

State Bar of California
ENVIRONMENTAL LAW SECTION UPDATE
RECENT JUDICIAL, LEGISLATIVE AND REGULATORY DEVELOPMENTS

JANUARY / FEBRUARY / MARCH 2012
VOL. XIV, No. 1

The *Environmental Law Section Update* is sponsored by the Environmental Law Section of the State Bar of California and reports on recent California case law of note, as well as significant legislative and regulatory developments. This edition of the *Update* reports on cases of significance, as well as legislative and regulatory developments from January 1 through March 31, 2012. For legislative developments since that date, the status of a particular bill can be accessed at. The current legislative calendar is also included at the end of the *Update* and can also be viewed online at:

<http://www.calbar.ca.gov/AboutUs/Legislation/SearchforLegislation/BillTrackingSectionsandCommittees.aspx>.

The current legislative calendar is also included at the end of the *Update*. *Please note that all case law, legislative and regulatory summaries included here are intended to provide the reader with an overview of the subject text; for those items of specific relevance to your practice, the reader is urged to review the subject text in its original and complete form.* In addition, this issue also includes selected recent Federal case law of note from the U.S. Supreme Court, Ninth Circuit Court of Appeals and Federal District Courts.

Each edition of the *Environmental Law Section Update* is posted in the “Members Only Area” of the State Bar's Environmental Law Section website at <http://www.calbar.ca.gov/enviro>. Notice of the availability of the *Update* on the Environmental Law Section website is distributed by electronic mail to all State Bar Environmental Law Section members who have provided the Bar with an e-mail address. If you have not provided the Bar with your e-mail address, you can do so by setting up your *State Bar Member Profile*. When you set up your *Profile*, be sure to click on “Change my e-mail list preferences” and check the box for the Environmental Law Section's e-mail list. If you have already set up your *State Bar Profile*, but did not check the box for the Environmental Law Section's e-mail list, you can do so at any time by logging in and clicking on “Change my e-mail list preferences.”

Any opinions expressed in the *Update* are those of the respective authors, and do not represent necessarily the opinions of the Environmental Law Section, or the State Bar of California. We appreciate your feedback on this publication and its relevance to your practice. Comments may be e-mailed to the Editor at cday-wilson@ci.eureka.ca.gov. I would like to thank Michael Haberkorn, Arielle Harris, David Levy, Whit Manley, Danielle K. Morone, Sal Salvador, Michael J. Steinbrecher, Stephen Velyvis and John Epperson for their contributions to this issue of the *Update*. – Cyndy Day-Wilson.

Cyndy Day-Wilson
City Attorney
City of Eureka
Editor, Co-Author

Case Law and Regulatory Update Authors:

Michael Haberkorn
Gatzke Dillon & Ballance LLP

Arielle O. Harris
Burke Williams & Sorensen LLP

David Levy
Baird Holm LLP

Whitman Manley
Remy, Thomas, Moose & Manley

Danielle K. Morone
Gatzke Dillon & Ballance LLP

Sal Salvador
8 Minute Energy Inc.

Michael J. Steinbrecher
Chevron U.S.A. Inc.

Stephen Velyvis
Burke Williams & Sorensen LLP

Legislative Committee:
John Epperson, Chair

TABLE OF CONTENTS

State of California Summaries

Air Quality
Attorneys Fees
California Environmental Quality Act
Climate Change
Coastal Resources
Endangered Species
Energy
Fees/Taxes
Forest Resources
Hazardous Materials/Wastes
Insurance Coverage
Land Use
Proposition 65
Resource Conservation
Solid Waste
Water Resources
Water Quality

Federal Summaries

Supreme Court

Ninth Circuit Court of Appeals
Air Quality
Forest Resources
Hazardous Waste/Materials
NEPA

STATE OF CALIFORNIA SUMMARIES

AIR QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

National Ambient Air Quality Standards ("NAAQS"). The following items summarize various regulatory actions taken by the U.S. Environmental Protection Agency ("USEPA") concerning the federal NAAQS on a pollutant-by-pollutant basis.

Nitrogen Dioxide ("NO₂")

In February 2012, the USEPA issued a final rule establishing the air quality designations for all areas in the United States for the 2010 primary NO₂ NAAQS. Based on the available air quality monitoring data, the USEPA designated all areas as "unclassifiable/attainment." For more information, see 77 Fed.Reg. 9532.

Ozone

In February 2012, the USEPA proposed thresholds for classifying nonattainment areas for the 2008 ozone NAAQS, and the timing of attainment dates for each classification. For more information, see 77 Fed.Reg. 8197.

In March 2012, the USEPA proposed to revise the definition of VOCs for purposes of preparing State Implementation Plans to attain the ozone NAAQS. This proposed revision would add four chemical compounds to the list of compounds excluded from the definition of VOC on the basis that each makes a negligible contribution to tropospheric ozone formation. For more information, see 77 Fed.Reg. 16981.

State Implementation Plan ("SIP") Revisions. The following items summarize various regulatory actions that concern the California SIP on a jurisdiction-by-jurisdiction basis.

California Air Resources Board ("CARB")

In February 2012, the USEPA finalized its approval of revisions to the CARB portion of the California SIP pertaining to VOC emissions from consumer products. For more information, see 77 Fed.Reg. 7535.

Antelope Valley Air Quality Management District ("AVAQMD")

In January 2012, the USEPA took direct final action to approve revisions to the AVAQMD portion of the California SIP concerning NO_x emissions from stationary gas turbines. For more information, see 77 Fed.Reg. 2469, 2496.

In March 2012, the USEPA: (1) took direct final action to approve revisions to the AVAQMD portion of the California SIP concerning negative declarations for VOC and oxides of sulfur source categories (see 77 Fed.Reg. 12491, 12527); (2) took direct final action to approve revisions to the AVAQMD portion of the California SIP concerning recordkeeping for rules governing VOC emissions from coatings, solvents and adhesives, and rules governing VOC emissions from graphic arts and paper, film, foil and fabric coatings (see 77 Fed.Reg. 12495, 12526)

Feather River Air Quality Management District ("FRAQMD")

In March 2012, the USEPA finalized its limited approval and limited disapproval of revisions to the FRAQMD portion of the California SIP concerning NO_x emissions from internal combustion engines. For more information, see 77 Fed.Reg. 12493.

Imperial County Air Pollution Control District ("ICAPCD")

In January 2012, the USEPA took direct final action to approve revisions to the ICAPCD portion of the California SIP concerning NO_x emissions from stationary gas turbines. For more information, see 77 Fed.Reg. 2469, 2496.

Mojave Desert Air Quality Management District ("MDAQMD")

In February 2012, the USEPA: (1) proposed to approve revisions to the MDAQMD portion of the California SIP concerning NO_x emissions from glass melting furnaces and biomass boilers (see 77 Fed.Reg. 119990); and, (2) proposed a limited approval and limited disapproval of revisions to the MDAQMD portion of the California SIP concerning NO_x emissions from stationary gas turbines (77 Fed.Reg. 11992).

In March 2012, the USEPA took direct final action to approve revisions to the AVAQMD portion of the California SIP concerning recordkeeping for rules governing VOC emissions from coatings, solvents and adhesives, and rules governing VOC emissions from graphic arts and paper, film, foil and fabric coatings. For more information, see 77 Fed.Reg. 12495, 12526.

Placer County Air Pollution Control District ("PCAPCD")

In January 2012, the USEPA finalized its limited approval and limited disapproval of revisions to the PCAPCD portion of the California SIP concerning NO_x emissions from biomass fuel-fired boilers. For more information, see 77 Fed.Reg. 2643.

San Joaquin Valley Unified Air Pollution Control District ("SJVUAPCD")

In January 2012, the USEPA: (1) finalized its approval of revisions to the SJVUAPCD portion of the California SIP concerning VOC, NO_x, and PM emissions from open burning (see 77 Fed.Reg. 214, 745); (2) finalized its approval in part and disapproval in part of revisions to the SJVUAPCD portion of the California SIP concerning the "Reasonably Available Control Technology Demonstration for Ozone SIP" (see 77 Fed. Reg. 1417); and, (3) finalized its approval of revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from confined animal facilities and biosolids, animal manure, and poultry litter operations (see 77 Fed.Reg. 2228).

In February 2012, the USEPA: (1) finalized its approval of revisions to the SJVUACPD portion of the California SIP concerning VOC emissions from polyester resin operations (see 77 Fed.Reg. 5709); and, (2) finalized its approval of revisions to the SJVUAPCD portion of the California SIP concerning VOC emissions from motor vehicles and motor equipment coating operations and adhesives and sealants (see 77 Fed.Reg. 7536).

In March 2012, the USEPA finalized its approval of SIP revisions providing for attainment of the 1997 8-hour ozone NAAQS in the San Joaquin Valley (see 77 Fed.Reg. 12652); (2) took direct final action to approve revisions to the AVAQMD portion of the California SIP concerning negative declarations for VOC and oxides of sulfur source categories. For more information, see 77 Fed.Reg. 12491, 12527.

South Coast Air Quality Management District ("SCAQMD")

In January 2012, the USEPA proposed to approve SCAQMD Rule 317, "Clean Air Act Non-Attainment Fee," as a revision to the SCAQMD portion of the California SIP. For more information, see 77 Fed.Reg. 1895.

In February 2012, the USEPA proposed to approve revisions to the SCAQMD portion of the California SIP that would incorporate Rule 1315 – Federal New Source Review Tracking System – into the approved New Source Review Program. For more information, see 77 Fed. Reg. 10430.

In March 2012, the USEPA: (1) finalized its approval of SIP revisions providing for attainment of the 1997 8-hour ozone NAAQS in the Los Angeles-South Coast area (see 77 Fed. Reg. 12674); (2) finalized its approval of revisions to the SCAQMD portion of the California SIP concerning PM emissions from paved and unpaved roads and livestock operations and aggregate and related operations (see 77 Fed. Reg. 13495).

Yolo-Solano Air Quality Management District ("YSAQMD")

In February 2012, the USEPA proposed to approve revisions to the YSAQMD portion of the California SIP concerning NOx emissions from glass melting furnaces and biomass boilers. For more information, see 77 Fed. Reg. 11990.

ATTORNEY FEES

Recent Court Rulings

No Summaries or updates this quarter.

Legislative Developments

No Summaries or updates this quarter.

Regulatory Updates

No Summaries or updates this quarter.

CEQA

Recent Court Rulings

Neighbors for Smart Rail v. Exposition Metro Line Const. Auth. (2012) 204 Cal.App.4th 1480

The Second District Court of Appeal holds an agency has discretion to measure the traffic and air quality impacts of a transit project measured against predicted future “baseline” conditions. In February 2010, the Authority certified an EIR and approved construction of a 6.6-mile extension of a light rail line between Culver City and Santa Monica. Neighbors sued. The trial court denied the petition. The neighbors appealed. The Court of Appeal affirmed.

The EIR equated “baseline” conditions with those population and traffic levels expected to exist in 2030. Generally, under CEQA, baseline conditions consist of the existing environmental setting at the time the analysis is performed, rather than hypothetical conditions at some point in the future. Thus, for a project involving retrofitting an oil refinery, the environmental baseline consists of actual air pollutant emissions at the refinery, rather than theoretical emissions authorized by the refinery’s permits. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310 (CBE).) Courts have interpreted this case to mean an agency never has discretion to use as its baseline those conditions that are predicted to exist sometime in the future, after the date after the agency certifies an EIR. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48.)

In this case, the Authority used a “future baseline” for purposes of analyzing traffic and air quality impacts. The baseline assumed population and traffic growth as of the year 2030, in addition to planned and funded improvements to the region’s transportation system. The year 2030 was selected because it matched the agency’s “planning horizon.” The neighbors argued this approach violated the rule established by *Sunnyvale* and *Madera Oversight*.

