CALIFORNIA

Environmental Law Reporter

APRIL 2016
VOLUME 2016 • ISSUE NO. 04

WILDLIFE PROTECTION AND PRESERVATION

LexisNexis™
Matthew Bender®

THE 2015 LEGISLATIVE RECAP: SETTLING IN AND TAKING A BREATH

By

Gary A. Lucks[*]

In his 2015 State of the State address, Governor Brown laid out an ambitious goal of achieving substantial reductions in greenhouse gas (GHG) emissions. As described more fully below, the Legislature responded by approving SB 350 which went a long way to accomplishing the Governor's vision. During the 2015-2016 legislative session, Governor Brown signed 808 bills—down significantly from the 930 bills he signed the year before. Perhaps the decreased productivity stems from recent legislative term limit changes allowing members to serve up to a total of 12 years in either chamber. This expanded time frame allows legislators to settle into their legislative roles and take a longer view on policy without the burden of posturing for their next political office.

It may be that, with their new found longevity, they have more time to develop expertise which contributes to charting a more sustainable path on policy-making. As a result, these "12 year" members can focus on fewer,

[*] Gary A. Lucks JD CPEA is a partner in the Environmental, Health, and Safety Performance and Assurance Practice of ERM West in the San Francisco Bay Area. He advises clients on environmental regulatory compliance, auditing, and sustainability. He is a certified professional environmental auditor and frequent instructor on environmental law, legislation, auditing, and sustainability in California and nationally. He recently served as an advisor to the Bay Area Air Quality Management District and now serves on the Board of Directors of the California State Bar Environmental Law Section. He also chairs the West Coast Institute of Internal Auditors/Auditing Roundtable. Mr. Lucks has published numerous articles and newsletters addressing environmental legislation and policy. He is the coauthor of a book entitled: *California Environmental Law and Policy: A Practical Guide*.
Special thanks to Donald Sobelman and Darrin Gambelin for their contributions to the land use, natural resources, and CEQA legislation portions of this article. Mr. Sobelman is a partner, and Darrin Gambelin is an associate attorney, in the San Francisco office of Downey Brand LLP. They are members of the firm's Natural Resources Group specializing in environmental, land use, and water law. Sobelman's practice is focused on environmental litigation (including cost recovery actions, citizen suit defense, and environmental toxic tort claims), site remediation, brownfields redevelopment, CEQA review, and industrial storm water regulation. Gambelin is an environmental permitting, compliance, litigation, and enforcement defense attorney.

continued on page 84

CONTENTS:

text continued from page 83

more substantive initiatives and take on larger scale reform efforts. The "top two" system has also yielded less polarized and moderate legislators, contributing to a calming effect in Sacramento.

Despite the relative dearth of new laws, the Legislature produced a number of noteworthy environmental, land use and natural resources policies. Key legislation this year includes new laws addressing GHG reductions and climate change resiliency, Department of Toxic Substances Control (DTSC) reforms regarding hazardous waste permits, enforcement, and clean up, and safeguarding oil pipeline transportation. Other noteworthy legislation tackled water efficiency, streamlining water rights adjudication, potable water access and standards, and hydraulic fracturing. Other key policies advance composting and plastics, renewable energy, Subdivision Map Act adjustments, amendments to the California Endangered Species Act (CESA), and promoting wildlife corridors. Except for budget-related urgency bills that passed by a supermajority (both of which took effect upon approval), newly enacted laws became effective on January 1, 2016.

Climate Change

The Brown administration pioneered the Subnational Global Climate Leader Initiative (Under2MOU.org) which invites subnational cities and regions around the world to commit to achieving no more than a 2-degree Celsius global temperature increase. The signatories agree to reduce per capital emissions to below two metric tons of GHG in order to reduce GHG emissions by at least 80% of 1990 levels by 2050. The "Under 2 MOU" has over 127 signatories representing over 729 million people (27 countries and 6 continents) and $20.4 trillion in GDP, equivalent to more than a quarter of the global economy. The Senate weighed in as well with a package of clean energy and climate legislation establishing renewable energy, energy efficiency, transportation electrification targets, a new adaptation process at the Office of Planning and Research (OPR), and a mandate to divest from coal.

SB 350 (De León) is the most noteworthy new law that enacts the "Clean Energy and Pollution Reduction Act of 2015." The Senate Pro Tem introduced SB 350 to implement three 50% targets: a 50% renewable portfolio standard (RPS), a 50% reduction in fossil fuel consumption, and to increase energy efficiency in buildings by 50% by 2030. The Senate Leader acceded to stiff opposition from the oil industry, moderate assembly members and Republicans and removed the petroleum reduction goal in the waning days of the 2015 legislative session. Notwithstanding the scaled back bill, Governor Brown may be exploring a regulatory alternative to achieve the fossil fuel reductions originally envisioned in the bill. The same opposition coalition succeeded in blocking SB 32 (Pavley) which would have extended interim GHG emissions limits beyond 2020—the date that the Global Warming Solutions Act (otherwise known as "AB 32") is set to expire.

The prior RPS target of 33% renewable energy by 2020 was expanded to 50% annually by 2030. Investor-owned utilities, Community choice aggregators (CCAs), energy service providers (ESPs), and publicly owned utilities (POUs) of eligible sources of renewable electricity must work towards accomplishing this more ambitious goal. SB 350 establishes interim targets on the way to the 2050 goal including a 40 percent renewables target by 2024, 45 percent by 2027.

In order to achieve the 50% increase in building efficiency, this new law requires the State Energy Resources Conservation and Development Commission (otherwise known as the CEC) to essentially double the energy efficiency savings and reduce demand in natural gas and electricity consumption for existing residential and nonresidential buildings by January 1, 2030. Similarly, this new law requires the California Public Utilities Commission (CPUC) to set energy efficiency targets for electrical and gas corporations and local POUs to accomplish the 50% energy efficiency goal. AB 802 (Williams) aligns with SB

350 and requires the CPUC, by September 1, 2016, to authorize investor-owned utilities to offer ratepayers incentives and assistance to drive energy efficiency in existing buildings. The Independent System Operator (ISO) is responsible for managing the electrical transmission grid to ensure reliable performance and efficiency. SB 350 also allows the ISO to geographically expand and become a regional organization.

In 2014 California's bipartisan oversight agency (the Little Hoover Commission) determined that state government should adopt a more unified approach to climate change adaptation and resiliency. The Legislature approved three bills establishing a framework to integrate comprehensive climate adaptation planning at the state, regional, and local government levels. SB 379 (Jackson) requires cities and counties to modify, as appropriate, their general plans to incorporate climate change considerations. Local governments must review and update their general plan safety elements and include an assessment identifying climate change risks such as fire and flood risk. This vulnerability assessment must, among other things, include feasible strategies to avoid or minimize climate change impacts arising from new land uses and essential public facilities (e.g., hospitals, emergency shelters, emergency command centers). When considering adaptation alternatives, the general plan must adopt existing natural features and ecosystem processes such as urban tree planting, floodplain and wetlands restoration. In to updating their safety elements, local governments must modify local hazard mitigation plans by January 1, 2017. Jurisdictions without a hazard mitigation plan must incorporate mitigation measures by January 1, 2022.

SB 246 (Wieckowski) is another law that is part of the climate change adaptation package. This new law creates the Integrated Climate Adaptation and Resiliency Program within OPR. OPR is charged with coordinating statewide planning by connecting with regional and local governments and establishing a climate adaptation informational clearing house. In addition, this new law establishes an advisory council charged with improving communications among all levels of government. AB 1482 (Gordon) is the third bill addressing climate resiliency. This new law requires the California Natural Resources Agency (NRA) to regularly update the Safeguarding California Plan which describes climate adaptation strategies. In addition, this law requires the Strategic Growth Council, to triennially, beginning July 1, 2017, update the state's climate adaptation strategy. This law encourages state agencies to incorporate climate adaptation strategies into land use decisions while taking into account climate impacts on state investments. Finally, California agencies must utilize natural systems and infrastructure to manage adaptation.

After the Ninth Circuit Court of Appeals upheld the low carbon fuel standard (LCFS) in 2013, ethanol interests petitioned the U.S. Supreme Court for review. A major ethanol producer also challenged the LCFS in state court (Poet, LLC v. California Air Resources Board, Case No.

F064045 (CA Dist. 5 Ct. App., Jul. 15, 2013)). The Court of Appeal in Fresno found that the ARB failed to fully comply with the California Environmental Quality Act (CEQA) and the Administrative Procedures Act in promulgating the LCFS regulation. The ARB responded by revising the LCFS rules to satisfy the Court of Appeal. Nonetheless, the LCFS level remains unchanged from 2013 levels. AB 692 (Quirk) was introduced to increase LCFS levels by requiring California agencies to purchase at least 3% of "very low carbon transportation fuels," beginning January 1, 2017 and an additional 1% per year thereafter until 2024. This fuel category includes fuels with no more than 40% carbon intensity as defined.

