintain An Encroachment On Neighboring Property" at http://blog.aklandlaw.com.

3. *Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406

The Court of Appeal for the First Appellate District applied the doctrine of implied easements and held that the water from a well dug by a mother on one of her two parcels of neighboring property should be shared by her sons after the mother died and her sons took separate possession of the parcels. An implied easement is created when the grantor (here, the mother) conveys a portion of the real estate she owns or when she divides a larger tract among separate grantees (here, her two sons). In this case, the long-standing feud between the siblings and their wives after the mother's death was resolved when the court issued injunctive relief that mandated the reasonableness rule that generally applies to the use of an easement and to the burden on the servient tenement. The court held: "Plaintiffs and Defendants are both entitled to reasonable residential use of the water from the 1980 well. Neither party may make excessive use of the water which unnecessarily impedes the rights of the other." In short, the court had to issue orders for the adult brothers and their wives to share what their mother had given to them.

For more information, see "In Legal War Between Brothers Over An Implied Easement For Well Water, The Court Mandates ... Sharing" at http://blog.aklandlaw.com.

4. *Hill v. San Jose Family Housing Partners* (2011) 198 Cal.App.4th 764

Plaintiffs James C. Hill and Dawn L. Hill (the "Hills") and Defendants San Jose Family Housing Partners, LLC ("LLC") own adjacent parcels of land located along U.S. Highway 101 in San Jose, California. Since the 1970s, the Hills have owned and operated a two-sided commercial billboard on a section of LLC's parcel, near the joint property line. In 2000, the Hills and LLC's predecessors in interest entered into a written easement agreement relating to the Hills's use of the billboard. The easement expressly provided: "No structures, vegetation, or other objects will be allowed to interfere with or encroach on the easements in the above described Grant Deed and as herein referenced." In or about 2007, the Hills learned that LLC planned to construct a multi-unit residential development on its property, which would obstruct the view of the billboard's north face. The Hills brought a lawsuit against LLC in 2007 for injunctive relief and damages. LLC raised an affirmative defense that the easement is unenforceable because the billboard was constructed and maintained in violation of county and city building codes and ordinances. The trial court rejected that defense. The trial court also held that the easement agreement must be interpreted "to allow viewing of the billboard," and that LLC's development interfered with the Hills' easement by obstructing the billboard's visibility. The trial court therefore awarded damages in the amount of $778,539, which included lost future profits through 2037. After trial, the City of San Jose ("City") issued a compliance order that directed removal of the "illegally constructed billboard." LLC moved for a new trial on the ground that this newly-discovered evidence of the City's actions would substantially reduce or eliminate the lost profits portion of the Hills'

damages award. The trial court denied the motion. LLC appealed. On appeal, the court affirmed the trial court's determination as to the illegality defense. This was not a case where the parties entered into an easement agreement that allowed for an illegal use of the property. The court explained: "The Hills's action to enforce the easement is entirely legitimate because the property's use for advertising purposes is not illegal in and of itself. Although the instrumentality of that use, i.e., the billboard, may be illegal, that is not a bar to the enforcement of the agreement." Also, the servient owners' multi-family residential development that unreasonably interfered with the visibility of the billboard could be grounds for lost profits damages. The court reversed the trial court's judgment and order denying the motion for new trial, in light of the evidence regarding the City's post-trial efforts to remove the billboard. The court remanded the matter for retrial on the issue of damages, and directed the trial court to stay the retrial pending a final resolution of the City's removal actions.

For more information, see "Illegal Construction Of A Billboard Does Not Render Billboard Easement Unenforceable, Nor Does It Allow The Servient Owner To Block Visibility Of The Billboard" at http://blog.aklandlaw.com.

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C. LAND USE LAW UPDATE

William W. Abbott and Kate J. Hart

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1. CALIFORNIA ENVIRONMENTAL QUALITY ACT ("CEQA")

A. Regulatory Framework

Summary

- Over 40 years old, CEQA requires lead agencies to prepare environmental documents prior to granting discretionary approvals. CEQA documents are subject to numerous court decisions applying case law and CEQA Guidelines. (Pub. Resources Code, §§ 21000 et seq; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15000 et seq.)

- Substantive mandate: Public agencies should not approve projects that will significantly affect the environment if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (Pub. Resources Code, § 21002.)

- CEQA applies to all governmental agencies at all levels. (Pub. Resources Code, § 21000(g).)

Trends/Issues

- Baseline

- Sufficiency of water supply analysis; what approvals are subject to SB 610?

- Sufficiency as to the level of detail in mitigation measures; avoiding deferred mitigation claims.

- Global warming. (See Air Quality & Climate Change section.)

B. Update

1. *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150

A city and its redevelopment agency entered into a "term sheet" for the development of a professional football stadium development project. While the term sheet expressly bound the parties to continue negotiating in good faith, it did not commit the public agencies to a definite course of action with respect to the development of the stadium or effectively rule out any mitigation measure or alternative. Thus, under *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, the public agencies did not "approve" the project for purposes of CEQA.

For more information, see "A Very Detailed Agreement In The Process of Negotiating A Development Project May Not Constitute an Approval for CEQA Environmental Review Purposes" at http://blog.aklandlaw.com.

2. *Hillside Memorial Park and Mortuary v. Golden State Water Company* (2011) 199 Cal.App.4th 658

This case involved amendment of a prior 1961 judgment imposing a physical solution on the West Coast Groundwater Basin. The trial court ruled that prior to amending the judgment, the physical solution proposed in the amendment must undergo CEQA. The appellate court held, where there is an existing court judgment in place, CEQA compliance is not required prior to going forward with a motion to amend the judgment because the amendment is not a discretionary project. The Supreme Court has granted review of this case, and the opinion has been de-published. Abbott & Kindermann, LLP will continue to follow the case to its conclusion.

3. *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329

Development standards waived under density bonus laws were not applicable to a density bonus project because Government Code section 65915 requires a local agency grant waivers or reductions of development standards that "will have the effect of physically precluding the construction of a development meeting the criteria" of the density bonus statute, and the City's code requires the City to grant density bonuses upon a proper application. Further, the project was not required to comply with the CEQA Guidelines section 15332 requirement that the project be consistent with the applicable general plan designations and policies and all applicable zoning designations and regulations…" in order for the infill exemption to apply.

For more information, see "The Normal Rules Don't Apply When it Comes to Affordable Housing Projects" at http://blog.aklandlaw.com.

4. *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173

A lead agency's preparation of an EIR does not constitute a waiver or prohibit the lead agency from asserting that the project is exempt from CEQA. In this case, the appellate court held that as pled in the complaint, the CEQA exemption found in Public Resources code section 21080.13 relating to grade separation projects that eliminate railway crossings applied, and petitioner could not challenge the project on CEQA grounds.

5. *Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949

The appellate court reminded lead agencies of the importance of following CEQA's mandatory notice requirements, but found that a lack of notice to state agencies was not prejudicial. The appellate court then affirmed the authority of the trial court to craft a tailored remedy to correct a CEQA error.

For more information, see "Not Every CEQA Notice Defect is Prejudicial; Not Every CEQA Violation Compels Setting Aside the Approval" at http://blog.aklandlaw.com.

