

Environmental Law Reporter

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CAN EVERYTHING OLD BE NEW AGAIN?

Chaptered bills from the 2009 legislative session are included in this issue.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

A consultant hired by the county to prepare an EIR for a development project could not be held liable to the project applicant on theories of breach of contract or negligence based on its failure to timely prepare the EIR (p. 583)

WATER QUALITY CONTROL

On remand from the Supreme Court, the court of appeal held that 22 Cal. Code. Reg. § 64256(e) imposed on the county an express mandatory duty to review water monitoring reports submitted by a water system operator, which showed the water was contaminated, and that the complaint in this case adequately alleged breach of this duty (p. 593)

AIR QUALITY CONTROL

The San Joaquin Valley Air Pollution Control District had statutory authority to promulgate indirect source review rules to address indirect pollution, i.e., mobile source emissions, caused by new development projects (p. 601)

Are the Deferential Standards Often Applied for Requiring Subsequent or Supplemental Environmental Review Consistent with CEQA's Purposes?

By

*Arthur Pugsley and Michelle Black**

I. Introduction

The California Environmental Quality Act (CEQA) [Pub. Res. Code § 21000 et seq.] serves both to protect the environment and to encourage vigorous public participation in the environmental review process [*Citizens of Goleta Valley v. Bd. of Supervisors* [(1990) 52 Cal. 3d 553, 564, 276 Cal. Rptr. 410]]. One of CEQA's oldest interpretive rules requires its provisions to be "interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." [*Friends of Mammoth v. Bd. of Supervisors* [(1972) 8 Cal. 3d 247, 259, 104 Cal. Rptr. 761]. Court review of agency decisions on whether to prepare environmental analysis is reviewed independently or de novo, i.e., without deference to the agency decision. [*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* [(2007) 40 Cal. 4th 412, 435, 53 Cal. Rptr. 3d 821 ("we determine de novo whether the agency has employed the correct procedures, scrupulously enforc[ing] all legislatively mandated CEQA requirements" (internal quotes omitted)] ("*Vineyard*").]

Given the history of judicial decisions interpreting CEQA vigorously, and the de novo review standard that applies to CEQA procedural issues, one might expect de novo court review of an agency decision about reopening the environmental review process in response to changes in a project. Yet, citing an interest in finality of environmental review, California courts often give

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great deference to agency decisions on whether to reopen the environmental review process because of changes or new information. As a result, the environmental protection and accountability goals of CEQA are sometimes defeated. Previously reviewed projects can languish unbuilt for years, or even decades, and then be resurrected with minimal public oversight. Many courts have allowed agencies great discretion in determining what constitutes changes significant enough to warrant reopening of the environmental review process, sometimes resulting in situations where wholesale revisions to a previously reviewed project proceed with almost no review or opportunity for public comment. This article discusses the current CEQA requirements on when to reopen a completed environmental review, highlights case law pointing out inconsistencies and difficulties with the current approach, compares California's approach with other jurisdictions, and suggests potential improvements.

II. CEQA Has Rigorous Requirements Governing Preparation of EIRs

The Environmental Impact Report (EIR) lies at the "heart of CEQA" and is the primary mechanism through which CEQA's mandate for a public accounting of the environmental effects of a proposed project is effectuated. [*In Re Bay-Delta Programmatic EIR Coordinated Proceedings* [(2008) 43 Cal. 4th 1143, 1162, 77 Cal. Rptr. 3d 578].] The EIR includes a detailed assessment of the potential impacts of the project, along with an analysis of alternatives and mitigation measures. [Pub. Res. Code § 21061.] Because of the importance of the EIR process to fulfilling CEQA's mandates, CEQA "reflect[s] a preference for requiring an EIR to be prepared," and the threshold requirement for preparing an EIR is low. [*Mejia v. City of Los Angeles* [(2005) 130 Cal. App. 4th 322, 332, 29 Cal. Rptr. 3d 788].] An EIR is required "whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." [*No Oil v. City of Los Angeles* [(1974) 13 Cal. 3d 68, 75, 118 Cal. Rptr. 34]; *see also* Pub. Res. Code § 21080(d).] This requirement is triggered even if substantial evidence exists to the contrary. [14 Cal. Code Reg. §§ 15064(f)(1); *Architectural Heritage Ass'n v. County of Monterey* [(2004) 122 Cal. App. 4th 1095, 1110, 19 Cal. Rptr. 3d 469].] Judicial review of whether substantial evidence exists to warrant preparation of an EIR under Pub. Res. Code § 21151 (for local agencies) or section 21100 (for state agencies) is treated as a matter of law, and courts therefore review de novo agency findings that an EIR is unnecessary. [*City of Antioch v. City Council* [(1986) 187 Cal. App. 3d 1325, 1331, 232 Cal. Rptr. 507].]

III. Reopening the CEQA Process in Response to Changes in the Project or New Circumstances Requires Meeting a Much Higher Threshold

Pub. Res. Code § 21166 addresses the situations in which additional environmental review may be necessary following certification of an EIR. It identifies three events, any one of which triggers the requirement for a “subsequent or supplemental” EIR. Those events are (1) substantial changes to the project; (2) substantial changes to the circumstances under which the project is being undertaken; or (3) availability of new information that was not known or could not have been known when the EIR was certified.

The CEQA Guidelines [14 Cal. Code Reg. § 15000 et seq.] divide “subsequent or supplemental” environmental review into three categories. Guidelines section 15162 governs the preparation of a subsequent EIR. It tracks the language of Pub. Res. Code § 21166 and provides additional detail on what qualifies as “substantial.” Guidelines section 15163 allows for preparation of a “supplement to an EIR” rather than a subsequent EIR when a subsequent EIR would otherwise be required but “only minor additions or changes” are necessary to make the original EIR adequate in light of the event causing the change. Guidelines section 15164 allows an “addendum to an EIR” when only “minor technical changes or additions” to a previously certified EIR are needed and none of the events that would require a subsequent EIR have occurred. CEQA review is reopened when there is a need for “a subsequent version of an EIR that revises the earlier EIR to make it adequate for a project’s approval after conditions have changed.” [*Mani Brothers Real Estate Group v. City of Los Angeles* [(2007) 153 Cal. App. 4th 1385, 1397, 64 Cal. Rptr. 3d 79 (“*Mani Brothers*”)].]

The language and structure of the Guidelines imply a hierarchy, in which a subsequent EIR would involve an essentially “stand-alone” document while a supplement to an EIR would largely incorporate previous analysis with relatively small changes. An addendum to an EIR would be appropriate for minor changes unaccompanied by a significant event within the meaning of Pub. Res. Code § 21166. However, the Guidelines specify that the same circulation and public review requirements that apply to initial CEQA review of the project are operative, regardless of whether the agency prepares a subsequent EIR or a supplement to an EIR [Guidelines section 15162(d)]. By contrast, an addendum to an EIR has no requirements for public notice and comment [Guidelines section 15164(c)].

Courts rarely specify whether a subsequent EIR or supplement to an EIR is required. [See, for example, *Concerned Citizens of Costa Mesa v. 32nd Dist. Ag.*

Ass’n [(1986) 42 Cal. 3d 929, 938, 231 Cal. Rptr. 748 (referring to “supplemental or subsequent EIR”)]; *City of San Jose v. Great Oaks Water Co.* [(1987) 192 Cal. App. 3d 1005, 1016–1017, 237 Cal. Rptr. 845 (discussing differences between subsequent EIR and supplement to an

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EIR, then treating the two together for purposes of relief)]. Others have used a generic term such as “additional EIR” or “SEIR” for any document prepared in response to an event defined in Pub. Res. Code § 21166. [See, for example, *Mira Monte Homeowners Ass’n v. County of Ventura* [(1985) 165 Cal. App. 3d 357, 363, 212 Cal. Rptr. 127]; *Gentry v. City of Murieta* [(1995) 36 Cal. App. 4th 1359, 1401, 43 Cal. Rptr. 2d 170].] The imprecise language used by courts underscores the lack of much practical difference between a subsequent EIR and a supplement to an EIR. This article uses the term “SEIR” to encompass both documents.

The requirement to prepare an SEIR is phrased in the negative—after an EIR is certified, an agency is prohibited from requiring an SEIR in the absence of an event that would require one. [Pub. Res. Code § 21166.] “After certification [of the EIR], the interests of finality are favored over the policy of encouraging public comment.” [*Laurel Heights Improvement Ass’n v. Regents of the University of California* [(1993) 6 Cal. 4th 1112, 1130, 26 Cal. Rptr. 2d 231 (“*Laurel Heights II*”).] Numerous courts have explained that section 21166 elevates finality and certainty over public participation because “in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired . . . and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process” [*Gentry, above*, 36 Cal. App. 4th at 1401, emphasis in original; *accord, Moss v. County of Humboldt* [(2008) 162 Cal. App. 4th 1041, 1050, 76 Cal. Rptr. 3d 428 (“*Moss*”)]].

Courts of Appeal have usually interpreted Pub. Res. Code § 21166 to require judicial deference to agency decisions whether or not to prepare an SEIR. The analysis proceeds under the deferential “substantial evidence” test, i.e., the agency decision regarding the preparation of an SEIR is upheld if it is supported by substantial evidence in the record, even if the record also contains substantial evidence to the contrary. [See, for example, *Bowman v. City of Petaluma* [(1986) 185 Cal. App. 3d 1065, 1073, 230 Cal. Rptr. 413 (“*Bowman*”) (deferring to agency decision not to prepare SEIR)]; *Security Environmental Systems Inc. v. South Coast Air Quality Management Dist.* [(1991) 229 Cal. App. 3d 110, 126, 280 Cal. Rptr. 108 (deferring to agency decision, over objections of applicant, to prepare SEIR)].] Thus, the existence of substantial evidence in the record has the opposite effect in a challenge to an agency decision against preparing an SEIR than it does in a challenge to an agency decision against preparation of an EIR in the first instance. However, courts have applied the substantial evidence standard to cases challenging agency decisions against supplemental review even in situations where the

agency had originally decided against preparation of an EIR and proceeded with only a Mitigated Negative Declaration (MND), a much less comprehensive document. [*Benton v. Bd. of Supervisors* [(1991) 226 Cal. App. 3d 1467, 1479, 277 Cal. Rptr. 481 (“*Benton*”).] In such a case, the “in-depth analysis” did not occur, but the interests of finality still were found to outweigh the interests of public participation. *Benton* may be misused to allow an agency to use a series of MNDs to defeat the “fair argument” test and low threshold requirement for preparation of an EIR, by approving an initial project based on a MND, then later approving a much larger project based on a subsequent MND, any judicial review of which would proceed under the substantial evidence test.

IV. The Supreme Court Has Not Settled on a Consistent Approach to SEIRs

The Supreme Court has sent conflicting messages on what standard of review should be applied to agency decisions concerning SEIRs. In *Concerned Citizens of Costa Mesa v. 32nd District Agricultural Ass’n* [(1986) 42 Cal. 3d 929, 231 Cal. Rptr. 748], the Court addressed the situation where an agency deliberately withheld information on project changes from the public, and constructed a project considerably larger than that evaluated in the EIR, doubling the seating capacity of a fairgrounds venue and nearly doubling the size of the project site. While the case was primarily about the statute of limitations under CEQA, the Court flatly stated, “It cannot be doubted . . . [t]he district’s failure to address these changes in a subsequent EIR violated section 21166, subdivision (a).” [42 Cal.3d at 937.] The Court also stressed that failure to prepare an SEIR “compromised the goal of public participation in the environmental review process.” [42 Cal.3d at 938.] This holding implies a non-deferential review of the agency action and is consistent with the Court’s often-repeated language that CEQA serves the twin goals of environmental protection and public participation. Yet seven years later, the court elevated finality over public participation in *Laurel Heights II, above*, and applied the deferential substantial evidence test to an agency decision against recirculating an already certified EIR in response to changes in the project [6 Cal. 4th at 1130].

A deferential standard of review of an agency’s decision not to prepare an SEIR is more questionable based on the Supreme Court decision in *Vineyard, above*, in which the Court explicitly applied a de novo review standard for challenges to agency decisions involving the procedural aspects of CEQA [40 Cal. 4th at 435]. An agency decision to prepare or forego an SEIR involves the procedural aspects of CEQA, and should under *Vineyard* logically fall under the de novo review standard. However, subsequent to *Vineyard*, the

Mani Brothers court showed great deference to an agency procedural decision to not prepare an SEIR.

Then, in *Save Tara v. City of West Hollywood* [(2008) 45 Cal. 4th 116, 84 Cal. Rptr. 3d 614 (“*Save Tara*”)], the Supreme Court remanded a case to the Superior Court with explicit instructions to review whether an SEIR should be prepared applying the deferential substantial evidence standard of review [*Save Tara*, 45 Cal. 4th at 143, citing the pre-*Vineyard* case of *Santa Theresa Citizen Action Group v. City of San Jose* [(2003) 114 Cal. App. 4th 689, 704, 7 Cal. Rptr. 3d 868]]. The Supreme Court issued this holding despite its concurrent reaffirmation of the applicability of the de novo review standard to CEQA procedural questions [*Save Tara*, 45 Cal. 4th at 131, citing *Vineyard, above*, 40 Cal. 4th at 435; *see also Save Tara*, 45 Cal. 4th at 127–128, 143 (agency decision on project must be reviewed “in light of a legally adequate EIR”)]. The Supreme Court also directed an examination of whether the EIR, which had been prepared after the agency entered into binding agreements to develop the property at issue, was “premised upon” those agreements, but did not indicate what standard of review should apply to this “premised upon” inquiry. The *Save Tara* case involved the question of proper timing of CEQA review, and the issue of whether an SEIR should be prepared or what standard of review should govern its preparation was not briefed or before the court. The Supreme Court in *Save Tara* apparently carved out an exception to the *Vineyard* de novo review standard governing CEQA procedural questions when the particular CEQA procedural question involves an agency decision regarding preparation of an SEIR. Presumably, this outcome means the deferential review standard from *Laurel Heights II* of agency decisions to recirculate an EIR in response to new information has also survived *Vineyard* and *Save Tara*. The tension within the *Save Tara* decision demonstrates Supreme Court jurisprudence on supplemental environmental review is far from settled.

V. Labeling a Project “New” as Opposed to “Revised” Determines the Standard of Review

The question of whether a proposal is a new project subject to the fair argument test applicable to preparation of an EIR under Pub. Res. Code § 21151, or merely the revision of an existing proposal subject to the substantial evidence test applicable to preparation of an SEIR under Pub. Res. Code § 21166, will often determine the outcome in judicial review of challenges to agency decisions. Unfortunately, the existence of such a key distinction in legal analysis on what amounts to a semantic difference could encourage use of conclusory terminology by agencies and courts alike.

In *Benton v. Bd. of Supervisors* [(1991) 226 Cal. App. 3d 1467, 1479, 277 Cal. Rptr. 481], the First District held the county’s treatment of a project as a modification of an existing project was conclusive for purposes of determining the application of section 21166. In *Benton*, the applicant received a permit for a winery 1986, on the basis of a mitigated negative declaration [226 Cal. App. 3d at 1473]. The next year, the applicant decided to move the winery to a newly-acquired adjacent parcel of land, closer to existing residences [226 Cal. App. 3d at 1473]. Because county staff “consistently treated” the 1987 application as the relocation of the approved 1986 winery, the court ruled it was merely a modification of the original project and section 21166 applied, even though the applicant filed for a new permit instead of a modification of the existing permit, and the site had changed [226 Cal. App. 3d at 1476].

In *Santa Teresa Citizen Action Group v. City of San Jose* [(2003) 114 Cal. App. 4th 689, 7 Cal. Rptr. 3d 868], eight years passed between the certification of a final EIR and preparation of an addendum for a city recycled water project. Despite the eight year time lapse and changes to the project including realignment of a major wastewater conveyance pipeline, the Sixth District found that no further environmental review was necessary, conducting its analysis of the case under the substantial evidence standard [114 Cal. App. 3d at 702].

However, not all courts have been so deferential. In *Burbank-Glendale-Pasadena Airport Authority v. Hensler* [(1991) 233 Cal. App. 3d 577, 284 Cal. Rptr. 498 (“*Hensler*”)], the Second District reviewed a challenge to an eminent domain proceeding involving CEQA and did not treat the agency’s categorization of an activity as a “revised project” deferentially. In *Hensler*, the airport authority in 1985 prepared a negative declaration for a proposed taxiway extension. Four years later, it prepared another plan which required acquisition of a neighboring property in order to extend the taxiway [233 Cal. App. 3d at 593]. Without discussing the applicable standard of review, the court held the 1989 documents “simply describe a different project,” despite the agency’s argument the proposal made in 1989 was only a revision to the project approved in 1985 [233 Cal. App. 3d at 593–94].

In *Sierra Club v. County of Sonoma* [(1992) 6 Cal. App. 4th 1307, 8 Cal. Rptr. 2d 473], the First District found the “fair argument” test of section 21151 applied to an amendment to a previously reviewed resources management plan, on which an EIR had been prepared. The amendment to the plan proposed to reclassify an area from agricultural to mining uses. In requiring a new EIR, the court explained “section 21166 and its companion section of the Guidelines appear to control only when

the question is whether more than one EIR must be prepared for what is essentially the same project” [6 Cal. App. 4th at 1320], thereby treating the amendment as creating a “new” project subject to the fair argument test.

VI. Recent Cases Highlight the Different Approaches to Determining Whether a Project Is New or Revised, and the Problems with the Current Approach to SEIRs

In *Save Our Neighborhood v. Lishman* [(2006) 140 Cal. App. 4th 1288, 45 Cal. Rptr. 3d 306 (“*Save Our Neighborhood*”)], the Third District treated two very similar proposals as distinct projects and applied section 21151. The first project, proposed in 1997, was a 106-unit motel, restaurant, lounge, gas station, convenience store, carwash, and entrance road, approved after preparation of a MND [140 Cal. App. 4th at 1291]. Seven years later, a new applicant prepared an initial study for a 102-room hotel with convention facilities, gas station with convenience store, carwash, and entrance road [140 Cal. App. 4th at 1291–92]. After local opposition developed, the city prepared an addendum to the 1997 MND [140 Cal. App. 4th at 1292]. The court exercised de novo review of the “threshold question” of “whether we are dealing with a change to a particular project or a new project altogether,” finding that “the totality of the circumstances proved” that it was a new project and thus not subject to the deferential substantial evidence test associated with section 21166 [140 Cal. App. 4th at 1297, 1301]. The court held “the two projects are unrelated, except that they both include hotels and are located on the same land” [140 Cal. App. 4th at 1297].

By contrast, in *Mani Brothers Real Estate Group v. City of Los Angeles* [(2007) 153 Cal. App. 4th 1385, 1397, 64 Cal. Rptr. 3d 79], the Second District used the substantial evidence standard to evaluate the city’s decision not to prepare an SEIR for major project revisions, sharply criticizing the Third District’s use of de novo review in *Save Our Neighborhood* [153 Cal. App. 4th at 1400–1401]. In *Mani Brothers*, an EIR was prepared in 1989 for a 5-building, 2.7 million square foot downtown redevelopment, comprised mainly of office space [153 Cal. App. 4th at 1389]. This project was never built. In 2000, eleven years after the initial EIR, the city prepared an addendum to analyze street alterations [153 Cal. App. 4th at 1389]. A second addendum to the 1989 EIR was prepared in 2005 allowing residential uses [153 Cal. App. 4th at 1391]. A rival developer sued, arguing substantial changes in the project and its circumstances necessitated an SEIR. The 2005 changes increased project size by 18.5 percent to 3.2 million square feet, added 800 residential units, and nearly doubled building heights, although the developer asserted

that traffic impacts were reduced because residences generate less traffic than office space [153 Cal. App. 4th at 1391–92]. Additionally, significant downtown redevelopment, including Staples Center and L.A. Live, had been completed or approved in the intervening 15 years [153 Cal. App. 4th at 1391].

The *Mani Brothers* court distinguished *Save Our Neighborhood* in ruling the standard for requiring an SEIR prepared subsequent to a MND, as in *Save Our Neighborhood*, is different from that which applies to preparation of an SEIR subsequent to an EIR [153 Cal. App. 4th at 1400]. Relying on this distinction contradicts the approach taken by the *Benton* court. The *Mani Brothers* court also factually distinguished the cases, finding that, even though *Save Our Neighborhood* involved the same site and the same mixes of uses, the later project had “different proponents using completely different drawings, materials, and configurations of structures” [153 Cal. App. 4th at 1399]. This distinction seems unconvincing, given the magnitude of the changes at issue in *Mani Brothers*.

The *Mani Brothers* court sharply criticized the *Save Our Neighborhood* decision, declaring “its fundamental analysis is flawed” [153 Cal. App. 4th at 1400]. The second district found that the “novel ‘new project’ test does not provide an objective or useful framework” because “[d]ramatic changes to a project might be viewed by some as transforming the project into a new project, while others may characterize the same drastic changes in a project as resulting in a dramatically modified project” [153 Cal. App. 4th at 1400]. The *Mani Brothers* court also hypothesized that allowing a court to first determine, de novo, if section 21166 even applied to a project “imposes a new analytical factor beyond the framework of CEQA” [153 Cal. App. 4th at 1401].