AB 1496 (Thurmond) expands upon legislation from last year (SB 605 (Lara), Chapter 523, Statutes of 2014) that required the ARB to develop a strategy to control short-lived climate pollutants (SLCP). This new law requires the ARB to monitor high-emission hot spots of methane—a "short-lived" and potent GHG. The ARB must also consult with federal and state agencies to gather information to perform life-cycle analysis of GHG emissions from natural gas imports. ARB must also review scientific data addressing the chemical reactivity of methane in forming photochemical oxidants. SB 758 (Block) is another law that directs a state agency to engage in climate change research. This new law creates the Atmospheric Rivers Research, Mitigation, and Climate Forecasting (ARRMCF) Program within the Department of Water Resources (DWR). Atmospheric rivers are "relatively narrow regions in the atmosphere responsible" for transporting water vapor outside of the tropics. According to the National Oceanic and Atmospheric Administration 30-50% of the average annual precipitation on the west coast is generated from a limited number of atmospheric river events. The ARRMCF program is authorized to research "climate forecasting and the causes and impacts that climate change has on atmospheric rivers, to operate reservoirs in a manner that improves flood protection . . ., and to re-operate flood control and water storage facilities to capture water generated by atmospheric rivers."

SB 185 (De León) prohibits the Public Employees' Retirement System (PERS) and the State Teachers' Retirement System from new or renewed investments in thermal coal companies. In addition, by July 1, 2017, these agencies must liquidate investments in thermal coal companies. Their boards are must constructively engage with thermal coal companies when making their divestment determinations to evaluate whether the coal companies are transitioning toward clean energy. AB 865 (Alejo) is intended to ensure that California's climate change policies and investments help working families and working-class communities make economic and environmental gains with its investments while reducing pollution and poverty.

The Legislature approved two transportation-related bills pertaining to climate change. The GHG Reduction Fund supports capital improvements to upgrade California's rail systems by funding the Transit and Intercity Rail Capital Program (TIRCP). SB 9 (Beall) establishes a planning process within the Transit and Intercity Rail Capital Program to fund intercity, commuter, and urban rail systems, bus and ferry transit systems, and transit safety. SB 231 (Gaines) provides that water-borne transit projects (e.g. commuter ferries) are eligible to receive cap-and-trade funding pursuant to the Affordable Housing and Sustainable Communities Program (AHSCP) and the Low Carbon Transit Operations Program (LCTOP).

Air Quality

AB 1288 (Atkins) responds to socioeconomic data showing people of color experience a 50% higher cancer risk from air pollution than the general population. This new law adds two new board members to the Air Resources Board (ARB) to represent the interests of environmental justice communities. The Senate Rules Committee and the Speaker of the Assembly are authorized to appoint a new member each increasing the total number of ARB members from 12 to 14.

The Carl Moyer Memorial Air Quality Standards Attainment (Carl Moyer) Program funds projects to attain or maintain state or federal ambient air quality standards, to reduce mobile source air emissions, to support alternative fuel and electric infrastructure fueling programs, and technology development. SB 513 (Beall) was introduced to address perceived limitations in the Carl Moyer Memorial Air Quality Standards Attainment (Carl Moyer) Program and supports newer technologies to combat air pollution by expanding the types of projects eligible for funding. Alternative fuel and electric infrastructure, Marine vessels projects are now eligible for funding to achieve state and local air quality goals. This new law is additionally focused on streamlining the program to leverage funds from multiple sources as well as to modify the process to evaluate cost-effectiveness of potential projects. Prior to SB 513, only nonattainment air districts were authorized to levy a fee to support the Carl Moyer program. This new law adjusts the cost-effectiveness calculations used to determine emission reductions for purposes of allocating GHG Reduction Fund resources for the Carl Moyer Program.

AB 194 (Frazier) eliminates the sunset date authorizing the California Transportation Commission to allow regional transportation agencies to operate high-occupancy toll (HOT) lanes on California roadways. This new law

additionally removes a prior limit on the number of facilities the agency could approve.

Solid Waste

The Legislature expanded its efforts to manage non-hazardous solid wastes with a particular focus on increasing diversion or organic wastes from landfills and supporting technologies to sort recyclables while also prohibiting microplastics in commerce. Other legislation addressed fraudulent waste diversion reporting and disposal of abandoned mobile homes.

Assembly member McCarty states, "AB 876 will help California meet its goal of reducing 75% of solid waste by 2020." This new law is designed to advance that goal by expanding organic waste recycling which comprises approximately one-third of landfilled wastes. Beginning August 1, 2017, county or regional agencies must annually estimate the amount of organic waste projected over a 15-year period and report it to CalRecycle (Department of Resources Recycling and Recovery). The report must also include an estimate of the additional organic waste capacity that will be necessary to process the projected amount of waste within its jurisdiction. Finally, the agency must identify locations within its jurisdiction to accommodate new or expanded organic waste recycling facilities. AB 1045 (Irwin) regulates composting. This new law requires the California Environmental Protection Agency (CalEPA) to coordinate with CalRecycle, the State Water Resources Control Board (SWRCB), the ARB, and the Department of Food and Agriculture to establish policies to increase organic recycling and organic waste diversion from landfills. CalEPA must also coordinate with the ARB and SWRCB to develop coordinated permitting and regulation of composting facilities.

Assembly member Eggman introduced AB 199 to help ensure more recyclables are recovered and diverted from landfills. He states that partly due to the dearth of recycling equipment capable of sorting recyclables, "California exports 20 million tons of recyclables annually, worth nearly $8 billion." According to CalRecycle, 81% of mixed waste from materials recovery facilities (MRFs) are disposed of in landfills. AB 199 (Eggman) is an urgency measure intended divert more recoverable materials from landfills by incentivizing the recycling industry to purchase equipment to sort plastics, paper, metals, and glass. Specifically, this new law expands projects eligible for the sales and use tax (SUT) exclusion to include machinery to sort recyclable materials.

AB 901 (Gordon) responds to a perceived lack of enforcement of disposal facility waste flow reporting (i.e., Disposal Reporting System (DRS). Late, incomplete, and inaccurate reports can contribute to fraud that results local jurisdictions and the state losing millions in revenues. For example, in 2015, employees of the Ox Mountain Landfill were accused of grand theft of nearly $1.4 million by misclassifying construction waste as green waste and fraudulently collecting tipping fees from landfill customers. Among other things, this new law requires operators of recycling, composting, and disposal facilities to submit data directly to CalReycle in lieu of the counties. Those who refuse or fail to submit waste information or who knowingly or willfully file false reports are subject to civil penalties.

According to The 5 Gyres Institute microplastic particles and microbeads pass through wastewater treatment systems and enter into California waters enroute to the North Pacific Central Gyre. These microplastics, which are added to personal care products as exfoliants and abrasives, absorb persistent organic pollutants, such as PCBs, DDT, and PBDEs. These chemicals bioaccumulate in aquatic organisms. AB 888 (Bloom) addresses this situation by prohibiting the sale and offer for promotional purposes of personal care products containing plastic microbeads beginning January 1, 2020. This law provides an exemption for products containing less than 1 part per million by weight of plastic microbeads. Violators are liable for a civil penalty up to $2,500 per day for each violation.

Prior to AB 999 (Daly), owners of mobile home parks faced barriers to disposing of abandoned mobile homes that were subject to delinquent property taxes. Mobile home parks were unable to remove the abandoned mobile home until the unpaid taxes were addressed. Sponsored by the Western Manufactured Housing Communities Association, AB 999 (Daly) establishes a due process scheme to alleviate these barriers. This new law allows mobile home park owners to dispose of abandoned mobile homes without first paying delinquent property taxes and vehicle license fees as long as they comply with due process. This new law requires the park owner to issue specified notices and to follow appellate procedures. After a judgment, park owners may dispose of the mobile home and its contents.

SB 83 (Committee on Budget and Fiscal Review) requires the California-Mexico Border Relations Council to establish the Border Region Solid Waste Working Group. This organization is charged with coordinating long-term solutions to manage impacts from waste tires, solid waste, and excessive sedimentation along the border.

Hazardous Waste

The Legislature served up a smorgasbord of new policies reforming permitting and DTSC enforcement of

hazardous waste facilities along with expanding or establishing relaxed management requirements for chemically treated waste wood (TWW) and spent photovoltaic panels. The Legislature also authorized DTSC to regulate metal recycling facilities.

An external oversight panel evaluated operational reforms at DTSC and reviewed the agency's performance regarding cost recovery, cleanup and abatement, permitting, and community outreach. It discovered significant costs and delays associated with completing the permit process for hazardous waste facilities (otherwise known as hazardous waste treatment storage and disposal facilities or TSDFs). It also uncovered a perception that DTSC does not "deny or revoke permits as often as it should to address community concerns." In 2014, the DTSC responded with the Permitting Enhancement Work Plan (PEWP) "to improve the permitting program's ability to issue protective, timely, and enforceable permits using more transparent standards and consistent procedures. . .to develop a standardized process with decision criteria and corresponding standards of performance."

SB 673 (Lara) builds upon the PEWP and reforms the process governing hazardous waste permitting and public participation for new, modified, or reconstructed hazardous waste facilities. This new law establishes a bright line for DTSC to render TSDF permitting decisions. By January 1, 2018, DTSC must modify criteria for permitting hazardous waste facilities including completing a health risk assessment (HRA). In addition, DTSC must implement, by July 1, 2018, programmatic reforms governing hazardous waste permitting to enhance "protectiveness, timeliness, legal defensibility, and enforceability." Using specified tools and resources, DTSC must take into consideration vulnerable communities when making permit decisions and consider minimum facility setback distances from schools, hospitals, homes, and other sensitive receptors. SB 83 (Committee on Budget and Fiscal Review) is a similar law that requires the Cal-EPA Secretary and the Secretary of the NRA to establish an independent review panel to recommend strategies to improve the effectiveness of DTSC permitting, enforcement, public outreach and fiscal management. This new law also establishes within DTSC an assistant director for environmental justice to serve as an ombudsman to support disadvantaged communities. SB 83 also removes duplication in prior law and specifies how the Office of Environmental Health Hazard Assessment must externally review public health goals pursuant to the Safe Drinking Water Act (SDWA).