The Court rejected this argument, stating: “As a major transportation infrastructure project that will not even begin to operate until 2015 at the earliest, its impact on *presently existing* traffic and air quality conditions will yield no practical information to decision makers or the public. An analysis of the environmental impact of the project on conditions existing in 2009, when the final EIR was issued (or at any time from 2007 to 2010), would only enable decision makers and the public to consider the impact of the rail line *if it were here today*. Many people who live in neighborhoods near the proposed light rail line may wish things would stay the same, but no one can stop change. The traffic and air quality conditions of 2009 will no longer exist (with or without the project) when the project is expected to come on line in 2015 or over the course of the 20-year planning horizon for the project. An analysis of the project’s impacts on anachronistic 2009 traffic and air quality conditions would rest on the false hypothesis that everything will be the same 20 years later. [¶] Consequently, we reject the notion that CEQA forbids, as a matter of law, use of projected conditions as a baseline. Nothing in the statute, the CEQA Guidelines, or *CBE* requires that conclusion. To the extent *Sunnyvale* and [*Madera Oversight*] purport to eliminate a lead agency’s discretion to adopt a baseline that uses projected future conditions under any circumstances, we disagree with those cases.” (Emphasis in original.) The Court held that, when supported by substantial evidence, an agency has discretion to use a projected future baseline to assess the traffic and air quality impacts of a long-term transportation infrastructure project. Because substantial evidence supported the Authority’s approach in this case, it was upheld.

The Flanders Foundation v. City of Carmel-by-the-Sea (2012) 202 Cal.App.4th 603

The Sixth District Court of Appeal rules that, in a project involving restoration and sale of an historic mansion, the city had a sufficient basis for rejecting as economically infeasible alternatives involving retaining ownership of the mansion. The Flanders Mansion is an historic, 1920s-era Tudor Revival residence. The City of Carmel-by-the-Sea owns the mansion. The site is surrounded by a 35-acre nature preserve, also owned by the city. The city certified an EIR and approved the sale of the mansion in view of the substantial cost of implementing necessary repairs. The Foundation sued. The trial court granted the petition. Both sides appealed.

First, the Foundation argued the EIR did not contain an adequate analysis of potential future uses of the mansion in light of the Surplus Lands Act. Under that statute, when a local agency wishes to dispose of surplus property, the agency must offer to sell or lease the property to other agencies for use as affordable housing or for park purposes before the property can be sold to a private party. The EIR recognized the sale of the property would be subject to the act. The Foundation argued, and the trial court agreed, that the EIR was deficient because it did not analyze the impacts of potential uses for the property authorized under the act. That was so because an agency buying under the act would not be subject to mitigation measures or conservation easements adopted by the city when it approved the sale. The Court of Appeal disagreed, holding that the city had authority to require, as conditions of sale, adherence to these measures and easements. Moreover, the city did not have to analyze the impacts of using the mansion as affordable housing because the record supported the city’s conclusion that this use was not reasonably foreseeable in view of the high cost of rehabilitating the mansion and complying with adopted mitigation measures.

Second, during the CEQA process, a commenter asked the city to consider reducing the size of the parcel sold with the mansion. The Court ruled the Final EIR's response was inadequate. Reducing the size of the parcel would also reduce one of the project's significant and unavoidable impacts: a reduction in public parkland. The Final EIR had not provided a complete response to this proposal.

Third, the Foundation argued the city erred by failing to include an economic feasibility analysis in the EIR. That analysis was prepared by a real-estate consultant to address the economic feasibility of the various alternatives analyzed in the EIR. The Court ruled the city could rely on information in the record in making its feasibility determinations, regardless of whether that information appeared in the EIR itself.

Fourth, the EIR analyzed alternatives focusing on restoring and leasing the mansion for residential or non-residential use, or doing nothing (no project). All these alternatives were environmentally superior to the proposed project. The city rejected them, however, as economically infeasible, citing the consultant's feasibility report. The issue for the Court was whether this report constituted substantial evidence supporting the city's decision. The Court ruled that it did. The report estimated that restoration would cost \$1.4 million, and lease payments would not enable the city to recoup this cost for many years. Selling the mansion would recover these costs, however, because the appraised value of the restored mansion was estimated at \$4 million. Doing nothing meant the city would incur ongoing maintenance costs, with no revenue to cover them. Under such circumstances, the city acted within its discretion in rejecting these alternatives.

Finally, the Court ruled that substantial evidence supported the city's adopted statement of overriding considerations. The city acted within its discretion in deciding to sell the mansion, subject to mitigation measures and easements requiring its sensitive restoration. Although the city could have retained ownership of the restored the building (alternatives the city rejected as infeasible), that did not mean the city could not cite restoration in its list of project benefits, even if the city intended to sell the restored mansion.

No Wetlands Landfill Expansion v. County of Marin (2012) 204 Cal.App.4th 573

The First District Court of Appeal rules that a County Board of Supervisors did not need to hear an appeal of a decision to certify an EIR for modifications to a solid waste facility permit approved by the County's local enforcement agency. The Redwood Landfill is an existing landfill located in northern Marin County. In 1999, the landfill operator applied to revise the landfill's solid waste facility permit. The application sought to expand the landfill's capacity and to adjust landfill operations. Marin County Environmental Health Services (EHS), the local permitting agency under State law, prepared and certified the Final EIR. The petitioners tried to appeal that decision to the County Board of Supervisors. The county rejected the appeal because EHS was the final decision-maker. In December 2008, EHS approved the permit amendments. The petitioners sued. The trial court ruled the county had erred by rejecting the appeal to the Board of Supervisors. The trial court did not reach the merits with respect to the adequacy of the EIR. The county and applicant appealed.

The Court of Appeal reversed. EHS was lead agency as the designated local enforcement agency under the California Integrated Waste Management Act. As such, its decision to certify the EIR was not appealable to the Board of Supervisors. Public Resources Code section 21151, subdivision (c), provides that, if an EIR is certified by a non-elected decision-making body within a local lead agency, then that certification may be appealed to the local lead agency's elected decision-making body. That section did not apply, however, because EHS was a separate, distinct entity vested with authority over the permit and, as such, EHS had no elected decision-making body. The trial court erred in directing the Board of Supervisors to consider the appeal.

The county and applicant asked the Court of Appeal to reach the merits of the petitioners' attack on the EIR. The Court of Appeal declined, and sent the case back to the trial court to be heard on the merits.

Consolidated Irrigation Dist. v. City of Selma (2012) 204 Cal.App.4th 187

The Fifth District Court of Appeal affirms a trial court's decision to augment the record with documents that the agency said it never received, finds an irrigation district has standing to bring a CEQA lawsuit, and holds an agency cannot reject comments as incredible for purposes of the "fair argument" standard of review unless the agency makes express credibility findings during its administrative process. A developer proposed a 160-lot subdivision on 44 acres of fallow farmland adjacent to the City of Selma. The project proposed to rely on groundwater provided by a local private water company. Analyses showed the conversion of the property from agricultural to urban uses would cause a net increase of roughly 80 acre-feet per year in groundwater use. An irrigation district submitted data showing the groundwater basin is in an overdraft condition, with groundwater levels expected to decline further in the future. The city circulated an initial study and draft mitigated negative declaration. Comments were submitted stating the conversion of land to urban uses was having a cumulative impact on groundwater levels. The district asked the city to prepare an EIR to address these and other issues. The city adopted the negative declaration and approved the project. The district sued. The trial court granted the petition. The city appealed.

The city argued the trial court erred by augmenting the record with two documents pertaining to groundwater overdraft in the area. At trial, the district had moved to augment the record with the documents based on a declaration signed by a district employee stating she had submitted the documents to the city's planning commission. The city filed declarations stating the commission did not receive the documents. The Court held that, consistent with its recent decision in *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, a trial court's ruling on a motion to augment the record is subject to the "substantial evidence" standard of review on appeal. Because the trial court had discretion to find the district employee's declaration to be more credible than those of the city, the Court of Appeal upheld the trial court's decision to augment the record with the documents.

The city argued the district did not have standing to bring the lawsuit. The Court rejected this argument, holding that (1) under Water Code section 22650, the district had authority to bring a lawsuit concerning any issue in which it had a beneficial interest, (2) the district did not need to have jurisdiction over a natural resource affected by the project in order to have a beneficial interest, and (3) the district's groundwater recharge program provided the district with a

sufficient interest in groundwater to give the district a beneficial interest in the project, insofar as the project had the potential to contribute to groundwater overdraft conditions.

The city argued the record did not contain a “fair argument” that the project might have significant environmental effects. The city argued it had discretion to determine whether the comments constituted “substantial evidence” based on the credibility of the comments. The Court held this discretion applied only to legitimate issues of credibility. In order to reject evidence as incredible, the agency had to identify that evidence, and explain why it lacked credibility, during the administrative process itself; only then would it be appropriate to ignore such evidence for purposes of applying the fair argument standard.

Berkeley Hillside Preservation v. City of Berkeley (2012) 203 Cal.App.4th 656

The First District Court of Appeal adopts a new test for the application of the “unusual circumstances” exception to categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c). Homeowners in the Berkeley hills applied to demolish their house, and to construct a new house with an attached, ten-car garage; taken together, the house and garage were 9,872 square feet in size. The city concluded the project fell within the Class 3 (new construction of small structures) and Class 32 (infill) categorical exemptions. Although most neighbors supported the proposal, others in the city did not. The opponents hired an engineer, who submitted letters stating the grading required would result in unstable conditions and could cause landslides during an earthquake. The homeowners’ engineer submitted a report stating the opponents’ engineer had misread the plans. Other engineers and planners also stated the opponents’ engineer was off base. The city approved the permits. An unincorporated association sued. The trial court denied the petition. The association appealed.

On appeal, the association conceded that the project fell within the Class 3 and Class 32 categorical exemptions. The association argued, however, that the city violated CEQA because the record showed the project fell within the exception to the categorical exemptions established by CEQA Guidelines section 15300.2, subdivision (c). That section establishes what has generally been described as a two-step test: an activity that would otherwise be categorically exempt is not exempt if (1) there are “unusual circumstances,” and (2) those unusual circumstances create a “reasonable possibility” that the activity will have a significant effect on the environment.

The Court of Appeal collapsed this two-part test into a single inquiry: whether there is substantial evidence that proposed activity may have an effect on the environment. According to the Court, if there is such evidence, then by definition the circumstances are “unusual.” That is because categorical exemptions adopted by the Resources Agency are designed to cover categories of projects that do not normally result in significant environmental effects. Thus, “once it is determined that a proposed activity may have a significant effect on the environment, a reviewing agency is precluded from applying a categorical exemption to the activity.”

The Court held the record contained a “fair argument” that the proposed house would have significant environmental effects. First, the record showed the size of the house in that location was, in itself, an unusual circumstance as a matter of law. (It is unclear why the Court undertook this inquiry, given that the Court had earlier held that this inquiry is irrelevant under its new

formulation of the test under section 15300.2, subdivision (c).) Second, the letters submitted by the opponents' engineer constituted substantial evidence of a fair argument that the proposed construction would require massive grading and be seismically unstable. Although other engineers and the city's planning department stated that the letters of the opponents' engineer were based on an incorrect reading of the plans, such disagreement did not mean the comments of the opponents' engineer were insubstantial. Rather, the city needed to prepare a full EIR to resolve the differences of opinion between experts. (The Court did not address whether the comments of the opponents' engineer might not constitute a "fair argument" because, at least according to other commenter's, they lacked a factual foundation.)

Salmon Protection and Watershed Network v. County of Marin (April 20, 2012) – Cal.App.4th – [2012 Cal. App. LEXIS 458].