6. ***Citizens for Responsible Equitable Environmental Development v. City of San Diego*** **(2011) 196 Cal.App.4th 515**

Challenge to the adoption of an addendum to an EIR prepared in 1994 was improper where petitioner failed to demonstrate that the city's decision to approve the addendum over a supplemental EIR was not supported by substantial evidence, and where petitioner failed to exhaust its administrative remedies on the issues of drought and climate change. The court held that water supply assessments (WSAs) can be approved by a CEQA lead agency that also serves as the water supplier for the project area by including the WSA analysis in the environmental document and certifying that environmental document (i.e., no separate WSA approval is necessary). Moreover, information about greenhouse gases was not new information requiring a supplemental EIR because information about greenhouse gas has been available since the late 1970s. The court also held that the letters submitted to the city clerk on the date of the CEQA hearings contained only general, unelaborated objections, which were insufficient to satisfy the exhaustion doctrine. It also held that petitioners last minute document dump of 4,000 documents placed on a compact disc did not fairly present issues to the city. (This case is also discussed in the Air Quality & Climate Change section above.)

For more information, see "Petitioners Be Forewarned: Massive Document "Dumps" May Not Suffice to Exhaust Administrative Remedies; Water Supply Assessments May Be Approved Via Certification of an EIR" at http://blog.aklandlaw.com.

7. ***Ross v. California Coastal Commission*** **(2011) 199 Cal.App.4th 900**

Many CEQA requirements for preparation of CEQA documents do not apply to the Coastal Commission when it is acting as a responsible agency and when it is acting in a manner consistent with its certified regulatory program. The court found that the Coastal Commission's 13-day notice and distribution of the staff recommendation was reasonable under the commission's certified regulatory program. Additionally, the court ruled that the lead agency is not required to speculate as to what might occur on other parcels in analyzing cumulative effects, and a reviewing court should defer to the agency's interpretation of potentially conflicting regulatory requirements. Review by the Supreme Court has been requested, but the Supreme Court has not made a decision on whether to grant review.

For more information, see "Coastal Commission Properly Resolved Conflicting City Development Standards; Negative Declaration Was Upheld" at http://blog.aklandlaw.com.

8. ***Citizens for Responsible Equitable Environmental Development v. City of Chula Vista*** **(2011) 197 Cal.App.4th 327**

The appellate court found substantial evidence of a fair argument that the development of a Target store would have a significant environmental impact by disturbing contaminated soil, but rejected challenges based on air pollution and greenhouse gas impacts. On the

issue of air quality, the court found there was no substantial evidence of a fair argument that the Project would have a significant impact by exposing sensitive receptors to increased air pollution and the increases were below the screening level criteria in the Air Quality Assessment. Therefore, no substantial evidence of a fair argument existed that the Project would cause a significant and unavoidable cumulative contribution to air quality. On the issue of greenhouse gas impacts, the court found that the city properly exercised its discretion to use AB 32 compliance as the threshold and the Air Quality Assessment was adequate because it would reduce the project's emissions by 29 percent. The court also found the city had the discretion not to adopt the threshold set by San Diego County's On Road Transportation Report. (This case is also discussed in the Air Quality & Climate Change section above.)

For more information, see "Implicit Approval of Using AB 32 Reduction Goals to Establish GHG Thresholds" at http://blog.aklandlaw.com.

9. *Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042

Petitioner challenged the City of Santa Clarita's approval of a Master Plan claiming the city failed to provide substantial evidence or analysis to support its conclusion that the Project's impact on climate change could not be fully mitigated. Specifically, the organization had submitted a list from the Attorney General of potential GHG mitigation measures without indicating which of the mitigation measures might be appropriate for the project. The court found it was unreasonable to impose on the city an obligation to explore each and every mitigation measure in the Attorney General's list because Petitioner did not single out any specific suggestions from the numerous potential mitigation measures in the list, and the Petitioner's letter stated that "the measures cited may not be appropriate for every project." (This case is also discussed in the Air Quality & Climate Change section above.)

For more information, see "Lead Agencies Are Not Always Required to Explain Why Every Proposed Mitigation Measure is Infeasible" at http://blog.aklandlaw.com.

10. *Association of Irritated Residents v. California Air Resources Board* (S.F. Superior Court, No. CPF-09-509562)

San Francisco Superior Court enjoined the implementation of the Air Resources Board's Climate Change Scoping Plan, finding the alternatives analysis and public review process violated both CEQA and the Air Resources Board's certified regulatory program. CARB prepared a supplemental functional equivalent document and approved the document on August 24, 2011. On Tuesday, December 6, 2011, the San Francisco Superior Court issued an order discharging the peremptory writ of mandate. In so doing, the court indicated that the supplemental functional equivalent document complied with CEQA.

For more information, see "AB 32 Scoping Plan Enjoined" at http://blog.aklandlaw.com.

11. *South Orange County Wastewater Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604

An EIR is not necessary to analyze impacts of *existing conditions* on the project. Therefore, the court held that an EIR was not necessary for a mixed use project proposal adjacent to an existing wastewater treatment plant since the expansion of the facility would not have any impact on the environment.

For more information, see "Adjacent Landowners Can't Use CEQA to Avoid Potential Nuisance Claims" at http://blog.aklandlaw.com.

12. *Ballona Wetlands Land Trust v. City Los Angeles* (2011) 201 Cal.App.4th 455

The appellate court in this case reached a similar conclusion to that in *South Orange County Wastewater Authority v. City of Dana Point, supra,* 196 Cal.App. 4th 1604, namely that CEQA requires an examination of the impacts of the project on the environment, not the other way around. The court also found that an EIR adequately disclosed why the preferred mitigation strategy of preservation in place was not feasible. Finally, the court concluded that when challenging an EIR prepared following a writ, the petitioner is limited to the corrections specified in the judgment, and does not get a second bite at the apple.

For more information, see "2nd Appellate District Again Holds That For The Purposes of CEQA. It Is The Impact Of The Project On The Environment, Not The Other Way Around" at http://blog.aklandlaw.com.

13. *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48

The court affirmed the ruling in *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351 that the lead agency does not have authority to select a future, post-approval date for purposes of baseline. The appellate court found that a water supply assessment done in conjunction with an EIR "deprived the public of a full disclosure of the uncertainties related to the project's water supply." The court did not determine whether the conclusion of the assessment was faulty, only that it failed to provide adequate information to the public. The court addressed two issues relating to cultural resources, ruling that a mitigation measure requiring "verification" that a site was a historical resource, where the EIR already concluded that the site was a historical resource, violates CEQA and that although "preservation in place" is not mandatory, "feasible preservation in place must be adopted to mitigate impacts to historical resources of an archaeological nature unless the lead agency determines that another form of mitigation is available and provides superior mitigation of the impacts." The EIR should also include the justification for not adopting "preservation in place" as mitigation. In addition to the substantive issues discussed above, this case involved numerous issues relating to augmenting the administrative record and admission of extra record evidence.

14. *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552

In *Pfeiffer v. City of Sunnyvale City Council*, the Court of Appeal, Sixth Appellate District, upheld the city's certification of an EIR and approval of an expansion of the Palo Alto Medical Foundation's medical campus finding that the city properly deemed the project consistent with its general plan, used the correct baseline for the traffic and traffic noise analyses in the EIR, and found the discussion of traffic noise impacts in the EIR to be sufficient.