Prior to AB 1075 (Alejo) a "Class I" hazardous waste violation conflated immediate and direct threats to human health, safety, or the environment with less urgent threats. This new law modifies the DTSC categories of hazardous waste violations and distinguishes violations posing immediate and direct threats from relatively low- or long-term threats. This new penalty scheme is designed to provide DTSC a more objective standard to guide enforcement for repeat and serious hazardous waste facility violations. DTSC must deny, suspend, or revoke a permit, registration, or certificate for a hazardous waste facility that experiences three or more serious violations during a five-year period. This new law also authorizes DTSC to temporarily suspend a permit, registration, or certificate if it determines there is imminent and substantial endangerment to the public health or safety or the environment. Finally, persons found liable for or convicted of two or more previous violations of over 5 years are subject to an additional civil penalty of at least $5,000 and up to $50,000 for each day of each violation.

SB 162 (Galgiani) extends the sunset date to 2020 for relaxed management requirements governing chemically TWW. SB 489 (Monning) authorizes DTSC to regulate end-of-life photovoltaic modules as universal waste instead of hazardous waste. SB 83 (Committee on Budget and Fiscal Review) authorizes the DTSC to regulate metal recycling facilities.

Clean Up

The Bureau of State Audits released a 2014 report that identified several deficiencies with DTSC's cost recovery program that has resulted in millions of dollars uncollected cleanup obligations. AB 273 (Committee on Environmental Safety and Toxic Materials) implements one of the key findings from the report recommending an increase in the annual interest rate to 7% for delinquent costs connected to the state's cleanup efforts. After June 30, 2021, the interest rate increases to 10% on delinquent obligations.

Prior to AB 275 (Committee on Environmental Safety and Toxic Materials) DTSC was motivated to seek cost recovery under the federal Comprehensive Environmental Response Compensation, and Liability Act (CERCLA) instead of the California Hazardous Substances Account Act (HSAA). This is because under the HSAA, California is responsible for paying any portion of the judgment exceeding the amount available from the responsible party. AB 275 promotes using the HSAA by repealing the state's obligation to pay any portion of the judgment exceeding the aggregate amount apportioned to responsible parties. This new law is also designed to offer flexibility allowing DTSC to seek cost recovery through state court by adjusting the statute of limitations. Under this new law, the statute of limitations for DTSC to seek cost recovery for oversight of response and corrective actions is three years after all response or corrective

actions have been certified by DTSC or a regional water quality control board (RWQCB). As a result, this offers DTSC a better likelihood of recovering its costs before the statute of limitations expires."

Unlike the CERCLA, DTSC did not have authority to request financial information regarding a potentially responsible party's ability to pay for or conduct a cleanup. Instead, DTSC could only obtain this commencing a law suit compelling such disclosure. Subject to trade secret protections, AB 276 (Committee on Environmental Safety and Toxic Materials) authorizes DTSC to compel parties to provide relevant financial information. DTSC is further authorized to issue an order of compliance to compel disclosure and the ability to impose penalties for negligently or intentionally furnishing false information. Under specified circumstances, DTSC may disclose this information to the United States Environmental Protection Agency (US EPA).

Hazardous Materials

The Legislature delivered additional reforms governing hazardous materials management and the Medical Waste Management Act (MWMA). We also saw new warning requirements governing management of chemically treated wood, clarification of when local authorities can require mold abatement, and new warnings governing pesticide application.

SB 612 (Jackson) is another in a series of recent laws designed to reform and clarify provisions governing Certified Unified Program Agencies (CUPA) and hazardous materials business plans. Among other things, this new law requires CUPAs to triennially certify to the California Office of Emergency Services that they have reviewed their area plans and have addressed any necessary revisions. Under this new law, unified program agencies choosing to require additional site map requirements must first enact an ordinance as enabling authority. DTSC must also promulgate regulations by December 1, 2016 establishing instructions that exclude universal wastes from the "generator status" calculation—the amount of hazardous waste generated on a monthly basis that determines whether a generator is large, small, or conditionally exempt. In addition, this new law clarifies that a "tank in an underground area" can be managed as an aboveground tank pursuant to the California Aboveground Petroleum Storage Act if it is "substantially or totally above the surface of the ground." As a result, these tanks do not have to be managed as "underground storage tanks." This new law excludes from the definition of "aboveground storage tank" a tank or tank facility is located on and operated by a farm that is exempt from the federal spill prevention, control, and countermeasure (SPCC) plan requirements.

SB 162 (Galgiani) modifies warning information that must be posted by wholesalers and retailers of treated wood and treated wood-like products such as fencing, decking, retaining walls, landscaping, and outdoor structures. Retailers or wholesalers must include the following: "Warning—Potential Danger: These products are treated with wood preservatives registered with the United States Environmental Protection Agency and the California Department of Pesticide Regulation and should only be used in compliance with the product labels. This wood may contain chemicals classified by the State of California as hazardous and should be handled and disposed of with care. Check product label for specific preservative information and Proposition 65 warnings concerning presence of chemicals known to the State of California to cause cancer or birth defects." The warning also includes health and safety considerations for handling the treated wood.

SB 612 also establishes due process provisions governing CUPA enforcement of the MWMA. Persons who are assessed administrative penalties are now afforded the opportunity for a hearing and appeal. This new law also increases the administrative penalty for $1,000 to up to $5,000. (AB 333 (Wieckowski) Statutes of 2014) updated and recast provisions of the MWMA. SB 225 (Wieckowski) is an urgency measure intended to "clean up," and make corrections to clarify provisions of AB 333. This new law revises the definition of a "biohazard bags" used to collect medical waste along with modifying the requirements governing biohazard bags. Under this new law, biohazard bags used for transporting medical wastes to treatment and disposal facilities must be marked and certified by the manufacturer warranting that they have passed tear-resistance tests. Medical waste transporters must also maintain a tracking document to account for medical waste from generation to final treatment.

It is common practice for local code enforcement personnel to reference state law as the basis for ordering a landlord or property owner to make an improvement or repair. Prior to SB 655 (Mitchell) local governments managed mold complaints differently because mold was not identified in the Health and Safety Code. SB 655 was introduced to address this ambiguity by providing local enforcement agencies unequivocal authority to respond to mold complaints and require landlords and property owners to abate mold growth. Specifically, SB 655 provides that visible mold growth constitutes inadequate sanitation representing a substandard condition. This new law excludes from a substandard condition "mold that is minor and found on surfaces that can accumulate moisture

as part of their properly functioning and intended use." Pursuant to this law landlords are not required to address mold conditions unless they are notified of the alleged condition. This new law further permits a landlord to enter the dwelling to repair a dilapidation relating to mold.

SB 328 (Hueso) requires landlords who apply pesticides to a dwelling without a licensed pest control operator to notify tenants in writing before applying the pesticide. Landlords applying pesticides in common areas without using a licensed pest control operator, must post a similar notice at least 24 hours before applying the pesticide in a common area. In the event the pest poses an immediate threat, the landlord is required to post the notice as soon as practicable and no later than one hour after applying the pesticide. Landlords that routinely apply pesticides in a common area on a regular schedule without a licensed pest control operator must notify the tenant in each dwelling unit in writing. Finally, this new law immunizes landlords where the notice is removed without knowledge or consent.

Drinking Water

The California Department of Health issued its potable water regulatory limit (known as a maximum contaminant level or MCL) of 0.010 parts per billion for hexavalent chromium which became effective July 1, 2014. SB 385 (Hueso) is an urgency measure authorizing the SWRCB to allow a public water systems (PWS until January 1, 2020 to delay implementation of the MCL chromium-6. The extension is conditioned upon a PWS issuing a suitable compliance plan designed to meet the MCL by the earliest feasible date but not later than January 1, 2020. The PWS would not be deemed in violation of the MCL during the period in which the PWS implements an approved compliance plan. Finally, the PWS must notify ratepayers in writing twice annually of compliance plan.

In order to align with federal rules, AB 1531 (Committee on Environmental Safety and Toxic Materials) makes minor, clarifying changes to the California Safe Drinking Water Act (SDWA) and the Porter-Cologne Water Quality Control Act. This new law also establishes a procedure for an aggrieved person to petition the SWRCB to reconsider a ruling, within 30 days after issuance of an agency order or decision. Specifically, a petition for reconsideration must be filed before a petition for writ of mandate can be considered.

AB 434 (Eduardo Garcia) is an urgency measure that promotes potable water in farming communities that experience impaired drinking water (e.g., arsenic) and lacks access to centralized infrastructure, such as water and sewer. This new law authorizes use of technologies which provide access to clean water immediately including point-of-use (POU) point-of-entry (POE) systems. POU treats water directly at the tap (e.g., a single tap at the kitchen sink) and POE treats water entering a house or building. Specifically, this law extends the emergency regulations governing water treatment technology permits for these technologies by PWS serving 200 or fewer connections where centralized treatment is not "immediately economically feasible."