In *Moss v. County of Humboldt* [(2008) 162 Cal. App. 4th 1041, 76 Cal. Rptr. 3d 428], the First District held that reapproval of an expired tentative map, absent any actual project changes, did not require an SEIR. Citing both *Save Our Neighborhood* and *Lincoln Place Tenants’ Association v. City of Los Angeles* [(2005) 130 Cal. App. 4th 1491, 1503, 31 Cal. Rptr. 3d 353], the *Moss* court agreed the question of what constitutes a project for purposes of CEQA review is a question of law, reviewed de novo by the court. However, the decision also stressed deference to the agency decision in the context of supplemental environmental review, stating “*Mani Brothers*’ criticism [of *Save Our Neighborhood*] . . . strikes us as a bit harsh . . . However, we agree with *Mani Brothers* to the extent its discussion meant to suggest that a court should tread with extraordinary care before reversing a local agency’s determination about the environmental impact of changes to a project” [162 Cal. App. 4th at 1052, fn. 6]. *Moss*, too, was

concerned “about courts drawing their own conclusions about what is essentially a factual question—i.e., whether the effect of changes to a project rendered it so drastically changed as to constitute a ‘new’ project” [162 Cal. App. 4th at 1052]. Despite the discussion of deference to agency factual conclusions, however, the *Moss* court determined that the effect of tentative map expiration on CEQA was subject to de novo review, not the substantial evidence standard [162 Cal. App. 4th at 1053]. Only after completing this de novo threshold determination did the *Moss* court apply the substantial evidence standard to find an SEIR was required for specific water supply issues [162 Cal. App. 4th at 1058, 1067].

As highlighted by *Moss*, both *Save Our Neighborhood* and *Mani Brothers* are problematic for practitioners seeking a predictable application of CEQA’s provisions for supplemental environmental review. The “different” projects in *Save Our Neighborhood* are nearly identical; the “same” project in *Mani Brothers* had undergone wholesale transformation more than fifteen years after the EIR was certified. The two-step approach to application of section 21166 in *Save Our Neighborhood* invites the court to use a conclusory term (i.e., “new project”) to support a particular result; the *Mani Brothers* approach invites use of a conclusory term (i.e., “revised project”) to achieve the opposite result.

As *Moss* correctly points out, the question “what is a project” is reviewed as a matter of law, subject to de novo review by the court. Applying a different standard to the question of “what is a new project,” as done by the *Mani Brothers* court and seemingly endorsed by the *Moss* court, seems incongruous. The *Mani Brothers* court was concerned that a court determination of whether a project is a new project or a revised project would expand judicial power beyond what CEQA allows and “inappropriately undermines the deference due the agency in administrative matters” [*Mani Brothers*, 153 Cal. App. 4th at 1401]. However, whether an agency processes a project as new or revised is not indicative of the project’s impacts on the environment, and, as made clear in *Vineyard* and *Save Tara*, reviewing courts should review procedural issues arising under CEQA de novo.

VII. Requirements for Supplemental Environmental Review in Other Jurisdictions

With California law on SEIRs confusing and often lacking internal consistency, it is useful to look at the approach to the question taken in other jurisdictions. CEQA is modeled after the National Environmental Policy Act [NEPA, 42 U.S.C. § 4321 et seq.], and California

courts often look to NEPA as a guide to interpreting similar provisions in CEQA. [*Wildlife Alive v. Chickering* [(1976) 18 Cal.3d 190, 201, 132 Cal. Rptr. 377]. The regulations implementing NEPA from the Council on Environmental Quality (“CEQ”) are the federal equivalent of the CEQA Guidelines [see 40 C.F.R. § 1500 et. seq.]. The CEQ regulations mandate preparation of a supplement to an Environmental Impact Statement (EIS, the federal equivalent of an EIR) under similar conditions as California requires for preparation of an SEIR under Pub. Res. Code § 21166 [see 40 C.F.R. § 1502.09]. However, the federal standard of review of agency decisions against preparing an SEIS is much less deferential than the substantial evidence standard used in California. Federal courts “should not automatically defer to the agency’s express reliance on an interest in finality without carefully reviewing the record and satisfying themselves that the agency has made a reasoned decision based on its evaluation of the significance . . . or lack of significance . . . of the new information” [*Marsh v. Oregon Natural Resources Council* [(1989) 490 US 360, 378]].

At least fifteen states, including California, have adopted laws modeled after NEPA. Most of these laws include provisions governing the circumstances under which supplemental EIRs or EISs must be prepared. The provisions are generally similar to CEQA, specifying that supplemental review may be needed if the project changes, the circumstances around the project change, or new information comes to light. [See, for example, Washington State’s regulations at WAC 197-11-600, available online at <http://apps.leg.wa.gov/WAC/default.aspx?cite=197-11-600>.]

As the outcome in *Mani Brothers* makes clear, CEQA does not impose time limits on the validity of most EIRs (although CEQA imposes a five year limit on the validity of master EIRs under Pub. Res. Code § 21157.6). For those concerned with the use of “stale” information in an EIR, Massachusetts provides an example of a state program with strict limits on the use of old EIRs. After three years have passed following certification of the EIR, if there has been no substantial work in physically developing the project, a presumption arises that the circumstances surrounding the project have changed, and notification is required, potentially leading to supplemental environmental review [301 C.M.R. 11.10(2), available online at www.mass.gov/envir/mepa]. After five years have lapsed, the presumption of changed circumstances becomes conclusive and the environmental review process must begin again, even if the project remains the same [301 C.M.R. 11.10(3)]. Massachusetts also has very specific regulations for when supplemental review should be required based on changes to the project. The threshold requirements for supplemental review are expressed as percentages of tiered significance thresholds

[see 301 C.M.R. 11.10(6)]. For example, supplemental review is ordinarily not required if a project changes by less than 10 percent in its physical dimensions or generates additional impacts of less than 25 percent of the most restrictive tier of applicable significance thresholds.

VIII. Problems with the California Approach to SEIRs, and Potential Solutions

The use of a 15-year-old EIR in *Mani Brothers* and an eight-year-old EIR in *Santa Theresa* demonstrates that the use of the deferential substantial evidence test allows for use of very old EIRs and/or very substantial changes to projects to proceed with minimal analysis or judicial oversight. Given these real world examples, it is not difficult to imagine situations in which an agency could use the standard of review and Pub. Res. Code § 21166 to effectively shield its decisions on projects with significant environmental impacts from scrutiny. For example, suppose a city prepares a MND for a “big box” retail development on a 10-acre site adjacent to a 100-acre farm. The economy experiences a prolonged downturn, and the development proposal is abandoned. Twenty years later, development pressure increases dramatically, and a new developer proposes to develop a regional mall on the site of the farm. The city wants the tax base, but knows that public opposition will be intense if the plans are widely known. The City Planning Director, in consultation with members of the City Council anxious to avoid any controversy, quietly decides the regional mall on the farm site is just a “revision” to the old “big box” proposal, prepares an addendum to the twenty-year-old MND that includes some environmental analysis, and concludes, with no public input, that no further review is required. This sequence of events would likely withstand judicial scrutiny under the substantial evidence test, assuming the case made it to court. The CEQA statute of limitations would likely slip by quietly without any potentially interested members of the public even becoming aware of the city’s actions.

How could California ensure greater transparency in the outcome and more rigorous oversight of agency decisions regarding SEIRs? California courts could apply the *Vineyard* de novo standard to the clearly procedural decision on whether to prepare an SEIR. The threat of non-deferential court review alone could serve to discourage evasive behavior by agencies. California courts could also reject the approach taken in *Benton*, which allows agencies to evade the “fair argument” test for preparing an EIR through use of a subsequent MND, even if the subsequently proposed project has much greater environmental impacts than the initial proposal.

The Resources Agency could provide more specific guidance in the Guidelines, by developing categories that are more precise than the unhelpful current distinction without a difference between a subsequent EIR and a supplement to an EIR. Public notice could also be required when an agency is proceeding by an Addendum to an EIR.

Legislatively, CEQA could be amended to include clear time limits on the validity of EIRs. While Massachusetts may be unusually strict on EIR time limits, California could borrow the broad approach, and incorporate time limits on the validity of all EIRs (not just master EIRs as is currently the case pursuant to Pub. Res. Code § 21157.6) and shift the burden of persuasion to the agency proposing to forgo an SEIR after the time limits have passed. California could also specify that addition of a new site or transfer of the project to a new site requires starting CEQA review at the beginning, given the likely dramatically different circumstances caused by moving the project elsewhere. California could also encourage agencies to develop “SEIR significance thresholds.” The thresholds for supplemental review could logically be tied to existing significance thresholds, as Massachusetts has done. This new approach would respect the finality of CEQA review, but not at the expense of public participation in what is effectively a new or far different project than the one originally reviewed.

IX. Conclusion

Current law governing the preparation of supplemental environmental reviews under CEQA is confusing, marked by the use of imprecise terminology and conclusory categorizations, and runs against the general trend in CEQA to interpret the statute in a manner that maximizes protection of the environment. Case law involving preparation of SEIRs shows how major changes to projects, or even arguably entirely new projects, can proceed with little public or judicial oversight. This weakens the environmental protection and transparency forcing functions of CEQA. Judicial review of SEIRs has been incongruously deferential in many California courts, both compared to federal law interpreting analogous provisions in NEPA, and to California law interpreting all other procedural aspects of CEQA. Less deferential judicial review, better regulatory guidance, and relatively minor amendments to CEQA itself would largely eliminate the potential for abuse and ensure that SEIRs will not be an inadvertent tool for use of agencies or developers trying to evade CEQA’s mandates.

THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Cases

Consultant Not Liable to Project Applicant for Failure to Complete EIR

Lake Almanor Associates L.P. v. Huffman-Broadway Group Inc.

No. A122563, 1st App. Dist., Div. 5

11/2/09 Daily J. D.A.R. 15526, 2009 Cal. App. LEXIS 1744

October 30, 2009

A consultant hired by the county to prepare an EIR for a development project could not be held liable to the project applicant on theories of breach of contract or negligence based on its failure to timely prepare the EIR.

Facts and Procedure. Plaintiff developer submitted a project application to the county for a proposed 1,392-acre mixed land use development to consist of 1,032 residential units, commercial and open space, a golf course, and other amenities. A complete, revised development application was submitted to the county in April 2005. Under CEQA, the county was required to prepare an EIR regarding the potential significant environmental impacts of the proposed project [Pub. Res. Code § 21151; *Las Lomas Land Co., LLC v. City of Los Angeles* [(2009) 177 Cal. App. 4th 837, 99 Cal. Rptr. 3d 503 (“a public agency must prepare, or cause to be prepared, and certify the completion of an EIR for any project that it proposes to carry out or approve that may have a significant effect on the environment”)]]. Under CEQA, the county was required to establish by ordinance a time limit for completion and certification of an EIR, not to exceed one year from submission of a project applicant’s complete application [Pub. Res. Code § 21151.5; *Sunset Drive Corp. v. City of Redlands* [(1999) 73 Cal. App. 4th 215, 86 Cal. Rptr. 2d 209]].

Because this was an appeal following the sustaining of a demurrer, the court of appeal accepted the factual allegations of the complaint: The county entered into a written contract with defendant to prepare the EIR. The contract stated that the EIR was for plaintiff’s proposed project and

required defendant to provide plaintiff with a copy of the EIR. The county required plaintiff to reimburse it for defendant’s work, and entered into an agreement with plaintiff for that purpose. Defendant was aware that plaintiff was paying the county for respondent’s work. The contract contemplated submission of an administrative draft EIR to the county by November 14, 2005. Defendant failed to meet that deadline and the county sent it a notice of termination in June 2006. Defendant sought more time to perform and delivered to the county a “Preliminary Working Draft Environmental Impact Report.” In September 2006, the county rejected the draft report as unacceptable and sent a second notice of termination to defendant.

Defendant submitted invoices to the county seeking payment for its services and the county demanded reimbursement from plaintiff. Plaintiff also had to reimburse the county for the services of a second consultant to prepare the EIR.

In February 2008, plaintiff filed a second amended complaint against defendant seeking damages for breach of contract (as a third party beneficiary), negligence, and negligent interference with prospective economic advantage. In addition to reimbursement of amounts paid to the county for defendant’s services and other alleged damages, plaintiff sought \$50 million in damages due to loss of a sale of the project property to a third party; the sale fell through because the EIR was not completed on time. Defendant demurred to the complaint and the trial court sustained the demurrer without leave to amend and entered judgment in favor of defendant. Plaintiff appealed, and the court of appeal affirmed.

Complaint Failed to State Cause of Action for Breach of Contract. The court noted that plaintiff’s cause of action for breach of contract rested on a third party beneficiary theory, citing Civ. Code § 1559 (“a contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it”). The court further noted that section 1559 “excludes enforcement of a contract by persons who are only incidentally or remotely benefited by it,” citing *Martinez v. Socoma Companies, Inc.* [(1974) 11 Cal.3d 394, 113 Cal. Rptr. 585]. The court stated that a third party can have enforceable rights under a contract as either a creditor beneficiary or a donee beneficiary, citing *Martinez* and *Souza v. Westlands Water Dist.* [(2006) 135 Cal. App. 4th 879, 38 Cal. Rptr. 3d 78 (“a donee beneficiary is a party to whom a promisee intends to make a gift (i.e., a benefit the promisee had no duty to confer) of a promisor’s performance”)]. The court observed that plaintiff did not contend it was a donee beneficiary; it was clear that the county’s intent in contracting with defendant was to

satisfy the statutory obligation to prepare an EIR, not to make a gift to plaintiff.

The court noted that a “creditor beneficiary is a party to whom a promisee owes a preexisting duty which the promisee intends to discharge by means of a promisor’s performance,” citing *Souza* and *Martinez* (“a person cannot be a creditor beneficiary unless the promisor’s performance of the contract will discharge some form of legal duty owed to the beneficiary by the promisee”). Plaintiff contended that it was a creditor beneficiary under the contract because the county owed it a legal duty to complete the EIR in a timely fashion. The trial court concluded that the county owed plaintiff no such legal duty, relying on *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* [(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1]. The court stated that in *Mission Oaks*, after a project application was denied based on conclusions in a draft EIR prepared by a consultant, the applicant sued the consultant and the county for refund of fees paid to obtain the EIR, which it argued was inaccurate. *Mission Oaks* concluded that the applicant was not a third party creditor beneficiary of the contract with the consultant because the county did not owe the applicant a legal duty to “provide a proper EIR.” The court reasoned: “CEQA confers the duty upon the local lead agency to produce an adequate EIR for dissemination to the public, and the discretion to evaluate the project for the public. These statutory obligations may not be the consideration for a contract or promise, nor may the county bargain away its constitutional duty to regulate development. The county, as lead agency on the project, owes its duty to the public to release a proper EIR. The county owes no duty to assuage the desires of the potential developer.”

The court stated that in support of its holding that the county owed no duty to the developer, *Mission Oaks* cited to section 313 of the Restatement Second of Contracts, which addresses third party beneficiary claims in the context of government contracts. The court noted that section 313(2) provides: “A promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless [¶] (a) the terms of the promise provide for such liability; or [¶] (b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.” The court note that comment a to section 313 provides the following explanation for the rule: “Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a

different intention is manifested. In case of doubt, a promise to do an act for or render a service to the public does not have the effect of a promise to pay consequential damages to individual members of the public unless the conditions of [section 313(2)(b)] are met.”

The court stated that although plaintiff pointed out that the contract lacked language disclaiming a duty to plaintiff, it did not point to terms in the contract providing for defendant’s liability to plaintiff in the event of breach or otherwise demonstrating that plaintiff was an intended beneficiary, citing *Martinez* (applying predecessor to section 313 subd. (2)(a) and concluding that government contracts “manifest no intent that the defendants pay damages to compensate plaintiffs or other members of the public for their nonperformance”); *Zigas v. Superior Court* [(1981) 120 Cal. App. 3d 827, 174 Cal. Rptr. 806 (tenants were intended third party beneficiaries under predecessor to section 313, subd. (2)(a))]; and *County of Santa Clara v. Astra USA, Inc.* [(9th Cir. 2008) 540 F.3d 1094 (although the contract did not include “a provision expressly granting the third party the right to sue,” there was “clear intent” that the third party would be an intended beneficiary)]. The court stated that here, the provisions of the contract referring to plaintiff and requiring that it receive a copy of the EIR were insufficient to demonstrate an intent that defendant would be liable to plaintiff in the event of a breach, citing *Santa Clara*. The court stated that because plaintiff failed to provide reasoned analysis with citations to authority that the terms of the contract manifested an intent that defendant be liable to it for any breach, the argument was waived. The court thus concluded that plaintiff failed to establish a basis for defendant’s liability under section 313, subd. (2)(a).

The court further stated that plaintiff had not established a basis for liability under section 313, subd. (2)(b), which corresponds to the creditor beneficiary situation, because it had not shown that the county was subject to liability for plaintiff’s damages. The court noted that plaintiff sought to distinguish *Mission Oaks* on the ground the applicant’s claims in that case were based on the content of the EIR, rather than the failure of the consultant and county to produce a timely EIR. Plaintiff cited *COAC, Inc. v. Kennedy Engineers* [(1977) 67 Cal. App. 3d 916, 136 Cal. Rptr. 890], which held that an engineering firm hired by a public entity to draft an EIR could be liable to a general contractor for failure to produce the report in a timely fashion. The court noted that in *COAC*, the public entity, a water district, was also the owner of the project. The water district contracted with the general contractor to build a water treatment plant and contracted with the engineering firm to, among other things, prepare an EIR. *COAC* reasoned that the district, as the owner, owed the

contractor an implied contractual duty not to hinder the contractor's performance, which obligated the district to comply with the EIR requirement so that construction could commence. Because it was owed that duty, the contractor became a creditor beneficiary to the district's contract with the engineering firm. The court here stated that *COAC* was distinguishable because the county was not the owner in this case and thus lacked the contractual obligation relied on in *COAC*. The court noted that *Mission Oaks* distinguished *COAC* on the same grounds.

Plaintiff acknowledged the distinction but argued that the county owed it a statutory duty to complete the EIR on a timely basis. Plaintiff relied on *Sunset Drive Corp. v. City of Redlands*, *above*, in which an applicant filed a petition for a writ of mandate directing the city to complete and certify an EIR for a project, because the city had rejected multiple draft EIRs prepared by a consultant and had not taken further steps to complete an EIR. *Sunset* stated, "although an agency does not have a duty to approve any particular proposed draft EIR, it is obligated to complete a satisfactory EIR when a project requires it. It is the failure to perform the latter duty which forms the basis for *Sunset's* damage claim." Plaintiff argued that the same statutory duty supported its third party breach of contract claim.

The court stated that *Sunset* stood for the proposition that an applicant can petition for a writ of mandate to force a public entity to comply with CEQA. The court stated that *Sunset* did not involve a third party breach of contract claim and did not hold that a public entity owes an applicant the type of duty that can support such a claim. Thus, the court stated that contrary to plaintiff's assertions, *Sunset* did not hold that a government entity owes a legal duty to a developer such that a simple failure to complete an EIR on time subjects the government entity to an action for damages by the developer. The court stated that the project applicant in *Sunset* did not seek damages for breach of contract or violation of CEQA, but rather sought damages for deprivation of its federal constitutional rights to due process and equal protection. It stated that *Sunset* indicated that a government entity can be held liable for damages for denial of due process only if the failure to complete the EIR was "malicious, irrational, or arbitrary." *Sunset* rejected the city's contention that it could "maliciously or arbitrarily refuse" to complete an EIR "with impunity." Thus, the court stated that *Sunset* did not confirm the existence of a legal duty sufficient to support plaintiff's third party beneficiary claim.

The court stated that plaintiff failed to establish any other basis to hold the county liable for damages resulting from the untimeliness of the EIR, as relevant to section 313, subd. (2)(b). In particular, the court stated that

plaintiff pointed to nothing in CEQA authorizing an applicant to bring an action against a public entity for failure to complete an EIR on time. The court stated that, to the contrary, CEQA includes no cause of action for damages resulting from violation of its provisions, citing *Hecton v. People ex rel. Dept. of Transportation* [(1976) 58 Cal. App. 3d 653, 130 Cal. Rptr. 230]. The court stated that if a public agency fails to comply with CEQA, the appropriate remedy is a petition for writ of mandate seeking compliance with the law, citing *Sunset*; *Mission Oaks*; and Pub. Res. Code §§ 21168 and 21168.5.

Finally, the court stated that under section 313, subd. (2)(b), it had to consider whether a direct action against defendant would be consistent with the policy of CEQA, which was the law "authorizing the contract" between the county and defendant. The court stated that the Legislature's goal in requiring the preparation of EIRs was to provide the government and public accurate information regarding the significant environmental effects of proposed projects, citing Pub. Res. Code § 21002.1(a) and *Laurel Heights Improvement Assn. v. Regents of University of Cal.* [(1988) 47 Cal.3d 376, 253 Cal. Rptr. 426]. The court stated that lawsuits such as plaintiff's could undermine that goal by compromising the independence and objectivity of environmental consultants.

The court noted that in addition to reimbursement of amounts paid to the county for defendant's services and other alleged damages, plaintiff sought \$50 million in damages due to the loss of a sale of the project property to a third party. The court stated that the exposure to potential claims of such magnitude, and even much smaller claims, could affect the availability of consultants and the fees they charged. The court stated that such exposure would create incentives to complete the report that could undermine the analysis of the relevant environmental issues, creating a conflict between the consultant's duty to the public and its financial self-interest. The court stated that as in *Mission Oaks*, where the challenge was to the contents of the EIR, if suits such as this were permitted, "the independence of the professional experts and the objectivity of their specialized findings and conclusions would be undermined and jeopardized by fear of retaliatory action." Accordingly, the court concluded that a direct action against defendant was not consistent with CEQA. It therefore held that the trial court did not err in sustaining defendant's demurrer as to plaintiff's breach of contract cause of action.