The First District Court of Appeal upholds the use of tolling agreements in CEQA litigation. In 2007, Marin County certified an EIR and approved an update to its General Plan. The county entered into a tolling agreement with the Salmon Protection and Watershed Network extending the statute of limitations for a lawsuit challenging the EIR. The county and SPAWN were unable to reach agreement and, in 2010, SPAWN sued. A group of property owners filed a complaint in intervention alleging that SPAWN's petition was time-barred because CEQA does not allow parties to enter into tolling agreements. The property owners alleged that SPAWN's lawsuit focused on policies applicable to, and created uncertainty about the permitted use of, their land. The trial court sustained demurrers and dismissed the property owners' complaint. The landowners appealed.

The landowners argued the need for prompt resolution of CEQA disputes trumped the ability to enter into tolling agreements. The Court disagreed. CEQA contains a number of policies and procedures designed to expedite litigation. CEQA also contains provisions encouraging settlement. Those competing policies were not incompatible with one another. The agency or real party in interest could decide whether to enter into a tolling agreement, or to press for expeditious resolution of the case by adhering to CEQA's various deadlines. The interveners were not necessary or indispensable parties in a lawsuit challenging the General Plan update, so their consent to the tolling agreement was not required. At most, the interveners were incidentally affected by the adoption of the General Plan update. The same was true with respect to claims under the Planning and Zoning Law, subject to the 90-day statute of limitations established by Government Code section 65009; there, too, the agency had discretion to extend the deadline by entering into a tolling agreement. For these reasons, the tolling agreement between SPAWN and the county was valid, and the trial court was correct in dismissing the landowners' complain in intervention.

Legislative Updates

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

CLIMATE CHANGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Renewable Fuel Standard Program. In January 2012, the U.S. Environmental Protection Agency ("USEPA") published a direct final rule identifying additional fuel pathways that meet the biomass-based diesel, advanced biofuel, or cellulosic biofuel lifecycle greenhouse gas ("GHG") reduction requirements specified in Clean Air Act Section 211(o), the Renewable Fuel Standard Program, as amended by the Energy Independence and Security Act of 2007. For more information, see 77 Fed.Reg. 700, 462. The USEPA withdrew this direct final rule in March 2012. For more information, see 77 Fed.Reg. 13009.

In January 2012, the USEPA finalized the projected cellulosic biofuel volume for 2012, and annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that apply to all gasoline and diesel produced or imported for domestic use in calendar year 2012. For more information, see 77 Fed.Reg. 1320.

Mandatory Reporting Rule. In January 2012, the USEPA re-proposed confidentiality determinations for the data elements required by the mandatory GHG reporting rule. This rule previously was proposed on July 7, 2010, and has been re-issued due to significant changes to certain data elements. In addition, the USEPA proposed (i) confidentiality determinations for seven new data elements that are not inputs to equations; (ii) to categorize three data elements as inputs to emission equations and defer their reporting deadline to March 31, 2013. For more information, see 77 Fed.Reg. 1434.

In February 2012, the USEPA: (1) finalized technical revisions to the electronics manufacturing source category of the mandatory GHG reporting rule related to fluorinated heat transfer fluids (see 77 Fed.Reg. 10373); (2) re-proposed confidentiality determinations for the data elements applicable to the electronics manufacturing source category, and proposed amendments pertaining to the calculation and reporting of emissions from facilities that use best available monitoring methods (see 77 Fed.Reg. 10434); and, (3) re-proposed confidentiality determinations for the data elements applicable to the petroleum and natural gas systems category, and also proposed to assign 10 recently added reporting elements as "Inputs to Emission Equations" but defer their reporting deadline to March 31, 2014 (see 77 Fed.Reg. 11039, 15990).

National Fish, Wildlife, and Plants Climate Adaptation Strategy. In January 2012, the USFWS, along with the National Oceanic and Atmospheric Administration and other federal,

state and tribal partners, announced the availability of the draft "National Fish, Wildlife, and Plants Climate Adaptation Strategy" for review and comment. For more information, see 77 Fed.Reg. 2996.

Inventory of Emissions and Sinks. In February 2012, the USEPA made available for review and comment the "Draft Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2010." For more information, see 77 Fed.Reg. 11533.

Tailoring Rule. In March 2012, the USEPA issued a proposal relating to Step 3 in the Tailoring Rule; amongst the changes contemplated by the proposed rule are maintaining the applicability thresholds at the current levels, and two streamlining approaches that would improve the administration of the GHG PSD and Title V permitting programs. The first streamlining approach addresses the implementation of GHG plantwide applicability limitations, while the second would create the regulatory authority needed for the USEPA to issue synthetic minor limitations for GHGs in areas subject to a GHG PSD Federal Implementation Plan. For more information, see 77 Fed.Reg. 14426.

Title V Programs. In March 2012, the USEPA proposed to approve revisions to the Operating Permits (Title V) programs of the Monterey Bay Unified Air Pollution Control District, San Luis Obispo County Air Pollution Control District, Santa Barbara County Air Pollution Control District, South Coast Air Quality Management District, and Ventura County Air Pollution Control District. These program revisions require sources with the potential to emit GHGs above the thresholds in the USEPA's Tailoring Rule to obtain a Title V permit, even if they have not been previously subject to Title V for other reasons. For more information, see 77 Fed.Reg. 16509.

COASTAL RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

ENDANGERED SPECIES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Black-Backed Woodpecker. In January 2012, the California Fish and Game Commission ("CFGC") provided notice of its acceptance of a petition to list the Black-backed Woodpecker as a threatened or endangered species under the California Endangered Species Act ("CESA"). As a result, the Black-backed Woodpecker is a candidate species, as that term is defined by Section 2068 in the California Fish and Game Code. Within one year of the publication date of this notice, a written report addressing whether the listing action is warranted shall be issued. For more information, see Cal. Reg. Notice Register, No. 1-Z, p. 18.

Sierra Nevada Red Fox. In January 2012, the U.S. Fish and Wildlife Service ("USFWS") announced its 90-day finding on a petition to list the Sierra Nevada red fox as endangered or threatened under the federal Endangered Species Act ("ESA"), and designate critical habitat. The USFWS found that the petition presented substantial information indicating that listing this subspecies may be warranted; therefore, the USFWS announced its initiation of a status review, the results of which will be published in a 12-month finding. For more information, see 77 Fed.Reg. 45.

Humboldt Marten. In January 2012, the USFWS announced its 90-day finding on a petition to list the Humboldt marten as endangered or threatened under the federal ESA, and designate critical habitat. The USFWS found that the petition presented substantial information indicating that listing this species may be warranted; therefore, the USFWS announced its initiation of a status review, the results of which will be published in a 12-month finding. For more information, see 77 Fed.Reg. 1900.

Western Snowy Plover. In January 2012, the USFWS announced the re-opening of the public comment period on the March 22, 2011 proposed revised designation of critical habitat for the Pacific Coast population of the western snowy plover. The USFWS also announced the availability of a draft economy analysis, and an amended required determinations section of the proposal. The USFWS specifically solicited comments on additional proposed revisions to Unit CA 46 in Orange County. For more information, see 77 Fed.Reg. 2243.

Southern Mountain Yellow-Legged Frog and Sierra Nevada Yellow-Legged Frog. In February 2012, CFGC provided notice of its finding that the southern mountain yellow-legged frog warrants listing as an endangered species, and that the Sierra Nevada yellow-legged frog warrants listing as a threatened species. CFGC also provided notice of related amendments to Section 670.5 of Title 14 of the California Code of Regulations. For more information, see Cal. Reg. Notice Register 2012, No. 8-Z, p. 245.

San Bernardino Flying Squirrel. In February 2012, the USFWS announced its 90-day finding on a petition to list the San Bernardino flying squirrel as endangered or threatened under the federal ESA, and designate critical habitat. The USFWS found that the petition presented substantial information indicating that listing may be warranted; therefore, the USFWS

announced its initiation of a status review, the results of which will be published in a 12-month finding. For more information, see 77 Fed.Reg. 4973.

Riverside Fairy Shrimp. In March 2012, the USFWS announced the re-opening of the public comment period on the June 1, 2011 proposed revised designation of critical habitat for the Riverside fairy shrimp, and the availability of the draft economic analysis for the proposal. For more information, see 77 Fed.Reg. 12543.

Monardella Linoides ssp. Viminea. In March 2012, the USFWS announced its recognition of the current change to the taxonomy of *Monardella linoides* ssp. *viminea*, which has been split into two distinct full species: willowy monardella and Jennifer's monardella. Based on its review and updated analysis for the two distinct species, willowy monardella will remain a designated endangered species, whereas no protections will be afforded to Jennifer's monardella because it does not meet the definition of endangered or threatened. The USFWS also finalized a revised critical habitat designation for the willowy monardella, which includes approximately 122 acres of land in San Diego County. For more information, see 77 Fed.Reg. 13394.

Northern Spotted Owl. In March 2012, the USFWS issued a proposed rule revising the critical habitat designation for the northern spotted owl. The proposed rule identifies approximately 13,962,449 acres of land in California, Oregon and Washington for designation; however, the USFWS also proposed to exclude: (a) 2,631,736 acres of National Park lands, Federal Wilderness Areas, and other Congressionally reserved natural areas; (b) 164,776 acres of State Park lands; (c) 936,816 acres of state and private lands that have a Habitat Conservation Plan, Safe Harbor Agreement, conservation easement, or other similar conservation protection; and, (d) 838,344 acres of other non-federal lands. For more information, see 77 Fed.Reg. 14062.

Voluntary Conservation Actions. In March 2012, the USFWS invited public comment on potential regulatory changes that would create incentives for landowners and others to take voluntary conservation actions to benefit species that may be likely to become threatened or endangered. For more information, see 77 Fed.Reg. 15352.

ENERGY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FEES/TAXES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

FOREST RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

HAZARDOUS MATERIALS/ WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Emergency Planning and Notification. In March 2012, the USEPA took final action to revise the manner for applying the threshold planning quantities for those extremely hazardous substances that are non-reactive solid chemicals in solution. For more information, see 77 Fed.Reg. 16680.

INSURANCE COVERAGE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

LAND USE

Recent Court Rulings

Eiskamp v. Pajaro Valley Water Mgt. Agency (2012) , Cal.App.4th

Court determines that Plaintiff's action is barred by the doctrine of Res Judicata. The Pajaro Valley Water Management Agency (Agency) enacted three ordinances (Ordinance Nos. 2002-02, 2003-01, 2004-02) that increased groundwater augmentation charges for the operators of wells in the Agency's jurisdiction, several lawsuits challenging the constitutionality of the ordinances were filed. In 2008, these lawsuits were resolved by a stipulated agreement for entry of judgment. In 2010, appellant John G. Eiskamp filed a complaint against the Agency seeking a declaration that the Ordinance No. 2002-02 (Ordinance) was invalid, a refund of augmentation charges, and an order directing the Agency to cease collection of the augmentation charges.

The trial court sustained the Agency's demurrer to the complaint without leave to amend and entered judgment in favor of the Agency.

The Court of Appeal held that the doctrine of res judicata bars relitigation of the causes of action in Eiskamp's complaint and affirm the judgment. More specifically, the Court of Appeal reasoned that the stipulated agreement resolved the issue that Eiskamp now raises, that is, the validity of the augmentation charges imposed under the Ordinance, in favor of the Agency. Since the pending litigation was a validation proceeding, the judgment entered pursuant to the stipulated agreement was "binding and conclusive . . . against the agency and against all other persons" including Eiskamp. Accordingly, Eiskamp is barred from relitigating the same issues that were resolved in the pending litigation.