Water Supply

As California entered a fifth year of the most severe drought recorded, the Legislature served up several more new laws including cleanup legislation to last year's Sustainable Groundwater Management Act (SGMA), streamlining local approvals for groundwater replenishment, water diversion reporting and enforcement. Other new laws focus on expanding water service to disadvantaged communities while others address water efficiency and seismic integrity of water infrastructure, and establishment of the Office of Sustainable Water Solutions.

AB 617 (Perea) is a "clean up bill" that amends SGMA from last session (SB 1168 (Pavley) statutes 2013, SB1319 (Pavley) statutes 2013, and AB 1739 (Dickinson) statutes 2013). The SGMA authorizes local agencies (i.e., Groundwater Sustainability Agencies or GSAs) to develop and implement local sustainable groundwater management plans (GSPs) to regulate ground water basins experiencing overdraft conditions. This new law authorizes GSAs to enter into public-private partnership agreements and funding arrangements assist in implementing GSPs. This new law allows the GSA to direct the SWRCB to cooperate in the implementation of the GSP when it determines that the GSA implementation is being compromised by action or inaction. This new law also allows regional water management groups to incorporate groundwater planning into their regional water management plans. Finally, this new law clarifies that GSAs can be implemented before DWR approves the adopted GSP.

SB 13 (Pavley) is another SGMA cleanup law that makes technical amendments including an acknowledgement that functional equivalents to GSPs are permissible. This new law allows the SWRCB to designate a high- or medium-priority basin a probationary status allowing it 90 or 180 days to cure that situation that caused the basin to be declared as probationary. This new law also requires DWR to determine whether to establish a GSP for basins or subbasins that are not being monitored. Basins assigned a medium- or high-priority status that are not experiencing critical overdraft conditions prior to January 31, 2017 now have until January 31, 2022 to develop and implement a GSP. Finally, this new law simplifies notice requirements

to DWR governing designation as a GSA and permits mutual water companies to join GSAs. AB 939 (Salas) clarifies that GSAs are required to submit an alternative GSP after the basin is prioritized from a low status to a medium or high priority.

There is broad consensus that the common law ground water adjudication process takes too long to resolve water supply disputes. As a result, AB 1390 (Alejo) was implemented to streamline the ground water adjudication process to assist basins in meeting SGMA requirements and establish final water rights determinations. AB 1390 adds a new chapter to Title 10 of Part 2 of the Code of Civil Procedure (Section 830 *et seq.*). This new chapter establishes notice, service, discovery, expert testimony, and other procedures intended to comprehensively determine rights to extract groundwater within any basin. This new law requires plaintiffs to initiate comprehensive adjudications by filing a notice and complaint to all holders of fee title to real property in the ground water basin including a city, county, or city and county that overlies the basin or a portion of the basin. GSAs, cities, counties, and persons that overlie the basin or a portion of the basin are authorized to intervene in a comprehensive adjudication. The superior court must convene a case management conference to address how to resolve legal and factual issues. Within six months of appearing in the comprehensive adjudication, parties must serve initial disclosures to all other named parties and, where relevant, a special master. The superior court is authorized to issue a preliminary injunction for basins it finds to be in long-term overdraft.

AB 92 also expanded the California Department of Fish and Wildlife (DFW) authority and tools to enforce against illegal diversion of water from marijuana growing operations. DFW must issue corrective measure proposals no later than 30 days of notifying an owner of a deleterious diversion to salmon and steelhead. This new law also authorizes DFW to levy penalties for those responsible for diversions that obstruct fish passage. This law additionally authorizes wardens to lodge a complaint to the SWRCB and remain a party to the proceeding for unauthorized water diversions impacting fish and wildlife. SB 165 (Monning) and AB 243 (Wood) also address the impacts of marijuana cultivation on natural resources. SB 165 imposes additional civil penalties for violations of various provisions of the Penal Code and Public Resources Code related to the production or cultivation of a controlled substance. AB 243, in conjunction with AB 266 (Bonta) and SB 643 (McGuire), comprises the Medical Marijuana Regulation and Safety Act (MMRSA). AB 243 establishes a regulatory program that attempts to comprehensively address the environmental impact of marijuana cultivation. It tasks state agencies (including the Department of Pesticide Regulation, DFW, and the SWRCB) with developing regulations, permitting schemes, and enforcement programs to address pesticide usage, and water diversions that impact instream flows for fish spawning and migration, site remediation, and discharges of waste.

SB 88 (Committee on Budget and Fiscal Review) requires permittees or licenses diverting surface water greater than 10 acre feet of water annually to measure and report on the diversions at least annually. The new law imposes liability of up to $10,000 for violations of SWRCB water conservation programs or rules, including $500 for each additional day of violation. Local water agencies may impose penalties for up to $1,000 for violations of water conservation requirements.

SB 226 (Pavley) authorizes DWR to intervene in a comprehensive adjudication pursuant to AB 1390 (above) to determine groundwater rights in basins required to have a GSP. This new law requires a superior court involved in an adjudication to determine groundwater rights in a basin required to have a GSP. The court must manage the proceedings in a "manner that minimizes interference with timely completion and implementation of a GSP, avoids redundancy. . .and is consistent with the attainment of sustainable groundwater management within the timeframes established by the [SGMA]." DWR is required to provide the court input including recommended corrective actions and establishes a procedure for the court to amend the judgment to reflect DWR's recommended corrective actions. This new law provides that a superior court may only approve judgments in a basin adjudication that "will not substantially impair" the ability to comply with the SGMA. Finally, this new law places limitations adjudicating basins subject to probationary basins and interim plans.

The Legislature approved AB 91 (Committee on Budget) and AB 92 (Committee on Budget)—urgency, budget-related measures that together accelerated over $2 billion in bond-related support for water and flood infrastructure to respond to the drought. AB 92 establishes the Office of Sustainable Water Solutions within the drinking water program of the SWRCB. This office is charged with promoting "permanent and sustainable drinking water and wastewater treatment solutions." Among other things, the office is charged with assisting small communities in obtaining state and federal funds to support drinking water and wastewater treatment systems. SB 88 (Committee on Budget and Fiscal Review) is an urgency water trailer bill that is also aimed at expanding potable water to disadvantaged communities. This new law is designed to implement drought relief measures to provide safe, reliable and adequate supplies of drinking

water to disadvantaged communities. This new law authorizes the SWRCB to require PWSs serving disadvantaged communities to extend (on an interim basis) service these communities. As discussed more fully in the CEQA section (below), this new law clarifies local government authority to regulate groundwater during a state of emergency for drought pursuant to a gubernatorial proclamation. By providing a CEQA exemption, this new law encourages local governments to support groundwater replenishment projects. Specifically, this new law allows a CEQA exemption for recycled water systems and related groundwater replenishment projects. This new law additionally provides a CEQA exemption for local ordinances that impose stricter conditions well permits or changes in land use intensity that would increase demand on groundwater. Finally, AB 92 (discussed above) suspends until July 1, 2018, procurement and contracting provisions governing projects supporting community water system projects serving disadvantaged communities.

Several new laws address water efficiency including AB 92 (discussed above) which targets significant water leakage from piping infrastructure that DWR estimates to be as high as 50% in some water systems. This new law establishes the CalConserve Revolving Fund Water Efficiency Pilot Projects to fund water conservation projects to, among other things, provide low-interest loans to address leaks on private property. This could include subsidizing water efficiency projects where the water supply provides water efficient washing machines or dishwashers. The homeowner repays the cost of these appliances over time via their utility bill. SB 555 (Wolk) also addresses water efficiency by requiring urban retail water suppliers to annually audit potential water leaks beginning October 1, 2017. The audit results must be submitted to DWR and include steps undertaken to mitigate water losses. DWR must post the water loss assessment and offer technical assistance to urban retail water suppliers to assist in preventing water losses. This new law also requires the SWRCB to promulgate rules that establish performance standards addressing water loss governing urban retail water suppliers.

AB 1164 (Gatto) is another water efficiency law premised on the notion that landscape irrigation presents strong potential to conserve water as it accounts for close to 43% of urban water use in California. AB 1164 is an urgency measure that furthers Governor Brown's Executive Order B-29-15 which mandates a 25% reduction in potable urban water usage statewide. According to Assembly member Gatto, this new law tackles urban water use which represents the largest urban water consumption. This new law prohibits cities and counties from establishing ordinances that prohibit drought tolerant landscaping, synthetic grass, or artificial turf on residential property. In a similar vein, AB 606 (Levine) obligates state agencies to reduce water consumption and increase water efficiency where feasible for new state buildings, landscaping, and irrigation. AB 1(Brown) is another law designed to promote the Governor's drought declaration and preempts local ordinances that penalize residents who fail to maintain lawns by conserving water. AB 149 (Chávez) extends the due date for water agencies to meet the mandatory statewide goal of achieving a 20% reduction in per capita water use (20x2020 goal) to July 1, 2021 from December 31, 2020.

SB 664 (Hertzberg) responds to a perceived lack of a systematic seismic risk assessment of California's water infrastructure. This new law requires that Urban Water Management Plans include a seismic risk assessment and plan to mitigate seismic risks to water systems beginning January 1, 2020. Urban water suppliers may submit a copy of its approved local hazard mitigation plan or multi-hazard mitigation plan that discusses managing seismic risk.