Complaint Failed to State Causes of Action for Negligence. Plaintiff also contended that the trial court erred in sustaining the demurrer to its causes of action for negligence and negligent interference with prospective economic advantage because defendant had a duty to

plaintiff to use due care in completing the draft EIR in a timely fashion. The court stated that the question of tort liability was separate from the question of liability under a third party beneficiary breach of contract theory, although some of the same considerations might be relevant to both issues. The court observed that “the threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion,” citing *Bily v. Arthur Young & Co.* [(1992) 3 Cal.4th 370, 11 Cal. Rptr. 2d 51]. It noted that whether a duty exists is a question of law to be determined by the courts. The court stated that in the absence, as here, of a duty that arises by statute or contract, the court assesses whether the nature of the activity or the relationship of the parties gives rise to a duty, citing *Ratcliff Architects v. Vanir Construction Management, Inc.* [(2001) 88 Cal. App. 4th 595, 106 Cal. Rptr. 2d 1]. It observed that “recognition of a duty to manage business affairs so as to prevent purely economic loss to third parties in their financial transactions is the exception, not the rule, in negligence law” [*Quelimane Co. v. Stewart Title Guaranty Co.* [(1998) 19 Cal.4th 26, 77 Cal. Rptr. 2d 709]], and therefore courts are reluctant to impose duties to prevent purely economic harm to third parties.

The court stated that ultimately, duty is a question of public policy, generally determined by balancing the factors set forth in *Biakanja v. Irving* [(1958) 49 Cal.2d 647, 320 P.2d 16], including: (1) the extent to which the transaction was intended to affect the plaintiff; (2) the foreseeability of harm to the plaintiff; (3) the degree of certainty that the plaintiff suffered injury; (4) the closeness of the connection between the defendant’s conduct and the injury suffered; (5) the moral blame attached to the defendant’s conduct; and (6) the policy of preventing future harm. The court found the analysis of the duty issue in *Mission Oaks* was helpful. It stated that in *Mission Oaks*, the project applicant sued the consultant who prepared the EIR, alleging the EIR was inaccurate. *Mission Oaks* pointed out that the contract for preparation of an EIR was “not intended to affect [the applicant] directly; it was intended to provide the county and the public with the information it needed to assess the proposed project pursuant to CEQA.” *Mission Oaks* also reasoned there was “little degree of certainty and less closeness of connection between the consultants’ conduct” and the applicant’s injury, because the county independently determined whether to approve the project. It noted that the foreseeability factor is due little weight where the harms are economic, albeit foreseeable. The court here stated that all of *Mission Oak*’s reasoning on those factors applied here.

The court stated that with respect to the moral blame attributable to the defendant’s conduct and the policy of

preventing future harm, the relevant considerations on those factors in *Mission Oaks* were not identical to those in the present case, because plaintiff’s suit arose from defendant’s failure to complete a timely draft EIR, not the contents of an EIR. Nevertheless, the court stated that suits such as plaintiff’s still would be likely to compromise the independence and objectivity of environmental consultants by exposing them to substantial liability. The court stated that a consultant would be confronted with a conflict between its duty to the public and its alleged duty to the project applicant, and “courts have refused to impose a duty to protect third parties to a contract for professional services from economic loss where such a duty would subject the professional service provider to a conflict in loyalties,” citing *Ratcliff, above*. The court further stated that the conflict would undermine the Legislature’s goal of obtaining accurate EIRs for proposed projects.

The court concluded that the balance of the factors militated against a conclusion that a consultant owes a duty of care to a project applicant in the timely completion of a draft EIR. The court therefore held that the trial court properly sustained defendant’s demurrer as to plaintiff’s causes of action for negligence and negligent interference with prospective economic advantage.

Commentary by Ron Bass

Fortunately for the integrity of CEQA, the decision reaffirms the concept that the law is designed to benefit the public, not the private applicant whose project is being evaluated in an EIR. Although one certainly cannot condone the failure of a consultant to miss contractual deadlines, this court correctly pointed out that the consultant’s contractual duty is to the lead agency, not to the applicant—even though the applicant may be footing the bill.

In reaching its decision, the court noted that the fundamental objectives of CEQA would be thwarted by allowing an applicant to sue an EIR consultant. The court recognized that the availability of independent consultants is critical to the successful implementation of CEQA. According to the court, the exposure to applicant-initiated lawsuits “would create incentives to complete the report (e.g. EIR) that could undermine the analysis of the relevant environmental issues, creating a conflict between the consultant’s duty to the public and its financial self-interest.” The court further pointed out, citing *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* [(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1], that “the independence of the professional experts and the objectivity of their specialized findings and conclusions would be

undermined and jeopardized by fear of retaliatory action.” The court also pointed out that CEQA itself makes no provision for any cause of action against a public entity for damages resulting from a violation of its provisions.

While the court’s view of CEQA’s purpose and the consultant’s role is reassuring, what, if anything, can a disgruntled applicant do when the EIR preparer takes longer than contractually obligated to prepare the document? As in *Sunset Drive Corp. v. City of Redlands* [(1999) 73 Cal. App. 4th 215, 86 Cal. Rptr. 2d 209], the court pointed out that the applicant could have filed a mandate action against the lead agency for failing to act on its project within statutory deadlines, or could have sued the lead agency for violating its federal constitutional right to due process and equal protection.

Outside of the realm of litigation, these types of contentious situations can best be avoided when a lead agency fosters an open, cooperative CEQA process, but at the same time adheres strictly to CEQA’s requirements and deadlines. While the three-party arrangement for consultant preparation is quite common, how well it works depends greatly on how well the lead agency maintains control of the process. At the risk of being called a Monday morning quarterback, in this case, the lead agency should have never allowed the consultant to submit the EIR in such an untimely fashion. Nor should the applicant have taken such a punitive approach toward the consultant, especially when the lead agency had not yet approved its project, and writ of mandate options were available. While CEQA litigation is sometimes inevitable, it seems that much more could have been done to resolve this situation. Although the public purposes of CEQA were ultimately vindicated by the court, the underlying facts certainly tarnish the environmental review process.

Commentary **by David Sandino**

Pub. Res. Code § 21082.1 provides that a lead agency may contract with environmental consulting firms to prepare CEQA documents (environmental impacts reports, negative declarations, etc.) provided it independently reviews and analyzes the document. Under CEQA Guidelines section 15045(a), a lead agency may charge any project applicant the reasonable costs of preparing a CEQA document.

Using these authorities, rather than preparing environmental documents themselves, lead agencies often contract with environmental firms to help with the preparation of the CEQA document and receive reimbursement of those costs from the project applicant. The lead agency sometimes selects the consulting firm with input from the applicant.

This case addresses the situation when the relationship between the project applicant and the consultant becomes adverse because of the failure to complete the CEQA document in a timely manner. This is the first case to address the relationship between the project applicant and the consulting firm since *Mission Oaks Ranch, Ltd. v. County of Santa Barbara* [(1998) 65 Cal. App. 4th 713, 77 Cal. Rptr. 2d 1]. However, *Mission Oaks Ranch* addressed the situation where the views expressed in the environmental document about the project were contrary to those held by the project application.

The project applicant in this case argued that it should be considered a third-party beneficiary in the contractual relationship between the lead agency and the environmental consulting firms. However, the court rejected all of the project applicant’s contract theories of recovery against the environmental firm as well as tort theories based on negligence. Consistent with *Mission Oaks Ranch*, the court reasoned that such actions undermine the goal of having objective environmental consultants and could create a conflict between the duty of the consultant to the lead agency and its own financial self-interest. With these limits on recovery, from a project applicant’s perspectives, this case will put even more of a premium on the lead agency selecting an environmental firm that will be able to complete the environmental document in a timely, professional manner.

Air Quality District Failed to Support Finding of Categorical Exemption for Emission Offset Rule

California Unions for Reliable Energy v. Mojave Desert Air Quality Management District

No. E046687, 4th App. Dist., Div. 2

11/2/09 Daily J. D.A.R. 15531, 2009 Cal. App. LEXIS 1746

October 30, 2009

The Mojave Desert Air Quality Management District adopted Rule 1406. Rule 1406 authorizing the use of road paving, which reduces airborne dust, to offset increases in airborne dust as well as other forms of particulate air pollution. The district found that the Rule came within the Class 8 categorical exemption from CEQA, which applies to “actions taken by regulatory agencies . . . to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment.” In an action challenging application of the categorical exemption, the court of appeal held that it was not only reasonably foreseeable, but almost undeniable that the adoption of Rule 1406 would result in some road paving. Plaintiffs showed that road paving would tend to have adverse environmental effects while the

district failed to show that these effects would be either de minimis or too speculative to analyze. Accordingly, there was insufficient evidence to support the district's finding that the adoption of Rule 1406 would "assure the maintenance, restoration, enhancement, or protection of the environment."

Facts and Procedure. The Mojave Desert Air Quality Management District is the local agency with the primary responsibility for the development, implementation, monitoring, and enforcement of air pollution control strategies for most of the Mojave Desert Air Basin [Health & Safety Code § 41211; 17 Cal. Code. Reg. § 60109]. The Legislature intended the District "to successfully develop and implement a comprehensive program for the attainment and maintenance of state and federal ambient air quality standards" [Health & Safety Code § 41200(d)]. To that end, the district has the power to make rules that become part of the state implementation plan [Health & Safety Code § 41230].

Particulate matter consisting of particles that are 10 micrometers or less in diameter (PM10) is considered an air pollutant [40 C.F.R. § 50.6(c)]. PM10 can be further subclassified into fine particles, which are 2.5 micrometers or less in diameter (PM2.5) [40 C.F.R. part 50, App. L] and coarse particles, which are between 10 and 2.5 micrometers in diameter (PM10-2.5) [40 C.F.R. part 50, App. O]. Parts of the district have been designated as nonattainment areas for PM10 [40 C.F.R. § 81.305; 67 Fed. Reg. 50805, 59005; 17 Cal. Code. Reg. § 60205]. However, the district does not include any nonattainment areas for PM2.5 [40 C.F.R. § 81.305; 17 Cal. Code. Reg. § 60210].

In 2007, the district adopted Rule 1406, allowing the use of road paving, which reduces airborne dust, to offset increases in airborne dust as well as other forms of particulate air pollution. The district's jurisdiction includes approximately 5,000 miles of unpaved roads. "Traditional" offset methods include shutting down an existing facility or controlling the emissions from it. The district identified road paving as an acceptable "non-traditional" method of offsetting PM10 emissions. Rule 1406 was derived from a similar rule adopted in Maricopa County, Arizona. Its purpose was to ensure that PM10 offsets for road paving met federal requirements that all offsets be "real," "quantifiable," "permanent," "enforceable" and "surplus" [42 U.S.C. § 7503(a); 40 C.F.R. Part 51, App. S, § IV(C)(3)(i)(1)].

Rule 1406 provided that paving offsets "may be used as offsets in accordance with" other district rules governing new source review. It set forth two mathematical formulas for determining the PM10 emissions from paved and unpaved roads, respectively, in units of pounds per vehicle mile traveled. The rule provided that "the [PM10] emission reductions associated with paving an unpaved [road] shall be calculated as the difference . . .

between the emissions from the road in the unpaved condition and the emissions from the road in the paved condition." The resulting reduction in PM10 emissions could be used to offset an increase in PM10 emissions on a one-to-one basis.

Rule 1406 also set forth procedures for approving or denying applications for paving offsets. It provided that "after the [district] has determined to issue the [paving offsets] the [district] shall submit the proposed [paving offsets] for public notice and comment. . . ." The rule further provided that "upon the expiration of the public comment period; after review of comments accepted, if any; and upon payment of the appropriate analysis fee, if any; the [district] shall issue the [paving offsets]. . . ."

A staff report acknowledged that the adoption of Rule 1406 was a "project" within the meaning of CEQA. It stated, however: "The potential environmental impacts of compliance with the adoption of proposed Rule 1406 are positive to the environment, as proposed Rule 1406 will encourage additional road paving with commensurate reduction in particulate emissions from unpaved road dust entrainment." The report also stated: "The adoption of proposed Rule 1406 is exempt from CEQA review because it will not create any adverse impacts on the environment. Because there is no potential that the adoption might cause the release of additional air contaminants or create any adverse environmental impacts, a Class 8 categorical exemption [14 Cal. Code Reg. § 15308] applies." A Class 8 exemption applies to "actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption."

Plaintiffs submitted comments on the staff report, as well as in-depth analyses by two qualified environmental experts. The issues raised by plaintiffs in their comments that were at issue on appeal were (1) the differences between combustion-related PM10, such as that emitted from power plants, and road dust PM10; (2) the effects of road paving on animals and plants, including protected species; and (3) growth-inducing effects. The district's response stated: "There will be no increase in any particulate emissions due to the proposed rule." It also stated, "It is the District's reasonable judgment that detailed environmental review of potential, speculative impacts from paving of particular roads which might occur at some point in the future is unable to be performed due to the highly speculative and unknown nature of any potential paving projects which could be used to generate

[offsets] pursuant to this Rule. . . . When and if any application for [offsets] is submitted the environmental impacts of such should be assessed by the agency accepting the paving of the road.” The district subsequently adopted Rule 1406 and found that the Class 8 exemption applied.

Plaintiffs filed a petition for writ of mandate pursuant to CEQA challenging the adoption of the Rule. The trial court denied the petition, ruling that substantial evidence supported the district’s determination that the exemption applied. The trial court stated, “Rule 1406 is [a] component of new source review of any new or modified stationary sources of air pollutants and is intended to assist the district in bringing the non-attainment area into attainment with national air pollution standards. As such, it will enhance or protect the environment. It does not relax standards or allow environmental degradation. Indeed, it does not permit any activity that would harm or degrade the environment. Contrary to petitioners’ argument, the rule does not permit the paving of any road or the using of any offset . . . : the rule simply sets forth a protocol for calculating such an offset if one is sought. Whether the use of such offsets in connection with a particular project is appropriate will be part of the environmental analysis of that project. Nothing in the rule entitles a future applicant to use such offsets.” Plaintiffs appealed from the judgment for defendant. The court of appeal reversed with directions to the trial court to grant the petition and to issue a writ of mandate commanding the district to set aside (1) its adoption of Rule 1406 and (2) its finding that the adoption of Rule 1406 was within the Class 8 categorical exemption.

CEQA Review of Rulemaking Actions. The court noted that CEQA and the CEQA Guidelines establish a three-tier process to ensure that public agencies inform their decisions with environmental considerations, citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com’n* [(2007) 41 Cal.4th 372, 60 Cal. Rptr. 3d 247]. The first tier is jurisdictional, requiring that an agency conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a “project” is not subject to CEQA. The second tier concerns determining the applicability of exemptions from CEQA review. The third tier applies if the agency determines that substantial evidence exists that an aspect of the project may cause a significant effect on the environment. In that event, the agency must ensure that a full environmental impact report is prepared on the proposed project.

The court observed that the adoption of a rule or regulation can be a project subject to CEQA, citing *Wildlife Alive v. Chickering* [(1976) 18 Cal.3d 190, 132 Cal. Rptr. 377] and *Plastic Pipe & Fittings Assn. v. California*

Building Standards Com. [(2004) 124 Cal. App. 4th 1390, 22 Cal. Rptr. 3d 393]. It quoted 2 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed. 2009) § 20.43: “Many agencies take the position that rulemaking actions are [exempt under] CEQA, relying either on the exemption from CEQA that applies when it is certain an activity will not have a significant environmental impact, or the categorical exemptions for actions taken to protect natural resources] or to protect the environment.” “Rulemaking proceedings cannot be found exempt, however, when the rule has the effect of weakening environmental standards. [¶] [Even a] new regulation that strengthens some environmental requirements may not be entitled to an exemption if the new requirements could result in other potentially significant effects.”

The court cited as an example *Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* [(1992) 9 Cal. App. 4th 644, 11 Cal. Rptr. 2d 850, disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* [(1995) 9 Cal.4th 559, 38 Cal. Rptr. 2d 139]], in which an air quality management district adopted regulations that required new control measures for the emission of volatile organic compounds (VOCs) from paint and other “architectural coatings.” The plaintiffs presented evidence that the new regulations required lower quality products. As a result, more product would be used, which would lead to a net increase in VOC emissions. The district took the position that its adoption of the regulations was categorically exempt, including under the Class 8 exemption. It argued that the regulations constituted more stringent standards for VOC and thus could not be said to have created an adverse change. The court of appeal in *Dunn-Edwards* rejected the exemption claim, stating, “The only evidence in rebuttal to that presented by plaintiffs is a . . . staff response . . . that . . . concludes: ‘The staff disagrees with the assertion that implementation of the [suggested control measures] will result in an emissions increase due to increased thinning, more frequent recoating and increased incidence of job failures. Thus, the staff disagrees with the contention . . . that implementation will have adverse environmental impacts.’ This conclusion is based on the fact there was no supporting data for plaintiffs’ claims. Thus, rejection of plaintiffs’ claims is predicated on lack of the very information which would be provided by an EIR. Since the staff likewise was unable to produce evidence of no adverse impact, the District cannot say with certainty ‘there is no possibility that the activity in question may have a significant effect on the environment.’ ”

Insufficient Evidence to Support District’s Finding that Adoption of Rule was Within Class 8 Exemption. The court stated that it ordinarily reviews a categorical exemption finding under the substantial evidence standard,

citing *Great Oaks Water Co. v. Santa Clara Valley Water Dist.* [(2009) 170 Cal. App. 4th 956, 88 Cal. Rptr. 3d 506]. The court stated, however, that the district's exemption claim was based not so much on evidence as on logic. The court stated that if that logic was flawed, or if it was contrary to the evidence, the claim had to fail. The court noted that the district reasoned, in part, that "Rule 1406 [is] positive to the environment, as [it] will encourage additional road paving with commensurate reduction in particulate emissions from unpaved road dust entrainment." The court stated that this overlooked the fact that Rule 1406 merely provided for road paving as an offset for new, increased PM10 emissions, and did so on a one-to-one ratio. Thus, the court stated that even assuming that (1) road dust was environmentally indistinguishable from other PM10 and (2) road paving itself had no deleterious environmental effects, the net effect was, at best, a push, and if either of those assumptions was false, the net effect would be negative.

The court stated that the district also reasoned that Rule 1406 permitted applicants to seek offsets for road paving, but did not require them to do so; if and when an applicant sought such offsets, the application would be subject to further environmental review. It noted that in response to plaintiffs' comments, the district added that environmental review at that point would be unduly "speculative." The court stated that the district's argument flowed from its narrow view of the relevant project as strictly limited to the adoption of Rule 1406. The court noted, however, that the term "project" means the whole of an action which has a potential for physical impact on the environment, and refers to the underlying activity and not the governmental approval process, citing *Orinda Assn. v. Board of Supervisors* [(1986) 182 Cal. App. 3d 1145, 227 Cal. Rptr. 688]. The court stated that in this case, the underlying activity was road paving (when performed by applicants for the purpose of obtaining the district's approval of PM10 offsets in the process of new source review). It stated that the approval of Rule 1406 was the first step in a process of obtaining governmental approval for such road paving.

The court quoted 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, § 6.31: "Under CEQA's definition of a project, although a project may go through several approval stages, the environmental review accompanying the first discretionary approval must evaluate the impacts of the ultimate development authorized by that approval. This prevents agencies from chopping a large project into little ones, each with a minimal impact on the environment, to avoid full environmental disclosure. . . . It is irrelevant that the development may not receive all necessary entitlements or may not be built. Piecemeal environmental review that ignores the

environmental impacts of the end result is not permitted." Further, "The scope of review under CEQA is not confined to immediate effects but extends to reasonably foreseeable indirect physical changes to the environment. An agency action is not exempt from CEQA simply because it will not have an immediate or direct effect on the environment. CEQA applies if it is reasonably foreseeable that environmental impacts will ultimately result" [1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act, § 4.20].

The court also cited *Bozung v. Local Agency Formation Com.* [(1975) 13 Cal.3d 263, 118 Cal. Rptr. 249], in which the Supreme Court defined the issue before it as "whether [CEQA] applies to the approval of annexation proposals by a Local Agency Formation Commission (LAFCO), where property development is intended to follow the annexation approval and annexation." In *Bozung*, the City of Camarillo and a private landowner had petitioned the LAFCO to allow Camarillo to annex 677 acres of the landowner's land. The Supreme Court observed, "Vital to our disposition of this case is that [the landowner's] application stated that the land was presently used for agriculture and would be used 'for residential, commercial and recreational uses,' and that such development was 'anticipated . . . in the near future.'" It held that approval of the annexation was a "project" for purposes of CEQA. The Court disagreed with the argument "that such an approval is merely permissive and does not compel the city to annex." The Court stated that it was "an activity directly undertaken by a public agency. [Also,] . . . it involves the issuance . . . of an entitlement for use. That, in theory, the city eventually may not use the entitlement by not annexing, does not retroactively turn a project into a nonproject."

Bozung further held that an EIR was required because the "'project' was one 'which may have a significant effect on the environment.'" It rejected "the notion that the project itself must directly have such an effect." "The impetus for the . . . annexation is [the landowner's] desire to subdivide 677 acres of agricultural land, a project apparently destined to go nowhere in the near future as long as the ranch remains under county jurisdiction. The . . . application to LAFCO shows that this agricultural land is proposed to be used for 'residential, commercial and recreational' purposes. Planning was completed, preliminary conferences with city agencies had progressed 'sufficiently' and development in the near future was anticipated. In answer to the question whether the proposed annexation would result in urban growth, the city answered: 'Urban growth will take place in designated areas and only within the annexation.' [¶] It therefore seems idle to argue that the particular project here involved may not culminate in physical change to the environment."