Water Replenishment Dist. of So. California v. City of Cerritos (2012), Cal.App.4th

Court has jurisdiction to consider a motion to allocate unused storage in the Central Basin and to appoint watermaster. This case concerns unused storage space in the Central Basin, an area containing a groundwater reservoir capable of furnishing a substantial water supply. The Central Basin extends underneath approximately 277 square miles and provides a source of water for cities, municipalities, water companies, school districts, landowners, and others. Appellants seek to amend a judgment, originally issued in 1965, which, among other things, allocated the right to extract water from the Central Basin.

In 2009, appellants moved to amend the judgment to allocate storage space in a manner different from the proposed allocation the Court of Appeal considered in 2003. The trial court did not consider appellants' motion on the merits, but concluded that it lacked jurisdiction to hear the motion in general and to implement specific proposed amendments including (1) contracts between water right holders in the Central and West Coast Basins and (2) the appointment of one appellant as the new watermaster. The trial court reasoned that it lacked jurisdiction because the 1965 judgment did not allocate storage space in the Central Basin. It also concluded that it was statutorily precluded from appointing WRD as a watermaster.

The Court of Appeal held that the trial court had jurisdiction to consider a motion to allocate storage in the Central Basin. More specifically, the Court of Appeal concluded that the trial court erred in (1) finding it lacked jurisdiction to consider a provision governing the contractual transfer of water and (2) finding it was prohibited from appointing one of the appellants as watermaster because the allocation of storage space fell within the following broad reservation of jurisdiction: "[t]o provide for such other matters as are not contemplated by the judgment and which might occur in the future, and which if not provided for would defeat any or all of the purposes of this judgment to assure a balanced Central Basin subject to the requirements of Central Basin Area for water required for its needs growth and development.". Therefore, as the appeal was limited to jurisdictional questions, the Court of Appeal did not reach a decision on the merits of any proposed amendment.

San Luis & Delta-Mendota Water Authority v. Department of Interior United States Court of Appeals, Ninth Circuit. Argued and Submitted March 15, 2011—Davis, California. Filed March 2, 2012.

Water releases of Approximately 9000 AF in 2004 within the Central Valley Project did not constitute an abuse of discretion. This water claim arises from a long-running conflict which has devolved to the present remaining dispute as to the classification of approximately 9,000 acre feet (AF) of water released between June 17 through 24 of 2004 from the Nimbus and New Melones reservoirs (latter June 2004 releases) within California's Central Valley Project (the "CVP" or "Project") by Defendant Appellee United States Department of the Interior ("Interior"), acting through the United States Bureau of Reclamation (the "Bureau") (collectively, "Federal Defendants" or "Federal Appellees"). Plaintiff-Appellants San Luis & Delta-Mendota Water Authority ("San Luis") and West lands Water District ("Westlands") (collectively, "Water Agencies" or "Appellants") contend that Interior abused its discretion in failing to apply the latter June 2004 releases against the 800,000 AF of CVP yield especially

designated for fish, wildlife, and habitat restoration under section 3406(b)(2) of the Central Valley Project Improvement Act (“CVPIA”).

The District Court upheld that the orders granting summary judgment in favor of the Department of Interior. Plaintiff’s appeal the decision.

The Court of Appeals affirmed the District Court’s decision inasmuch as it determined that the District Court properly found that the Appellants had standing to challenge Department Interior's decisions regarding its treatment of the latter June 2004 releases and that the Department of Interior's accounting with respect to those releases was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the applicable law.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

2013 Building Energy Efficiency Standards. In February 2012, the California Energy Commission ("CEC") provided notice of proposed changes to the Building Energy Efficiency Standards contained in Title 24, Part 6, of the California Code of Regulations. The proposed efficiency standards would go into effect in 2014. For more information, see Cal. Reg. Notice Register 2012, No. 8-Z, p. 228.

Nonresidential Building Energy Use Disclosure Program. In March 2012, the CEC proposed to adopt regulations relating to nonresidential building energy use benchmarking and disclosure. For more information, see Cal. Reg. Notice Register 2012, No. 12-Z, p. 400.

PROPOSITION 65

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Chlorothalonil. In January 2012, the Office of Environmental Health Hazards Assessment ("OEHHA") provided notice of a change to its proposed regulation establishing a No Significant Risk Level ("NSRL") for chlorothalonil in Section 25705, Title 27 of the California Code of Regulations. Specifically, the NSRL previously published on March 18, 2011 was changed to 41 micrograms per day to account for a more current calculation that converts estimates of animal cancer potency to human cancer potency. For more information, see Cal. Reg. Notice Register 2012, No. 2-Z, p. 30.

Considerations for Listing. In January 2012, OEHHA announced its selection of deltamethrin and xylene for possible listing under Proposition 65, following review by the Developmental and Reproductive Toxicant Identification Committee of OEHHA's Science Advisory Board. For more information, see Cal. Reg. Notice Register 2012, No. 3-Z, p. 57.

Notices of Intent to List. In January 2012, OEHHA announced its intent to list the following chemicals as known to the State to cause cancer: (1) benzophenone; (2) coconut oil diethanolamine condensate (cocamide diethanolamine); (3) diethanolamine; and, (4) 2-methylimidazole. For more information, see Cal. Reg. Notice Register 2012, No. 3-Z, p. 58.

Kresoxim-Methyl. In February 2012, OEHHA announced that, effective February 3, 2012, kresoxim-methyl was added to the list of chemicals known to the State to cause cancer. For more information, see Cal. Reg. Notice Register 2012, No. 5-Z, p. 125.

Requests for Relevant Information. In February 2012, OEHHA requested information as to whether four chemicals – isopyrazam; beta-myrcene; pulegone; 3,3',4,4'-tetra-chloroazobenzene – meet the criteria for listing as known to the State to cause cancer. For more information, see Cal. Reg. Notice Register 2012, No. 6-Z, p. 147.

Methyl Isopropyl Ketone. In February 2012, OEHHA announced that, effective February 17, 2012, methyl isopropyl ketone was added to the list of chemicals known to the State to cause reproductive toxicity. For more information, see Cal. Reg. Notice Register 2012, No. 7-Z, p. 176.

Trichloroethylene. In March 2012, OEHHA proposed to update the existing regulatory levels posing no significant risk for trichloroethylene to 14 micrograms per day for oral exposure and 50 micrograms per day for inhalation exposure. For more information, see Cal. Reg. Notice Register 2012, No. 11-Z, p. 342.

Methanol. In March 2012, OEHHA: (1) proposed to establish a maximum allowable dose level for methanol of 47,000 micrograms per day for inhalation and 23,000 micrograms per day for ingestion (see Cal. Reg. Notice Register 2012, No. 11-Z, p. 345) ; (2) announced that, effective March 16, 2012, methanol was added to the list of chemicals known to the State to cause reproductive toxicity (see Cal. Reg. Notice Register 2012, No. 11-Z, p. 366); and, (3) issued Interpretive Guideline No. 2012-01, which addresses consumption of methanol resulting from pectin that occurs naturally in fruits and vegetables (see Cal. Reg. Notice Register 2012, No. 11-Z, p. 367).

No Significant Risk Levels. In March 2012, OEHHA proposed to amend various sections within Title 27 of the California Code of Regulations to clarify that the Science Advisory Board Committees provide peer review for the proposed No Significant Risk Levels for carcinogens and proposed Maximum Allowable Dose Levels for reproductive toxicants that are developed by OEHHA. For more information, see Cal. Reg. Notice Register 2012, No. 12-Z, p. 404.

Nickel and Nickel Compounds. In March 2012, OEHHA adopted revised acute, 8-hour and chronic Reference Exposure Levels for nickel and nickel compounds. For more information, see Cal. Reg. Notice Register 2012, No. 12-Z, p. 408.

Chemicals Known To The State. For the most current list of the chemicals known to the State of California to cause cancer or reproductive toxicity, see Cal. Reg. Notice Register 2012, No. 11, p. 348.

RESOURCE CONSERVATION

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Salmon Sport Fishing. In January 2012, the California Fish and Game Commission ("CFGC") published a proposed rule to amend Section 27.80, Title 14 of the California Code of Regulations, relating to early season ocean salmon sport fishing. The amendments are proposed to conform state regulations to federal rules promulgated by the National Marine Fisheries Service ("NMFS") in May 2011. For more information, see Cal. Reg. Notice Register 2012, No. 1-Z, p. 9.

In February 2012, CFGC published a proposed rule to amend Section 27.80 further; this series of amendments proposes three options for consideration that reflect the potential actions of the Pacific Fishery Management Council ("PMFC") and NMFS. For more information, see Cal. Reg. Notice Register 2012, No. 5-Z, p. 143.

In February 2012, CFGC published a proposed rule to amend Section 7.50, Title 14 of the California Code of Regulations, relating to Central Valley salmon sport fishing. This series of amendments proposes a range of varied season dates that reflect the final PFMC recommendations. For more information, see Cal. Reg. Notice Register 2012, No. 8-Z, p. 222.

In February 2012, CFGC published a proposed rule to amend Section 7.50 further; this series of amendments, however, relates to salmon sport fishing in the Klamath-Trinity Rivers. For more information, see Cal. Reg. Notice Register 2012, No. 8-Z, p. 225.

Defensible Space Regulations. In January 2012, the California Board of Forestry and Fire Protection published a proposed rule to adopt Section 1299, Title 14 of the California Code of Regulations, pertaining to defensible space. The purpose of this regulation is to provide guidance for implementing the defensible space criteria of Public Resources Code Section 4291, and minimize the spread of fire within a one-hundred foot zone around a building or structure. For more information, see Cal. Reg. Notice Register 2012, No. 3-Z, p. 43.

Suction Dredge Permitting Program. In February 2012, the California Department of Fish and Game ("CDGF") provided notice of the availability of further revisions to the proposed suction dredge permitting program regulations. For more information, see Cal. Reg. Notice Register 2012, No. 7-Z, p. 174.

Marine Protected Areas. In March 2012, CFGC proposed to amend Section 632 of Title 14 of the California Code of Regulations relating to marine protected areas. For more information, see Cal. Reg. Notice Register 2012, No. 12-Z, p. 383.

Land-Based Wind Energy Guidelines. In March 2012, the U.S. Fish and Wildlife Service announced the availability of the final voluntary Land-Based Wind Energy Guidelines, which supersede the 2003 voluntary interim guidelines for land-based wind energy development. For more information, see 77 Fed.Reg. 17496.

SOLID WASTE

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

No summaries or updates this quarter.

WATER RESOURCES

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Oil Spill Prevention. In January 2012, the Office of Spill Prevention and Response, within the California Department of Fish and Game, proposed to amend Sections 791.7, 870.17, 870.19 and

Form FG OSPR-1972 in Title 14 of the California Code of Regulations. These sections and form pertain to the nontank vessel fee requirements and the Oil Spill Prevention and Administration Fee Fund. For more information, see Cal. Reg. Notice Register 2012, No. 3-Z, p. 47.

WATER QUALITY

Recent Court Rulings

No summaries or updates this quarter.

Legislative Developments

No summaries or updates this quarter.

Regulatory Updates

Construction and Development Point Source Category. In January 2012, the U.S. Environmental Protection Agency ("USEPA") published a notice soliciting data and information associated with revisions to the Effluent Limitations Guidelines and New Source Performance Standards for the Construction and Development Point Source Category issued under the Clean Water Act. The USEPA specifically solicited data on the effectiveness of technologies in controlling turbidity in discharges from construction sites and information on other related issues, and the passive treatment data already available to the USEPA. For more information, see 77 Fed.Reg. 112.

Integrated Municipal Stormwater and Wastewater Plans. In January 2012, the USEPA announced that it would be holding a series of workshops to solicit the individual views of stakeholders on the use of integrated municipal stormwater and wastewater plans to meet the water quality objectives of the Clean Water Act. For more information, see 77 Fed.Reg. 1687.