The LA Times reported that Division of Oil, Gas, and Geothermal Resources (DOGGR) violated the federal Safe Drinking Water Act [SDWA] by inadvertently allowing oil companies to inject benzene-laden wastewater "from fracking and other oil production operations into hundreds of disposal wells in protected aquifers." SB 83 (Committee on Budget and Fiscal Review)—the Omnibus Resources Trailer Bill for 2015-16—responded by lifting the confidential veil for well logs (also known as well completion reports) and makes them publicly available. These reports are required for digging, boring, drilling water wells, cathodic protection wells, monitoring wells, abandoning or destroying, deepening, and reperforating wells (which must be filed with DWR). These reports contain details on the construction and location of the well, the soils and geology, along with the depth to groundwater. This geologic and hydrologic groundwater information can assist groundwater managers in their efforts to manage oil contamination in groundwater. DOGGR is authorized to propose to US EPA that an aquifer be an exempted as a Class II well pursuant to the federal SDWA. If DOGGR and the water boards support the proposed exemption, they must jointly convene a public hearing to evaluate the proposal.

Water Quality

The Legislature responded to the Refugio oil spill with a burst of legislation strengthening safeguards to oil pipelines. Other legislation addresses gas pipeline safety,

mercury from mining activities, management of nonindigenous species from ballast waters, and water quality impacts near the United States-Mexican border.

SB 414 (Jackson) is one of three bills that respond to the crude oil pipeline rupture at the Refugio State Beach in Santa Barbara County in May, 2015 which released over 100,000 gallons of oil. The onshore common carrier pipeline, which transported oil from offshore platforms was not equipped with an automatic shut off devise and was inspected every other year. The damaged pipeline was classified by the Pipeline and Hazardous Materials Safety Administration (PHMSA) as an interstate pipeline (even though it never shipped oil out-of-state) and was exempt from the Elder California Pipeline Safety Act of 1981. The Elder Act regulates intrastate petroleum pipelines and must be capable of leak detection and have cathodic protection. SB 414 (Jackson) amends the Lempert-Keene-Seastrand Oil Spill Prevention and Response Act which governs preparedness for, prevention of and responses to oil spills. This new law requires the administrator for the Office of Oil Spill Prevention and Response (OSPR), in cooperation with the United States Coast Guard, to conduct drills and exercises and requires the administrator to require Harbor Safety Committees to evaluate their ability to provide emergency towing in their respective jurisdictions. This new law also requires the administrator to license oil spill cleanup agents or dispersants. Finally, those responsible for spills will be held strictly liable.

The Office of the State Fire Marshal's (SFM) Pipeline Safety Division is responsible for regulating approximately 5,500 miles of intrastate hazardous liquid transportation pipelines. Beginning January 1, 2017, SB 295 (Jackson) is another pipeline law that requires the SFM or its designee to annually inspect all intrastate pipelines and operators of intrastate pipelines within its jurisdiction. The last bill of the package—AB 864 (Williams) requires that new or replacement pipelines located near environmentally and ecologically sensitive areas in the coastal zone to be equipped with best available technology (BAT) by January 1, 2018. Operators of existing pipelines near these sensitive areas must submit a plan to retrofit the pipeline by July 1, 2018 and complete the work by January 1, 2020.

AB 1420 (Salas) is another pipeline safety law which requires the DOGGR to evaluate its regulatory framework governing active gas pipelines. DOGGR must review rules that regulate pipelines "four inches or less in diameter, located in sensitive areas, and that are 10 years old or older." Operators of active gas pipelines in sensitive areas must submit to DOGGR maps identifying their location by January 1, 2018. DOGGR must periodically and randomly spot check pipelines to validate the maps are accurate. This new law also requires owners or operators of active gas pipelines in a sensitive area to notify DOGGR and the appropriate local health officer of pipeline leaks upon discovery. Local health officers must then collaborate with DOGGR and the owner or operator of the leaking pipeline. They must also notify residents who could be exposed to leaks posing a serious public health and safety threat. This new law also requires DOGGR to keep a list of active gas pipelines located in sensitive areas.

SB 637 (Allen) was introduced to manage water quality impacts from mining such as mercury pollution. This new law authorizes the SWRCB or a RWQCB to establish waste discharge requirements permit governing suction dredge mining. This new law additionally prohibits the DFW from permitting suction dredge mining that violates other applicable rules and requirements governing vacuum or suction dredge equipment.

The Marine Invasive Species Act is designed to minimize the release of nonindigenous species to California waters due to ballast water intake and associated sediments from oceangoing vessels. The Act requires ocean-going vessels operating outside of the coastal waters to report on ballast waters and sediments. AB 1312 (O'Donnell) delays implementation of the ballast water performance standards due to the lack of suitable ballast water treatment technologies. This new law delays interim performance standard to 2020 and the final standards until 2026. This new law also authorizes the State Lands Commission's to inspect vessels for biofouling.

AB 965 establishes the New River Water Quality, Public Health, and River Parkway Development Program administered by the California-Mexico Border Relations Council. The Council is authorized to issue grants to fund organizations to mitigate cross-border transmission of environmental pollutants or toxics. The Council is also authorized to implement recommendations from the New River Strategic Plan.

California Environmental Quality Act

With no appetite to take on another attempt at CEQA reform, the Legislature managed to approve a series of "one-off" CEQA exemptions streamlining the permitting path for "environmental leadership projects."

SB 88 (Committee on Budget and Fiscal Review), in addition to other drought-related water initiatives, authorizes the SWRCB to require consolidation of water systems in disadvantaged communities in unincorporated areas or served by mutual water companies with a chronic lack of adequate, safe, and reliable drinking water. This new law additionally creates a CEQA exemption for

projects to construct or expand recycled water pipelines and related infrastructure within existing rights of way, if the project does not affect wetlands or sensitive habitat and the construction impacts are fully mitigated. SB 88 establishes another CEQA exemption for the adoption of local ordinances to limit or prohibit either the drilling of new or deeper groundwater wells. The exemption also applies to increased extractions from existing groundwater wells, through stricter conditions on well permits or changes in the intensity of land use that would increase demand on groundwater. Finally, this new law allows local water agencies to issue administrative civil penalties for violations of local and state water conservation programs.

The governor signed two new laws extending expiring provisions of CEQA. AB 117 (Committee on Budget) extends the deadline for CEQA lead agencies to certify environmental impact reports (EIRs) for "environmental leadership" projects certified by the Governor. Under AB 900, the Jobs and Economic Improvement Through Environmental Leadership Act of 2011, the Governor was authorized to certify certain large-scale ($100 million+) clean energy generation projects, clean energy manufacturing projects, and transit-oriented, infill development projects as environmental leadership projects entitled to streamlined judicial review, so long as the EIR was certified by the lead agency by January 1, 2016. AB 117 extends this deadline by one year, to January 1, 2017. AB 323 (Olsen) extends the sunset date for the statutory exemption for minor alterations to roadways (Public Resources Code section 21080.37), from January 1, 2016 to January 1, 2020. In 2012, AB 890 established this CEQA exemption for projects to repair, maintain, or make minor alterations to an existing roadway, if the project is carried out by a city or county with a population of less than 100,000 persons and meets certain other conditions. Interestingly, at the time that AB 323 was passed (June 2015), it appeared that the exemption had not been used. Lead agencies claiming the exemption are required to file a notice of exemption with OPR, and no such notices had yet been filed.

Two statutory exemptions addressing railroad crossing projects were amended by SB 348 (Galgiani). With respect to the exemption for projects to eliminate grade crossings or reconstruct existing grade separations (Public Resources Code section 21080.13), SB 348 adds a requirement that the lead agency file a notice of exemption with OPR and, where the lead agency is a local agency, with the county clerk. With respect to the exemption for closure of a railroad grade crossing determined by the CPUC to present a threat to public safety (Public Resources Code section 21080.14), this new law extends the sunset date of the exemption by three years, from January 1, 2016 to January 1, 2019.

Land Use

In addition to approving land use laws supporting transit and EVs, the Legislature approved amendments to the Williamson Act, the Subdivision Map Act, and broke down barriers designed to achieve improved water efficiency.

The Governor approved three new land use laws promoting water efficiency. AB 786 (Levine) and AB 349 (Gonzalez) were enacted to facilitate Governor Brown's April 2015 executive order addressing the state's emergency drought conditions which, among other things, called for replacing 50 million square feet of lawns with drought-tolerant landscaping. AB 786 amends the same provision of the Davis-Stirling Common Interest Development Act and bars HOAs from (1) prohibiting HOA members from replacing lawns with low water-using plants or artificial turf, (2) imposing fines against HOA members who reduce or eliminate their watering of lawns during any drought emergency, unless the HOA has made available recycled water for landscape irrigation, or (3) requiring HOA members to remove water-efficient landscaping that was installed in response to a drought emergency, once the emergency is over. Approximately one quarter of the state's housing stock, including condominiums, community apartments, and planned unit developments are part of a CID. Existing law makes any CID governing documents, guidelines or policies void and unenforceable if they prohibit the use of low water-using plants or restrict compliance with water-efficient landscape ordinances. AB 349 (Gonzalez) removes barriers for individual home and condominium owners in common interest developments (CID) from installing and maintaining artificial turf and other water-efficient landscape measures. This new law has the potential to significantly reduce landscape irrigation which represents 43% of urban water use. The new law extends this to void any CID document that prohibits the use of artificial turf or synthetic grass. The new law would prohibit a CID from requiring homeowners to remove or reverse water-efficient landscaping measures when the state of emergency is lifted.