For more information, see "Sunnyvale West Baseline Issue Revisited? Not Exactly." at http://blog.aklandlaw.com.

15. *Citizens for East Shore Parks v. California State Lands* Commission (December 30, 2011, No. A129896) __ Cal.App.4th __ (2011 Cal.App. LEXIS 1645)

Renewal of a lease between Chevron and the State Lands Commission for a marine terminal, in operation since 1902, correctly used existing operations as the baseline. The fact that the Commission could refuse to extend the lease did not compel it to set the baseline for impact analysis with the hypothetical assumption that the terminal was not a functioning activity. In evaluating the project's consistency with land use plans, since the wharf was an existing facility, the EIR was not required to examine potential conflicts with a Bay Area plan for a boating trail or an uplands trail as there would be no impacts to either of these from the project under consideration. Moreover, as there were no recreation impacts, the lead agency had no duty to respond to comments pertaining to alleged recreation impacts. Furthermore, in the assessment of a lease extension for a marine terminal, the lead agency was not required to analyze the upland (refinery portion of the project) as it only had jurisdiction over the portion of the project located on State lands. The court also held in selecting alternatives, the focus is on alternatives which reduce or avoid impacts associated with the proposed project.

For more information, see "The Lead Agency Correctly Utilized Existing Conditions As The Baseline For Environmental Assessment When Acting Upon A Lease Extension Request" at http://blog.aklandlaw.com.

16. *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200

A lead agency can (and must) withhold sensitive information regarding cultural resources from full disclosure through the CEQA process. (This case is also discussed in the Cultural Resources section above.)

For more information, see "Balancing CEQA's Full Disclosure Requirements with the Protection of Cultural Resources" at http://blog.aklandlaw.com.

17. *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538

Where the project did not discharge anything into the groundwater, the city was not required to analyze the project's contribution to cumulative groundwater impact. Additionally, a legal challenge to project's construction impacts on hydrology and water was moot because the construction had been completed. CEQA dispute with respect to other issues were not moot. (This case is also discussed in the Water Quality section above.)

For more information, see "No Discharge, No Cumulative Impact" at http://blog.aklandlaw.com.

18. *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884

The city's significance threshold to evaluate seismic impacts did not violate CEQA for two reasons: (1) there is no requirement that a significance threshold be formally adopted: and (2) the significance threshold used substantially conformed to the significance threshold for seismic impacts in Appendix G of the CEQA Guidelines. Also, mitigation of seismic effects was not deferred where the EIR discussed the statutes and regulations aimed at increasing seismic safety, proposed compliance with them, and gave adequate assurances that seismic impacts would be mitigated through engineering methods known to be feasible and effective. Substantial evidence supported the City's determination that these mitigation measures would reduce the seismic impacts to a less-than-significant level.

For more information, see "Building Code Compliance Mitigation for Seismic Impacts Upheld" at http://blog.aklandlaw.com

19. *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016

This case involved the technical interpretation of the provision in the School Facilities Act limiting the "methods of considering and mitigating impacts on school facilities" to the fees provided in the School Facilities Act. (Gov. Code, § 65996(a).) The court held that the term "considering" means that an EIR is not required to "contain a description and analysis of a development's impacts on school facilities." However, the court also held that the phrase "on school facilities" narrowed the application of the statute to direct impacts on school facilities only. Thus, indirect impacts such as increased traffic or construction impacts caused by building a new school must be analyzed in the EIR.

For more information, see "The Devil is in the Details… At Least When it Comes to Interpreting the School Facilities Act" at http://blog.aklandlaw.com.

20. ***City of San Diego v. Board of Trustees of the California State University*** **(2011) 201 Cal.App.4th 1134**

The court held that CSU was obligated to consider additional onsite operational alternatives designed to reduce or avoid unmitigated traffic impacts. The lead agency has the duty to implement all feasible mitigation. The fact that the Legislature has not appropriated funds does not terminate the duty of a CSU campus to look at other funding options. The court also held that a commitment to develop a transportation demand strategy after project approval constitutes deferred mitigation, and lacks the required mitigation targets and commitments required by *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1216, *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018.

For more information, see "Lack of Appropriation of Funds by the Legislature for Mitigation of Offsite Traffic Impacts Did Not Discharge the State University from Considering Other Feasible Strategies for Mitigation" at http://blog.aklandlaw.com.

21. ***Silverado Modjeska Recreation and Park District v. County of Orange*** **(2011) 197 Cal.App.4th 282**

Sitings of arroyo toad larvae within approximately 330 feet of the project by a zoologist with the Department of Defense, do not constitute significant new information requiring the recirculation of a supplemental EIR where the prior EIR addressed that possibility. The observations thus constituted only an amplification of information found within the FEIR and thus the recirculation was not necessary to permit the public to make intelligent and meaningful comments. The court also ruled that a supplemental EIR prepared in response to a writ compelling its preparation and adjudged adequate by the trial court discharging the writ, may not be subsequently challenged by parties, where both challengers act on the public's behalf.

22. ***Latinos Unidos de Napa v. City of Napa*** **(2011) 196 Cal.App.4th 1154**

The appellate court held that a Notice of Determination (NOD) posted over the course of 31 calendar days was not posted long enough because the NOD must be posted for a period of 30 days, starting the day after the NOD is posted, and must be posted for the entire 30th day. If these requirements are not satisfied, the 180-day statute of limitations applies.

For more information, see "How Long Must a Notice of Determination be Posted?" at http://blog.aklandlaw.com.

23. ***Landvalue 77, LLC v. Board of Trustees of California State University*** **(2011) 193 Cal.App.4th 675**

Public Resources Code section 21168.9 makes the issuance of the writ following an entry of judgment mandatory. If the trial court finds that an element of the CEQA document must be redone, the trial court may not sever one portion of the project from the portion tainted by the invalid CEQA analysis.

For more information, see "CEQA Remedies for CEQA Sins" at http://blog.aklandlaw.com.

24. ***Save the Plastic Bag Coalition v. City of Manhattan Beach*** **(2011) 52 Cal.4th 155**

The Supreme Court overturned the rule that corporations must make a heightened showing to demonstrate public interest standing. The Supreme Court also urged the use of common sense at all stages in the CEQA process and held that an EIR was not required to adopt a plastic bag ordinance.

For more information, see "California Supreme Court Rejects Need for EIR and Supports Use of Common Sense" at http://blog.aklandlaw.com.

25. ***Friends of Shingle Springs Interchange, Inc. v. County of El Dorado*** **(2011) 200 Cal.App.4th 1470**

The trial court properly dismissed a petition alleging CEQA and land use violation where the plaintiff corporation's status was suspended at the time of filing the complaint and was not revived until after the statute of limitations had expired

26. ***Quantification Settlement Agreement Cases*** **(2011) 201 Cal.App.4th 758**

Public Resources Code section 21167.6.5 requires that persons/entities which are a "recipient of an approval" be named and served in a CEQA proceeding. Such parties are necessary parties, and can include entities such as the federal government and Indian tribal nations. However, these parties are not necessarily indispensible parties as defined by Code of Civil Procedure section 389 (b). The trial court retains discretion to determine whether or not the party who is a "recipient" is indispensible.