BEACH Act Grants. In February 2012, the USEPA provided notice of the availability of BEACH (Beaches Environmental Assessment and Coastal Health) Act grants to support microbiological monitoring and public notification of the potential for exposures to disease-causing microorganisms in coastal recreation waters. For more information, see 77 Fed.Reg. 5793.

No Discharge Zones. In February 2012, the USEPA established a No Discharge Zone in marine waters of the State of California for sewage discharges from specified vessel types pursuant to Section 312(f)(4)(A) of the Clean Water Act. This action was taken in response to an April 6, 2006 application from the California State Water Resources Board requesting the establishment of the zone. For more information, see 77 Fed.Reg. 11401.

National Pollutant Discharge Elimination System ("NPDES"). In February 2012, the USEPA provided notice of the final issuance of the general permit for stormwater discharges from large and small construction activities. For more information, see 77 Fed.Reg. 12286.

Federal Summaries

Supreme Court

No summaries or updates this quarter.

Ninth Circuit Court of Appeals

Air Quality

Recent Court Rulings

Montana Sulphur & Chemical Company v. United States Environmental Protection Agency, 666 F.3d 1174 (9th Circuit, January 19, 2012).

Ninth Circuit rejects industry challenge and affirms Environmental Protection Agency rules partially disapproving proposed revision to Montana’s State Implementation Plan and promulgating a Federal Implementation Plan for the State of Montana’s sulfur dioxide emissions.

This case involves a long-standing dispute between Montana Sulphur & Chemical Company (“Montana Sulphur”) and the EPA regarding the interrelated state/federal air quality regulatory scheme under the federal Clean Air Act in the specific context of the regulation of sulfur dioxide (“SO₂”) emissions from industrial facilities in the Billings, Montana area. Montana Sulphur operates a sulfur recovery plant northeast of Billings, which is adjacent to and works together with a petroleum refinery owned by ExxonMobil. In 1978, the EPA determined that the Billings area met the applicable air quality standards for SO₂, but a neighboring area, Laurel, Montana, was designated nonattainment due to measured and modeled SO₂ violations. In 1980, the state submitted and the EPA approved Montana’s State Implementation Plan (“SIP”) for attaining and maintaining SO₂ standards in the Billings/Laurel area. Subsequent air quality monitoring and dispersion modeling in the 1980’s and 1990’s, however, showed potential violations of the SO₂ standards and predicted high concentrations in areas where ambient monitoring had not been conducted. Citing these results and studies, the EPA advised the state in 1992 that its SIP might be inadequate and in need of revision and, in 1993, EPA formally found the existing SIP “substantially inadequate” and asked the state to submit revisions to its SIP within 18 months (“SIP Call”).

The state submitted various revisions to the SIP to the EPA between 1996 and 2000, incorporating EPA-approved models. In May 2002, the EPA approved most of the state's SIP revisions, but disapproved a number of specific items affecting Montana Sulphur ("SIP Disapproval"). Montana Sulphur's petition for review of the EPA's 2002 SIP Disapproval action was stayed pending the EPA's promulgation of a Federal Implementation Plan ("FIP") to address the revised SIP's shortcomings. The EPA published its proposed FIP in 2006 and promulgated its final FIP in 2008. Again, Montana Sulphur challenged EPA's FIP action and both actions were eventually consolidated by the Ninth Circuit.

Thus, the consolidated cases involve distinct challenges to EPA's authority to even make the SIP Call in the first place as well as to aspects of both the EPA's 2002 SIP Disapproval and 2008 FIP actions.

With respect to the SIP Call, the court first had to address whether Montana Sulphur even had standing to raise a challenge thereto given that a SIP Call in and of itself is not a final agency action. The court held Montana Sulphur did have standing, because its claim that the EPA exceeded its statutory authority by issuing the SIP Call in the first place would necessarily invalidate the 2002 SIP Disapproval as well, which was a final agency action. Moving to the merits of Montana Sulphur's challenge to the SIP Call, the court rejected Montana Sulphur's claim that the EPA exceeded its authority when it based its SIP Call on predicted (computer modeled) SO₂ violations, not actual, monitored violations. The court noted that the EPA did not ignore actual SO₂ monitoring data, but expressly addressed the monitoring data and explained its shortcomings. The court also reviewed the evidence regarding the accuracy of air quality computer modeling and the Clean Air Act's express recognition of such modeling as an appropriate regulatory tool, holding that the EPA did not act arbitrarily or capriciously by relying on predictive modeling to make the SIP Call in 1993.

Next the court moved on to reject Montana Sulphur's challenge to EPA's 2002 SIP Disapproval action, which alleged that the EPA erred when it rejected: (1) the state's proposed 97.5-meter stack height credit and used a 65-meter credit for Montana Sulphur's 100-meter high flue stack; (2) the state's revised SIP for failing to include any numerical emissions limits on flares; and (3) the state's proposed 12 lbs/3-hour period SO₂ limit for Montana Sulphur's 30-meter stack and its five auxiliary vent stacks.

With respect to the stack height credits, the court reviewed the Clean Air Act's restriction of stack height credits to Good Engineering Practice ("GEP") figures and EPA's regulations for calculating GEP stack height and determined that the statute and regulations left room for interpretation and lent support to EPA's determinations on these complex points. In essence, the court deferred to the EPA's reasoned judgment under *Chevron* and held that EPA did not act arbitrarily or capriciously by rejecting Montana's stack height credit calculation. Next, the court quickly affirmed EPA's rejection of the SIP for failing to include any numerical emission limits on flares by noting that the state's proposed use of "best practices" instead of numerical emission limitations for flares failed to demonstrate how national SO₂ standards would be attained and maintained. Finally, the court also affirmed EPA's rejection of the state's proposed emission limit for Montana Sulphur's 30-meter stack and its five auxiliary vent stacks noting that because

the 12 lbs/3-hour period limit lacked a monitoring method, it was unenforceable and failed to ensure compliance with the standard it was designed to achieve.

Finally, the court similarly rejected Montana Sulphur's challenge to EPA's FIP, which alleged that the EPA (1) lost its authority to promulgate a FIP by failing to do so within 2 years; and acted arbitrarily and capriciously by (2) imposing numerical limits on flaring emissions during periods of unusual operations (i.e., startup, shutdowns and maintenance "SSM"); (3) requiring flare monitoring technology that does not exist; (4) imposing fixed emission limits when it granted variable emission limits to a nearby power plant and the ExxonMobil refinery; (4) by imposing emission limits and monitoring requirements regarding Montana Sulphur's 30-meter stack and its five auxiliary vent stacks; (5) failing to take into account reduced emission limits resulting from certain consent decrees and state air quality permit changes entered into between ExxonMobil, CHS Refineries and the state; and (6) by using the outdated Industrial Source Complex ("ISC") model in the FIP.

With respect to the timeliness of EPA's promulgation of the FIP, the court, citing *Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 158 and *Nat'l Petrochemical & Refiners Ass'n v. EPA* (D.C. Cir. 2010) 630 F.3d 145, 155-56, declined to treat the Clean Air Act's requirement that EPA promulgate an FIP within 2 years after disapproval of an SIP as a jurisdictional limit precluding action later. The court reasoned that while a suit to compel agency action is appropriate during any period of unreasonable agency delay, in the absence of clear Congressional intent, failure to meet the 2 year deadline does not utterly deprive the EPA of authority to promulgate the FIP. The court then moved swiftly through the remainder of Montana Sulphur's claims finding that the inclusion in the FIP of an affirmative defense and its allowance of alternative flare monitoring techniques ensured that the EPA's continuous emission limits and monitoring requirements on flares (even during SSM) were not arbitrary or capricious; that EPA's fixed emission limits were reasonable despite the state's use of variable emission limits for nearby facilities as such variable limits are unusual and fixed emission limits are the norm and the preferred method across the country; that EPA's specific emission limits and monitoring requirements for Montana Sulphur's 30-meter stack and its five auxiliary vent stacks were reasonable because they were based on revised emission models and allowed Montana Sulphur to use the existing technology it had in place; that EPA's FIP reasonably declined to consider the emission reductions resulting from the ExxonMobil and CHS Refineries consent decrees because their emission requirements/reductions are not part of the underlying SIP and are measured by different means over a different time frame; and EPA's use of the ISC model, as opposed to its newly favored AERMOD dispersion model, was reasonable given that the ISP model was employed in the state SIP and use of a different model in the FIP could have yielded results that did not comport with the remainder of the SIP that the EPA did approve.

Sierra Club v. United States Environmental Protection Agency (9th Circuit 2012) 671 F.3d 955.

Ninth Circuit Finds EPA's Approval of 2004 State Implementation Plan for San Joaquin Valley's Nonattainment Area for Ozone Air Quality Was Arbitrary and Capricious. Sierra Club and several environmental groups ("Petitioners"), petitioned for review of the United States

Environmental Protection Agency's ("EPA") approval of the 2004 State Implementation Plan ("2004 SIP") for the San Joaquin Valley's (the "Valley") nonattainment area for the 1-hour ozone National Ambient Air Quality Standard ("NAAQS"). Petitioners challenged the 2004 SIP on several grounds, but the Ninth Circuit only reached Petitioners' first argument that the EPA acted arbitrarily and capriciously in violation of the Administrative Procedure Act ("APA") by approving the 2004 SIP knowing that the emissions inventory data on which the plan relied were outdated and inaccurate by the time that EPA approved the plan in 2010. The Court agreed, finding the EPA's 2010 approval of the 2004 SIP, which was based solely on data currently only as of 2004, was arbitrary and capricious.

The Clean Air Act ("CAA") authorizes the EPA to establish NAAQS that apply to air pollutants that are dangerous to the general health of the public. 42 U.S.C. § 7409. EPA designates areas that fail to attain NAAQS as nonattainment areas. *Id.* §§ 7409(d)(1). Based on the severity of the pollution, nonattainment areas are further divided into five categories: (1) marginal, (2) moderate, (3) serious, (4) severe, and (5) extreme. The Valley has been designated as "extreme." The CAA requires the states to address nonattainment areas, like the Valley, by developing a state implementation plan ("SIP") setting out how that area will come into compliance with the requisite NAAQS. Generally, all SIPs for nonattainment areas must include: (1) an emissions inventory; (2) an attainment demonstration, (3) a means to measure reasonable further progress ("RFP"); (4) nonattainment area permit requirements for new or modified stationary sources; and (5) contingency measures to be implemented if the nonattainment area does not make RFP or does not attain NAAQS by the required date. SIPs for extreme ozone nonattainment areas like the Valley must also include an attainment demonstration "based on photochemical grid modeling or any other analytical method determined by the Administrator, in his or her discretion, to be at least as effective." *Id.* § 7511a(c)(2)(A), (e). The CAA also regulates mobile source emissions, but allows the EPA to authorize California to set its own mobile source emissions standards so long as it obtains EPA approval. Therefore, California relies on its own mobile source standards in the development of its SIPs.

In 1991 the Valley was classified as a "serious" nonattainment area under the 1-hour standard, which limits the acceptable level of ozone in the ambient air to 0.12 parts per million as measured by monitored levels averaged over 1 hour. The State timely submitted its SIP to EPA in 1994, and EPA approved the plan setting an attainment deadline of November 1999. The State failed to meet its deadline, and was thereby reclassified as "severe" with a deadline for an SIP revision of May 2002. The State again failed to meet the deadline but subsequently obtained an extension, which the State again failed to meet. After a voluntary reclassification by the EPA, which re-set the clock, the State obtained a new deadline of November 2004 for submission of a revised SIP and November 2010 for attainment. In 2003, the State adopted the "State and Federal Strategy for the California State Implementation Plan" (the "State Strategy"), which set forth California's regulatory agenda to reduce ozone and specific commitments to reduce emissions in the Valley. The 2004 SIP relied on the State Strategy's mobile source emissions data for its attainment demonstration and rate of progress ("ROP") demonstration, which is supposed to include a "comprehensive, accurate, current inventory of actual emissions from all sources of the relevant pollutant or pollutants in such area." 42 U.S.C. § 7511a(c)(2)(A), (e). EPA approved the 2004 SIP in March 2010, six years after its original submission and eight months before the plan's November 2010 attainment deadline.