The court also cited *Plastic Pipe & Fittings Assn. v. California Building Standards Com.*, above, in which the California Building Standards Commission determined that the adoption of regulations allowing the use of cross-linked polyethylene (PEX) pipes required environmental review under CEQA. The Plastic Pipe and Fittings Association (PPFA) challenged this position. The court of appeal agreed with the Commission, stating: “PPFA contends the enactment of regulations allowing the use of PEX is not a project because the causal link between the enactment of regulations and a physical change in the environment is too remote. PPFA argues that PEX is only one of several materials available for plumbing uses and that at this time there is no certainty that PEX will be used in any particular work of construction. A project, however, includes an activity that ‘may cause . . . a reasonably foreseeable indirect physical change in the environment.’ Thus, an activity need not cause an immediate environmental impact to be considered a project.”

The district contended that in *Plastic Pipe & Fittings Assn.*, the Commission had already concluded that the regulations could have a significant environmental impact and thus the case merely stood for the proposition that a court must defer to an agency’s findings if they are supported by substantial evidence. The court disagreed. It stated that *Plastic Pipe & Fittings Assn.* held that the adoption of the regulations constituted a project as a matter of law: “whether an activity constitutes a project under CEQA is a question of law that can be decided de novo based on the undisputed evidence in the record.” The court further stated that here, the district determined that Rule 1406 could not have any adverse environmental impacts as a matter of logic, not evidence. The court stated that *Plastic Pipe* refuted the district’s reasoning.

The court further stated that although the district acknowledged that its adoption of Rule 1406 was a “project,” it cut short its consideration of the project’s environmental effects by concluding that the causal link between the adoption of the rule and a physical change in the environment was too remote. The court stated that this was inconsistent with the holding in *Plastic Pipe*.

Rule 1406 Not Permissive. The court next stated that under *Bozung*, it had to reject the district’s argument that Rule 1406 was merely permissive. The court stated that under *Bozung*, the focus must be not on the project alone, but rather on the project’s reasonably foreseeable direct and indirect physical effects. The court stated that while the adoption of Rule 1406 did not cause any road paving by itself, it encouraged third parties to pave roads. The court stated that it was reasonably foreseeable that, if the district allowed applicants to obtain PM10 offsets

by paving roads, at least some applicants would do so—otherwise, why adopt the rule?

No Evidence that Impacts from Future Road Paving Were “Speculative.” The district argued that *Bozung* was not controlling because the annexation in that case was “driven by a developer’s specific project and therefore sufficiently definite to require an EIR,” whereas here, any future road paving was “speculative.” The court stated, however, that as the Supreme Court itself defined the issue in *Bozung*, what was crucial was merely that further property development was “intended.” The court stated that the fact that, in *Bozung*, the evidence of that intent was strong did not mean that lesser evidence would not suffice.

The court stated that here, the district intended that at least some actual road paving would occur. The court stated that the administrative record showed that at the same time the district was considering Rule 1406, the City of Victorville was proposing to build a power plant called the Victorville 2 Hybrid Power Project. Victorville proposed to offset the resulting increased PM10 by paving 1.37 miles of road. The court observed that Victorville had been “working closely” with the district in the development of Rule 1406, and that the district had even drawn up a list of roads within its jurisdiction that were suitable for paving.

The court stated that the administrative record contained no evidence (as opposed to the district’s bare assertion) that the environmental effects of the adoption of Rule 1406 were speculative. The court stated that plaintiffs’ comments were at least some evidence that the quality of those effects would in fact be adverse. The court stated that plaintiffs showed that trading a pound of PM10 from road dust for a pound of PM10 from combustion would mean that the resulting PM10 would stay in the air longer, spread more widely, and be more likely to cause disease. The court further stated that the very act of road paving would produce still more PM10—mostly made up of PM2.5—while also having adverse biological and growth-inducing effects.

The court stated that the only thing that was even arguably speculative about these effects was their quantity. It stated that plaintiffs’ evidence did not necessarily require a finding that these adverse environmental effects would be significant. The court observed, for example, that there was no evidence of how many third parties were likely to apply to pave how many miles of roads, and that it was unclear how many miles of road paving were likely to kill how many burrowing owls, a state and federal species of concern.

District Failed to Meet Burden of Establishing that Class 8 Exemption Applied. The court stated that nevertheless, the district found that a Class 8 exemption applied. The court stated that this necessarily meant that the adoption of Rule 1406 would “assure the maintenance, restoration, enhancement, or protection of the environment” [CEQA Guidelines section 15308]. The court stated that the district had the burden of proof, i.e., there had to be substantial evidence to support this categorical exemption finding. The court stated that in the absence of evidence that the negative environmental effects of Rule 1406 would not be significant, the exemption finding could not be sustained.

The court stated that here, as in *Dunn-Edwards*, “rejection of plaintiffs’ claims is predicated on lack of the very information which would be provided by an EIR. Since the staff likewise was unable to produce evidence of no adverse impact, the District cannot say with certainty ‘there is no possibility that the activity in question may have a significant effect on the environment.’ ”

The district argued that *Dunn-Edwards* was distinguishable because here, there would be further environmental review when individual applicants sought paving offsets. The court stated that nothing in *Dunn-Edwards* suggested that the outcome there would have been different if there had been a subsequent opportunity for environmental review. The court further stated that nothing in the definition of a Class 8 categorical exemption turns on whether there will be a subsequent opportunity for environmental review.

The district also argued that environmental review at this point would be premature and hence unduly speculative. The court stated that this argument flew in the face of the district’s actual determination that the adoption of Rule 1406 would have beneficial environmental effects, and that there was no possibility that it would have adverse environmental effects.

The court observed that “choosing the precise time for CEQA compliance involves a balancing of competing factors. EIRs and negative declarations should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment” [CEQA Guidelines section 15004(b)]. “To implement the above principles, public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of CEQA compliance. For example, agencies shall not: . . . take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives

or mitigation measures that would ordinarily be part of CEQA review of that public project” [CEQA Guidelines section 15004(b)(2)(B)]. “Where an individual project is a necessary precedent for action on a larger project . . . with significant environmental effect, an EIR must address itself to the scope of the larger project” [CEQA Guidelines section 15165].

The court stated that at a minimum, the district committed itself to allowing paving offsets pursuant to the procedure and the formulas set forth in Rule 1406. Rule 1406 provided that: “The [district] shall determine whether to issue or deny [paving offsets] in compliance with [specified] standards. . . .” The court stated that although the rule made the issuance of a paving offset subject to a public comment period, it also provided that “upon the expiration of the public comment period; after review of comments accepted, if any; and upon payment of the appropriate analysis fee, if any; the [district] shall issue the [paving offsets]. . . .” (Italics added.) The court stated that it did not appear that the district could refuse to issue a paving offset on the ground that the formulas in Rule 1406 failed to adequately account for the environmental effects of road paving.

Thus, the court stated that by adopting Rule 1406, the district lost the opportunity to consider possible alternatives and mitigation measures. The court gave as an example a situation where an applicant sought to build a new power plant, using paving offsets, and a challenger argued that there had to be environmental review of the proposed offsets, because they tended to increase PM_{2.5}, or because the very activity of road paving would have adverse environmental impacts. The court stated that the district would be able to respond that this was, in effect, a CEQA challenge to Rule 1406, and that the statute of limitations had run on any such challenge. The court cited *Temecula Band of Luiseño Mission Indians v. Rancho Cal. Water Dist.* [(1996) 43 Cal. App.4th 425, 50 Cal. Rptr. 2d 769 (where statute of limitations had run on challenge to previous project, review of modified project was limited to its incremental effects)].

Commentary by Al Herson

This case presents an interesting interpretation of CEQA’s Class 8 categorical exemption for actions taken by regulatory agencies for actions that assure the maintenance, restoration, enhancement, or protection of the environment. The manner in which the court rejected the district’s exemption determination also has implications for future offset programs for greenhouse gas emissions (GHGs).

The court limited its analysis to whether Rule 106 fell within the definition of the Class 8 exemption, and found that it did not because there was insufficient evidence to support the district's finding that Rule 1406 would "assure" environmental protection. It therefore did not need to examine whether an exception to the exemption would apply (reasonable possibility of significant impact due to unusual circumstances), which could have provided a different basis for rejecting the exemption.

Plaintiffs produced evidence that application of Rule 1406 could cause significant adverse impacts, even though the Rule established a 1:1 offset ratio. They argued that the particulates emitted by stationary sources had worse environmental impacts than the particulates that would no longer be emitted from roadless areas. They also argued that road paving activities could have direct adverse environmental impacts. The administrative record contained no evidence supporting the district's contention that these effects were speculative.

This case has interesting implications for CEQA analysis of GHG offset programs. Adoption and project-specific implementation of these programs will be vulnerable to a similar attack: a GHG offset program could cause significant environmental effects if offset projects are not effective in compensating for 100 percent of a project's GHG emissions increases. In fact, the Center for Biological Diversity on November 9, 2009, challenged the Air Resources Board's adoption of an offset protocol for forest projects as violating CEQA, using the California Unions for Reliable Energy case as its primary basis (see www.biologicaldiversity.org/news/press_releases/2009/clearcut-carbon-credits-11-10-2009.html, accessed November 11, 2009).

♦ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE, §§ 21.05 (Projects Subject to CEQA), 21.06[7] (Categorical Exemptions from CEQA).

Enacted Legislation

The following bill was chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 599, SB 605—Exemption—Biogas Pipeline

Adds Pub. Res. Code § 21080.23.5

CEQA provides exemptions from its requirements for specified projects, including for a project that consists of

the inspection, maintenance, repair, restoration, reconditioning, relocation, replacement, or removal of an existing pipeline, if specified conditions are met. This bill provides that until January 1, 2013, for purposes of that exemption, "pipeline" also means a pipeline located in Fresno, Kern, Kings, or Tulare County, that is used to transport biogas, as defined, and that meets the existing requirements for the exemption and all local, state, and federal laws.

WATER QUALITY CONTROL

Cases

County Had Mandatory Duty to Review Drinking Water Monitoring Reports

Guzman v. County of Monterey

No. H030647, 6th App. Dist.

178 Cal. App. 4th 983, 2009 Cal. App. LEXIS 1725

October 28, 2009

On remand from the Supreme Court, the court of appeal held that 22 Cal. Code Reg. § 64256(e) imposed on the county an express mandatory duty to review water monitoring reports submitted by a water system operator, which showed the water was contaminated, and that the complaint in this case adequately alleged breach of this duty.

Facts and Procedure. This matter was before the court of appeal on remand from the California Supreme Court. Plaintiffs were residents of Jensen Camp Mobile Home Park located in Monterey County. Plaintiffs alleged that Jensen Camp water was contaminated with dangerously high levels of naturally occurring fluoride since at least 1995 but that they were not informed of the contamination until 2003. Plaintiffs sued Jensen Camp's owner and water system operator (Pinch). Plaintiffs also sued the county. Plaintiff's third cause of action alleged that the county was liable under Gov. Code § 815.6 for breaching mandatory duties imposed by the California Safe Drinking Water Act [Health & Safety Code § 116270 et seq.] and its implementing regulations. Plaintiffs pointed out that the regulations required the county to have reviewed the reports Pinch submitted between 1995 and 2002, all of which showed that the water was contaminated, and to have reported the violations to the State Department of

Health Services (DHS). According to plaintiffs, these duties implied the further duty to direct Pinch to notify them of the contamination.

Under Health & Safety Code § 116325, DHS is “responsible for ensuring that all public water systems are operated in compliance with [the California Safe Drinking Water Act].” As permitted by Health & Safety Code § 116330, DHS delegated its primary responsibility for administration and enforcement of the act to the county as the “local primacy agency.” Thus, the county was responsible for ensuring that the Jensen Camp system was operated in compliance with the law. Among the applicable laws were the regulations issued by the DHS that set maximum contaminant level (MCL) for many substances found in drinking water. Water system operators were required to monitor their water and report the results to county. Whenever a test revealed contaminants in excess of the specified MCL, monitoring and reporting requirements were intensified. At all pertinent times, the MCL for fluoride was never more than 2.4 mg/L. According to plaintiffs, water containing fluoride in excess of the established MCL poses a risk of injury to persons drinking it.

Plaintiffs’ third amended complaint alleged that Pinch was not a knowledgeable water system operator and that he depended on the county for direction and advice concerning operation of the Jensen Camp water system. Pinch submitted a report to the county in November 1995 showing the level of fluoride in the Jensen Camp water to be 7.6 mg/L. Pinch submitted another report in 1999 showing the fluoride level to be 8.5 mg/L. Around 2001, Pinch submitted one or more consumer confidence reports to county, which reflected the fluoride levels detected in 1995 and 1999. Finally, in 2002, Pinch reported a fluoride level of 5.8 mg/L.

Although the reports Pinch submitted between 1995 and 2002 showed that the Jensen Camp water contained levels of fluoride that exceeded the MCL’s specified by the regulations, prior to 2002, county employees did not review those reports and did not direct Pinch to do any followup monitoring other than at routine three-year intervals. Further, county did not ensure that Pinch delivered the consumer confidence reports to his customers, did not otherwise direct Pinch to notify his customers that their drinking water was unsafe, and did not report his violations to DHS. It was not until April 2003 that the county imposed a compliance order under which Pinch acknowledged the contamination and agreed to make repairs to the water system. Plaintiffs did not learn of the contamination until after plaintiffs purchased Jensen Camp from Pinch in August 2003.

The third and fourth causes of action in plaintiffs’ third amended complaint were directed against the county. The third cause of action was for negligence under Gov. Code § 815.6, and the fourth cause of action alleged negligence under a special-relationship theory. Plaintiffs alleged that, due to the county’s negligence, they unknowingly consumed contaminated drinking water from at least November 1995, “resulting in pain and suffering and in injuries to their bodies and nervous systems, skeletal structures and other injuries not yet identified.”

The trial court sustained the county’s demurrer to both causes of action without leave to amend. It sustained the county’s demurrer to the third cause of action on the ground Gov. Code § 815.6 did not impose any actionable mandatory duty. The court of appeal reversed the judgment, agreeing with plaintiffs that the regulations imposed an implied mandatory duty to direct Pinch to alert his customers to the elevated fluoride level. The Supreme Court reversed but limited its holding to rejecting the existence of an implied duty “to instruct a water system to notify consumers of water contamination” [*Guzman v. County of Monterey*] [(2009) 46 Cal.4th 887, 95 Cal. Rptr. 3d 183, 2009 CELR 386]. The Supreme Court remanded the case, directing the court of appeal to consider whether plaintiffs had alleged any express mandatory duties that would, in and of themselves, give rise to an action under section 815.6.

On remand, the court of appeal concluded that 22 Cal. Code. Reg. § 64256(e) imposed upon the county the express mandatory duty to undertake a monthly review of all water quality monitoring data submitted to it in order to detect deviations from specific water quality standards. It further concluded that this duty was designed to protect water consumers like plaintiffs from the type of harm they claimed to have suffered. The court concluded that plaintiffs had adequately alleged a cause of action based upon the county’s breach of that duty and there was no applicable immunity. Accordingly, the court reversed the judgment and instructed the trial court to enter a new order overruling the county’s demurrer to the third cause of action.

Government Tort Liability. The court observed that public entities such as the county are not liable in tort except as provided by statute, citing Gov. Code § 810 et seq. and *Guzman, above*. One such statute is Gov. Code § 815.6, which provides: “Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty.” The court stated that there are three

elements to a cause of action under section 815.6, citing *Guzman*: First, the enactment at issue must be obligatory, not merely discretionary or permissive in its directions to the public entity. Typically, an enactment imposing a mandatory duty also includes specific rules and guidelines for implementation. Second, the duty imposed must be designed to protect against the particular kind of injury the plaintiff suffered. “We examine the ‘language, function and apparent purpose’ of each cited enactment ‘to determine if any or each creates a mandatory duty designed to protect against’ the injury allegedly suffered by [the] plaintiff” . The requirement is not satisfied if the enactment merely confers some incidental benefit upon the class to which the plaintiff belongs. The third and final requirement is that the breach of the duty must have been a proximate cause of the plaintiff’s injury.

Mandatory Duty to Review Water Quality Reports.

The court stated that particularly pertinent here were 22 Cal. Code. Reg. §§ 64431 and 64432, which are part of division 4, chapter 15. Those sections contain the MCLs for inorganic chemicals, including fluoride, and the water system’s monitoring and reporting requirements. The court stated that the gist of plaintiffs’ claim was found in 22 Cal. Code. Reg. §§ 64256 through 64258, which pertain to the responsibilities of the local primacy agency. Section 64256 requires the local primacy agency to inform the water system operator of its monitoring and reporting requirements, to establish a system for review of all water quality data submitted by the water system operators, and to review such data monthly. Section 64257 requires the agency to report to the DHS monthly any water systems in violation of the monitoring or reporting requirements and to submit monthly compliance reports listing any water system that is in violation of, among other things, the standards set by Chapter 15. Section 64258(a) requires the agency to “take enforcement actions as necessary to assure that all small water systems under [its] jurisdiction . . . are in compliance with [Chapter 15 and other specified regulations].”

In their third amended complaint, plaintiffs cited sections 64256 and 64257 as bases for their negligence claim against County. In their supplemental brief on remand, plaintiffs argued that those sections imposed upon the county an express mandatory duty to report Pinch’s various violations to the DHS. Plaintiffs argued generally that under section 64256(e) and section 64257(a), the county had a mandatory duty “to report Jensen Camp’s ongoing water quality, monitoring and testing, notification and reporting violations to [DHS],” the breach of which was a proximate cause of plaintiffs’ injuries because “both the County and state had mandatory enforcement duties which, even if not actionable themselves . . . required the County and state to respond to

violations such as those at issue in this case.” The court stated that plaintiffs’ argument incorporated what it viewed as the central duty, which was the duty to conduct a regular monthly review of all water quality monitoring data submitted.

The court cited section 64256(e): “A system shall be established by the local primacy agency to assure that the water quality monitoring data submitted by the small water systems is routinely reviewed for compliance with the requirements of Title 22, Division 4, Chapters 15, 17, and 17.5 of the California Code of Regulations. The monitoring reports shall be reviewed each month for each small water system and the data entered into the data management system at least monthly.” It stated that although the first half of section 64256(e) gave the county discretion to devise an effective system for reviewing water quality monitoring data, the second half imposed a particular duty—the review of water quality monitoring data. The court stated that it also contained an implementing guideline—review had to be conducted at least monthly.

The court stated that the verb “review” meant that the county had to read the water quality data submitted to determine if they reflected any deviation from the applicable standards. The court stated that this was clear from the plain language of the statute—the data were to be “reviewed for compliance” with Chapter 15 and other specified regulations. The court stated that chapter 15 included section 64431, which set the MCL for fluoride, and section 64432, which contained the water system’s monitoring and reporting requirements. It stated that the only way that the county could know whether the Jensen Camp water met the quality standards or whether Pinch was in compliance with his monitoring and reporting requirements was to examine the water quality data it received from him.

The court acknowledged that if the county had recognized the excessive fluoride reflected in the data submitted by Pinch, it could have responded in any number of other ways, citing *Guzman*. The court stated that since its choice of enforcement actions was discretionary, the county’s enforcement duty could not form the basis for liability under section 815.6, citing *Guzman*. The court further stated that the requirement that the county report violations was not sufficiently particular to be deemed a mandatory duty as there might be questions as to when a system was actually “in violation.” The court questioned, for example, whether the county was required to report the Jensen Camp system on the first notice of excess fluoride in 1995, or whether Jensen Camp would have been in violation only if followup testing confirmed the results of the 1995 test, citing *In re Groundwater Cases* [(2007) 154 Cal. App. 4th 659, 64 Cal. Rptr. 3d 827 (isolated exceedances of

MCLs are not “violations” of drinking water standards for purpose of water supplier liability)]. The court stated that the parties did not address this question nor did the court find it necessary to do so. It stated that the point was that in order to determine whether any enforcement action or report was required, the county had to review the water quality data it received. There was no discretion involved in deciding how often to conduct a review; it was required to review the data “each month.” Nor was there any discretion involved in deciding whether the water quality met the regulatory standards. The county only had to compare the data to the standards listed in the regulations. The court concluded that, given the very clear regulatory standards for contaminants and the particular duty prescribed by section 64256(e), it would not be unfair or against public policy to impose a mandatory duty on a public entity to review the water quality data it received at least monthly to determine whether the water met the regulatory standards.

The county argued that it was undisputed that it never received any of the notices Pinch was required to issue. The court pointed out that in an appeal following a demurrer sustained it assumed the allegations of the complaint to be true. The operative complaint alleged that the county received at least four water quality reports from Pinch between 1995 and 2002, each of which showed that the level of fluoride in the Jensen Camp water exceeded the MCL set by section 64431 but that the county never reviewed them. The court stated that such review was a particular, nondiscretionary obligation imposed by section 64256(e).

Persons Protected by the Obligation to Review. The court next considered whether the county’s failure to review the data could in and of itself form the basis for liability under section 815.6, that is, was this duty designed to protect against the kind of injury plaintiffs were alleged to have suffered and was its breach a proximate cause of their injuries.