27. ***Voices of the Wetlands v. State Water Resources Control Board*** **(2011) 52 Cal.4th 499**

The Supreme Court reasoned that Code of Civil Procedure section 1094.5, subdivisions (e) and (f) do not preclude the use of *prejudgment* limited remand procedures such as the interlocutory remand employed in this case. Specifically, "the statute does not preclude the agency from accepting and considering additional evidence to fill the gap the court has identified." In so holding, the court specifically disapproved two prior CEQA cases: *Resources Defense Fund v. Local Agency Formation Commission* (1987) 191 Cal.App.3d

886 and *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212. (This case is also discussed in the Water Quality section above.)

For more information, see "California Supreme Court Rules Interlocutory Remand a Valid Remedy in Writ Petitions" at http://blog.aklandlaw.com.

28. *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312

Code of Civil Procedure section 1021.5 authorizes a prevailing party to recover its attorney fees for administrative time as well as in litigation. Such an award is discretionary with the trial court and will not be reversed on appeal absent an abuse of discretion.

For more information, see "Code of Civil procedure §1021.5 Authorizes a Prevailing Party to Recover its Attorney Fees for Administrative Time As Well As in Litigation" at http://blog.aklandlaw.com.

29. SB 226 (Chapter 469) – CEQA

This bill made several changes to CEQA, which include the following. First, the bill added an exemption for solar retrofits on existing buildings and parking lots for qualified projects. Second, the bill pronounced that greenhouse gas emissions, by themselves, do not render a project ineligible for a categorical exemption. Third, thermal power plants under the jurisdiction of the Energy Commission are subject to the functionally equivalent CEQA process. Fourth, for infill projects preceded by a planning level decision, CEQA is amended to restrict review to project or site specific impacts not previously described in the prior EIR. This applies to projects consistent with an SCS or alternative planning strategy or is a designated small walkable community or has a density of 20 units to the acre or FAR of at least 0.75, and it complies with statewide standard adopted pursuant to Public Resources Code § 21094.5.5. Fifth, the bill provides that statutory referrals under the planning law of new general plans (or substantial amendments) can be conducted as part of the CEQA scoping process.

30. AB 209 (Chapter 171) – EIR or ND Notice

CEQA requires any lead agency that is preparing an environmental impact report or a negative declaration or making a specified determination to provide public notice of that fact within a reasonable period of time prior to certification of the environmental impact report, adoption of the negative declaration, or making the determination, as prescribed. This bill would require that the notice include a description of how the draft environmental impact report or negative declaration can be provided in an electronic format.

31. AB 320 (Chapter 570) – Notice of Determination or Notice of Approval

CEQA requires a lead agency to file a notice of approval or a notice of determination with the Office of Planning and Research or the county clerk of each county in which the project is located. This bill would require a notice of approval or notice of determination to identify the person undertaking an activity that receives financial assistance from a public agency or the person receiving a lease, permit, license, certificate, or other entitlement of use from a public agency.

CEQA provides a procedure by which a party may attack, review, set aside, void, or annul the determination, finding, or decision of a public agency and requires that a petitioner or plaintiff name, as a real party in interest, a recipient of an approval that is the subject of an action or proceeding challenging the determination, finding, or decision of a public agency pursuant to CEQA. This bill would require a petitioner or plaintiff to name, as a real party in interest, the person identified by the public agency in its notice of determination or notice of exemption, as reflected by the agency's record of proceedings.

32. SB 267 (Chapter 588) – Water Supply Assessments

This bill amends the water supply assessment statutes to exclude photovoltaic or wind energy projects approved after the effective date of the act which use less than 75 acre feet per year from the water supply assessment requirements

33. AB 900 (Chapter 354) – Expedited Judicial Review

This bill provides expedited judicial review for projects certified by the Governor as leadership projects. The types of projects that may qualify include LEED development projects, clean renewable energy projects, and clean energy manufacturing projects. (This bill is also discussed in the Renewable Energy section above.)

34. AB 1020 (Chapter 27) – Tribal Sovereignty

The bill would provide that, in deference to tribal sovereignty, certain actions may not be deemed projects for purposes of the California Environmental Quality Act.

35. SB 292 (Chapter 353) – Stadium

This bill would establish specified administrative and judicial review procedures for the administrative and judicial review of the EIR and approvals for a stadium in the City of Los Angeles.

Notes:

Notes:

2. PLANNING, ZONING, AND DEVELOPMENT

A. Regulatory Framework

Summary

- California's basic planning, zoning, and development law was formed largely during the 1970s. There has been little legislative movement except to deal with very specific issues, such as affordable housing.
- Developers need to be concerned with the legal sufficiency of the local general plan.
- The Permit Streamlining Act is anything but streamlined.
- Zoning law remains largely static with the exception of periodic inroads into affordable housing and density bonuses.
- Impact fees have become a cottage industry to various consultants.
- Development is not a level playing field in California.

Trends/Issues

- The big MPO's move to adopt their sustainable community plans (SB375) in 2012.
- Redevelopment faces a game changer.
- Farmland mitigation; legal adequacy of open space elements; impact fees, building green
- Over time, more cities and counties are warming up to development agreements.
- Developers are becoming more aggressive in asserting rights guaranteed by development agreements.

B. Update

1. *DeCicco v. California Coastal Commission* (2011) 199 Cal.App.4th 947

Under Public Resources Code section 30603, subdivision (a)(4), the California Coastal Commission has appellate jurisdiction over a project within the coastal zone that needs subdivision approval, even if the project involves the construction of a principal permitted use under the local coastal plan.

For more information, see "Coastal Commission has Appellate Jurisdiction over a Project that Needs Subdivision Approval, Even if the Project's Use Complies with the Local Coastal Plan" at http://blog.aklandlaw.com.

2. *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526

In this case, the city did not spot zone Arcadia's property and did not violate Arcadia's equal protection rights by placing a measure on the ballot which amended the city's zoning code to prohibit extensive development on Arcadia's property.

For more information, see "Growth Measure Survives Spot Zoning and Equal Protection Challenge in an 'As Applied' Challenge" at http://blog.aklandlaw.com.

3. *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256

The City of San Clemente imposed a "Residential, Very Low" ("RVL") set of land use restrictions on an undeveloped 2.85-acre parcel in the middle of a residential tract otherwise zoned "Residential, Low Density Zone" ("RV"). The RVL designation limited parcels to one dwelling per 20 acres. The RV designation allowed at least four dwellings per acre. Thus, the parcel was a "one-house-per-20-acre island in a two-to-six house-per-acre sea." The character of the governmental action appears to have been largely motivated to keep the subject parcel open space. The Court of Appeal for the Fourth Appellate District affirmed a trial court judgment that found that the City engaged in spot zoning, which resulted in a compensable taking of the property. In the judgment, the City was given the choice of either (1) adopting a new resolution vacating the resolution denying the owners' application to develop four houses on the property, or (2) paying damages for the value of the property taken by the RVL restrictions, the amount of which was originally set by the trial court at $1.3 million, but which needed to be reconsidered on remand because the trial court erred in failing to account for the property's value with the one house the RVL zoning did allow.