The sole issue decided by the Court was whether the EPA's approval of the 2004 SIP was arbitrary and capricious under the APA. "This standard requires the EPA to 'articulate[] a rational connection between the facts found and the choice made.'" *Latino Issues Forum v. EPA*, 558 F.3d 936, 941 (9th Cir. 2009) (quoting *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001).) The Court analyzed whether deference should be afforded to the EPA's decision under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), but ultimately concluded that while EPA has general rulemaking authority, which when exercised requires deference under *Chevron*, that the EPA did not exercise its rulemaking authority to fill in the meaning of "current" and "accurate," the terms in the CAA that the Ninth Circuit was interpreting. Instead, the EPA's interpretation of the CAA in its material terms was largely based on a policy guidance document ("Seitz Memo") along with the EPA's own past practices. Policy statements, agency manuals, and enforcement guidelines, all lacking the force of law, are not entitled to *Chevron-style* deference—but such views are entitled to *Skidmore* deference insofar as they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Vigil v. Leavitt*, 381 F.3d 826, 835 (9th Cir. 2004) (internal quotations omitted). Under *Skidmore*, the weight afforded to an administrative interpretation not carrying the force of law "is a function of that interpretation's thoroughness, rational validity, and consistency with prior and subsequent pronouncements." *The Wilderness Society v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1068 (9th Cir. 2003). The Ninth Circuit ultimately gave limited deference to the EPA's reliance on the Seitz Memo (which was not issued by the EPA under its rulemaking authority, but promulgated under a relatively formal administrative procedure) and EPA's past practices that were not codified through EPA's rulemaking authority.

The State based the 2004 SIP emissions inventory data on mobile source data estimated through the use of the State's computer modeling tool released in 2002 (called EMFAC2002) ("2002 tool"). The 2002 tool estimated emissions from heavy-duty diesel trucks based on where the trucks were registered. The 2007 SIP emissions inventory data were compiled using mobile source data estimated using the next generation modeling tool (EMFAC2007) released in November 2006 and approved by EPA in January 2008 ("2006 tool"). The 2006 tool improved estimates by basing them on where the trucks were being *driven*, which better accounted for the amount of pollution trucks driven in, but not necessarily registered in, the Valley. The change in the 2002 to the 2006 tool resulted in disparities in NOx emissions estimates between the 2004 SIP emissions inventory and the 2007 SIP emissions inventory. While EPA knew of this disparity it did not address the differences or their likely impact on the validity of the 2004 SIP in its final rule approving the 2004 SIP. Instead, the EPA relied on its past practice and interpretation of the CAA in which emissions inventory data are considered "current" and "accurate" as long as the data are current and accurate when the State *submits* an SIP for approval, not necessarily when EPA *approves* an SIP.

The EPA primarily relied on the Seitz Memo as well as the decision in *Sierra Club v. EPA*, 356 F.3d 296 (D.C. Cir. 2004) to support its interpretation. However, the Ninth Circuit found that the Seitz memo itself supports the argument that there comes a time after which reliance on outdated models and data is inconsistent with requisite guidelines for ensuring that agency action is timely and responsive to current public needs. The memo specifically states that SIPs must be based on

applicable models and acknowledges that it would be difficult for EPA to approve an SIP with an old modeling tool after a new modeling tool becomes available after a significant amount of time has passed since the new model was introduced. With regard to the decision in *Sierra Club*, the Court found that case factually distinguishable in that the SIP was submitted only one month after the new modeling tool became available and the approval of the SIP was only one year after the new modeling tool became available. Here, on the other hand, the 2006 tool was released in November 2006 and approved by the EPA in January 2008, but the 2004 SIP was not approved until 2010, *more than three years* after the release of the tool. Further, in *Sierra Club* the D.C. Circuit noted that the Seitz Memo’s argument that requiring new compilation of emissions data based on the new modeling tools would place an onerous burden on and unnecessarily prolong approval, but in that case no new data based on the new modeling tool was available and a new study just to collect the raw data would have had to be commissioned. By contrast, here the State had already collected the emissions data using the 2006 tool and had presented to EPA the 2007 SIP that relied on that updated data, therefore no new study needed to be commissioned. Concluding that the agency’s action in approving the 2004 SIP was arbitrary and capricious under the APA, the Court granted the petition for review and remanded the matter to the EPA for further proceedings.

Forest Resources

Recent Court Rulings

Adams v. United States Forest Service (9th Circuit 2012) 671 F.3d 1138.

Ninth Circuit Finds Forest Service Fee Structure Violates “Plain Language” of Federal Lands Recreation Enhancement Act. Four recreational visitors sued the Forest Service seeking a declaration that the Forest Service was exceeding the scope of its authority under the Federal Lands Recreation Enhancement Act (“REA” or the “Act”) by charging fees to those who drive to Mount Lemmon (a heavily used recreational area within the Coronado National Forest north of Tuscon, Arizona) along the Catalina Highway, park their cars, then picnic, hike, or camp in nearby undeveloped areas.

Defendants filed a motion to dismiss, which the District Court granted. The sole issue on appeal is whether the district court’s ruling that Count I of Plaintiffs’ complaint (alleging that the Forest Service violated section 6802(d)(1) of the REA by collecting a standard amenity recreation fee for parking and hiking, picnicking, or camping in undeveloped areas in Mount Lemmon) failed to state a claim.

In 1996, prior to the REA, the Recreational Fee Demonstration Program was enacted. The Recreational Fee Demonstration Program required the Forest Service to select sites where it would “charge and collect fees for admission to the area or for the use of outdoor recreation sites, facilities, visitor centers, equipment, and services.” Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. III, § 315(b)(1) (1996). The Forest Service selected several parts of the Coronado National Forest, including Mount Lemmon, where it promptly began charging an entrance fee for all recreational visitors.

Thereafter, Congress enacted the REA in response to concerns that fees were being collected from individuals who were only using undeveloped land, not services and amenities. Under the Act, everyone is entitled to enter national forests without paying an entrance fee. 16 U.S.C. § 6802(e)(2). The REA, however, does permit the Forest Service to charge a “standard amenity recreation fee” in an “area” that provides significant opportunities for outdoor recreation, has substantial federal investments, where fees can be efficiently collected, and that contains certain required amenities such as designated parking, toilet facilities, etc. 16 U.S.C. § 6802(f)(4). However, the Forest Service cannot charge that fee “for certain activities or services,” even in a place that meets the definition of “area” under subsection (f). This blanket prohibition under REA forbids fees “[s]olely for parking, undesignated parking, or picnicking along roads or trailsides,” for “hiking through . . . without using the facilities and services,” and “[f]or camping at undeveloped sites” 16 U.S.C. § 6802(d)(1)(A), (D), and (E).

After the Act was enacted, the Forest Service drafted Interim Implementation Guidelines that interpreted the REA as authorizing the Forest Service to impose a standard amenity recreation fee in a “High Impact Recreation Area” (“HIRA”), defined as: “a clearly delineated, contiguous area with specific, tightly defined boundaries and clearly defined access points . . . ; that supports or sustains concentrated recreation use; and that provides opportunities for outdoor recreation that are directly associated with a natural or cultural feature, place, or activity” The Guidelines require a HIRA to meet the same criteria that the REA requires for an “area,” and adds four more criteria. The Forest Service designated the land adjacent to the Catalina Highway as a HIRA, resulting in a fee structure that remained essentially the same as the one under the Recreational Fee Demonstration Program with two exceptions: an exemption for visitors who drive through without stopping except at overlooks and pullouts, and an exemption for all visitors who enter the Mount Lemmon HIRA without a car. The Forest Service *did not exempt* visitors who drive into the HIRA, park, and then picnic, camp, or hike in undeveloped areas accessible from the highway. Any visitor who fails to pay the \$5.00 fee and display a valid pass is subject to a fine.

The Ninth Circuit evaluated the Forest Service’s interpretation of the REA pursuant to the two-step *Chevron* inquiry. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837 (1984). Under the first step, the Court found the statutory language of the REA to unambiguously prohibit the standard amenity recreation fee structure in place at the Mount Lemmon HIRA. Because the Act is not ambiguous, the Forest Service’s interpretation of the REA was not entitled to deference under *Chevron* step two.

The Court found subsection (d)(1) of section 6802 to be “abundantly clear” in its prohibition of collection of either standard or expanded amenity recreation fees “[s]olely for parking, undesignated parking, or picnicking along roads or trailsides,” for “hiking through . . . without using the facilities and services,” and “[f]or camping at undeveloped sites” 16 U.S.C. § 6802(d)(1)(A), (D), & (E). The Forest Service violated this prohibition by charging visitors at Mount Lemmon just for parking. The Court also found that the REA prohibits the Forest Service from charging standard amenity recreation fees for the Plaintiffs’ activities undertaken after they park at Mount Lemmon: hiking without using facilities and services, picnicking on a road or trailside, or camping at a site that does not have a majority of the nine enumerated amenities,

even if those activities occur within an “area” that has amenities. Because the Forest Service’s fee structure violated the REA, the Court reversed the district court’s grant of Defendants’ motion to dismiss.

Hazardous Waste/ Materials

Recent Court Rulings

Otay Land Co. v. United Enterprises Ltd., No. 10-55550, 2012 U.S. App. LEXIS 5349 Ninth Circuit 3/14/12.

Ninth Circuit overturns award of \$270,000 in "just costs" to defendants in a Superfund case dismissed for lack of jurisdiction. Plaintiff Otay Land Company sued former owners and operators of a shooting range in Chula Vista, California in federal district court under CERCLA, RCRA, and state law theories alleging defendants were liable for lead contamination on land owned by Otay. The former owners and operators were granted summary judgment on the merits of the federal law claims; the court declined to exercise ancillary jurisdiction over the state law claims. Otay then brought nearly identical claims in state court.

Defendants successfully sought costs totaling approximately \$270,000 in the district court. Otay appealed and the Ninth Circuit vacated and remanded, instructing the district court to determine whether defendants should be awarded their costs. On remand, the district court once again awarded all costs to defendants under the provisions of 28 U.S.C. § 1919 which reads in pertinent part "Whenever any action or suit is dismissed in any district court... for want of jurisdiction, such court may order the payment of just costs." The district court noted the costs were "necessary because they enable Defendants to properly ascertain the claims in the case and litigate the case accordingly."

Defendants appealed once again and the issue centered on what constitutes "just costs" for purposes of § 1919.

The Ninth Circuit determined that the district court's decision was "inadequate and erroneous." Noting that the issue of whether to award costs under § 1919 is discretionary, Judge McKeown wrote that "A determination of 'just costs' under § 1919 must involve an analysis of what is fair and equitable under the totality of the circumstances." While acknowledging that an award of costs may well have been appropriate here, the Ninth Circuit emphasized that the appropriateness of such an award cannot be "presumed simply because a party was successful on a threshold ground and the costs were incurred."

The cost award was vacated and remanded to the district court to consider the "just costs" issue consistent with the considerations outlined by the Ninth Circuit.

Klein v. Chevron U.S.A. Inc., 202 Cal. App. 4th 1342, 2012 Cal. App. LEXIS 57, 1/25/12

Court of Appeal affirms in part and reverses in part trial court order in class-action "hot fuel" case. Plaintiffs filed a class action complaint against defendant oil company alleging violations of California's unfair competition law (UCL) (Business & Professions Code § 17200 et seq.), violation of the Consumers Legal Remedies Act (CLRA) (Civil Code § 1750 et seq.), breach of contract, and unjust enrichment. The basis of the allegations was that because the oil company was failing to adjust for increases in fuel temperature when selling gasoline at the retail level, consumers were receiving less fuel (in terms of mass and energy) than they would receive if the gasoline was temperature-adjusted to account for the expansion in volume that motor fuel undergoes as it is heated.