The court stated that the core duty imposed by section 64256(e) was administrative in nature. It required the county to review water quality data every month in order to determine whether the water system complied with the regulatory requirements. The county insisted that the regulatory scheme imposed specific duties only on the operators of small water systems. With respect to its own administrative duties, the county asserted that “there may be many reasons for the legislature to address [the county] reporting and record keeping tasks.” The court stated that, in its view, the primary reason for imposing the duty to review water quality reports monthly was to insure that contamination would be promptly recognized and to avoid having reports of

contamination fall through the cracks unexamined. The court stated that this purpose was expressly set forth in section 64256(e), which requires the local primacy agency to establish a system “to assure that the water quality monitoring data submitted by the small water systems is routinely reviewed for compliance.” The court stated that plaintiffs were directly benefitted by the routine review of such data, citing *In re Groundwater Cases* (“MCLs are developed for the purpose of protecting the public from possible health risks associated with long-term exposure to contaminants”). The court stated that regular review of water quality reports directly benefits water consumers like plaintiffs by ensuring that the agency charged with enforcement of water quality standards receives notice when the water is out of compliance so that it can take action to protect them from prolonged exposure.

The court stressed that the county’s response to any particular notice of noncompliance would not be subject to liability under section 815.6. It stated, however, that the allegation in this case was not that the county chose not to take action in response to the reports of contamination; the allegation was that the county did not make any choice about enforcement because, in failing to review the reports, the county lacked notice of the contamination altogether—the reports fell through the cracks unexamined and plaintiffs continued to drink the contaminated water. The court stated that section 64256(e), requiring monthly review of water quality data for compliance with regulatory requirements, was designed to prevent exactly the type of harm plaintiffs alleged here.

Causation. The court stated that the final question was whether plaintiffs’ injuries were proximately caused by the county’s failure to review the water quality data. It stated that whether the county’s breach was a proximate cause of the harm, or whether the harm was caused solely by the operation of some other factor (such as Pinch’s negligence), was a factual issue that could not be decided in this appeal.

The court noted that plaintiffs alleged that the county did not “review monitoring reports each month” and that because the county failed to review the data, the county “failed to recognize” the fluoride contamination. They further alleged, “As a direct result of the County’s negligent failure to perform its obligations, as described herein, under [sections 64256 and 64257, among others] plaintiffs unknowingly consumed contaminated drinking water from at least November 1995, resulting in pain and suffering and in injuries to their bodies and nervous systems, [and] skeletal structures.” The court stated that it could only speculate about what the county might have done and what the results of that choice would have been if the

county had actually reviewed the water data. The court stated that plaintiffs might produce evidence that would make the determination less speculative. It stated that, given only the allegations of the pleading, reasonable minds could draw any number of conclusions, one of which could be that the county's breach was a substantial factor in causing the injuries plaintiffs are alleged to have suffered. Accordingly, the court held that plaintiffs had alleged a cause of action for breach of the mandatory duty contained in section 64256(e) that was adequate for pleading purposes, and the trial court erred in sustaining the demurrer on the ground county had no such mandatory duty.

Immunity. The court noted that in a tort action against a public entity, the question of duty is a threshold issue, and the next question is whether any statutory immunity applies to bar plaintiffs' negligence cause of action. The court further noted that it previously concluded that none of the immunities the county raised in its defense were applicable here [Gov. Code §§ 818.2, 820.4, 821, 818.4, 821.2, 820.8]. The court found no reason to revise that ruling.

The court observed that section 818.2 provides that a public entity "is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law." The court stated that a companion section, Gov. Code § 821, extends the same immunity to the public employee. The county cited the California Law Revision Commission comments to section 818.2 in arguing that the section was "designed to protect a public regulatory agency from the implications of Government Code section 815.6." The court stated that the county misconstrued the comment, which was: "This section recognizes that the wisdom of legislative or quasi-legislative action, and the discretion of law enforcement officers in carrying out their duties, should not be subject to review in tort suits for damages if political responsibility for these decisions is to be retained." It stated that section 818.2 was intended to provide immunity for legislative and quasi-legislative action and to protect the exercise of discretion by law enforcement officers in carrying out their duties, citing *Morris v. County of Marin* [(1977) 18 Cal.3d 901, 136 Cal. Rptr. 251]. The court stated that because sections 818.2 and 821 applied to legislative and discretionary law enforcement actions, they did not apply in this case, which concerned a nondiscretionary act. The court stated that the duty to review water quality data is not a law "enforcement" duty; it is a recordkeeping requirement designed to make sure that the entities having enforcement authority get notice when enforcement is needed. The court stated that to apply these sections to immunize the county from liability for breach of a mandatory duty "would completely eviscerate Government Code section

815.6 which specifically provides for liability of the public entity for injuries resulting from a failure to carry out a mandatory duty imposed by a public enactment," citing *Elton v. County of Orange* [(1970) 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27].

The court stated that Gov. Code § 820.4 (extending immunity to a public employee "for his [or her] act or omission, exercising due care, in the execution or enforcement of any law ...") did not warrant dismissal of plaintiffs' negligence claims because there was a question of fact as to whether county employees exercised "due care" in reviewing Pinch's water quality reports, citing *Ogborn v. City of Lancaster* [(2002) 101 Cal. App. 4th 448, 124 Cal. Rptr. 2d 238].

The court next noted that the immunity provided by Gov. Code § 818.4 pertains to injuries caused by the public entity's "issuance, denial, suspension or revocation of, or by the failure or refusal to issue, deny, suspend or revoke, any permit, license, certificate, approval, order, or similar authorization where the public entity or an employee of the public entity is authorized by enactment to determine whether or not such authorization should be issued, denied, suspended or revoked." Section 821.2 extends the same immunity to the public employee. The court stated that those sections did not apply here because there was no discretionary licensing decision—the wrongful act was the failure to comply with the mandatory duty to review water quality reports.

The court stated that Gov. Code § 820.8, which provides that a public employee "is not liable for an injury caused by the act or omission of another person" was inapplicable because the injury was alleged to have been caused by the public employee's negligence. The court noted that section 820.8 concludes, "Nothing in this section exonerates a public employee from liability for injury proximately caused by his own negligent or wrongful act or omission."

In its supplemental brief, the county raised the additional defense of Gov. Code § 818.6, which provides immunity to a public entity for a failure to make an inspection or for making a negligent inspection of property for the purpose of determining whether the property violates the law or is hazardous to health or safety. The court stated that the county was correct that, unlike sections 818.2 and 818.4, section 818.6 applies to both discretionary and ministerial acts. The court stated, however, that section 818.6 concerned inspections of physical property, and therefore was inapplicable here. The court observed that this case did not involve the county's inspection of physical property, it merely required reading the written reports submitted by Pinch.

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 194, SB 614—Large Passenger Vessels and Oceangoing Ships—Discharge of Sewage

Amends Pub. Res. Code §§ 72401, 72420.1, 72421, 72430, and 72441, amends and repeals Pub. Res. Code § 72440

Existing law prohibits an owner or operator of a large passenger vessel or oceangoing ship from releasing or permitting anyone to release sewage and graywater from the vessel or sewage from the ship into the marine waters of the state or a marine sanctuary. Existing law excludes from those requirements a large passenger vessel or oceangoing ship that operates in the marine waters of the state solely in innocent passage, and discharges made for the purpose of securing the safety of the vessel or ship or saving life at sea if specified precautions are taken. This bill amends existing law to provide that for purposes of that exclusion, a vessel is engaged in innocent passage if its operation in the marine waters of the state would constitute innocent passage under specified conventions.

Existing law requires certain statutes relating to the release of sewage from specified vessels traveling in the marine waters of the state to be repealed on January 1, 2010. This bill extends the operation of those statutes to January 1, 2014.

2009 Stats., Ch. 317, AB 248—Marine Invasive Species Act—Records and Reporting Requirements

Amends Pub. Res. Code § 71205

The Marine Invasive Species Act generally applies to all vessels carrying or capable of carrying ballast water into the coastal waters of the state after operating outside of the coastal waters of the state and to all ballast water and associated sediments taken on a vessel. The Act requires the master, owner, operator, agent, or person in charge of a vessel that visits a California port or place of call to maintain specified information and records related to the vessel and ballast water management, and to make available or provide the information to the State Lands Commission. A person who, knowingly and with intent to deceive, falsifies a ballast water control report form required by the act is guilty of a misdemeanor. This bill requires the master, owner, operator, agent, or person in charge of a vessel carrying or capable of carrying ballast water that has a

ballast water treatment system installed on board the vessel that is used to comply with the Act to maintain on board the vessel, in written or electronic form, records that include material data safety sheets for certain chemicals, technical guides, publications, and manuals, and ballast water treatment system performance information. The bill provides that the master, owner, operator, agent, or person in charge of one of those vessels that has discharged ballast in waters of the state must provide to the Commission the manufacturer and product name of the ballast water treatment system on board the vessel, the name of the organization that has approved the system, if applicable, the approval or certification number of the system technology, if applicable, the number of tanks and the volume of each tank that is managed using the system and that was discharged in waters of the state, and any additional information required by the Commission by rule or regulation. Such information must be provided on a form developed by the Commission.

2009 Stats., Ch. 577, SB 310—Stormwater Discharge—Watershed Improvement Plans

Adds Water Code § 16100 et seq.

Authorizes a county, city, or special district that is a permittee or copermitttee under an NPDES permit for a municipal separate storm sewer system to develop a watershed improvement plan that addresses major sources of pollutants in receiving water, stormwater, urban runoff, or other surface runoff pollution within the watershed or subwatershed to which the plan applies. The regional water quality control boards may participate in the preparation of the watershed improvement plan. The regional board must review, and are authorized to approve, a watershed improvement plan if they find that the proposed plan will facilitate compliance with water quality requirements. The entities that develop a plan submitted to a regional board for approval must reimburse the regional board for its costs in accordance with a fee schedule adopted by the State Water Quality Control Board. A county, city, or special district, or combination thereof, may impose fees on activities that generate or contribute to runoff, stormwater, or surface runoff pollution to pay the costs of the preparation of a watershed improvement plan or the implementation of a plan that is approved by a regional board if certain requirements are met. The bill authorizes a county, city, or special district, or combination thereof, to plan, design, implement, construct, operate, and maintain controls and facilities to improve water quality.

2009 Stats., Ch. 620, SB 790—Stormwater Runoff—Stormwater Resource Planning

Amends Pub. Res. Code § 30916, amends Water Code § 10540, adds Water Code § 10560 et seq.

The Watershed, Clean Beaches, and Water Quality Act authorizes the Water Resources Control Board, in consultation with the State Coastal Conservancy, to award grants to public agencies and nonprofit organizations for projects designed to restore and protect the water quality and environment of coastal waters, estuaries, bays, and near shore waters, including, among other things, a project to make improvements to, or upgrades or conversions of, existing sewer collection systems and septic systems for the restoration and protection of coastal water quality. This bill also authorizes grants for projects designed to implement or promote low-impact development for new or existing developments that will contribute to the improvement of water quality or reduce stormwater runoff and for projects designed to implement specified stormwater resource plans.

Under existing law, the State Water Resources Control Board and the California regional water quality control boards prescribe waste discharge requirements for the discharge of stormwater in accordance with the national pollutant discharge elimination system permit program and the Porter-Cologne Water Quality Control Act. Existing law authorizes regional water management groups to adopt integrated regional water management plans. This bill authorizes a city, county, or special district to develop, jointly or individually, stormwater resource plans that meet certain standards. The bill authorizes regional water management groups to coordinate planning activities to address or incorporate into their plans any stormwater resource planning undertaken pursuant to these provisions.

The following bills form a comprehensive legislative package addressing the California water system that was enacted during a special session of the Legislature.

2009 Stats., Ch. ____, SBX7_1—Delta Governance—Delta Plan

This bill establishes the framework to achieve the co-equal goals of providing a more reliable water supply to California and restoring and enhancing the Delta ecosystem. The bill creates the seven-member Delta Stewardship Council; establishes the Sacramento-San Joaquin Delta Conservancy to implement ecosystem restoration activities within the Delta; restructures the current Delta Protection Commission, reducing the membership from 23 to 15 members, and tasks DPC with the duties of adopting an economic sustainability plan for the Delta, which is to include flood protection recommendations to state and

local agencies, and submitting the economic sustainability plan to the Delta Stewardship Council for inclusion in the Delta Plan.

2009 Stats., Ch. 3, SBX7_2—Safe, Clean, and Reliable Drinking Water Supply Act of 2010

Urgency measure; adds Water Code § 79700 et seq.

This bill enacts the Safe, Clean, and Reliable Drinking Water Supply Act of 2010, which, if approved by the voters, will authorize the issuance of bonds in the amount of \$11,140,000,000 pursuant to the State General Obligation Bond Law to finance the safe drinking water and water supply reliability program. The bond is comprised of seven categories, including drought relief, water supply reliability, Delta sustainability, statewide water system operational improvement, conservation and watershed protection, groundwater protection and water quality, and water recycling and water conservation. The bill provides for the submission of the bond act to the voters at the November 2, 2010, statewide general election. This is part of the legislative package created to reform and rebuild California's water system. For an explanation of the allocation of the bond funds, see www.water.ca.gov/news/newsreleases/2009/11092009waterpackagefactsheets.pdf.

2009 Stats., Ch. 1, SBX7_6—Groundwater Monitoring Program

Adds Water Code § 10920 et seq., repeals and adds Water Code § 12924

This bill requires local agencies to monitor the elevation of their groundwater basins. The bill establishes a groundwater monitoring program pursuant to which specified entities may propose to be designated by the Department of Water Resources as groundwater monitoring entities for the purposes of monitoring and reporting with regard to groundwater elevations in all or part of a basin or subbasin.

According to a fact sheet prepared by DWR [<http://gov.ca.gov/fact-sheet/13823>], the bill:

- Requires the Department of Water Resources to establish a priority schedule for the monitoring of groundwater basins and the review of groundwater elevation reports, and to make recommendations to local entities to improve the monitoring programs.
- Requires DWR to assist local monitoring entities with compliance with this statute.
- Allows local entities to determine regionally how best to set up their groundwater monitoring program, crafting the program to meet their local circumstances.

- Provides landowners with protections from trespass by state or local entities.
- Provides that if the local agencies fail to implement a monitoring program and/or fail to provide the required reports, DWR may implement the ground-water monitoring program for that region.
- Provides that failure to implement a monitoring program will result in the loss of eligibility for state grant funds by the county and the agencies responsible for performing the monitoring duties.

2009 Stats., Ch. 4, SBX7_7—Statewide Water Conservation

Amends and repeals Water Code § 10631.5, adds Water Code § 10608 et seq., repeals and adds Water Code § 10800

SB 7 creates a framework for future planning and actions by urban and agricultural water suppliers to reduce statewide water use. The bill requires the development of agricultural water management plans and requires urban water agencies to reduce statewide per capita water consumption 20 percent by 2020.

2009 Stats., Ch. 2, SBX7_8—Water Diversion and Use—Funding

Amends Water Code §§ 5100, 5101, 5103, and 5107, adds Water Code § 348 et seq., amends and supplements the Budget Act of 2009 (Chapter 1 of the 2009–10 Third Extraordinary Session) by amending Items 3940-001-0439 and 3940-001-3058 of Section 2.00

SB 8 improves accounting of the location and amounts of water being diverted by recasting and revising exemptions from the water diversion reporting requirements under current law. The bill also appropriates existing bond funds for various activities to benefit the Delta ecosystem and secure the reliability of the state's water supply, and to increase staffing at the State Water Resources Control Board to manage its duties under the statute.

Regulatory Activity

Oil Spill Prevention and Response—Certificates of Financial Responsibility. The Office of Spill Prevention and Response is proposing to amend 14 Cal. Code. Reg. §§ 791.7 and 792 and the following forms: FG OSPR-1924, FG OSPR-1925, FG OSPR-1947, and FG OSPR-1972. These sections and forms pertain to California Certificates of Financial Responsibility for the payment of any costs resulting from oil spills occurring in California

marine waters, or in locations that could affect California marine waters. A *hearing* will be held at 10:00 a.m., December 16, 2009, Office of Spill Prevention and Response, First Floor Conference Room, 1700 K Street, Sacramento, CA. *Written comments* by 5:00 p.m., December 16, 2009, *copies* of the proposed text and statement of reasons, and *inquiries*: Joy D. Lavin-Jones, Office of Spill Prevention and Response, P.O. Box 944209, Sacramento, CA 94244-2090, (916) 327-0910. Comments may also be submitted by fax to (916) 324-5662 or by email to jlavin-j@ospr.dfg.ca.gov. The documents are also available on the Department of Fish and Game's website at www.dfg.ca.gov/ospr/law/regs_rev.html.

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective on filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 1020 O St., Sacramento, CA 95814, (916) 653-7715. Current regulations are also available online at <http://www.calregs.com>.

Ballast Water Discharge—Performance Standards—Sampling. Filed 10/1/09; adopts 2 Cal. Code. Reg. § 2297, amends 2 Cal. Code. Reg. §§ 2291, 2292, 2294. Information: Maurya Falkner, (916) 574-2568.

AIR QUALITY CONTROL

Cases

Air Quality District Had Authority to Impose Regulatory Fees to Mitigate Vehicle Emissions related to Development

California Building Industry Association v. San Joaquin Valley Air Pollution Control District

No. F055448, 5th App. Dist.

178 Cal. App. 4th 120, 2009 Cal. App. LEXIS 1641

October 6, 2009

The San Joaquin Valley Air Pollution Control District had statutory authority to promulgate indirect source review rules to address indirect pollution, i.e., mobile source emissions, caused by new development projects. Under the rules, a developer could reduce emissions by incorporating pollution-reducing features in the project, by paying a fee to fund offsite projects that would reduce emissions, or by a combination of the two. The rules established valid regulatory fees, the district correctly computed the costs of the ISR program, and the fees were fairly apportioned among developers.

Facts and Procedure. Under the California Clean Air Act [Health & Safety Code § 39000 et seq.], the California Air Resources Board is responsible for the control of vehicular sources of air pollution [Health & Safety Code § 39002]. However, the state air pollution control districts have authority to mitigate vehicle emissions. A district must adopt transportation measures [Health & Safety Code § 40717]; must pay particular attention to reducing the emissions from transportation [Health & Safety Code § 40910]; and may adopt regulations to reduce the number or length of vehicle trips [Health & Safety Code § 40716(a)(2)]. Air quality control districts are also authorized to regulate indirect sources of air pollution [Health & Safety Code § 40716(a)(1)], and must include provisions to develop indirect source control programs in their attainment plans [Health & Safety Code § 40918(a)(4)].

The California Clean Air Act does not define the term “indirect source.” However, under the federal Clean Air Act, “indirect source” is defined as “a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution” [42 U.S.C. § 7410(a)(5)(C)].

Defendant San Joaquin Valley Air Pollution Control District (“the district”) is responsible for controlling air pollution in the region formed by eight counties in the San Joaquin Valley [Health & Safety Code § 40600]. In 1993, the valley was classified as serious nonattainment under federal standards for particulate matter with particle size less than or equal to 10 microns (PM10). In 2004, the valley was classified as extreme nonattainment for the federal one-hour ozone standards. PM10 can be directly emitted geologic material (dust) or can be formed when precursor emissions, such as nitrogen oxides (NOx) and volatile organic compounds (VOCs), react chemically. Ground level ozone (smog) is formed during summer months when NOx and VOCs react in the presence of sunlight.

Due to the valley’s serious nonattainment federal classification for PM10, the district was required to develop an attainment plan that included both a demonstration of future PM10 attainment and provisions to assure that the best available PM10 control measures would be implemented within four years [42 U.S.C. § 7513a(b)]. The district concluded that the rapid valley growth and concomitant increase in motor vehicle use would result in increases in PM10 emissions. Therefore, as part of its attainment plan, the district committed to adopt indirect source review (ISR) regulations to mitigate that increase. The EPA approved this course of action as part of the district’s PM10 plan in 2004.

The district was also required to implement all reasonably available control measures on ozone sources because of the valley’s extreme nonattainment ozone classification. This was reflected in the district’s extreme ozone attainment plan, which included the ISR commitment.

The district adopted an ISR program (“rule 9510”) to fulfill its PM10 and ozone plan commitments. The district also adopted rule 3180, which provided the means for the district to recover its costs of administering and operating rule 9510. The development process for the rules included public meetings and workshops. The district received and responded to public comments and conducted analyses with respect to cost-effectiveness, socioeconomic impact, emissions reduction, and environmental impact.

The purpose of rule 9510 was to reduce indirect sources of NOx and PM10 emissions from new development projects. An “indirect source” was defined as “any facility, building, structure, or installation, or combination thereof, which attracts or generates mobile source activity that results in emissions of” NOx and PM10. Rule 9510 required emission reductions from each new development project. The district found that although the number of vehicle miles traveled was increasing valleywide, the majority of new NOx emissions were attributable to new

development. To ensure that each developer was responsible for only its share of emissions, the district discounted each project's NOx emissions in two ways: It gave a 50 percent emissions credit to ensure that a development was only charged for the vehicle trips that would not have occurred but for the development. Thus, only one-way trips from the site are counted. In addition, developers received credit for increasingly stringent state and federal vehicle tailpipe controls that would reduce NOx over time.

In contrast, operational PM10 emissions (dust) from a project do not decline over time. Accordingly, rule 9510 required mitigation equal to half of the emissions after build-out for 10 years. The end result was that projects had to reduce their operational NOx emissions by 33 percent and their operational PM10 emissions by 50 percent over a 10-year period.