4. *Zubaru v. City of Palmdale* (2011) 192 Cal.App.4th 289

In this case, the appellate court addressed the preemption of a local Zoning Ordinance that restricted the height of amateur radio antennas and frequency interference of the radio antenna with other devices. Ultimately, the court held that the city's refusal to allow a tower antenna at the height of 55' and a horizontal array was reasonable, particularly in the light of the fact that the city permitted a 30' roof antenna. As enunciated by the court, "the applicable [federal] laws required the City to reasonably accommodate amateur radio communications," and the city's actions constituted reasonable accommodation. On the other hand, the court held that the area of radio frequency is solely the jurisdiction of the Federal Communications Commission, and therefore, the section of the Zoning Ordinance relating to radio frequencies was void. The court also held that a section of the Zoning Ordinance providing specific height limitations was fatally vague and, thus, impermissible because two provisions of the section were in direct conflict and the terms were not sufficiently defined.

5. *Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542

Generally, challenges to land use decisions are governed by a 90 day statute of limitations, although in the case of challenges based upon housing element law compliance, the applicable statute is one year, following written notice to the agency.

For more information, see "Legal Challenges to Land Use Decision Governed by Strict Statutes of Limitation, Including those Based Upon Non Compliance with the Housing Element Requirements" at http://blog.aklandlaw.com.

6. *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861

The county enacted an ordinance requiring that medical marijuana dispensaries obtain a conditional use permit and business license and prohibiting dispensaries within 1000 feet of "schools, playgrounds, parks, libraries, places of religious worship, child care facilities, and youth facilities." The ordinance also limited dispensaries to the C-1 zone. In this case, the county brought a nuisance action against a dispensary that violated the ordinance, and the trial court granted a preliminary injunction to enjoin the operation of the dispensary. The dispensary appealed, but the appellate court upheld the legality of the ordinance and affirmed the preliminary injunction.

For more information, see "Medical Marijuana Dispensaries 0 for 3 Against Local Government" at http://blog.aklandlaw.com.

7. *Traudt v. City of Dana Point* (2011) 199 Cal.App.4th 886

According to the appellate court in this case, "an individual medical marijuana patient is not the proper party to challenge generally applicable zoning provisions because – whatever the contours of the right to engage in cooperative or collective medical marijuana activity (see e.g., § 11362.775) – the Legislature invested this right in cooperative and collective groups and entities, not individuals." Therefore, the plaintiff had no standing to bring an action against the city. A request has been submitted to the Supreme Court to review the appellate court's decision but the Supreme Court has not yet made a decision on reviewing the case.

For more information, see "No Matter How Compelling a Story, a Medical Marijuana Patient Lacks Standing to Sue City" at http://blog.aklandlaw.com.

8. *City of Riverside v. Inland Empire Patient's Health and Wellness Center, Inc.* (2011) 200 Cal.App.4th 885

Following the holding in *Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, the appellate court held that cities and counties can ban medical marijuana dispensaries in all zones, and the ban is not preempted by state statutes on medical marijuana.

9. ***Pack v. Superior Court of Los Angeles*** **(2011) 199 Cal.App.4th 1070**

California's marijuana laws, which decriminalize certain aspects of marijuana sale and possession, is not in conflict with federal law as it only impacts criminal liability under state law. However, a comprehensive local ordinance regulating collectives which creates a lottery, annual fees, along with extensive regulations which effective permit collective operations, is pre-empted.

10. ***SJCBC, LLC v. Horwedel*** **(2011) 201 Cal.App.4th 339**

The director the City of San Jose Planning and Code Enforcement department issued two nuisance abatement orders to marijuana collectives on the basis that the operations violated local zoning requirements. Based upon the City orders, the landlord for one collective obtained a preliminary injunction barring distribution, while the other landlord brought an eviction action. The collective operators then filed an action for a writ of mandate or prohibition, then sought a stay. The court denied the stay, then denied the writ for failure to exhaust administrative remedies. The operators appealed, and the appellate court reversed, holding that failure to exhaust (appealing up through the City administrative hearing procedure) was not required in this instance as the operators did not have the right to seek an administrative hearing under the City Code (to be initiated by the Director). As the landlord's actions had the effect of implementing the Director's decision, the court found sufficient finality/ripeness, thereby permitting judicial review.

11. ***Wollmer v. City of Berkeley*** **(2011) 193 Cal.App.4th 1329**

Development standards waived under density bonus laws were not applicable to a density bonus project because Government Code section 65915 requires a local agency grant waivers or reductions of development standards that "will have the effect of physically precluding the construction of a development meeting the criteria" of the density bonus statute, and the city's code requires the city to grant density bonuses upon a proper application. This case also addressed the CEQA infill exemption, which is discussed in more detail in the CEQA section.

For more information, see "The Normal Rules Don't Apply When it Comes to Affordable Housing Projects" at http://blog.aklandlaw.com.

12. ***Bollay v. California Office of Administrative Law*** **(2011) 193 Cal.App.4th 103**

This case considered whether a State Lands Commission policy prohibiting development seaward of the most landward historical position of the mean high tide line was an invalid underground regulation because it was not promulgated as a regulation pursuant to the Administrative Procedures Act ("APA"). The Court of Appeal for the Third Appellate District held that the policy was an invalid underground regulation because it was not exempt from promulgation under the APA.

For more information, see “Exemption to APA’s Promulgation Rule was Inapplicable” at http://blog.aklandlaw.com.

13. *West Chandler Boulevard Neighborhood Association v. City of Los Angeles* (2011) 198 Cal.App.4th 1506

In this case, the appellate court considered the validity of the City of Los Angeles’ grant of a conditional use permit, height variance, and parking variance to a group operating a synagogue in a residential neighborhood within the city and found that the city failed to follow its own procedures for limited review.

For more information, see “Failure of City to Comply with its Charter, Zoning Code and the *Topanga* Case, Requires Reconsideration and Proper Findings for Use Permit and Variances” at http://blog.aklandlaw.com.

14. *International Church of Foursquare Gospel v. City of San Leandro* (9th Cir. 2011) 634 F.3d 1037

A church created a triable issue of fact, defeating a motion for summary judgment, when it presented evidence that there were no alternative locations sufficient in size for it to accommodate its religious practices. The city’s refusal to rezone a site acquired by the church or to grant it a conditional use permit potentially constituted an impermissible substantial burden on the exercise of religion. The Supreme Court denied review.

For more information, see “General Plan Goal of Creating Employment Opportunities Insufficient Basis to Thwart Church Rezoning Request” at http://blog.aklandlaw.com.

15. *Disney v. City of Concord* (2011) 194 Cal.App.4th 1410

A city ordinance that regulated the storage of recreational vehicles on residential property for aesthetic reasons was within the city’s constitutional police powers.

For more information, see "Regulation Of Recreational Vehicle Storage On Residential Property For Aesthetic Reasons Is Within A City's Constitutional Police Powers" at http://blog.aklandlaw.com.

16. *Alameda Books v. City of Los Angeles* (9th Cir. 2011) 631 F.3d 1031

The Ninth Circuit reversed the district court’s grant of summary judgment to plaintiffs who claimed an ordinance requiring the dispersal of adult entertainment businesses violated the First Amendment. The Ninth Circuit found that the biased declarations upon which the summary judgment was based did not amount to actual and convincing evidence sufficient to cast doubt on the rationale of the City of Los Angeles in creating the ordinance.

For more information, see "Government Rationale Given Benefit of the Doubt in First Amendment Challenge to Zoning Ordinance" at http://blog.aklandlaw.com.