The trial court sustained the oil company's demurrer to plaintiffs' claims for breach of contract, unjust enrichment, and unlawful business practices under the UCL. Defendant's demurrer to the CLRA claim and claims for unfair and fraudulent business practices under § 17200 was overruled. The trial court granted defendant's motion for judgment on the pleadings as to the remaining claims under the judicial abstention doctrine.

A significant issue on appeal was whether the trial court erred in dismissing the UCL unlawful business practice and CLRA claims pursuant to the judicial abstention doctrine.

The oil company pointed to a report by that California Energy Commission that found that even if temperature-adjusting technology were employed the "expected benefits for retail motorists would be essentially zero." It argued that the Energy Commission report demonstrated that further adjudication of plaintiffs' claims would require the court to re-do the economic analysis or put itself in the position of anticipating what the legislature or regulators would do. It also argued that the report evinced an intent to regulate in this area and that therefore the courts should abstain from hearing plaintiffs' claims.

The Court of Appeal reversed the order granting defendant's motion for judgment on the pleadings, holding that at this stage of the proceedings it was not clear that adjudicating plaintiffs' claims would require the trial court to resolve complex policy issues as contended by the oil company. The court noted that the Energy Commission report did nothing more than convey research on an issue and that there was no suggestion that a government entity intended to address the issue. Thus, it was not a proper basis for abstaining. Moreover, plaintiffs had alleged facts that demonstrated standing to assert claims under the UCL and the CLRA because the complaint asserted that the oil company's alleged conduct -- failing to sell temperature-adjusted gasoline or disclose the effects of temperature increases on motor fuel -- was unfair because it harmed consumers.

The Court of Appeal found that plaintiffs' allegations were sufficient to state a CLRA claim based on a material omission. It upheld the trial court's finding that plaintiffs failed to state a claim for breach of contract and also concluded that there was no error in the trial court's sustaining the oil company's demurrer to the unjust enrichment claims.

NEPA

Recent Court Rulings

Tri-Valley CAREs v. United States Department of Energy (9th Circuit 2012) 671 F.3d 1113.

Ninth Circuit Finds that Department of Energy’s Environmental Assessment Took Requisite “Hard Look” at Possible Environmental Impacts of a Terrorist Attack at Proposed Biosafety Facility at Lawrence Livermore National Laboratory. Plaintiffs-Appellants Tri-Valley CAREs and two individuals (collectively, Tri-Valley CAREs) challenged the sufficiency of the United States Department of Energy’s (“DOE”) Environmental Assessment (“EA”) of a prospective biosafety level-3 (“BSL-3”) facility at the Lawrence Livermore National Laboratory (“LLNL”). Tri-Valley CAREs challenged the same EA in an earlier round of litigation, in which the Ninth Circuit upheld all aspects of the EA except for the failure to consider the impact of a possible terrorist attack. Following the Ninth Circuit’s remand, the district court entered summary judgment in the DOE’s favor on the grounds that it had sufficiently revised its Final Revised Environmental Assessment (“FREA”) to adequately consider the environmental impact of an intentional terrorist attack on the BSL-3 facility at LLNL. Tri-Valley CAREs timely appealed that decision.

In December of 2002, the National Nuclear Security Administration (“NNSA”), an agency within the DOE, authorized the construction of a BSL-3 laboratory at LLNL. BSL-3 laboratories work with agents that may cause diseases in humans with serious or lethal consequences if untreated, and which have the potential of airborne transmission. At the time of construction, the LLNL BSL-3 facility was the only one of its kind operating in the same facility as a nuclear laboratory. The LLNL already had BSL-1 and BSL-2 (less hazardous ratings) facilities on site. In 2002 the DOE performed an EA for the proposed BSL-3 laboratory pursuant to the National Environmental Policy Act (“NEPA”). The EA considered the environmental impacts of the BSL-3 laboratory on a wide range of issues, including human health, ecological resources, transportation, waste management, geology, soils and seismology, noise, and air quality. In evaluating the public risk potentially caused by the BSL-3 facility, the DOE relied upon three major sources of data: (1) statistics from hundreds of other BSL-3 laboratories; (2) the U.S. Army’s Biological Defense Research Program (“BDRP”) laboratories; and (3) LLNL’s BSL-1 and -2 laboratories. The EA also analyzed potential abnormal impacts on those sources using a “catastrophic release” scenario, modeled upon a “Maximum Credible Event” (“MCE”), simulating the outer bounds of impact caused by a pathogen’s accidental release.

For analyzing the threat of release the DOE chose a catastrophic release simulation (centrifuge analysis) that the Army used to perform a NEPA analysis of its own biological research labs, which was also a MCE type of analysis simulating a reasonably foreseeable event with a low likelihood of occurrence but a high risk. In the Army’s model, a liter of a bacterial pathogen was hypothetically divided into six centrifuge tubes with loose caps and loose Orings. When the centrifuge was activated, some of the tubes’ contents would be aerosolized resulting in the production of almost 10 billion airborne pathogens. Using the Army centrifuge analysis the DOE concluded that the chances of exposure at the LLNL BSL-3 lab were even more remote than those modeled by the Army because the LLNL had an additional HEPA filter that was more effective, the wind speeds were greater at LLNL than the speeds assumed by the Army (resulting

in a decrease of airborne concentrations more quickly), and the location of the LLNL was one-half mile from the nearest public area, whereas the Army scenario assumed a lab in close physical proximity to the public. This conclusion let the DOE to issue a Finding of No Significant Impact (“FONSI”).

After the first round of litigation, the DOE prepared its Draft Revised Environmental Assessment (“DREA”), which addressed the impacts associated with terrorist attacks to determine whether the threat of such an attack necessitated preparation of an EIS. To analyze this threat the DOE was required to take a different approach than it did when analyzing the threat posed by accidents. The DOE considered three types of terrorist attacks: (1) a direct terrorist attack at the facility, resulting in loss of containment; (2) the theft and release of pathogenic material by an LLNL terrorist outsider; and (3) the theft and release of pathogenic material by an LLNL terrorist insider. In January 2008, the DOE found no significant environmental impact would result from a terrorist attack on the BSL-3 lab, and therefore released a FREA and FONSI. In the current appeal, Tri-Valley CAREs claims: (1) that the DOE did not comply with the Ninth Circuit’s mandate in the earlier litigation because it failed to take a “hard look” at the human health, safety, and environmental risks associated with an intentional terrorist act; (2) that the DOE violated NEPA by failing to supplement its DREA and FREA with information regarding incidents in which the DOE violated protocols and policies at LLNL BSL-3’s biological facilities, depriving decision-makers and the public of a reasonable opportunity for input; and (3) that the district court erred in excluding Tri-Valley CAREs’ extra-record evidence proving that centrifuge scenarios are inadequate to measure risks from an intentional terrorist attack. As to the first issue, in the earlier litigation the Ninth Circuit remanded “for the DOE to consider whether the threat of terrorist activity necessitates the preparation of an EIS by conducting a comprehensive analysis of the human health, safety, and environmental risks associated with a terrorist attack at the BSL-3 lab. The Ninth Circuit found the DOE’s use of the MCE centrifuge model, developed in the original EA, sufficient under NEPA because the DOE reasonably justified its selection based upon record evidence and additional analysis of site-specific factors. The Court noted that whether or not it agreed that the “centrifuge model was the best way to assess the threat of direct terrorist attack” is not the relevant inquiry since when specialists express conflicting views an agency has discretion to rely on the reasonable opinions of its own qualified experts even when a court might find contrary views more persuasive.

In assessing the impact of a terrorist threat by the theft and release by an LLNL BSL-3 terrorist outsider, the DOE used a comparative nationwide analysis to determine that the LLNL BSL-3 facility would not be an attractive terrorist target since it would not alter the status quo because there are hundreds of other BSL-3 facilities in the United States that regularly handle and store the same substances and because the same substances are available to potential terrorists from common environmental sources. Contrary to Tri-Valley CAREs’ view, the Court found that the use of the nationwide analysis was permissible under 40 C.F.R. § 1508.27(a), because nothing in that regulation prohibits the DOE from exercising its discretion to apply the nationwide analysis when appropriate. Further, the Court cited to specific evidence in the record that supported the DOE’s conclusion that the construction of a BSL-3 facility at LLNL did not change the status quo.

As to the DOE's discussion of the impact of the potential theft and release of a pathogen by an LLNL BSL-3 terrorist insider, the Court held that while the DOE did not use an empirical model, such a model is not required by NEPA and further, the DOE provided the require convincing statement of why the threat did not require an EIS through its dual-tiered probabilistic analysis. Therefore, under issue one, the Court found that the DOE took the requisite "hard look" at the risks associated with a terrorist attack.

The Ninth Circuit likewise found Tri-Valley CAREs' arguments under the second issue unpersuasive. The Court pointed out that in the original EA, the DREA, and the FREA, the DOE specifically and carefully considered the risks of shipping infectious materials to and from the BSL-3 lab and disclosed these risks to the public. The Court noted that "the purpose of an EA is not to compile an exhaustive examination of each and every tangential event that potentially could impact the local environment." Instead, the purpose of an "EA is simply to create a workable public document that *briefly* provides evidence and analysis for an agency's finding regarding an environmental impact." The Court rejected Tri-Valley CAREs' argument that the DOE's disclosure of the 2005 anthrax shipping incident was deficient, finding that such an argument was illogical given that Tri-Valley CAREs itself relied upon the very document to specifically and publicly comment on the 2005 shipping incident. The Court concluded that the discussion of the incident in the DREA and the FREA satisfies NEPA. The Court also swiftly rejected Tri-Valley CAREs' argument that the DOE violated the NEPA supplementation rule by failing to supplement the FREA to address the results of its Security Assessment ("SA") conducted at LLNL in 2008, which identified several deficiencies in performance of LLNL's physical security system and protection program management. The Court held that it was required to defer to the DOE's finding in its July 2008 supplemental report concerning whether the SA constituted significant new information that the SA did not show a "seriously different picture of the likely environmental harms stemming from the proposed project." Finally, as to the third issue, Tri-Valley CAREs' evidentiary claims, the Court held that the district court's denial of Tri-Valley CAREs' motion to augment the record was proper since the motion failed to comply with a local rule and such failure gave the district court discretion to deny the motion. The Court also found that, absent the failure to comply with the local rule, the district court could have denied the motion on the merits since the motion did not provide any showing of why the evidence fit within any of the exceptions allowing the admission of extra-record evidence.

Pacific Rivers Council v. United States Forest Service, 668 F.3d 609 (9th Circuit, February 3, 2012). **Ninth Circuit finds that the United States Forest Service violated NEPA when it approved the 2004 Framework amendment to the Sierra Nevada Forest Plan by failing to analyze the environmental consequences of the 2004 Framework on individual fish species.**

The Sierra Nevada Mountains form one of the longest continuous mountain ranges in the lower 48 states, stretching for more than 400 miles from Southern California northward to the California-Oregon border. The United States Forest Service ("Forest Service") manages eleven separate national forests covering nearly 11.5 million acres of these mountain lands under the Sierra Nevada Forest Plan ("Forest Plan"), a Land Resource Management Plan ("LRMP")

formulated and promulgated pursuant to the National Forest Management Act. LRMP's guide all management decisions within the forests subject to the Plan and individual projects are developed according to the guiding principles and management goals expressed in the LRMP.