The Governor signed two measures amending the Subdivision Map Act. AB 1303 (Gray) revises the Subdivision Map Act, and makes conforming changes to the Permit Streamlining Act, to provide developers with additional time to complete projects in economically disadvantaged counties. In such counties, the new law automatically extends by 24 months the expiration date for any map that was approved between January 1, 2002, and July 11, 2013, and had not expired as of the effective date of the law. For maps approved prior to January 1,

2002, the new law directs counties to extend the expiration date by 24 months, if (1) an application for an extension is timely filed by the subdivider, and (2) the county determines that the map is consistent with the applicable zoning and general plan requirements in effect when the application is filed. Before approving a map in such areas, a county must typically make three findings: (1) the design and location of each lot are consistent with state fire protection regulations; (2) structural fire protection and suppression services will be available for the subdivision; and (3) ingress and egress for the subdivision meets local and state road standards for fire equipment access. AB 644 (Wood) creates an exemption from making these findings for areas in a "state responsibility area" (for wildfire protection) or a "very high fire hazard severity zone" (as identified by the Department of Forestry and Fire Protection). AB 644 exempts from this requirement any approvals of subdivisions of land identified in the open space element of the general plan for the managed production of resources (including forest land, rangeland, and agricultural land), if the subdivision is consistent with the open space purpose. For the exemption to apply where the subdivision would result in parcels that are 40 acres or smaller in size, those parcels must be subject to a binding and recorded restriction prohibiting the development of a habitable, industrial, or commercial structure.

The Williamson Act (i.e., the California Land Conservation Act of 1965) authorizes a city or county to enter into 10-year contracts with owners of land devoted to agricultural use, whereby the owners agree to continue using the property for that purpose, and the city or county agrees to reduce the property tax. To deter landowners from canceling Williamson Act contracts, they are levied a fee—equal to 12.5% of the "cancellation value" of the land. Some local jurisdictions, such as Merced County and Humboldt County, have passed ordinances that impose an additional cancellation fee that is also derived from the agreed upon "cancellation value." Prior to AB 707, the Department of Conservation (DOC) and the landowner could negotiate and agree on the cancellation value without notice to or input from such a local jurisdiction. AB 707 (Wood) requires the COC to provide notice of the preliminary cancellation valuation of Williamson Act contract land to the county assessor and the city council or county board of supervisors, where the local jurisdiction in which the property is located imposes additional local contract cancellation fees. This new law changes that by requiring the DOC to provide 60-day notice of its preliminary valuation to the local jurisdiction, and to take into account any comments provided by the jurisdiction, prior to making a final determination on the cancellation valuation.

Assembly member Chau succeeded in enacting two laws designed to promote transit and electric vehicles (EVs). AB 744 (Chau) reduces minimum parking requirements for transit-oriented developments that include affordable housing, senior housing, or special needs housing. This new law is intended to promote both types of housing developments and the goals of the Sustainable Communities and Climate Protection Act of 2008 (*see* SB 375 (Steinberg) statutes of 2008). AB 744 generally prohibits a city or county from imposing a vehicular parking ratio above specified levels for such developments that are located within 1/2 mile of a major transit stop and provide unobstructed access to the transit stop (or, for senior and special needs housing, that provide paratransit service to the transit stop). However, this new law allows a city or county to impose a higher vehicular parking ratio based on substantial evidence found in an area-wide or jurisdiction-wide parking study. As explained more fully below, AB 1236 (Chiu) removes barriers for approval of new EV charging stations and requires counties and cities to create an expedited permitting process for these stations.

Energy

The Legislature continues with its insatiable appetite for advancing renewable energy, promoting energy efficiency, and supporting alternative fuels and EVs.

AB 1236 (Chiu) advances Executive Order Executive Order B-16-12 that helps facilitate California's zero-emission vehicle infrastructure to help achieve the target of 1.5 million zero emission vehicles in California by 2025. Currently, there is a patchwork of local requirements governing the installation of new EV charging stations. This new law removes barriers for approval of new EV charging stations and requires counties and cities to create an expedited permitting process for these stations. This new law requires municipalities with a population of 200,000 or more residents to approve an ordinance, by September 30, 2016, to expedite and streamline the EV charging station permitting process. Under this new law local governments may no longer deny an application based on other factors, such as aesthetics. In addition, all counties and cities must develop a permitting checklist listing the public health and safety requirements for proposed EV charging stations and provide an expedited review process for applications that meet these requirements. This new law allows a conditional use permit for an EV station where a building official finds, based on substantial evidence, that the station could have a specific, adverse impact upon the public health and safety and there is "no feasible method to satisfactorily mitigate or avoid the adverse impact." This new law allows the local

planning commission to entertain an appeal for the land use decision.

AB 808 (Ridley-Thomas) was introduced to help the California Department of Food and Agriculture (CDFA) to advance Executive Order B-16-12. AB 808 (Ridley-Thomas) is intended to provide CDFA unambiguous authority to prevent consumer confusion and unfair business practices by authorizing the agency to, among other things, regulate alternative fuels. Specifically, this new law expands the authority of CDFA to embrace alternative fuels and lubricants and to establish a "single, consistent method of sale," advertising, labeling, and fuel quality. AB 1008 (Quirk) exempts from public utility status those owners and operators who sell hydrogen at retail to the public for use only as a motor vehicle fuel pursuant to the Public Utilities Act.

Two new laws promote renewable energy including AB 1034 (Obernolte) which is designed to encourage establishment of renewable energy generation facilities on existing mine sites. This applies at mines whose reclamation plans were approved prior to 1993, when more stringent requirements came into effect under the Surface Mining and Reclamation Act (SMARA). Prior to this law, a miner who chose to collocate renewable energy on its mining claim would be required to amend their reclamation plans and face new reclamation standards. Under this new law mine owners with "grandfathered" pre-1993 reclamation plans who wish to co-locate such a project will not be required to bring those plans into compliance with current SMARA standard. This new law requires lead agencies to consider construction and operation of a renewable energy facility (under 50 megawatts) on disturbed, mined land as an "interim use." Among other things, the renewable energy facility must not adversely affect the current mining operation or ultimate reclamation of the mined lands. The renewable energy facility is required to have separate closure and decommissioning plans and separate financial assurance mechanisms. SB 83 (Committee on Budget and Fiscal Review) is the other renewable energy law. It increases the amount of renewable energy that may be generated via net energy metering on a military base. Bases may generate one megawatt more than the historical load or twelve megawatts, whichever is lower. This new law also establishes June 1, 2018 as the sunset date for the Solar Homes Partnership Program.

The Governor signed three new laws addressing energy efficiency. AB 793 (Quirk) requires electrical and gas corporations to inform rate payers of their energy usage to assist them in making informed decisions on optimizing energy consumption. Electrical and gas corporations must educate rate payers and offer incentive programs to acquire energy management technology in homes and businesses. AB 1448 (Lopez) allows a tenant to use a clothesline or drying rack subject to reasonable time and location restrictions. This new law specifically makes void and unenforceable HOA provisions that restrict an owner's ability to use a clothesline or drying rack.

SB 1018 (Committee on Fiscal and Budget Review) statutes of 2012) is a budget trailer bill that allows up to 15% of GHG funds generated from GHG allowances to support clean energy and energy efficiency programs. AB 693 builds on that law and establishes the Multifamily Affordable Housing Solar Roofs Program which allows eligible multi-family properties to access these funds for solar installations. This new law also requires the CPUC to require that the solar-generated electricity offset electricity usage by low-income tenants.

SB 1128 ((Padilla) Statutes of 2012) expanded the sales and use exclusion (SUT) program to include advanced manufacturing projects. The author states that this law is essential for attracting and retaining cutting edge high tech manufacturing in California. AB 1269 (Dababneh) extends authority under the CAEATFA to provide a sales and use tax exclusion for advanced manufacturing projects from July 1, 201 to January 1, 2021.

Natural Resources

The Legislature produced a potpourri of new natural resources programs including the establishment of a newly protected wild and scenic river; amendments to CESA along with other species protections; greenway easements and wildlife corridors; and implementation of state park reforms.

To date, only a few rivers in California have been designated as wild and scenic, including the Klamath, Trinity, Eel, and lower American. AB 142 (Bigelow) amends California Wild and Scenic Rivers Act to specifically include consideration of segments of the Mokelumne River as "wild, scenic, or recreational." The Mokelumne River, which is tributary to the Delta, provides water to agricultural uses in the Central Valley and municipal uses within the East Bay Municipal Utilities District service area. The Mokelumne is also used by wildlife and for recreation. This new law adds specific segments of the North Fork and main stem Mokelumne River for potential addition to the wild and scenic river system, and requires the NRA to submit a report to the Legislature and Governor no later than December 31, 2017. Until the Legislature acts on the recommendation or December 31, 2021, whichever occurs first, "no dam, reservoir, diversion, or other water impoundment facility may be constructed on any segment designated for study" unless the Secretary makes certain

findings—that the water is needed for domestic water supplies and that there will be no adverse effects on the "free-flowing" condition of the river.