17. *Coalition for Sustainable Future in Yucaipa v. City of Yucaipa* (2011) 198 Cal.App.4th 939

A citizens group challenged a shopping center proposed by the City of Yucaipa and Target Stores, Inc. on land owned by Palmer General Corporation. The trial court denied the citizens group's petition for writ of mandate, which challenged the project on a number of grounds including affordable housing, greenhouse gas, urban decay and traffic. The citizen group appealed and during the appeal, Target Stores, Inc. and Palmer abandoned the project because of litigation between them over breach of contract and the city rescinded the project approvals. Target moved to dismiss on the grounds that the litigation was moot since the project had been rescinded. The appellate court determined that the appropriate relief in a case where the underlying judgment was moot was a reversal with directions to the superior court to vacate the otherwise final judgment solely on the grounds of mootness.

18. *Citizens for a Better Eureka v. California Coastal Commission* (2011) 196 Cal.App.4th 1577

Activities undertaken within the Coastal Zone which are in response to a local abatement order are not subject to a coastal development permit. However, if the level of authorized development activity goes beyond what is necessary for abatement, then a coastal development permit is required.

19. *California Redevelopment Assn. v. Matosantos* (December 29, 2011, No. S194861) __ Cal.4th __(2011 Cal. LEXIS 13236)

In the summer of 2011, the Legislature enacted two measures intended to stabilize school funding by reducing or eliminating the diversion of property tax revenues from school districts to the state's community redevelopment agencies. AB1X 26 barred redevelopment agencies from engaging in new business and provides for their windup and dissolution. AB1X 27 offers an alternative: redevelopment agencies can continue to operate if the cities and counties that created them agree to make payments into funds benefiting the state's schools and special districts. Citing its original jurisdiction, the California Supreme Court accepted a constitutional challenge to the two bills by the California Redevelopment Assn., the League of California Cities and other affected parties. The Court held that AB1X 26 was constitutional and a proper exercise of the Legislature's power. Redevelopment agencies do not have a protected right to exist that immunizes them from statutory dissolution by the Legislature. The Court then held that AB1X 27 was unconstitutional and violated Proposition 22, which was enacted by the voters in 2010. Proposition 22 protected redevelopment agencies and their sponsoring communities from having to make payments to various funds benefiting schools and special districts as a condition of continued operation. As a result of the Court's decision, redevelopment agencies will have to close down by February 1, 2012. It remains to be

seen what new funding arrangement, if any, the redevelopment community and the Legislature may agree to in order keep redevelopment agencies alive in California.

20. *Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319

Residents of a mobilehome park filed a complaint against the City and City Council of Lynwood and the Lynwood Redevelopment Agency ("LRDA") claiming that the proposed plan to change the mobilehome park into townhomes would violate Community Redevelopment Law (Health & Saf. Law, § 33000 et seq.) Eventually, the parties settled, with LRDA agreeing to comply with several aspects of the Community Redevelopment Law. The settlement stated that nothing in the agreement would preclude LRDA from raising its financial condition in response to efforts to recover attorney's fees. Plaintiffs filed a motion for an award of $ 2.7 million in attorney's fees. LRDA opposed claiming among other things that the most it could pay without harming its affordable housing mission was $160,000. The trial court found that Plaintiffs clearly were entitled to attorney's fees and did "a fantastic job" litigating the case, but applied a negative multiplier of 0.2 to the lodestar requested on the grounds that the settlement agreement authorized the court to consider LRDA's financial condition, and the requested amount would significantly reduce the amount that the LRDA had to provide additional low income housing. The appellate court found that the record supported the trial court's consideration of the LRDA's financial condition, but the trial court had failed to make any findings with respect to the LRDA's financial condition and had based its decision on "a value judgment that it would be better for money to stay in the LRDA than to go to Plaintiffs' attorney." The appellate court remanded directing the trial court to make findings based on evidence of the LRDA's actual finances prior to considering the LRDA's ability to pay in setting the attorney's fees award.

21. *Community Water Coalition v. Santa Cruz County Local Agency Formation Commission* (2011) 200 Cal.App.4th 1317

LAFCo law permits the Regents, rather then the city, to file an application for extension of sewer and water services outside the city limits of the City of Santa Cruz. Government Code section 56133(a) permits LAFCo to authorize a city or district to extend services by contract or agreement outside of its service boundaries, but only upon application of the municipality or district. Government Code section 56133(b) independently authorizes LAFCo to approve a service extension outside of city/district boundaries "in anticipation of a later change of organization." This particular requirement does not require the city or district to initiate the request. Accordingly, LAFCo was authorized to process the application. Whether or not the extension request should be approved and under what conditions, was a question for another day.

22. ***Wright v. Incline Village General Improvement District*** **(9th Cir., December 27, 2011, No. 10-16043) __ F.3d __**

The First Amendment does not mandate an unrestricted right of free speech with respect to the property owned by a public entity in every circumstance. Different levels of speech are accommodated depending upon how the property fits within four categories: traditional public forum (streets, parks); designated public forum; limited public forum and non-public forum. Publicly owned beach property, which by private covenant and supplemented by agency rules and policies was available to only certain property owners within the district boundaries, was not a traditional public forum. Agency adopted rules and procedures which implemented the private covenant restricting the right of access and nature of beach use did not violate the First Amendment or the Equal Protection clause.

23. **AB 1103 (Chapter 210) – Housing Needs**

This bill authorizes the California Department of Housing and Community Development to allow cities and counties to meet up to 25% of their housing needs through a program tied to foreclosed properties.

24. **SB 618 (Chapter 596) – Williamson Act**

This bill permits mutual rescission of Williamson Act contracts for solar projects in order to simultaneously enter a solar easement. It also establishes valuation procedures for the properties that will transition from the agricultural use to the solar development use. (This bill is also discussed in the Renewable Energy section above.)

25. **SB 668 (Chapter 254) – Williamson Act**

This bill allows non-profits or public entities to make up for lost property taxes to affected agencies in the event that the State of California eliminates or reduces state subventions.

Notes:

3. SUBDIVISION MAP ACT

A. Regulatory Framework

Summary

- The Subdivision Map Act ("SMA") was enacted in 1893, making it the earliest area of land use regulation. (For current statutes, see Gov. Code, §§ 66410-66499.58.)
- Over time, the SMA has evolved from a consumer protection law into a land use planning tool.
- The rule on when offsite improvements can be used to trigger a mandatory extension is uniformly misunderstood by cities, counties, developers and consultants.

Trends/Issues

- How does one extend an approved tentative map?
- The Legislature's extensions in 2009-2011 are not as broad as those in the 90's.
- When do old maps create separate legal parcels?
- When does an exclusive use easement constitute a subdivision?
- Unwinding recorded but un-built subdivisions.

B. Update

1. *Coronado Cays Homeowners Association v. City of Coronado* (2011) 193 Cal.App.4th 602

This case involved the appeal by the City of Coronado of a trial court's grant of declaratory relief on the question of whether the city or the homeowners association was required to maintain a berm in the Coronado Cays subdivision pursuant to the terms of a special use permit granted in 1968 and an assessors parcel map. In upholding the trial court's determination, the appellate court held that the subdivision map was not ambiguous as to the term "ancillary structures" and that the berm in question was not such an "ancillary structure." Thus, the city not the association was required to maintain the berm.