Developers could accomplish the required emission reductions onsite by incorporating measures to reduce vehicle miles traveled, vehicle trips and/or areawide sources of emissions such as fireplaces, wood stoves and landscape equipment. Alternatively, the emissions could be reduced through paying a fee to fund offsite emission reducing projects. Developers could also use a combination of onsite emission reduction measures and a fee to fund offsite emission reduction projects.

Rule 9510 required the proponent of a new development project to submit an air quality impact assessment (AIA) to the district before or at the project's final discretionary approval by the approving public agency. Either the developer or district staff prepared the AIA by using an approved model to quantify the emissions attributable to the new development. The AIA additionally identified any voluntary onsite reduction measures that were components of the project design. Such onsite reduction measures included increased energy efficiency, electrical landscape maintenance equipment, elimination of wood-burning devices, increased residential densities, locating near public transit, incorporating mixed uses (residential/retail), transportation management demand programs, and incorporating pedestrian/bicycle facilities. The incorporation of onsite measures could substantially reduce potential offsite fees.

Project information, including any voluntary onsite reduction measures, was input into the urban emissions model (URBEMIS), a district-approved computer model that quantified NOx and PM10 attributable to a development. Another model calculated construction emissions. If the onsite reduction measures would not reduce 33 percent of the project's NOx emissions and 50 percent of the PM10 emissions, the developer was required to pay a fee to the district for offsite emission reduction projects. Any fees

paid under rule 9510 were directly proportional to tons of NOx and PM10 that would not be mitigated by the developer through onsite features. The per-ton fees were based on the historical and projected cost to achieve reductions through district emission reduction programs.

Rule 9510 fees could only be used for reduction programs. The collected fees were segregated by pollutant from other district revenue in a separate mitigation fund and used only to "buy" offsite emission reduction projects. For every ton of NOx and PM10 not mitigated by the developer onsite, the district purchased an equivalent reduction of that same pollutant offsite.

Plaintiffs filed a complaint and petition for writ of mandate challenging the district's adoption of the ISR regulations (rules 9510 and 3180). Plaintiffs alleged that the rules imposed invalid development fees, regulatory fees, exactions, state agency fees, and/or special taxes, were unconstitutional, and were adopted in excess of the district's authority. The trial court ruled in the district's favor on all causes of action. On appeal from the judgment, plaintiffs argued that the ISR fees were invalid both as development fees and regulatory fees and that the district did not have the authority to impose the fees. The court of appeal affirmed the judgment.

ISR Fees Were Valid Regulatory Fees. The court noted that there are three general categories of fees or assessments that are distinguishable from special taxes and thus can be imposed without a two-thirds majority vote: "(1) special assessments, based on the value of benefits conferred on property; (2) development fees, exacted in return for permits or other government privileges; and (3) regulatory fees, imposed under the police power" [*Sinclair Paint Co. v. State Bd. of Equalization* [(1997) 15 Cal.4th 866, 64 Cal. Rptr. 2d 447]]. It further noted that a fee is considered a development fee if it is exacted in return for building permits or other governmental privileges so long as the amount of the fee bears a reasonable relation to the development's probable costs to the community and benefits to the developer, citing *Sinclair Paint*. The Mitigation Fee Act defines such a fee as "a monetary exaction other than a tax or special assessment . . . that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project" [Gov. Code § 66000(b)]. When a fee is imposed "as a condition of approval of a development project," the local agency must meet specific requirements, including identifying the purpose of the fee and the use to which the fee is to be put, and determining how there is a reasonable relationship between the fee and the development project [Gov. Code § 66001(a), (b)]. In addition, a fee imposed

“as a condition of approval of a proposed development . . . or development project” is limited to the estimated reasonable cost of providing the service or facility [Gov. Code § 66005(a)].

The court stated that, in contrast, when a fee is charged for the associated costs of regulatory activities and does not exceed the reasonable cost of carrying out the purposes and provisions of the regulation, it falls within the category of a regulatory fee, citing *California Assn. of Prof. Scientists v. Department of Fish & Game* [(2000) 79 Cal. App. 4th 935, 94 Cal. Rptr. 2d 535]. Regulatory fees are not dependent on government-conferred benefits or privileges and are imposed under the police power [*Sinclair Paint, above*].

Plaintiffs contended that the ISR fees met the Gov. Code § 66000(b) definition of development fees because they were imposed “in connection with approval of a development project” for the purpose of defraying the cost of public facilities, i.e., public services or community amenities, related to the development project. Plaintiffs thus contended that they were fees “that alleviate the effects of development on the community” [*Barratt American, Inc. v. City of Rancho Cucamonga* [(2005) 37 Cal. 4th 685, 37 Cal. Rptr. 3d 149]].

The court rejected the argument. It observed that “a fee does not become a ‘development fee’ simply because it is made in connection with a development project,” citing *Barratt American, above*. Rather, the court stated that approval of the development project must be conditioned on payment of the fee, citing *Barratt American and Capistrano Beach Water Dist. v. Taj Development Corp.* [(1999) 72 Cal. App. 4th 524, 85 Cal. Rptr. 2d 382]. The court noted that the Mitigation Fee Act specifically limits its application to situations where the fee or exaction is imposed as a condition of approval of a development project, citing Gov. Code §§ 66001(a), (b), 66005(a), and 66006(c).

The court stated that here, approval of a development project was not conditioned on the developer’s payment of the ISR fees. It stated that the ISR fees were not exacted in return for permits or other government privileges. Thus, the court concluded that the ISR fees were not development fees and therefore were not subject to the Mitigation Fee Act. Rather, the court concluded that the fees were regulatory in nature. It stated that the fees were designed to mitigate growth in air pollution from new development in order to achieve and maintain federal air quality standards.

The court noted that a regulatory fee may be validly imposed under the police power for the purpose of legitimate regulation when the fee does not exceed the amount required to carry out the purposes and provisions of the

regulation and is not levied for unrelated revenue purposes, citing *Sinclair Paint* and *San Diego Gas & Electric Co. v. San Diego County Air Pollution Control Dist.* [(1988) 203 Cal. App. 3d 1132, 250 Cal. Rptr. 420]. The court stated that regulatory fees are not compulsory—fee payers have some control both over when, and if, they pay any fee, i.e., when or if they elect to engage in a regulated activity, and/or the amount of the fee they are compelled to pay. The court pointed out, for example, that fee payers can modify their conduct to pollute less or consume less water, citing *California Assn. of Prof. Scientists, above*; *Brydon v. East Bay Mun. Utility Dist.* [(1994) 24 Cal. App. 4th 178, 29 Cal. Rptr. 2d 128]; and *Terminal Plaza Corp. v. City and County of San Francisco* [(1986) 177 Cal. App. 3d 892, 223 Cal. Rptr. 379]. The court stated that the absence of any perceived “benefit” accruing to the fee payer does not invalidate a regulatory fee, citing *California Assn. of Prof. Scientists*.

The court noted that “ ‘to show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on or benefits from the regulatory activity,’ ” citing *Sinclair Paint*. Thus, the court stated that there must be a nexus between the amount of the fee and the cost of the service for which the fee is charged, citing *Sinclair Paint*.

Fee Calculation Method. Plaintiffs first contended that the district did not use a valid method to calculate the fees. The court stated that a valid fee calculation method is one that establishes a reasonable relationship between the fee charged and the burden posed by the development, citing *Shapell Industries, Inc. v. Governing Board* [(1991) 1 Cal. App. 4th 218, 1 Cal. Rptr. 2d 818]. It observed, however, that proportionality of the fees, i.e., whether the fees collected exceed the cost of the regulatory program they are collected to support, need not be proved on an individual basis. Rather, the court stated that the agency is allowed to employ a flexible assessment of proportionality within a broad range of reasonableness in setting fees, citing *California Assn. of Prof. Scientists*.

The court noted that the district determined a new development project’s emissions and credits for onsite mitigation measures by a computer model. A fee was charged based on a dollar-per-ton estimate of the cost for the district to reduce the emissions offsite that the developer did not mitigate onsite. Plaintiffs contended that the calculation method improperly charged for the total emissions and total vehicle trips of a development rather than the net increase in emissions and the net increase in vehicle trips. Plaintiffs argued that the fee was calculated as if the

immediately preceding land use at the site produced zero emissions and zero vehicle trips. The court disagreed. It stated that the emission reduction targets were based on predicted growth in emissions from new development. The reconstruction of any development project rebuilt to essentially the same use and intensity was excluded from ISR. Thus, the court stated that unlike the situation in *Warmington Old Town Associates v. Tustin Unified School Dist.* [(2002) 101 Cal. App. 4th 840, 124 Cal. Rptr. 2d 744 (school impact fees assessed on replacement housing)], cited by plaintiffs, the fees were not unrelated to the impact of the development. The court further stated that the district's calculations gave every development project subject to ISR an automatic 50 percent credit for both NOx and PM10 emissions. The court stated that in this way, a fee was not charged for trips that were the responsibility of another new source or an existing indirect source.

Plaintiffs further contended that the computer model used by the district to calculate air quality impacts from new development (URBEMIS) was flawed because it yielded excessive fees on both the regional and individual levels. Plaintiffs argued that the travel demand model (TDM) computer program, used by regional transportation planning agencies to calculate travel impacts within the planning region, was more accurate and appropriate.

The court stated that before the rules were adopted, the district undertook extensive efforts to ensure that URBEMIS was the best tool for ISR. The court noted that the district hired consultants to recommend the most suitable model and identify areas for improvement. It stated that after receiving a report recommending URBEMIS, the district initiated an extensive statewide effort to update the URBEMIS model. After further recommendations were incorporated into the report, the model was subject to peer review by several well-respected researchers in the field. Thereafter, those recommendations were also incorporated and approved.

The court stated that plaintiffs' criticism of URBEMIS indicated no more than the existence of a difference in expert opinion. The court observed that when, as here, review is of a quasi-legislative action, a court will interfere as little as possible in such technical matters, citing *Western States Petroleum Assn. v. South Coast Air Quality Management Dist.* [(2006) 136 Cal. App. 4th 1012, 39 Cal. Rptr. 3d 354]. The court stated that it was up to the district to decide which expert opinion to accept.

The court concluded that the administrative record provided considerable evidence in support of the district's determination that URBEMIS was an appropriate computer model for ISR, and therefore that the district's use of URBEMIS was reasonable.

Plaintiffs also argued that the fee was a penalty calculated to incentivize project design changes and thus fees were not imposed in proportion to a project's actual emissions. They asserted that a developer could reduce fees by submitting a "dirty" version of a project and then "clean it up" with design changes, and thus two identical projects could pay different fees. The court rejected the argument. It noted that the analysis of every development began with the unmitigated NOx and PM10 emissions as calculated by the approved model. The court stated that this was the operational baseline, and thereafter, the mitigation measures were taken into account. Thus, the court stated that it did not matter whether a project was proposed as "clean" or "dirty"—the analysis was the same because the starting place for each project was the same, i.e., unmitigated.

Estimated Costs of the Regulatory Activity. Plaintiffs contended that the fees were invalid because there was no estimate of the total costs of the ISR program but rather only an estimate of the revenue the district expected the program to generate. The court stated that the cost for the program, i.e., the fee amount, was dependent on how the developers achieved the necessary reductions in emissions. It stated that the balance of emissions not reduced by onsite mitigation measures were assessed a flat fee based on what it cost the district per ton to fund offsite emission reduction projects. Thus, the court stated that the program cost was the cost per ton of the offsite emission reduction necessitated by the development. Consequently, the fees were calculated before the specific reduction projects were identified and funded. Nevertheless, the court stated that the district estimated the emission reduction cost through a careful analysis of past and future emission reduction projects. It stated that the fees were then charged in direct proportion to the amount of NOx or PM10 that the developer chose not to mitigate onsite. The court stated that, contrary to plaintiffs' position, the district thus established the estimated costs of the program.

Apportionment of Program Costs. The court stated that while the costs of a regulation must be apportioned so that the amount of the fee bears a reasonable relationship to the social or economic burden caused by the regulated entity, certainty is not required. The court stated that the record need only demonstrate a reasonable relationship, not an exact relationship, between the fees to be charged and the estimated cost of the program, citing *City of Dublin v. County of Alameda* [(1993) 14 Cal. App. 4th 264, 17 Cal. Rptr. 2d 845]. The court stated that here, the district produced a lengthy and detailed staff report regarding the ISR rules. With respect to the need for the ISR program, the district determined that there had been, and would continue to be, tremendous population increases in the valley. The district further concluded

that growth in new development paralleled those population increases and that such new development contributed to an increase in air pollution. The court stated that the report explained in detail how the district reached those conclusions and calculated the projected increase in NO_x and PM₁₀ emissions attributable to new development. It concluded that the district thus demonstrated a connection between population growth, new development, and increased emissions.

The court stated that the report also outlined the district's analysis of indirect source emissions and its method and rationale for determining the share of emissions attributable to individual development projects. This includes estimates of vehicle trips per average household, projections of the reductions necessary to counteract the growth in emissions, and the calculations for allocating the pollution attributable to the development.

Plaintiffs contended that the district had not established that the ISR fees were adequately apportioned. Plaintiffs argued that the district's methodology did not accurately calculate the "burdens" caused by new development in the form of increased total vehicle miles traveled (VMT) and the concomitant NO_x and PM₁₀ emissions, because the proper starting point for apportionment was the vehicles miles traveled (VMT) for the region as a whole, not the VMT for an individual project as was the case in the district's calculation. The court stated that plaintiffs were again arguing that the district should use the TDM computer model, not URBEMIS, in calculating the ISR fees. The court stated that plaintiffs' criticisms came down to nothing more than a difference in expert opinion. It stated that contrary to plaintiffs' position, the district had shown that the fees charged were reasonably related to the amount of pollution, or "burden," attributable to each new development. The court observed that the more a new development increased air pollution, the more the developer would pay.

District Had Authority to Adopt ISR Regulations. Plaintiffs asserted that the district exceeded its authority in adopting the ISR regulations. Plaintiffs pointed to the fact that the ARB is responsible for the control of vehicular sources of air pollution, and characterized the indirect source fees as the district's "thinly-disguised—and invalid—attempt to do 'indirectly' that which it is prohibited from doing directly—imposing fees on emissions" generated by motor vehicles. Plaintiffs contended that the district failed to identify any statutory authority for such fees, and that the district lacked authority to define "indirect sources" to include new development that did not in itself emit pollutants.

The court stated that the district identified the source of its authority to adopt the ISR rules as required under

Health & Safety Code § 40727: the resolution adopting rules 9510 and 3180 cited to sections 40716 (districts authorized to regulate indirect sources of air pollution), 42311(g) (a district may adopt a schedule of fees to be assessed on indirect sources of emissions), and 40604 (San Joaquin Valley Unified Air Pollution Control District shall adopt a schedule of fees to be assessed on indirect sources of emissions) in the recitals. The court stated that the fact that the district did not again specify those authorities in the findings section of the resolution did not alter the conclusion that the district identified its statutory authority. The court further stated that it was clear from those statutes that the district had the authority to adopt the ISR rules. The court stated that under section 40716(a), the district could adopt regulations to "reduce or mitigate emissions from indirect and areawide sources of air pollution" and to "encourage or require the use of measures which reduce the number or length of vehicle trips." Section 40604 directed the San Joaquin Valley Unified Air Pollution Control District board to adopt a schedule of fees to be assessed on areawide or indirect sources of emissions that are regulated, but for which permits are not issued, by the district to recover the costs of district programs related to these sources." Thus, the court stated that the district had specific statutory authority to regulate and assess fees on indirect pollution sources, which was precisely what it did in adopting the ISR rules.

Definition of "Indirect Source." Plaintiffs argued that the district lacked authority to define "indirect source" and that its definition was too broad. Plaintiffs questioned how a housing development, which does not in and of itself cause any significant emissions, could be an indirect source of pollution. The court stated that as an agency acting in a quasi-legislative manner, the district had the power to elaborate the meaning of key statutory terms, citing *Ramirez v. Yosemite Water Co.* [(1999) 20 Cal.4th 785, 85 Cal. Rptr. 2d 844]. The court stated that the district's definition closely paralleled both the federal and state definitions of "indirect source." The court noted that the federal Clean Air Act defined "indirect source" as "a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution" [42 U.S.C. § 7410(a)(5)(C)]. It stated that new housing developments certainly fell within that category as buildings and structures. The court stated that similarly, the ARB defined "indirect source" as "any facility, building, structure or installation, or combination thereof which generates or attracts mobile source activity that results in the emissions of any pollutant for which there is a state ambient air quality standard," quoting 76 Ops. Cal. Atty. Gen. 11 (1993).

The court observed that based on those definitions, the Attorney General concluded that "an indirect source may

be considered to be any development which attracts direct vehicular sources of air pollution” [76 Ops. Cal. Atty. Gen. 11]. The court stated that this would, of course, include a new housing development. The court stated that the fact that a housing development does not itself emit pollutants is what causes it to be an “indirect source” of pollution. Otherwise, it would be a direct source. The court concluded that the district’s definition of “indirect source” was not only reasonable but was also the only logical way to interpret the term.

Commentary

by Amanda R. Garcia, Shute, Mihaly & Weinberger LLP

The San Joaquin Valley Air Pollution Control District was the first regional air quality district in the state to adopt indirect source regulations targeting the construction and use of new development. Until now, California primarily applied a state-wide “end of tailpipe” approach to mobile source emissions. *California Building Industry Ass’n v. San Joaquin Valley Air Pollution District* affirms a regional air district’s authority to influence local land use decisions as a strategy for reducing air pollution by imposing emissions-based fees on new development. This case therefore clears the road for regional air quality boards throughout California to regulate new development as an indirect source of mobile source emissions.

The significance of the air district’s victory won’t be lost on those familiar with the history of the federal Clean Air Act. Congress has long recognized the connection between land use patterns and air quality, but scrapped federally-imposed land use requirements in the Federal Clean Air Act after the Environmental Protection Agency encountered significant resistance by the states, including California, in the early nineteen-seventies. The air district’s indirect source rules allow federal ambient air quality standards a role in local land use decision-making that the states long refused to grant them.

In addition to affirming an innovative and much-needed approach to reducing air pollution in the state, this case adds to the body of case law addressing state and local agencies’ authority to impose regulatory fees to mitigate an industry’s adverse effects without running afoul of Proposition 13 special tax voting requirements. In the late nineteen-nineties, the California Supreme Court upheld the Department of Health Service’s imposition of regulatory fees on the paint industry to address poisoning caused by lead paint. Since then, the courts of appeal have approved regulatory fees imposed by agencies and local governments to mitigate the adverse effects of activities as

diverse as the sale of alcoholic beverages and the use of landfill space. The court’s decision upholding the air district’s creative use of fee authority granted to it by the Legislature is consistent with precedent confirming the broad police power of the legislative branch to regulate for public health, safety and welfare.

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 206, SB 827—South Coast Air Quality Management District—Offsets—CEQA Compliance

Adds and repeals Health & Safety Code § 40440.13

Under existing law, every air pollution control district or air quality management district in a federal nonattainment area for any national ambient air quality standard is required to establish by regulation a system by which all reductions in emissions of air contaminants that are to be used to offset certain future increases in the emission of air contaminants are banked prior to use. The South Coast Air Quality Management District promulgated various rules establishing offset exemptions, providing Priority Reserve offset credits, and creating or tracking credits used for offset exemption or Priority Reserve projects. In *Natural Resources Defense Council v. South Coast Air Quality Management District* [Super. Ct. Los Angeles County, 2007, No. BS 110792], the superior court found the promulgation of certain of those district rules was in violation of CEQA. In this bill, the Legislature found that as a result of this decision, SCAQMD was unable to issue over a thousand pending permits that relies on the district’s internal offset bank to offset emissions. In addition, the district might also have to set aside several thousand permits that were previously issued in reliance on the district’s internal offset bank. The Legislature declared that nothing in the decision requires the setting aside of any permit issued by the South Coast Air Quality Management District to any essential public service, that relied on Rule 1309.1, nor any permit that relied on Rule 1304, between September 8, 2006, and November 3, 2008.

The bill adds Health & Safety Code § 40440.13, which provides that notwithstanding the decision in *Natural Resources Defense Council v. South Coast Air Quality Management District*, SCAQMD may issue permits in reliance on, and in compliance with, its Rule 1304, as amended on June 14, 1996, and Rule 1309.1, as amended

May 3, 2002, for essential public services, as defined in subdivision (m) of Rule 1302, as amended December 6, 2002. Section 40440.13(c) provides that (a) does not affect the decision in the case with respect to the adoption, readoption, or amendment, or environmental review, of south coast district Rule 1315. In implementing section 40440.13(a), SCAQMD must rely on the offset tracking system used prior to the adoption of Rule 1315 until a new tracking system is approved by the US EPA and is in effect, at which point it must use the new system.

In addition to using the prior offset tracking system, the district must also make use of any emission credits that have resulted from emission reductions and shutdowns from minor sources since 1990. It must make any necessary submissions to the US EPA with regard to the crediting and use of emission reductions and shutdowns from minor sources.

The provisions of the bill are repealed on May 1, 2012.

2009 Stats., Ch. 285, AB 1318—South Coast Air Quality Management District—Emission Reduction Credits—CEQA Exemption

Adds Health & Safety Code § 39619.8, adds and repeals Health & Safety Code § 40440.14, amends Pub. Res. Code § 21080

Requires the executive officer of the South Coast Air Quality Management District, on making a specified finding, to transfer emission reduction credits for certain pollutants from the district's internal emission credit accounts to eligible electrical generating facilities. Exempts from CEQA the selection, credit, and transfer of emission credits by the South Coast Air Quality Management District pursuant to Health & Safety Code § 40440.14, until the repeal of that section on January 1, 2012, or a later date.