The Sierra Nevada Ecosystem Project, a study commissioned by Congress, concluded in 1996 that the aquatic and riparian systems are the most altered and impaired habitats in the Sierra. In response, the Forest Service issued a detailed Final Environmental Impact Statement ("2001 EIS") recommending amendments to the Forest Plan intended in part to conserve and repair the Sierra's aquatic and riparian ecosystems. For example, the 2001 EIS included 64 pages of detailed analysis of the environmental consequences of the amendments on 34 different fish species (9 species listed as federally threatened and endangered, 11 sensitive fish species and 14 moderate and high vulnerability fish species). In January 2001 the Forest Service adopted a modified version of the preferred alternative recommended in the 2001 EIS. This amendment to the Forest Plan and 2001 EIS was prepared and adopted under the administration of President Clinton and is referred to as the "2001 Framework."

In November 2001, under the administration of the newly elected President Bush, the Chief of the Forest Service asked for a review of the 2001 Framework and in January 2004, the Forest Service issued a Final Supplemental Environmental Impact Statement ("2004 EIS") recommending significant changes to the 2001 Framework. The Regional Forester adopted Alternative 2 from the 2004 EIS shortly thereafter, and in response to over 6,000 administrative appeals, the Forest Service Chief approved that decision without change in November 2004. This is referred to as the "2004 Framework." The 2004 Framework differed substantially from the 2001 Framework, including significant increases in logging and logging-related activities and changes in grazing standards for commercial and recreational livestock. Specifically, the 2004 Framework significantly reduced grazing restrictions and allowed 4.9 billion more board feet of timber to be harvested, 90 more miles of new roads and reconstruction of 855 more miles of existing roads than under the 2001 Framework.

Pacific Rivers Council ("Pacific Rivers"), a public interest environmental organization, brought suit in federal district court challenging the 2004 Framework as inconsistent with the National Environmental Protection Act ("NEPA") and the Administrative Procedure Act, alleging that the Forest Service failed to adequately analyze the environmental consequences of the 2004 Framework for fish and amphibians. The district court granted summary judgment to the Forest Service on cross-motions for summary judgment and Pacific Rivers timely appealed to the Ninth Circuit.

On appeal, Pacific Rivers alleged that the 2004 EIS fails to take a "hard look" at the environmental impact of the 2004 Framework on fish and amphibians. The Forest Service disagreed, and argued, for the first time on appeal, that Pacific Rivers lacks standing under Article III of the Constitution.

The Ninth Circuit first addressed Pacific Rivers' standing and, pointing to declarations in the record regarding the Pacific Rivers' Chairman's and members' use and enjoyment of areas throughout the Sierra Nevada as well as the breadth of the Forest Plan amendments proposed in the 2004 Framework, held that Pacific Rivers had Article III standing to challenge the 2004

Framework under NEPA. In so holding, the Ninth Circuit rejected the Forest Service's reliance on *Summers v. Earth Island Inst.* (2009) 555 U.S. 488 and argument that because Pacific Rivers challenges amendments to a LRMP rather than a specific project under the LRMP, it failed to allege a threat of a "concrete and particularized" injury that is "actual or imminent." The court distinguished the case from *Summers* and cited its *Salmon River Concerned Citizens v. Robertson* (9th Cir. 1994) 32 F.3d 1346 and *Sierra Forest Legacy v. Sherman* (9th Cir. 2011) 646 F.3d 1161 decisions to support its finding that the harm flowing from a failure to comply with NEPA in formulating the 2004 Framework was sufficient to confer standing to bring a facial challenge to the 2004 Framework, independent from specific implementing projects.

On the merits, the Ninth Circuit found that the 2004 EIS failed to adequately analyze the 2004 Framework's impacts on fish species. Indeed, despite promising such an analysis the 2004 EIS contains no analysis whatsoever of individual species of fish. Citing its decision in *Kern v. Bureau of Land Mgmt.* (9th Cir. 2002) 284 F.3d 1062, the Ninth Circuit held that the Forest Service was required to analyze impacts on individual fish species if it was "reasonably possible" to do so, and pointed to the Forest Service's extensive analysis of impacts to fish species in its 2001 EIS (64 pages of analysis on 35 different species) as well as the 2004 EIS's analysis of impacts to six species of amphibians to demonstrate why it was also reasonably possible for the Forest Service to provide some analysis of the environmental consequences on individual fish species in the 2004 EIS. The Ninth Circuit also rejected what it called the Forest Service's "fall-back" argument – that even if reasonably possible, it satisfied NEPA's hard look requirement by two Biological Assessments ("BA") that were incorporated by reference in the 2004 EIS. Specifically, the court ruled that this fall-back argument failed for three reasons: (1) if the BAs were truly intended to serve as the impact analysis of the 2004 Framework on fish species, the 2004 EIS should have described and analyzed the BAs in the text and included the BAs themselves in an appendix to the 2004 EIS (instead of simply incorporating them by reference) in order to adequately inform the decisionmakers and the general public as required by NEPA; (2) even if the BAs had been included, they could not have satisfied NEPA's hard look requirement as the BAs functioned solely as a trigger to the consultation process required under Section 7 of the Endangered Species Act and contained no impact analysis themselves (the Biological Opinions issued by the U.S. Fish and Wildlife Service in response to the BAs were not included or referenced in any form in the 2004 EIS); and (3) even if the BA's could have satisfied NEPA's hard look requirement, they applied only to federally threatened and endangered fish species, and said nothing whatsoever about the other sensitive and moderate/high vulnerability fish species previously analyzed in the 2001 EIS.

Finally, the Forest Service determined that the 2004 EIS adequately analyzed the 2004 Framework's impacts on amphibians. The court reviewed the 2004 EIS's discussion of the potential grazing and prescribed fire/logging impacts on 6 frog species as well as the mitigation strategies to minimize the environmental consequences of the 2004 Framework on the frogs. The court rejected Pacific Rivers' contention that the Forest Service was required to provide further analysis given that the 2004 Framework delegated significant decisionmaking authority to local managers citing repeated commitments in the 2004 EIS and in the Forest Service's appellate brief that additional NEPA analysis will occur at the project-level when it can better examine the effects of a particular grazing or other site-specific project.

Accordingly, the Ninth Circuit reversed in part and affirmed in part, and remanded the case back to the district court. Circuit Judge N. R. Smith authored a substantial dissent, criticizing the majority for reinventing the arbitrary and capricious standard of review and not deferring to the Forest Service's reasonable decision.

The Save The Peaks Coalition v. United States Forest Service, 669 F.3d 1025 (9th Circuit, February 9, 2012).

Ninth Circuit finds District Court abused its discretion in finding the plaintiffs' NEPA claims barred by laches, but affirms District Court's alternative grant of summary judgment and rejects plaintiffs' challenge to U.S. Forest Service decision to permit snowmaking activities at Arizona's Snowbowl ski area.

Arizona Snowbowl ("Snowbowl") is a ski area located 7 miles northwest of Flagstaff on the western flank of the San Francisco Peaks. Unlike most ski areas in the United States, Snowbowl relies entirely on natural snowfall and does not operate artificial snowmaking equipment. Snowbowl operates under a special use permit issued by the United States Forest Service ("USFS") and the ski area's economic success depends on skier visits, which in turn closely parallel the availability of natural snow. For example, during the 2004-2005 ski season when more than 460 inches of natural snow fell, Snowbowl had over 193,564 skier visits; but during the 2001-2002 ski season when only 50 inches of natural snow fell, Snowbowl had fewer than 3,000 skier visits. Accordingly, in 2000 Snowbowl began working on a proposal to supplement its natural snowfall with artificial snow. Snowbowl's proposed snowmaking facility would use Class A+ reclaimed water provided by the City of Flagstaff and treated at the City's Rio de Flag Water Reclamation Facility.

In 2004, the USFS released a Draft Environmental Impact Statement ("DEIS") for Snowbowl's snowmaking project. 5,700 people, including The Save the Peaks Coalition and numerous affiliated individuals ("Save the Peaks Plaintiffs"), commented on the DEIS regarding the health effects of ingesting reclaimed water, among other things. The USFS prepared a Final EIS with updated analysis based on the public comments, including 31 pages of analysis concerning the quality of the reclaimed water to be used for snowmaking and the health effects of ingesting snow made from that water. In June 2005, four plaintiff groups (including individuals, several Native American Tribes and nations, and environmental organizations, collectively the "Navajo Nation Plaintiffs") filed suit to stop the USFS from permitting Snowbowl's snowmaking project alleging that the USFS failed to comply with NEPA, the Religious Freedom Restoration Act ("RFRA") and certain other federal statutes. The district court granted summary judgment against the Navajo Nation Plaintiffs on all but their RFRA claims, and after a bench trial rejected the RFRA claims as well. The Ninth Circuit accepted the case en banc (after a 3-judge panel initially held that the USFS violated both NEPA and the RFRA) and upheld the entirety of the district court's decision. The United States Supreme Court subsequently denied the Navajo Nation Plaintiffs' petition for a writ of certiorari. Importantly, the Ninth Circuit also found that the Navajo Nation Plaintiffs waived the claim that the USFS failed to consider risks posed by

human ingestion of snow made from reclaimed water by failing to appeal the district court's denial of their motion to amend the complaint to add such allegations.

Shortly after the Supreme Court denied certiorari sought by the Navajo Nation Plaintiffs, the Save the Peaks Plaintiffs filed another suit against the USFS on September 21, 2009, alleging three NEPA claims: (1) USFS' FEIS failed to contain a reasonably thorough discussion of the significant aspects of the probably environmental consequences of Snowbowl making snow from reclaimed water; (2) USFS failed to ensure the scientific integrity of its analysis; and (3) USFS did not disseminate quality information. The district court granted the defendants' motions for summary judgment, finding laches barred the Save the Peaks Plaintiffs' claims and, alternatively, even if laches did not apply the USFS did not violate NEPA.

On appeal, the Ninth Circuit first addressed the district court's laches determination. Despite finding that the Save the Peaks Plaintiffs lacked diligence in pursuing their legal action and harshly criticizing the Save the Peaks Plaintiffs for a gross abuse of the judicial process (*i.e.*, sitting idle for 4 years while actively encouraging and helping finance the Navajo Nation Plaintiffs only to spring their own related lawsuit based on similar issues and by way of the same attorney after the Navajo Nation Plaintiffs exhausted their appeal options), the Ninth Circuit found that the district court abused its discretion in barring the Save the Peaks Plaintiffs claims based on laches. Specifically, the Ninth Circuit found that the district court's determination that the Save the Peaks Plaintiffs' lack of diligence prejudiced the defendants was based on erroneous findings of fact concerning the snowmaking project's status. Contrary to the district court's finding that the project was near completion, project construction had not even begun when the Save the Peaks Plaintiffs initiated their action in 2009. Based on this fact and because Snowbowl and the USFS did not demonstrate any other legally cognizable prejudice, the court was compelled to overturn the district court's laches decision.

Turning to the merits, the Ninth Circuit affirmed the district court's grant of summary judgment, finding that the USFS fully complied with NEPA. Specifically, the Ninth Circuit held that the USFS took the requisite "hard look" at the possibility and the risks of persons ingesting snow made from reclaimed water after reviewing the USFS's detailed analysis of the issue and concluding that "it is hard to imagine how the USFS's analysis could have been more exhaustive." In doing so, the Ninth Circuit rejected the Save the Peaks Plaintiffs' claim that the USFS's analysis and conclusion that ingestion of snow made from Class A+ reclaimed water would not cause illness improperly relied upon the fact that the Arizona Department of Environmental Quality had previously approved the use of reclaimed water. Lastly, the Ninth Circuit held that the Save the Peaks Plaintiffs had waived their claim that the USFS failed to provide "high quality" information to the public about the safety of exposure to reclaimed water by failing to respond to the USFS's summary judgment motion on this issue in the district court and failing to argue in its opening brief on appeal that the district court erred in finding that it had abandoned this claim.