For more information, see "Map Didn't Constitute Admissible Parol Evidence; Berm Maintenance Requirement Falls on City" at http://blog.aklandlaw.com.

2. *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066

While courts ordinarily defer to cities and counties on general plan consistency determinations, housing projects are entitled to additional judicial review if the projects otherwise comply with objective development standards. In those circumstances, the city or county must adopt additional findings justifying an action to deny or reduce project density. (Gov. Code, § 65589.5.) The burden of proof is on the city or county. (Gov. Code, § 65589.6.)

For more information, see "How Do You Say 'No' to a Housing Project? With Findings" at http//blog.aklandlaw.com.

3. *Aiuto v. City & County of San Francisco* (2011) 201 Cal.App.4th 1347

The 90 day statute of limitations in Government Code section 66499.37 applies to a challenge to a city ordinance "clarifying" the status of below market rate units created under the authority of the Subdivision Map Act. The appellate court held that the 90 day statute also applied to an amendment of the local subdivision ordinance, not just decisions pertaining to map applications**.** (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1.)

4. AB 147 (Chapter 228) – Transportation Fees

This bill creates new statutory authority for adopting transportation facility fees (pedestrian, bicycle, transit and traffic-calming facilities) subject to AB 1600 requirements. It also includes protest provisions.

Notes:

4. LOCAL GOVERNMENT

A. Regulatory Framework

This is a catchall category. The thing to remember is that much of what local government does is not preempted by state law. The California Constitution, Article 11, section 7 supports a wide range of legislative enactments under the authority of the police power.

B. Update

1. *Monterey/Santa Cruz County Bldg. & Constr. Trades Council v. Cypress Marina Heights LP* (2011) 191 Cal.App.4th 1500

A developer acquired property from a redevelopment agency, and the deeds specifically referred to an Implementation Agreement, which in turn referred to a Master Resolution. The Master Resolution required all successors in interest to pay prevailing wages. The court held that because there was explicit language referring to the Implementation Agreement, the developer was required to pay prevailing wages. The court also held that the lawsuit vindicated a right of public interest, and therefore, attorney's fees were properly awarded under Code of Civil Procedure section 1021.5. (This case is also discussed in the Real Estate section above.)

For more information, see "Bad Deeds Make Bad Law" at http://blog.aklandlaw.com.

2. *Hensel Phelps Construction Company v. San Diego Unified Port District* (2011) 197 Cal.App.4th 1020

A ground lease for the development of a hotel complex on port property, coupled with a rent credit to offset increased development costs, triggered application of state prevailing wage laws.

For more information, see "The Prevailing Winds of Prevailing Wage" at http://blog.aklandlaw.com.

3. *Reliable Tree Experts v. Christine Baker* (2011) 200 Cal.App.4th 785

Work performed for Caltrans for purposes of landscape maintenance and diseased tree removal along state highways qualified as public work, and was subject to prevailing wage law. Although maintenance is not referenced in Labor Code §1720, it is included within §1721.

4. *Ardon v. City of Los Angeles* (2011) 52 Cal.4th 241

The California Supreme Court held that class actions for tax refunds against a local governmental entity are permissible under section 910 of the Government Code (i.e., Government Claims Act) in the absence of a specific statutory tax refund procedure.

For more information, see “California Supreme Court Decides Class Action Permitted Under Government Claims Act” at http://blog.aklandlaw.com.

5. *Citizens Planning Association v. City of Santa Barbara* (2011) 191 Cal.App.4th 1541

A development project relying upon a new road in a public park must first obtain voter approval in circumstances in which the City Charter was previously amended by the voters, restricting the use of park property.

For more information, see “Having the Last Say: Use of Parkland for Road and Bridge Requires Local Voter Approval” at http://blog.aklandlaw.com.

6. *Tafti v. County of Tulare* (2011) 198 Cal.App.4th 891

The court held that a local enforcement agency violated the due process rights of a property owner when it failed to provide adequate notice of the nature of an administrative appeal hearing. The case involved the recalculation of a civil penalty by an administrative law judge to $1,148,200, whereas the original penalty amount stated in the original enforcement order that the owner appealed from was $137,778. The enforcement order’s description of the appeal rights gave the misleading notion that the hearing, if requested, would be limited to the factual issues set forth in the enforcement order; and nothing in the order alerted the owner to the fact that if he requested a hearing, it would reopen the civil penalty issue and allow the administrative judge to determine anew, without any limitation to the amount set forth in the enforcement order, the total assessment of civil penalties. (This case is also referenced in the Hazardous Substance Control and Cleanup section above.)

For more information, see “Property Owner Hit with $137,778 Civil Penalty, Appeals, and (Without Adequate Notice) Ends Up a $1,148,200 Penalty! Court Reverses for Lack of Due Process” at http://blog.aklandlaw.com.

7. *Professional Engineers in California Government v. Department of Transportation* (2011) 198 Cal.App.4th 17

Acting under special legislative authorization, Caltrans properly delegated out engineering services to a private contractor on a state highway improvement project.

8. *Rental Housing Owners Association of Southern Alameda County v. City of Hayward* (2011) 200 Cal.App.4th 81

The City of Hayward adopted a mandatory inspection program ("MIP") for rental housing units located in certain areas of the city, and in other non-specified areas of the city for cause (e.g., a housing code violation complaint). Petitioner, a group of landlords and owners, challenged the mandatory inspection program claiming the ordinance was facially unconstitutional because it forced landlords to grant city officials access to occupied units without tenant consent in violation of the Fourth Amendment of the U.S.

Constitution and Civil Code section 1954. The trial court agreed. The city amended its ordinance and filed a return to the writ with the court. Petitioner objected to the return on the grounds the amendments to the ordinance failed to address the issues identified by the court. The trial court then ruled on the city's return and held that the amended ordinance (1) did not adequately address the Fourth Amendment and Civil Code section 1954 concerns by requiring landlords to make a good faith effort to obtain the consent of the tenant to an inspection; and (2) arbitrarily imposed sanctions on a landlord for costs associated with a tenant's refusal to consent to inspection. The city appealed the trial court's rulings against it. On appeal, the appellate court overturned the trial court and ordered costs to the city.

9. *Concerned Dog Owners of California v. City of Los Angeles* (2011) 194 Cal.App.4th 1219

The City of Los Angeles adopted an ordinance requiring that all dogs and cats within the city be spayed or neutered unless one of six exemptions applied. A dog owner's group challenged the ordinance on the grounds it violated the First Amendment right to free speech and association, the Fourteenth Amendment right to due process and equal protection clause and the Fifth Amendment right against takings of the U.S. Constitution. Plaintiff also alleged the ordinance infringed on the individual liberties protected under the California Constitution. The trial court rejected plaintiff's claims and held that the ordinance constituted an appropriate use of the city's police powers, which plaintiff appealed. The appellate court upheld the trial court's rulings and noted that spaying and neutering one's pets does not constitute a form of speech, dogs are personal property and do not enjoy a heightened scrutiny status under either federal or state laws, and the ordinance did not effectuate a physical taking of the pets or deprive owners of all economical viable use of their pets for which compensation is owed.