The Legislature served up four new laws addressing the CESA. AB 1527 (Committee on Water, Parks, and Wildlife) makes numerous technical amendments to the Fish and Game Code addressing fully protected and proposed, threatened, and endangered species. According to the Assembly Bill Analysis, the amendments were recommended by the California Law Revision Commission as part of its "comprehensive review and proposed recodification" of the Fish and Game Code, which is ongoing. Some of the changes include, for example, extending certain requirements relative to take and possession to both reptiles and amphibians, removing superfluous references to animals and animal "parts," and other clarifications and non-substantive changes. AB 353 (Lackey), another geographically targeted natural resources bill, amended the Fish and Game Code to authorize the DFW to permit the "take" of unarmored threespine stickleback, a fully protected fish species, to support a habitat restoration project on public lands in Bouquet Canyon and Bouquet Creek. Bouquet Creek is within unincorporated Los Angeles County and the Los Angeles National Forest and had been severely degraded by wildfire in 2002 and winter floods in 2004-2005. The agencies could not undertake the work necessary to restore the creek due to possible take of the stickleback because, unlike the CESA, the Fully Protected Species statutes authorize take in only severely limited circumstances, such as for scientific research. (*See Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal. 4th 204.) While AB 353 authorizes DFW to permit take of stickleback, the authorization must satisfy the requirements of Section 2081 of the Fish and Game Code—e.g., the take must be "minimized and fully mitigated"—and provide for development and implementation of an "adaptive management process that substantially contributes to the long-term conservation of the unarmored threespine stickleback."

AB 96 (Atkins) strengthens the California law governing the ivory trade. The existing prior to AB 96 had banned the sale of elephant ivory, as well as the importation and possession of such ivory with the intent to sell, but exempted from the ban any ivory that was imported prior to 1977. The legislative findings incorporated in AB 96 State that this exemption "has rendered the law unenforceable—allowing illegal sales to flourish." This new law significantly expands the ivory ban by (1) eliminating the exemption for elephant ivory imported prior to 1977, (2) extending the ban to other forms of ivory (tooths and tusks from any species of hippopotamus, mammoth, mastodon, walrus, warthog, whale, or narwhal) and to rhinoceros horn, and (3) providing for administrative civil penalties in addition to criminal penalties. This new law provides limited exemptions from the ban for law enforcement, educational, and scientific purposes, as well as for ivory in certain musical instruments manufactured prior to 1976 and antiques over 100 years old.

Monarch butterflies migrate across California, and populations have declined due to habitat loss, a substantial portion of which is on privately-owned lands. AB 559 (Lopez) authorizes DFW to take feasible actions to conserve monarch butterflies and their migration habitats, including for example "habitat restoration on DFW lands, education programs, and voluntary agreements with private landowners." This new authorizes DFW to partner with federal agencies, nonprofit organizations, academic programs, private landowners, and other entities and requires DFW to rely on the "best available science" in undertaking actions to conserve monarch butterflies and their habitats.

AB 498 (Levine) declares it is state policy to encourage, wherever feasible and practicable, voluntary steps to protect the functioning of wildlife corridors including acquisition or protection of wildlife corridors through conservation easements, installation of wildlife-friendly fending, siting of mitigation and conservation banks in areas that provide habitat connectivity, and provision of roadway crossings to allow for movement of fish and wildlife. This new law also provides that an authorized purpose of a conservation bank may include the protection of habitat connectivity. This new law only encourages voluntary measures and states that the failure of a project application to take any of these voluntary steps shall not be grounds for denying a permit or requiring additional mitigation under CEQA, the CESA or other laws. AB 1251 (Gomez), the Greenway Development and Sustainment Act, adds a chapter to the Civil Code that creates a new real property interest known as a "greenway easement." The statute defines this as an interest in real property, voluntarily created and freely transferable, for the purpose of developing a greenway—a landscaped bicycle and/or pedestrian corridor—adjacent to an urban creek, stream, or river. Greenway easements are perpetual and run with the land, and may be only held by the state, local governmental entities, California Native American tribes, or tax-exempt nonprofit organizations whose primary purpose is either the development of greenways or the preservation of land in its natural, scenic, historical, agricultural, forested, or open-space condition or use.

AB 549 (Levine) implements reforms recommended by the Parks Forward Commission to ensure a sustainable state park system for California. This new law clarifies the authority of the Department of Parks and Recreation

to enhance public access to state parks by acquiring and operating alternative overnight accommodations (camping cabins and parking facilities for recreational vehicles), and to accept donations of funds, services, and facilities for support of state parks. This new law also revises the process for review and approval of state park concession contracts, to promote efficiency, oversight and transparency.

The California Tahoe Conservancy (CTC) was established in the NRA to protect the natural environment and preserve the scenic beauty and recreational opportunities in the Lake Tahoe region. AB 1004 (Dahle) clarifies that the actions of the CTC must fulfill the statutory purposes of the CTC. This new law states that CTC's existing authority to lease, rent, sell, and transfer property must be conducted to meet these purposes.

Beginning in 2017, water transfers will reduce the agricultural runoff that has been providing significant inflow to the Sea, resulting in the Sea shrinking considerably in size and increasing in salinity, and exposing lakebed to desert winds. This is expected to "chronically and adversely affect both the environment and human health," including by impacting over 400 species of birds supported by the Sea and by increasing fine particulate air pollution in the Coachella and Imperial Valleys. AB 1095 (Garcia) requires that, by March 31, 2016, the NRA submit to the Legislature a list of Salton Sea restoration projects that are "shovel ready," i.e., that are in the final planning, environmental review, or permitting phase. The bill's final Assembly Floor Analysis states that "the need to identify projects that will help the Salton Sea is urgent."

Enforcement

AB 1071 (Atkins) requires CalRecycle, OEHHA, and the Department of Pesticide Regulation (DPR) to join the ARB, DTSC, and SWRCB in adopting Supplemental Environmental Projects (SEPs). These agencies may require up to 50% of the amount of the amount of a penalty to support an environmentally beneficial project that benefits environmental justice communities.

Looking Ahead

Unencumbered by the political dynamics of the next campaign, Brown completed the first year of his unprecedented, fourth and final term as Governor of California. Against the backdrop of this seasoned executive, the Legislature elected two new young leaders: Senate Pro tempore Senator Kevin De León and Assembly Speaker Anthony Rendon. Senator De León, who authored SB 350, has shifted the dialogue on environmental policy and has left his imprint on policies affecting disadvantaged communities. With the longer term limits, Speaker Rendon could be the longest serving Speaker since Willie Brown. Perhaps, more durable and steady leadership in the Assembly could further calm the mood in Sacramento.

The Governor's 2016 State of the State address was notably less ambitious than the prior year's vision on environmental policy. Despite an improving economy with a projected multi-million budget surplus, Governor Brown emphasized the inevitability of another near-term recession. He laid out his vision for sustaining the state's fiscal health by maintaining reserves, paying down short-term debt, and avoiding significant new spending commitments. Although the Governor did make a one-time $2 billion allocation for water reliability and other infrastructure projects, he has no appetite for committing funds longer term. In contrast, the democratically controlled Legislature has a bigger appetite for funding the neglected safety net and closing the estimated $77 billion for deferred road maintenance and other infrastructure.

With three years remaining in office, Governor Brown has his sights trained on cementing climate change policy well beyond his term in office. Although CEQA reform remains elusive, we could see progress on stalled CPUC reforms and a move to curtail petroleum consumption. Whether these initiatives move forward in the midst of an election year will require cooperation with the new legislative leaders and bridging differences among the fractious assembly caucus.

CALIFORNIA ENVIRONMENTAL QUALITY ACT

Regulatory Activity

CEQA Guidelines—Appendix G—Tribal Cultural Resources. The Natural Resources Agency is proposing to amend the CEQA Guidelines and Appendix G to include consideration of impacts to tribal cultural resources. The effect of the proposed rulemaking will be to assist lead agencies with compliance with new requirements in CEQA regarding consultation with California Native American Tribes and the analysis of potential impacts to

tribal cultural resources. A hearing will be held at 9:00 a.m., April 4, 2016, California Natural Resources Building, 1416 Ninth Street, First Floor Auditorium, Sacramento, CA. Written comments must be submitted by 5:00 p.m., April 4, 2016. Electronic submittal is preferred: ceqa.guidelines@resources.ca.gov. Comments may also be submitted by mail to Heather Baugh, California Natural Resources Agency, 1416 Ninth Street, Suite 1311, Sacramento, CA 95814. Copies of the proposed text and statement of reasons, and inquiries: Heather Baugh, (916) 653-8152. The documents are also available on the Resource Agency's website at www.resources.ca.gov.

AIR QUALITY CONTROL

Cases

Partial Disapproval of Arizona State Implementation Plan for Regional Haze Not Arbitrary and Capricious

Ariz. ex rel. Darwin v. United States EPA
Nos. 13-70366, 13-70410, 9th Cir.
2016 U.S. App. LEXIS 3196
February 24, 2016

Petitioners petitioned for review of a final rule promulgated by EPA. The rule partially disapproved Arizona's regional haze State Implementation Plan (SIP) submission and promulgated a Federal Implementation Plan (FIP) in place of the disapproved SIP elements. The court of appeals held that EPA did not act arbitrarily and capriciously when it disapproved in part the SIP's "best available retrofit technology" for a coal-fueled power plant located in Eastern Arizona, and when it issued a replacement FIP as to the disapproved portions. The court also held that EPA did not err procedurally in promulgating the FIP in the same rule as its partial disapproval of the SIP. The court further held that its ultimate review of EPA's FIP must await EPA's final action on its proposal to revise the FIP in specific respects. Accordingly, it stayed the proceedings as to evaluation of the FIP's technical feasibility until the administrative process was complete.