2009 Stats., Ch. 359, SB 728—Nonattainment Areas—Parking Cash-out Programs

Amends Health & Safety Code § 43845

Existing law requires an employer of 50 persons or more who provides a parking subsidy to employees and who is in an air basin that is designated as a nonattainment area in terms of air quality to offer a parking cash-out program, defined as an employer-funded program under which an employer offers to provide a cash allowance to an employee equivalent to the parking subsidy that the employer would otherwise pay to provide the employee with a parking space. This bill authorizes the State Air Resources Board to impose a civil penalty for a violation of this requirement. It also authorizes a city, county, and air pollution control district or air quality management district to adopt a penalty or other mechanism to ensure

compliance. The bill authorizes the imposition of a penalty by the state board or the local agency, but not both.

2009 Stats., Ch. 384, AB 1085—Promulgation of Regulations—Availability of Supporting Documents

Adds Health & Safety Code § 39601.5

Requires the Air Resources Board to make available to the public each technical, theoretical, and empirical study, report, or similar document, if any, on which the agency relies, related to, but not limited to, air emissions, public health impacts, and economic impacts, before the comment period for any regulation proposed for adoption by the board.

2009 Stats., Ch. 561, SB 124—Toxic Control Measures—Schoolbus Idling

Amends Health & Safety Code § 42407, adds Health & Safety Code § 39640 et seq.

Regulations adopted by the Air Resources Control Board establish toxic control measures to limit schoolbus idling and idling at schools. Those regulations provide that any violation of those requirements subjects the driver or the motor carrier to a minimum civil penalty of \$100 and to criminal penalties. They authorize the state board, peace officers and the authorized representatives of their law enforcement agencies, and air quality management districts and air pollution control districts, to enforce those provisions. This bill increases the minimum civil penalty for a violation to \$300 and authorizes additional civil penalties.

Regulatory Activity

High Global Warming-Potential Refrigerants—Stationary Sources. The Air Resources Board is proposing to adopt regulations [17 Cal. Code Reg. §§ 95380–95397] that would reduce high global warming-potential GHG emissions associated with stationary, non-residential refrigeration equipment and resulting from the installation and servicing of refrigeration and air-conditioning (R/AC) appliances and verify emission reductions. The proposed regulation would apply to: (1) any person who owns or operates a stationary refrigeration system that uses more than 50 pounds of a high-GWP refrigerant; (2) any person who installs, repairs, maintains, services, replaces, recycles, or disposes of a R/AC appliance; and (3) any person who distributes or reclaims high-GWP refrigerants. The proposed regulation specifies: (1) stationary refrigeration refrigerant management practices, (2) R/AC appliance required service practices, and (3) refrigerant distributor, wholesaler, and reclaimer requirements.

The item will be considered during a two-day meeting of the Board commencing at 9:00 a.m., December 9, 2009, California Environmental Protection Agency, Air Resources Board, Byron Sher Auditorium, 1001 I Street, Sacramento, CA. *Written comments* by 12:00 noon, December 8, 2009, to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically to www.arb.ca.gov/lispub/comm/bclist.php. *Copies* of the proposed text and statement of reasons: Public Information Office, Air Resources Board, 1001 I St., Sacramento, CA 95814, (916) 322-2990, or on the Board's website at www.arb.ca.gov/regact/2009/gwprmp09/gwprmp09.htm. *Substantive inquiries*: Pamela Gupta, Manager, Greenhouse Gas Reduction Strategy Section, (916) 327-0604 or Chuck Seidler, Air Pollution Specialist, (916) 327-8493. *Procedural inquiries*: Lori Andreoni, Manager, Board Administration and Regulatory Coordination Unit, (916) 322-4011.

Indoor Air Cleaning Devices—Ozone Emissions. The Air Resources Board is proposing to amend the current regulations governing indoor air cleaners that generate ozone, including an extension of the compliance date for labeling requirements and refinements to the ozone emissions test method [17 Cal. Code. Reg. §§ 94801, 94804, 94805, and 94806 and the incorporation of documents by reference]. The item will be considered during a two-day meeting of the Board commencing at 9:00 a.m., December 9, 2009, California Environmental Protection Agency, Air Resources Board, Byron Sher Auditorium, 1001 I Street, Sacramento, CA. *Written comments* by 12:00 noon, December 8, 2009, to Clerk of the Board, Air Resources Board, 1001 I St., Sacramento, CA 95814. Comments may also be submitted electronically to www.arb.ca.gov/lispub/comm/bclist.php. *Copies* of the proposed text and statement of reasons: Public Information Office, Air Resources Board, 1001 I St., Sacramento, CA 95814, (916) 322-2990, or on the Board's website at www.arb.ca.gov/regact/2009/iacd09/iacd09.htm. *Substantive inquiries*: Ms. Peggy Jenkins, Manager, Indoor Exposure Assessment Section, (916) 323-1504 or Mr. Jim Behrmann, (916) 322-8278. *Procedural inquiries*: Lori Andreoni, Manager, Board Administration and Regulatory Coordination Unit, (916) 322-4011.

Final Regulations

The following regulatory actions have been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective on

filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 1020 O St., Sacramento, CA 95814, (916) 653-7715. Current regulations are also available online at <http://www.calregs.com>.

Large Spark-ignition Engines—Emission Standards. Filed 10/20/09; amends 13 Cal. Code. Reg. § 2433. Information: Amy Whiting, (916) 322-6533.

Air Quality Improvement Program—Funding Plan—Implementation Guidelines. Filed 10/13/09; adopts 13 Cal. Code. Reg. §§ 2350–2359. Information: Amy Whiting, (916) 322-6533.

HAZARDOUS WASTE AND TOXIC SUBSTANCE CONTROL

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 167, SB 143—California Land Reuse and Revitalization Act—Repeal Date—Prospective Purchasers

Amends Health & Safety Code §§ 25395.91, 25395.109, and 25395.110

The California Land Reuse and Revitalization Act of 2004 provides that an innocent landowner, bona fide purchaser, or contiguous property owner qualifies for immunity from liability from certain state laws for pollution conditions caused by a release or threatened release of a hazardous material if the person enters into an agreement with a state agency and specified conditions are met. The Act prohibits the Department of Toxic Substances Control, the State Water Resources Control Board, or a California regional water quality control board from requiring one of those persons to take a response action under specified state laws. The Act requires a bona fide ground tenant who seeks to qualify for immunity to make all appropriate inquiries and enter into an agreement with an agency along with one or more specified entities that agree to take

responsibility for implementation of a site assessment and response plan. The Act formerly was to be repealed on January 1, 2010, unless a later enacted statute deleted or extended that date. Existing law, which was to become operative on January 1, 2010, provided for the continued immunity of a person subject to the Act before its repeal, after the repeal of the Act, if the person continued to comply with the repealed act. This bill extends the repeal date of the Act to January 1, 2017, and makes the provisions providing for continued immunity after repeal of the Act operative on January 1, 2017.

Amends the Act to also authorize a prospective purchaser who is in contract to acquire a site and who qualifies as a bona fide purchaser to enter into such an agreement with an agency. Prohibits a prospective purchaser who enters into an agreement from receiving immunity until the prospective purchaser acquires the site.

2009 Stats., Ch. 429, AB 305—Release of Hazardous Materials—Civil Penalties—Punitive Damages

Fines—Statute of Limitations

Amends Code Civ. Proc. § 338.1, Health & Safety Code § 25515

Existing law relating to the time for commencing an action requires that actions for civil penalties or punitive damages under specified provisions relating to hazardous waste and hazardous substances be commenced within five years after the discovery by the agency bringing the action of the facts constituting the grounds for commencing the action. This bill includes within that requirement actions relating to hazardous materials release response plans and inventory.

Existing law requires the handler or an employee, authorized representative, agent, or designee of a handler to, upon discovery, immediately report any release or threatened release of a hazardous material to the administering agency and to the Office of Emergency Services. The failure to report an oil spill occurring in waters of the state, other than marine waters, is punishable, on conviction, by a fine of not more than \$50,000. Knowingly making a false or misleading report on an oil spill occurring in waters of the state, other than marine waters, is punishable, on conviction, by a fine of not more than \$50,000. This bill makes a knowing failure to report an oil spill or knowingly making a false or misleading report on an oil spill occurring in waters of the state punishable, on conviction, by the \$50,000 fine, imprisonment in the county jail, or both the fine and imprisonment.

2009 Stats., Ch. 614, SB 757—Chemicals of Concern—Consumer Products—Lead Wheel Weights

Adds Health & Safety Code § 25215.6

Existing law requires the Department of Toxic Substances Control to adopt, by January 1, 2011, regulations to establish a process to identify and prioritize chemicals or chemical ingredients in consumer products that may be considered as being a chemical of concern, and to establish a process for evaluating chemicals of concern in consumer products and their potential alternatives to determine how best to limit exposure or to reduce the level of hazard posed by a chemical of concern. This bill prohibits the manufacture, sale, or installation in California of a wheel weight that contains more than 0.1 percent lead. It provides for injunctive relief, as well as civil and administrative penalties for violation of that provision. The bill requires all civil and administrative fines collected to be deposited in the Hazardous Waste Control Account for expenditure by DTSC, on appropriation by the Legislature, to implement and enforce the act. The bill specifies that if DTSC identifies an alternative to lead contained in wheel weights as a chemical of concern, that lead alternative remains subject to the evaluation process to determine how best to limit exposure or to reduce the level of hazard posed by the lead alternative.

2009 Stats., Ch. 649, AB 1188—Underground Petroleum Storage Tanks—Corrective Action

Urgency measure; amends Health & Safety Code §§ 25299.43, 25299.50.3, 25299.57, 25299.62, 25299.100, 25299.106, and 25299.107, adds Health & Safety Code § 25299.51.2

Existing law requires the owner or operator of an underground petroleum storage tank, or other responsible party, to take corrective action in response to an unauthorized release of petroleum from the tank. A person required to perform corrective action may apply to the State Water Resources Control Board for payment of specified portions of the costs of corrective action. Existing law requires the board to pay claims of owners and operators in accordance with a specified order of priority. Existing law establishes the Underground Storage Tank Cleanup Fund in the State Treasury and authorizes the money in the fund to be used, upon appropriation by the Legislature, to pay those claims, and, among other things, for corrective actions undertaken by the state board, a California regional water quality control board, or a local agency, and for the cleanup and oversight of unauthorized releases at abandoned tank sites. Existing law imposes certain petroleum storage fees upon the owner of an underground storage tank for which a permit is required and requires those fees to be deposited in the fund. This bill would temporarily increase a specified petroleum storage fee by \$0.006 per gallon of petroleum stored, between January 1, 2010, and December 31, 2011. The revenue resulting from the increase is required to be deposited in the fund and be available, upon appropriation,

for expenditure for the purposes authorized under existing law for money in the fund.

The bill requires the state board, within 90 days of completion of any independent program audit or fiscal audit of the fund, to post the results of the program audit or fiscal audit on its website. For a reimbursement request received by the board on or after November 7, 2008, but before June 30, 2010, if costs submitted by a claimant are approved by the board, but funding is not available for payment to the claimant at the time of approval, the bill requires the board to reimburse the claimant's carrying costs, as defined, subject to specified limitations.

Existing law establishes until July 1, 2014, the School District Account in the Underground Storage Tank Cleanup Fund and transfers in the 2009–10, 2010–11, and 2011–12 fiscal years \$10,000,000 per year from the fund to the account for payment of claims filed by a school district that takes corrective actions to clean up an unauthorized release from a petroleum underground storage tank. This bill requires that the annual transfers be made prior to the allocation of the moneys in the fund for payment of claims by other underground storage tank owners or operators.

Existing law provides for a grant and loan program for small businesses to pay specified costs of complying with underground petroleum storage tank regulations adopted by the board, and defines terms for the purposes of that program. If a grant or loan from specified moneys available for the grant and loan program is being requested for purposes of complying with the Enhanced Vapor Recovery Phase II regulations, existing law requires the applicant to have applied for or obtained a permit from an air quality management district by April 1, 2009, and have obtained an enforcement agreement or other binding obligation by June 30, 2009. This bill revises the definition of "project tank" to include one or more tanks that are upgraded to comply with the Enhanced Vapor Recovery Phase II regulations, and requires a grant application to include a detailed description of the costs incurred to perform the work and complete the Enhanced Vapor Recovery Phase II upgrade, if applicable. If the board received an applicant's grant application on or before April 1, 2009, the bill authorizes grant funds to be used to reimburse up to 100 percent of the costs that the applicant incurred after the board received the grant application to comply with the Enhanced Vapor Recovery Phase II regulations.

LAND USE AND ENVIRONMENTAL PLANNING

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 275, AB 1165—Sacramento-San Joaquin Valley—Flood Control—Encroachments

Amends Gov. Code § 65007, amends Water Code §§ 8502, 8559, 8560, 8610.5, and 8709.4, adds Water Code §§ 8709.5, 8709.6, 8709.7, 12645, 12646, and 12647, repeals Water Code §§ 8562 and 8577, repeals and amends Water Code §§ 8522.3, 8522.5, 8523, and 8578

Existing law prohibits the legislative body of a city or county within the Sacramento-San Joaquin Valley, after the adoption of specified amendments to the applicable general plan or zoning ordinance, from entering into a development agreement for property located within a flood hazard zone, unless the legislative body makes one of several possible determinations, one of which is a determination that the local flood management agency has made adequate progress on the construction of a flood protection system. After the adoption of those amendments, existing law also conditions the approval of a discretionary entitlement or ministerial permit that would result in the construction of a new residence for a project located within a flood hazard zone, and the approval of a tentative map or parcel map for a subdivision that is located within a flood hazard zone, upon the legislative body making one of several possible determinations, one of which is a determination that the local flood management agency has made adequate progress on the construction of a flood protection system. Existing law defines "adequate progress" to mean, among other things, that the revenues sufficient to fund each year of the project schedule for the flood protection system have been identified, and that at least 90 percent of the revenues scheduled to have been received in any given year have been appropriated and are being expended. For purposes of those provisions, this bill authorizes the Central Valley Flood Protection Board ("Board") to find that a local flood management agency is making adequate progress in working toward the completion of a flood protection

system for any year in which state funding is not appropriated consistent with an agreement between a state agency and the local flood management agency.

Existing law requires the Board to hold an evidentiary hearing for any matter that requires the issuance of a permit. This bill requires the Board to hold an evidentiary hearing for any matter that requires the issuance of a permit if the proposed work may significantly affect any element of the State Plan of Flood Control or if a formal protest against that permit has been lodged. It authorizes the Board to define by regulation types of encroachments that will not significantly affect any element of the State Plan of Flood Control. The bill authorizes the Board to delegate the approval of permits for those encroachments to the executive officer.

Existing law requires the Board to make findings regarding the impact of an encroachment on public safety before taking action to modify an encroachment on levees, channels, or other flood control works. This bill authorizes the Board to delegate to the executive officer the authority to take action to remove or modify the encroachment.

The bill authorizes the Board, and the executive officer if delegated that authority, to issue an order directing a person or public agency to cease and desist from undertaking, or threatening to undertake, an activity that may encroach on levees, channels, or other flood control works under the jurisdiction of the Board. The Board, and the executive officer if delegated that authority, are also granted authority to issue an order directing a person or public agency to cease and desist from undertaking, or threatening to undertake, an activity that requires a permit from the Board without securing a permit or an activity that is inconsistent with a permit issued by the board. Provides for the imposition of civil liability on a person or public agency that undertakes an encroachment or commits other action in violation of the statutory provisions governing encroachments on flood control works.

2009 Stats., Ch. 354, SB 575—Regional Transportation Planning—Sustainable Communities

Amends Gov. Code §§ 65080, 65583, and 65588, Pub. Res. Code § 75123

Existing law requires transportation planning activities to be conducted by designated regional transportation planning agencies, including development of a regional transportation plan. Certain of those agencies are designated under federal law as metropolitan planning organizations. Existing law requires metropolitan planning organizations to adopt a sustainable communities strategy as part of a regional transportation plan, which is to be designed to achieve targets established by the State Air

Resources Board for the reduction of greenhouse gas emissions from automobiles and light trucks in the region. Existing law, to the extent the sustainable communities strategy is unable to achieve the greenhouse gas emissions reduction targets, requires the affected metropolitan planning organization to prepare an alternative planning strategy showing how the targets may be achieved through alternative development patterns, infrastructure, or additional transportation measures or policies. Existing law requires the metropolitan planning organization to conduct at least two informational meetings in each county within the region for members of the board of supervisors and city councils on the sustainable communities strategy and alternative planning strategy, if any. Existing law provides that the purpose of the meetings is to present a draft of the sustainable communities strategy to the members of the board of supervisors and the city council members in that county and to solicit and consider their input and recommendations.

This bill instead provides that the purpose of the meeting or meetings is to discuss the sustainable communities strategy and alternative planning strategy, if any, including key land use and planning assumptions, with the members of the board of supervisors and the city council members in that county and to solicit and consider their input and recommendations. It requires the Tahoe Metropolitan Planning Organization to use the Regional Plan for the Lake Tahoe Region as its sustainable communities strategy, if specified requirements are met.

The Planning and Zoning Law requires each local government to review its housing element as frequently as appropriate to evaluate specified considerations, and requires different types of local governments to revise the housing elements of their general plans in accordance with specific schedules. This bill instead requires each local government to review its housing element as frequently as appropriate, but no less often than required by a specified schedule. The bill modifies that schedule as it pertains to local governments within the regional jurisdiction of the San Diego Association of Governments to require those governments to adopt the fifth revision of the housing element no later than 18 months after adoption of the first regional transportation plan update to be adopted after September 30, 2010, and subjects those governments to specified requirements relating to the fifth, sixth and subsequent revisions of the housing element. The bill specifies the schedule for all local governments to adopt subsequent revisions of the housing element after the fifth revision. It requires the Department of Transportation to maintain and publish a current schedule of the estimated regional transportation plan adoption dates and a current schedule of the estimated and actual housing element due dates on its website. The bill also requires each council of

governments to publish on its website the estimated and actual housing element due dates, as published by the Department, for the jurisdictions within its region, and to send notice of those dates to interested parties.

Existing law establishes the Strategic Growth Council and requires the council to manage and award grants and loans to support the planning and development of sustainable communities. Existing law also requires the council's meetings to be open to the public and subject to the Bagley-Keene Open Meeting Act. This bill provides that a meeting of the council, including a meeting related to the development of grant guidelines and policies and the approval of grants, is subject to the Bagley-Keene Open Meeting Act, and that, for the purposes of this provision, "meeting" does not include a meeting at which council members are meeting as members of the Governor's cabinet.

The bill provides that Chapter 728 of the Statutes of 2008, is to be known and may be cited as the Sustainable Communities and Climate Protection Act of 2008.

2009 Stats., Ch. 358, SB 671—Williamson Act Contracts—Cancellation Fees

Amends Gov. Code § 51203

Existing law requires the county assessor to assess current fair market valuations to determine the cancellation fee for removing land from a Williamson Act contract. Existing law permits the Department of Conservation or the landowner, if either believes that the current fair market valuations are inaccurate, to request formal review from the county assessor in the county considering the cancellation petition and authorizes the assessor to recover his or her reasonable costs of the formal review from the party requesting the review. This bill authorizes the assessor to require a deposit from the landowner to cover the contingency that payment of a cancellation fee will not necessarily result from the completion of a formal review.

2009 Stats., Ch. 467, AB 720—General Plans—Housing Element—Energy Efficiency—Committed Assistance—Regional Housing Needs

Amends Gov. Code §§ 65400, 65582, 65583, and 65583.1

The Planning and Zoning Law requires each city, county, and city and county to prepare and adopt a general plan that contains certain mandatory elements, including a housing element. The housing element is required to identify the existing and projected housing needs of all economic segments of the community. The Department of Housing and Community Development is authorized to allow a city, county, or city and county to

substitute the provision of units for up to 25 percent of the community's obligation to identify adequate sites for any income category in its housing element, when the community includes in its housing element a program committing the local government to provide units in that income category within the city, county, or city and county that will be made available through the provision of committed assistance during the planning period covered by the housing element to low- and very low income households at affordable housing costs or affordable rents. Units that are to be substantially rehabilitated with committed assistance from the city, county, or city and county and constitute a net increase in the community's housing stock may be included in this housing element program, if the units meet certain criteria.

This bill authorizes a city, county, or city and county to include weatherization and energy efficiency improvements as part of its efforts to substantially rehabilitate a unit, and modifies the definition of "committed assistance."

The Planning and Zoning Law requires a planning agency, after a legislative body has adopted all or part of a general plan, to provide an annual report to the legislative body, the Office of Planning and Research, and the Department of Housing and Community Development on the status of the general plan and progress in meeting the community's share of regional housing needs. This bill authorizes the planning agency to include in its annual report the number of units that have been substantially rehabilitated, converted from nonaffordable to affordable by acquisition, and preserved.

2009 Stats., Ch. 507, AB 1084—Development Projects—Fees

Amends Gov. Code §§ 65961, 66023, and 66452.22, adds Gov. Code § 66019

Existing law extends by 24 months the expiration date of any tentative or vesting tentative subdivision map or parcel map for which a tentative or vesting tentative map has been approved that had not expired as of July 15, 2009, and that will expire before January 1, 2012. Existing law prohibits a city, county, or city and county from requiring as a condition to the issuance of any building permit or equivalent permit for single- or multiple-family residential units conformance with or the performance of any conditions that the city, county, or city and county could have lawfully imposed as a condition to the previously approved tentative or parcel map for a period of three years following recordation of the final map or parcel map for the subdivision. This bill maintains this provision but recasts it within the Government Code.