10. *Larson v. City and County of San Francisco* (2011) 192 Cal.App.4th 1263

Various persons and associations challenged certain provisions of Proposition M, a voter-approved initiative, which amended San Francisco's Residential Rent Stabilization and Arbitration Ordinance to expand the anti-harassment section of the ordinance to provide a civil remedy to tenants who are harassed, and to add an attorney fees provision to prevailing tenants in unlawful detainer actions. The purpose of the provisions at issue is to reduce the number of tenants who are harassed to leave their rent-controlled apartments so that the owner may raise the rent on the unit. The appellate court held that Proposition M violates the judicial powers clause insofar as it empowers the rent control board to order rent reductions for harassment of tenants. In undertaking its analysis of Section 37.10B, the court conducted an extensive legal analysis of commercial speech, upholding certain portions of the Proposition and striking down others. In reviewing the final issue of whether San Francisco had the authority to supplement state unlawful detainer law through an ordinance, the court said the city did not have authority to mandate an award of attorney fees to successful tenants in unlawful detainer cases.

11. SB 436 (Chapter 590) – Transfer for Conservation Purposes

This bill amends existing provisions of land use law (Gov. Code, § 65965) authorizing transfer of interests in real property for conservation purposes to non-profits by including funding (endowment) language and requirements for budgeting and handling of funds.

Notes:

5. FEES

A. Regulatory Framework

- Impact fees and exactions are largely governed by constitutional principles of nexus. (*Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854.) These constitutional doctrines are reflected in statute (Mitigation Fee Act; Gov. Code, §66000 et seq.). In addition, there are a limited number of statutes which also govern the exaction process (e.g., The Quimby Act, Government Code section 66477).

- Not every governmental regulation is an exaction. Compare a 50-foot no-build setback from a stream to a requirement to dedicate a 100-foot stream conservation easement to Department of Fish & Game.

- Difficulties can arise in distinguishing regulations of use from divestment of interests in real property -- one time fees versus fees of broad based application.

B. Update

1. *Golden Hill Neighborhood Association, Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416

Agencies forming assessment districts must disclose the basis for assessment of public and private properties. The required engineer's report must provide and identify special and general benefits, and provide rationale for special benefits and corresponding assessments.

For more information, see "Finding the Special in Special Benefits After Proposition 218" at http://blog.aklandlaw.com.

2. *Concerned Citizens for Responsible Government v. West Point Fire Protection District* (2011) 196 Cal.App.4th 1427

The appellate court held that Proposition 218 largely precluded the use of assessments for funding general public services such as fire protection and emergency medical services. Attempts to fund services traditionally funded by property tax face a significant uphill legal fight. The Supreme Court has granted review of this case, and Abbott & Kindermann, LLP will continue to follow the case to its conclusion.

For more information, see "Fire Protection Assessments Fail Prop. 218 Challenge" at http://blog.aklandlaw.com.

3. *City of Palmdale v. Palmdale Water District* (2011) 198 Cal.App.4th 926

In this case, the water district imposed a rate structure whereby "irrigation only" users paid disproportionately higher rates for the same amount of water use. The water district asserted that this was permitted under Article X section 2 of the Constitution, which promoted water conservation and allowed, through statute, allocation-based water rates. The appellate court disagreed that Article X section 2 gave the district a "pass" from the requirement in Proposition 218 that fees shall not exceed the proportional cost of providing the service. Therefore, the court held that the disproportionate rate structure was invalid.

For more information, see "Water Conservation Does Not Trump Proportionality Requirement of Prop 218" at http://blog.aklandlaw.com.

Notes:

6. TAKINGS

A. Regulatory Framework

- Government's police power is limited by federal and state constitutional provisions prohibiting the taking of property without just compensation. (U.S. Const., 5th Amendment; Cal. Const., art. I, § 19.)

- Regulatory takings analysis:

  - *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104: The court considers the following three factors: 1) the economic impact of the regulation on the claimant; 2) the extent to which regulation has interfered with distinct investment-backed expectations; and 3) the nature of the governmental action.

  - *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003: A taking occurs when the government deprives the owner of all economically viable use of the property.

- Physical takings analysis: Where government requires an owner to suffer a permanent physical invasion of her property – however minor – it must provide just compensation. *Loretto v. Teleprompter Manhattan CATV Corporation* (1982) 458 U.S. 419.

- Exactions: For information on takings in the context of exactions, see the Fees section.

B. Update

1. *Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831

In this case, the court grappled with the application of the "reasonableness" takings test that applies to flood control projects. The facts of the case involved multiple storm events between 2003 and 2004. After the first storm which resulted in flooding to plaintiffs' properties, the county implemented measures to try and divert future debris from entering the properties. Unfortunately, the measure did not work, and plaintiffs' properties were flooded again in 2004. Plaintiffs claimed that strict liability applied, and the maintenance of the street as well as the implementation of the flood control measures constituted takings. The court concluded that the reasonableness test, and not strict liability, applied and the county acted reasonably. Therefore, there was no taking.

For more information, see "A Series of Unfortunate Events… That are Not Compensable under Inverse Condemnation" at http://blog.aklandlaw.com.

2. *City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210

This case involved a city program to have property owners with property near the airport apply to voluntarily sell their properties to the city. After acquiring the properties, the city demolished all buildings and left the land vacant to mitigate for incompatible residential dwellings near the airport. Certain property owners that chose not to sell their properties sued the city on the grounds that its actions amounted to a taking. The appellate court disagreed, finding that the program was voluntary and the property owners could not be compensated for the decrease in the property value.

For more information, see "That's the Way the Buildings Crumble: City's Purchase and Demolition of Adjacent Buildings is Not a Taking" at http://blog.aklandlaw.com.

3. *Colony Cove Properties, LLC v. City of Carson* (9th Cir. 2011) 640 F.3d 948

Colony Cove Properties, LLC, an owner of a mobilehome park, challenged the city's Mobilehome Park Rent Control Ordinance based on a facial takings claim, an as-applied takings claim and an as-applied substantive due process claim. The two takings claims were dismissed for being brought both too late and too early. In relation to the facial takings claim, the statute of limitations had long since run on challenging the 1979 ordinance. On the other hand, the as-applied challenge was filed too early because the mobilehome park owner failed to exhaust its state remedies before bringing suit in federal court. On the last issue of substantive due process, the court found that the city's actions were reasonable and thus dismissed this claim as well.

For more information, see "Timing is Everything: Ninth Circuit Dismisses Takings Claims for Being Both Too Late and Too Early" at http://blog.aklandlaw.com.

4. *Cobb v. City of Stockton* (2011) 192 Cal.App.4th 65

In this case, the city initiated an eminent domain action to build a road over a portion of plaintiff's property in 1998. The court granted the city prejudgment possession of the property, and the city built the road. However, the city failed to continue to prosecute the case, and in 2007, the court dismissed the case for lack of prosecution. One year later, the plaintiff filed an action in inverse condemnation to collect just compensation and damages for the road over the property. The sole question before the appellate court was whether the action accrued upon the granting of prejudgment possession or upon dismissal of the case for lack of prosecution. The court decided in favor of the plaintiff and held that the accrual date for an action such as this is when the eminent domain action was abandoned by the city, which was official as of the 2007 dismissal date. Therefore, plaintiff's action was properly filed within the statute of limitations.

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