Notwithstanding the above provision, existing law provides that a city, county, or city and county is not

prohibited from levying a fee or imposing a condition that requires the payment of a fee on the issuance of a building permit or after the issuance. The bill deletes this provision and instead provide that, for purposes only of a tentative subdivision map or parcel map that is extended by 24 months pursuant to Gov. Code § 66452.22, a city, county, or city and county is not prohibited from levying a fee or imposing a condition that requires the payment of a fee, including an adopted fee that is not included within an applicable zoning ordinance, on the issuance of a building permit.

The Mitigation Fee Act requires a local agency to hold a public hearing, at which oral or written presentations can be made, as part of a regularly scheduled meeting prior to adopting an ordinance, resolution, or other legislative enactment adopting new fees or approving an increase in existing fees [Gov. Code § 60016]. The Act also requires the local agency to publish notice of the time and place of the meeting, including a general explanation of the matter to be considered. The Act provides that any cost incurred by a local agency in conducting the hearing may be recovered as part of the fees that were the subject of the hearing. This bill additionally requires a city, county, or city and county to mail notice of the time and place of the meeting, including a general explanation of the matter to be considered and a statement that specified data is available, at least 14 days prior to the first meeting to any interested party who has filed a written request for mailed notice. It authorizes the legislative body of the city, county, or city and county to establish a reasonable annual charge for sending notices based on the estimated cost of providing the service, and also authorizes the legislative body to send the notices electronically. The bill provides that any new or increased fee adopted by a city, county, or city and county will be effective no earlier than 60 days following the final action on the adoption or increase of the fee, unless the city, county, or city and county follows specified procedures.

Existing law authorizes any person to request an audit to determine whether any fee or charge levied by a local agency exceeds the amount reasonably necessary to cover the cost of any product or service provided by the local agency. If a person makes that request, the legislative body of the local agency is authorized to retain an independent auditor to conduct an audit to determine whether the fee or charge is reasonable. The local agency is authorized to recover the cost of having the audit conducted by an independent auditor from the person who requests the audit, and the audit is required to conform to generally accepted auditing standards. This bill additionally authorizes any person to request an audit to determine whether any fee or charge levied by a local agency exceeds the amount reasonably necessary to cover the

cost of any public facility, as defined, provided by the local agency. It requires the local agency to retain an independent auditor only if the person requesting the audit deposits with the local agency the amount of the agency's reasonable estimation of the cost of the audit. The bill requires the local agency to adjust the amount of any fee or charge to the extent it determines that the fee or charge does not meet specified requirements.

2009 Stats., Ch. 570, SB 215—LAFCOs—Change of Organization or Reorganization—Consistency with General and Specific Plans and Transportation Plans

Amends Gov. Code § 56668

The Cortese-Knox-Hertzberg Act requires that a local agency formation commission, when reviewing a proposal for a change of organization or reorganization, consider specified factors, including the proposal's consistency with city or county general and specific plans. This bill modifies that factor to require a LAFCO to consider the proposal's consistency with city or county general and specific plans, and any applicable transportation plan, when reviewing a proposal for a change of organization or reorganization.

2009 Stats., Ch. 632, SB 251—General Plans—Regional Housing Needs—Allocation

Amends Gov. Code § 65584.05

Existing law requires each city, county, or city and county to prepare and adopt a general plan for its jurisdiction that contains certain mandatory elements, including a housing element. One part of the housing element is an assessment of housing needs and an inventory of resources and constraints relevant to meeting those needs. The assessment includes the locality's share of the regional housing need. That share is determined by the appropriate council of governments, subject to revision by the Department of Housing and Community Development. The council of governments is also required to issue a proposed final allocation plan and to hold a public hearing to adopt a final allocation plan. This bill requires the council of governments to submit its final allocation plan to the department within three days of adoption. The department must determine whether the plan is consistent with the existing and projected housing need for the region within 60 days from the date of its receipt of the final allocation plan adopted by the council of governments.

FORESTRY DEVELOPMENT

Enacted Legislation

The following bill was chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 269, AB 1066—Timber Harvest Plans—Extensions

Amends, repeals and adds Pub. Res. Code § 4590

For timber harvest plans on which timber operations have commenced but not been completed, allows extension by amendment for up to a maximum of four additional one-year extensions, if the notice of extension includes the circumstances that prevented a timely completion of the work under the plan and an agreement to comply with the specified law, rules, and regulations as they exist on the date the extension notice is filed, and in addition, if the plan expired in 2008 or 2009, and the notice of extension includes written certification by a registered professional forester that listed species have not been discovered in the logging area of the plan since approval of the plan and significant physical changes to the harvest area or adjacent areas have not occurred since the plan's cumulative impacts were originally assessed.

Authorizes up to a maximum of two two-year extensions for a plan approved on or after January 1, 2010, to December 31, 2011, inclusive, if the notice of extension includes the circumstances that prevented a timely completion of the work under the plan and an agreement to comply with the specified law, rules, and regulations as they exist on the date the extension notice is filed, and the Department of Forestry and Fire Protection finds that listed species have not been discovered in the logging area of the plan since approval of the plan and significant physical changes to the harvest area or adjacent areas have not occurred since the plan's cumulative impacts were originally assessed. If the Department is not able to make those findings, it is authorized to consider an amendment to the plan and, if approved, to grant an extension.

These provisions are repealed as of January 1, 2012.

Regulatory Activity

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective on filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 1020 O St., Sacramento, CA 95814, (916) 653-7715. Current regulations are also available online at <<http://www.calregs.com>>.

Sustained Yield Plans—Renewal. Filed 10/26/09; adopts 14 Cal. Code Reg. § 1091.15, amends 14 Cal. Code Reg. § 1091.9. Information: Christopher Zimny, (916) 653-9418.

WILDLIFE PROTECTION AND PRESERVATION

Enacted Legislation

The following bill was chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 184, SB 448—California Endangered Species Act—California State Safe Harbor Agreement Program Act

Adds and repeals Fish & Game Code § 2089.2 et seq.

The California Endangered Species Act prohibits a person from importing, exporting, or taking, possessing, purchasing, or selling within the state, any species, or any part or product thereof, that the Fish and Game Commission determines to be an endangered species or a threatened species, with specified exceptions. This bill enacts the California State Safe Harbor Agreement Program Act, which establishes a program to encourage

landowners to manage their lands voluntarily, by means of state safe harbor agreements approved by the Department of Fish and Game, to benefit endangered, threatened, or candidate species without being subject to additional regulatory restrictions as a result of their conservation efforts. Provides that the Department may authorize specified acts that are otherwise prohibited under CESA pursuant to a safe harbor agreement entered into under the State Safe Harbor Act. Repeals the Safe Harbor Act on January 1, 2020.

Regulatory Activity

American Pika—Threatened Species—Denial of Petition. At its June 24, 2009, the Fish and Game Commission set aside its June 27, 2008, written findings in support of its decision to reject the petition filed by the Center for Biological Diversity to list the American pika (*Ochotona princeps*) as a threatened species. The Commission reconsidered the petition and rejected it based on a finding that the petition did not provide sufficient information to indicate that the petitioned action may be warranted. At that meeting, the Commission also announced its intention to ratify its findings. At a meeting on October 1, 2009, the Commission adopted findings outlining the reasons for its rejection of the petition. See California Regulatory Register 2009, No. 43-Z, p. 1853, available at www.oal.ca.gov/res/docs/pdf/notice/43z-2009.pdf.

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective 30 days after filing; emergency regulations are effective on filing and other exceptions may apply. For effective dates and other information, contact the agency or obtain a copy of the regulation from the Secretary of State, Archives, 1020 O St., Sacramento, CA 95814, (916) 653-7715. Current regulations are also available online at <http://www.calregs.com>.

American Peregrine Falcon—California Endangered Species Act—Delisted. Filed 10/5/09; amends 14 Cal. Code Reg. § 670.5. Information: Sheri Tiemann, (916) 654-9872.

SOLID WASTE MANAGEMENT

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 318, AB 274—Solid Waste Landfills—Solid Waste Postclosure and Corrective Action Trust Fund

Amends Pub. Res. Code §§ 48000, 48001, adds Pub. Res. Code §§ 48001.5, 48010 et seq., amends Rev. & Tax. Code § 45901

Commencing January 1, 2012, authorizes the operator of a solid waste disposal facility that is required to meet financial assurance requirements and is in operation on July 1, 2011, to elect to participate in the State Solid Waste Postclosure and Corrective Action Trust Fund, which is created by the bill. Provides that a participating operator is required to pay a fee of \$0.12 per ton per disposal site, which is to be collected in the same manner as the existing solid waste disposal fee paid to the State Board of Equalization. Provides that the fee is to be deposited in the fund and made available to the Integrated Waste Management Board for expenditure, on appropriation by the Legislature, for postclosure activities and corrective actions not performed by any owner or operator of a solid waste landfill when the owner or operator fails to comply with the Board's final order, the financial assurance mechanisms are inadequate to fund necessary compliance activities, the solid waste landfill was operating pursuant to a valid solid waste facilities permit on or after January 1, 1988, and the Board has first used and exhausted all immediately available financial assurance mechanisms provided by the operator.

Provides that the fee will not be operative on and after January 1, 2012, unless the Board received, on or before July 1, 2011, letters of participation in the State Solid Waste Postclosure and Corrective Action Trust Fund from landfill operators representing at least 50 percent of the total annual waste disposal tonnage in 2010, as determined by the Board.

2009 Stats., Ch. 333, SB 167—Used Tires—Recycling—California-Mexico Border Region

Amends Pub. Res. Code §§ 42885.5 and 42889

The California Tire Recycling Act imposes a California tire fee on new tires purchased in the state. Revenue generated from the fee is used for the purposes of programs related to waste tires. The Act requires the California Integrated Waste Management Board to adopt a five-year plan, which is to be updated biennially, to establish goals and priorities for waste tire programs that include specified border region activities, conducted in coordination with the California Environmental Protection Agency, related to waste tires in the California-Mexico border region. This bill requires that the five-year plan include as a border activity the development of projects in Mexico in the California-Mexico border region, including education, infrastructure, mitigation, cleanup, prevention, reuse, and recycling projects, to address the movement of used tires from California to Mexico whose eventual disposal causes environmental problems in California. The bill authorizes the Board, on appropriation by the Legislature, to use the revenues generated from the California tire fee to fund border activities.

2009 Stats., Ch. 353, SB 546—Used Oil Recycling

Adds Health & Safety Code §§ 25250.29 and 25250.30, amends Pub. Res. Code §§ 48100, 48623, 48631, 48632, 48645, 48650, 48651, 48652, 48653, 48656, 48660, 48660.5, 48662, 48670, 48673, 48674, 48690, and 48691, adds Pub. Res. Code §§ 48620.2, 48651.5, and 48654, repeals Pub. Res. Code §§ 48633 and 48634

The California Oil Recycling Enhancement Act establishes a used oil recycling program, consisting of a recycling incentive system, grants or loans to local governments and nonprofit entities for specified purposes related to used lubricating oil collection and recycling and storm-water pollution from used oil and oil byproducts, development and implementation of an information and education program to promote alternatives to the illegal disposal of used oil, and a reporting, monitoring, and enforcement program to ensure that laws relating to used oil are properly carried out. A violation of the act is a crime. This bill revises the definition of “used oil hauler” and defines the term “rerefined oil” for purposes of the Act, and revises the used oil recycling program so that, among other things, it no longer provides for loans, and does provide for the development and implementation of an information and education program to promote methods to reduce the amounts of used oil generated. Revises the purposes for which grants under the program may be made and authorizes grants to be made to private entities.

The Act generally imposes a charge on oil manufacturers, payable to the California Integrated Waste Management Board, in the amount of \$0.04 for every quart, or \$0.16 for every gallon, of lubricating oil sold or transferred in California, or imported into the California for use in the state. The bill increases those amounts to \$0.065 and \$0.26, respectively through December 31, 2013, and on and after January 1, 2014, those charges will be \$0.06 for every quart and \$0.24 for every gallon. The charge for finished lubricant containing at least 70 percent rerefined base lubricant is revised to \$0.03 for every quart and \$0.12 for every gallon.

The Act requires the Board to pay a recycling incentive for used lubricating oil to every industrial generator, curbside collection program, and certified used oil collection center, as well as to an electric utility for certain used lubricating oil. Existing law requires the Board to set the recycling incentive amount at not less than \$0.04 per quart, and authorizes the Board to set a higher amount if it determines that a higher amount is necessary to promote recycling of used lubricating oil and sufficient funds are available in the California Used Oil Recycling Fund. This bill revises the conditions applicable to used lubricating oil that must be met before the Board is required to pay the recycling incentive, and deletes the requirement that the Board pay the recycling incentive to an electric utility.

The bill requires the Board, on and after January 1, 2013, to pay a rerefining incentive to certain recycling facilities that produce rerefined base lubricant meeting specified requirements. It requires the Board to coordinate a comprehensive life cycle analysis of the used lubricating and industrial oil management process, evaluate the used oil management policies on used oil collection rates, and by January 1, 2014, report its findings to the Legislature.

The bill requires the Board to increase the recycling incentive to not less than \$0.10 per quart, except for used oil generated by a certified used oil collection center and an industrial generator, and, on and after January 1, 2014, to set the rerefining incentive at not less than \$0.02 per gallon, and authorizes the Board to increase those amounts if it determines that a higher amount is necessary to promote the collection and recycling of used lubricating oil or the rerefining of used lubricating oil, and sufficient funds are available in the California Used Oil Recycling Fund.

The Act requires the Board to deposit the charge imposed on oil manufacturers, above, civil penalties and fines paid pursuant to the Act, and all other revenues received pursuant to the Act, in the California Used Oil Recycling Fund, part of which is continuously appropriated to the Board to pay recycling incentives, to provide a reserve for contingencies, to make payments

for implementation of local used oil collection programs, for grants and loans, and for reimbursement for disposal costs of contaminated used oil. In part, the bill authorizes the continuously appropriated moneys in the fund also to be used for rerefining incentives and to evaluate used oil management policies.

The Act prohibits a used oil collection center from being eligible for the payment of recycling incentives until the Board has certified the center, and authorizes the Board to cancel certification, after a public hearing, on finding noncompliance with certification requirements. The Act requires a center to reapply for certification every two years. This bill requires a center to reapply for certification every four years and eliminates the public hearing requirement for cancellation of certification.

Under the Act, if the Board finds that a shipment of used oil from a certified used oil collection center or a curbside collection program is contaminated by hazardous material and other specified requirements are met, the Board, on application of the center or program, is required to reimburse the center or program for the additional disposal cost of the used oil, subject to eligibility requirements and payment limitations. This bill includes uncertified publicly funded used oil collection centers in small rural counties in the entities eligible to receive reimbursement, and modifies the eligibility requirements and payment limitations.

The Act imposes certification requirements for used oil recycling facilities. This bill specifies requirements for out-of-state used oil recycling facilities seeking incentive payments, including requirements to register with the Board and make certain declarations under penalty of perjury. The bill authorizes a facility registered or certified under this provision to enter into a testing and reporting agreement with the Department of Toxic Substances Control and agree to reimburse the Department for its full reasonable costs associated with the agreement. The bill also imposes certification requirements on rerefiners of used oil.

The bill revises reporting requirements imposed on industrial generators of used lubricating oil, used oil collection centers, and curbside collection programs in order to be eligible for payment of recycling incentives.

The bill generally requires used oil to be tested and analyzed by a laboratory accredited by the State Department of Public Health, to ensure that it meets specified criteria, before a load of used oil is shipped to a transfer facility, recycling facility, or facility located out of state. The testing and analysis must be accomplished by a registered hazardous waste transporter before acceptance at a transfer or recycling facility or shipment out of state, with specified exceptions. The person performing the test must

maintain records of the test for at least three years and be subject to audit and verification by the Department of Toxic Substances Control. The registered hazardous waste transporter who is listed as the transporter on the Uniform Hazardous Waste Manifest used to ship used oil out of state must submit a report annually to DTSC.

2009 Stats., Ch. 591, SB 486—Household Medical Waste—Sharps Disposal

Adds Pub. Res. Code § 47115 et seq.

The California Integrated Waste Management Act of 1989 requires a city's or a county's household hazardous waste element to include a program containing specified components for the safe collection, treatment, and disposal of sharps waste generated by households. This bill requires, by July 1, 2010, and annually thereafter, a pharmaceutical manufacturer that sells or distributes medication that is self-injected at home through the use of hypodermic needles and other similar devices to submit to the Integrated Waste Management Board or its successor agency a plan that describes how the manufacturer supports the safe collection and proper disposal of the waste devices. It requires the manufacturer and the board, or its successor or agency, to post and maintain the plans on their respective websites.

2009 Stats., Ch. 603, SB 627—Recycling—Catalytic Converters

Adds Bus. & Prof. Code § 21610

Requires a core recycler (defined as a "person or business, including a recycler or junk dealer, that buys used individual catalytic converters, transmissions, or other parts previously removed from a vehicle, that accepts, ships, or sells used catalytic converters") to maintain specified information regarding the purchase and sale of the catalytic converters for not less than two years. Prohibits a core recycler from providing payment for a catalytic converter unless the payment is made by check, the check is mailed or provided no earlier than three days after the date of sale, unless the seller is a business, and the core recycler obtains a photograph or video of the seller, a written statement regarding the origin of the catalytic converter, and certain other identifying information. The bill excepts from this requirement a core recycler that buys used catalytic converters, transmissions, or other parts removed from a vehicle if the core recycler and the seller have a written agreement for the transaction. The bill applies more limited information collection requirements to, and provide an exemption from the other requirements of the bill for, core recyclers accepting catalytic converters from licensed auto dismantlers or certain recyclers. The bill requires a core recycler to provide this information for inspection by local law enforcement on demand.

CLIMATE CHANGE

Enacted Legislation

The following bills were chaptered in the 2009 legislative session. Bills that are enacted as urgency measures become effective immediately. Non-urgency measures go into effect on January 1, 2010, unless otherwise stated.

2009 Stats., Ch. 331, SB 104—California Global Warming Solutions Act—Nitrogen Trifluoride

Amends Health & Safety Code § 38505

The California Global Warming Solutions Act of 2006 charges the State Air Resources Board with responsibility for monitoring and regulating sources of emissions of greenhouse gases. The Act defines greenhouse gases to include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. This bill also includes nitrogen trifluoride in that definition.

2009 Stats., Ch. 375, AB 881—Sonoma County Regional Climate Protection Authority

Adds and repeals Pub. Util. Code § 181000 et seq.

The Local Transportation Authority and Improvement Act authorizes any county board of supervisors to create or designate a local transportation authority in the county for the purposes of imposing a retail transactions and use tax of up to one percent by a 2/3 vote thereof, subject to voter approval, with revenues to be used for transportation improvements. The California Global Warming Solutions Act of 2006 requires the State Air Resources Board to adopt a statewide greenhouse gas emissions limit equivalent to the statewide greenhouse gas emissions levels in 1990 to be achieved by 2020. This bill, until December 1, 2015, creates the Sonoma County Regional Climate Protection Authority. It provides that the authority is to be governed by the same board as that governing the Sonoma County Transportation Authority, which was created pursuant to the Local Transportation Authority and Improvement Act. The bill specifies that the authority is a separate entity from the Sonoma County Transportation Authority. It authorizes the authority, in cooperation with local agencies that elect to participate, to perform coordination and implementation activities within the boundaries of Sonoma County to assist those agencies in meeting their greenhouse gas emission reduction goals, and to develop, coordinate, and implement programs and policies to comply with the California Global Warming Solutions Act and other federal or state mandates and

programs designed to respond to greenhouse gas emissions and climate change. The bill authorizes the authority to apply for, and to receive grants of, funds to carry out its functions, and requires those funds to be held in a separate account. The bill prohibits the use of transportation funds by the authority other than for transportation activities. It prohibits funding from the Traffic Relief Act for Sonoma County (Measure M), approved by voters in 2004 to be used for these purposes.

2009 Stats., Ch. 585, SB 391—California Transportation Plan—Greenhouse Gas Emission Reduction

Amends Gov. Code §§ 65072 and 65073, adds Gov. Code §§ 14000.6, 65071, 65072.1, and 65072.2

Existing law requires various transportation planning activities by state and regional agencies, including preparation of sustainable communities strategies by metropolitan planning organizations. Existing law required the Department of Transportation to prepare the California Transportation Plan for submission to the Governor by December 1, 1993, as a long-range planning document. This bill requires the department to update the California Transportation Plan by December 31, 2015, and every five years thereafter. It requires the plan to address how the state will achieve maximum feasible emissions reductions in order to attain a statewide reduction of greenhouse gas emissions to 1990 levels by 2020 and 80 percent below 1990 levels by 2050. The plan must identify the statewide integrated multimodal transportation system needed to achieve these results. The bill requires the department, by December 31, 2012, to submit to the California Transportation Commission and specified legislative committee chairs an interim report regarding sustainable communities strategies and alternative planning strategies, including an assessment of how their implementation will influence the configuration of the statewide integrated multimodal transportation system. The bill specifies subject areas to be considered in the plan for the movement of people and freight. It requires the department to consult with and coordinate its planning activities with specified entities and to provide an opportunity for public input. The bill makes additional legislative findings and declarations and requires the plan to be consistent with that statement of legislative intent.

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION

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