Facts and Procedure. Congress initially enacted the Clean Air Act (CAA) in 1963 to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population" [42 U.S.C. § 7401(b)(1)]. Later, in the Clean Air Act Amendments of 1977, Pub. L. No. 95-95, § 128, 91 Stat. 685, 742 (current version at 42 U.S.C. § 7491), Section 169A was added "in response to a growing awareness that visibility was rapidly deteriorating in many places, such as wilderness areas and national parks" [*Am. Corn Growers Ass'n v. EPA* (D.C. Cir. 2002) 291 F.3d 1 (internal quotation marks omitted by the court) (quoting *Chevron U.S.A., Inc. v. EPA* (5th Cir. 1981) 658 F.2d 271)].

In enacting Section 169A, Congress "declare[d] as a national goal the prevention of any future, and the remedying of any existing, impairment of visibility in mandatory class I Federal areas which impairment results from manmade air pollution" [42 U.S.C. § 7491(a)(1)]. "Class I" federal areas include certain national wilderness areas and national parks. Arizona contains 12 Class I areas, the largest of which is Grand Canyon National Park.

Section 169A requires that certain sources contributing to visibility impairment install the best available retrofit technology (BART). States must review all major stationary emissions sources built between 1962 and 1977 to determine whether the source "emits any air pollutant which may reasonably be anticipated to cause or contribute to any impairment of visibility in" any Class I area [42 U.S.C. § 7491(b)(2)(A)]. The states are then responsible for determining the appropriate BART controls for each source.

EPA reviews the states' submissions of the State Implementation Plan (SIP), if any, for consistency with the statute and regulations. If EPA determines that a SIP does not meet the CAA's requirements, the federal agency may itself determine BART and impose a Federal Implementation Plan (FIP).

When determining BART, states or EPA must consider five factors: "[1] the costs of compliance, [2] the energy and nonair quality environmental impacts of compliance, [3] any existing pollution control technology in use at the source, [4] the remaining useful life of the source, and [5] the degree of improvement in visibility which may reasonably be anticipated to result from the use of such technology [42 U.S.C. § 7491(g)(2)]. Each source subject to the BART requirement must install and operate BART "as expeditiously as practicable but in no event later than five years after the date of approval of a [SIP] . . . or the date of promulgation of [a FIP]" [42 U.S.C. § 7491(g)(4)].

Section 169A directed EPA to issue regulations requiring states with Class I areas within their borders to submit SIPs containing "emission limits, schedules of compliance and other measures as may be necessary to make reasonable progress toward meeting the national goal" [42 U.S.C. § 7491(b)(2)]. EPA was also required to develop guidelines for the states "on appropriate techniques and methods for implementing" Section 169A [42

U.S.C. § 7491(b)(1)]. In 1990, Congress added Section 169B to expand the CAA's focus to include regional haze—that is, "visibility impairment that is caused by the emission of air pollutants from numerous sources located over a wide geographic area," 40 C.F.R. § 51.301. "Section 169B requires, among other things, that EPA undertake research to identify 'sources' and 'source regions' of visibility impairment in Class I areas, consider designating transport commissions to study the interstate movement of pollutants, and establish a transport commission for the Grand Canyon National Park" [*Am. Corn Growers*, *above*].

Pursuant to Sections 169A and 169B, EPA in 1999 promulgated regional haze regulations [64 Fed. Reg. 35,714 (July 1, 1999) (codified at 40 C.F.R. §§ 51.300–51.309)]. Thereafter, EPA in 2005 promulgated new regulations, the Regional Haze Regulations and Guidelines for Best Available Retrofit Technology Determinations, 70 Fed. Reg. 39,104 (July 6, 2005) (Haze Regulations). At the same time, EPA issued Guidelines to help states identify "BART-eligible" sources and determine the appropriate BART for each source [70 Fed. Reg. at 39,156 (codified at 40 C.F.R. pt. 51, app. Y) (Guidelines)].

The Haze Regulations set a goal of achieving natural visibility at all Class I areas by 2064 [40 C.F.R. § 51.308]. Toward that end, the Regulations direct states to submit SIPs to EPA containing "goals (expressed in deciviews) that provide for reasonable progress towards achieving natural visibility conditions" [40 C.F.R. § 51.308(d)(1)]. One deciview is the minimum visibility impairment humans can perceive.

The SIP must also include, among other matters, "emission limitations representing BART and schedules for compliance with BART for each BART-eligible source that may reasonably be anticipated to cause or contribute to any impairment of visibility in any mandatory Class I Federal area" [40 C.F.R. § 51.308(e)]. The BART requirements apply unless the state opts to implement an alternative emission control measure that provides greater progress than would be achieved through the installation of BART (commonly referred to as "better-than BART").

BART is defined as "an emission limitation based on the degree of reduction achievable through the application of the best system of continuous emission reduction for each pollutant which is emitted by an existing stationary facility" [40 C.F.R. § 51.301]. Three of the major pollutants that states must evaluate when determining whether a source causes or contributes to visibility impairment are sulfur dioxide ("SO_2"), nitrogen oxides ("NO_X"), and particulate matter.

BART determinations for fossil-fueled power plants with a total generating capacity greater than 750 megawatts must comply with the Guidelines [42 U.S.C. § 7491(b)(2)].

Section 309 of the Haze Regulations, 40 C.F.R. § 51.309, allows certain western states to develop alternative visibility improvement programs, based on the recommendations of the Grand Canyon Visibility Transport Commission (Commission). The Commission was created to address visibility impairment "for the region affecting the visibility of the Grand Canyon National Park." This region includes 16 Class I areas on the Colorado Plateau located in Arizona, Colorado, New Mexico, and Utah [40 C.F.R. § 51.309(b)]. States within the relevant Transport Region—Arizona, California, Colorado, Idaho, Nevada, New Mexico, Oregon, Utah, and Wyoming—that submit a SIP compliant with all of the Commission's recommendations are "deemed to comply with the requirements for reasonable progress with respect to the 16 Class I areas" [40 C.F.R. § 51.309(a)]. Any covered state that elects not to submit a Section 309 plan is "subject to the requirements of [Section 308] in the same manner and to the same extent as any State not included within the Transport Region" [40 C.F.R. § 51.309(a)]. Further, even if a state submits a Section 309 SIP, it must submit a Section 308 SIP or otherwise establish "reasonable progress goals"—including BART determinations—for any Class I areas in the state not covered under Section 309 [40 C.F.R. § 51.309(g)(2)].

EPA issued a finding on January 15, 2009, that 37 states, including Arizona, had not submitted SIPs satisfying the CAA's visibility requirements [Finding of Failure To Submit State Implementation Plans Required by the 1999 Regional Haze Rule, 74 Fed. Reg. 2,392 (Jan. 15, 2009)]. Noting that Arizona had "opted to develop [its SIP] based on the recommendations of the Grand Canyon Visibility Transport Commission" pursuant to Section 309, 74 Fed. Reg. at 2,393, EPA found that Arizona had failed to "submit the plan elements required by" two provisions of the Section 309 regulations, 40 C.F.R. §§ 51.309(d)(4) and 51.309(g) [74 Fed. Reg. at 2,393]. EPA further explained that "[t]his finding starts the two year clock for the promulgation by EPA of a FIP" [74 Fed. Reg. at 2,393].

Although EPA determined that its January 2009 finding triggered the CAA's two-year window, it did not take any further action by January 2011. Several environmental groups sued EPA in early 2011 to compel EPA to promulgate FIPs for the states covered by the January 2009 finding. EPA and the plaintiff groups entered into a consent decree setting deadlines for EPA action for each state covered by the lawsuit. For Arizona, the consent

decree required EPA by November 15, 2012 either to approve Arizona's SIP with respect to its BART determinations or to propose a FIP.

To avoid a FIP, Arizona elected to develop a Section 308 SIP; it was submitted to EPA on February 28, 2011. The SIP proposed progress goals and long term strategies to achieve those goals, including BART determinations. Specifically, the SIP included BART determinations for emission units at three fossil fuel power plants that Arizona concluded were BART-eligible and subject to BART: Apache Generating Station Units 1–3, Cholla Power Plant Units 2–4, and Coronado Generating Station Units 1–2.

Overall, Arizona's BART determinations for NO_X consisted of "combustion controls, either in the form of low-NO_X burners (LNB) with flue gas recirculation (FGR), or LNB with overfire air (OFA) or separated overfire air (SOFA)" [77 Fed. Reg. 42,834, 42,842 (July 20, 2012)]. For Coronado, Arizona determined that the proper control technology was low-NO_X burners with overfire air. Translating the chosen technology into the resulting emission improvement, the SIP established enforceable NO_X emissions limits of 0.32 lb/mmBtu for both units of the Coronado facility.

In July 2012, EPA proposed (1) partially to approve and partially to disapprove Arizona's BART determinations with respect to the three power plants in its Section 308 SIP; and (2) to promulgate a FIP for the disapproved elements [77 Fed. Reg. at 42,834]. EPA deferred taking action "on the Arizona's other BART determinations or any other parts of the SIP regarding the remaining requirements of the [Haze Regulations]" [77 Fed. Reg. at 42,836]. In a later rulemaking, EPA approved in part and disapproved in part the remaining portions of Arizona's Section 308 SIP. After a notice-and-comment period, EPA promulgated the final rule challenged here, in December 2012 [Approval, Disapproval and Promulgation of Air Quality Implementation Plans, 77 Fed. Reg. at 72,512 (final rule)].

The final rule approved Arizona's emission limits for SO_2 and particulate matter at all the units but disapproved its emissions limits for NO_X at the seven coal-fired generating units at Apache, Cholla, and Coronado [77 Fed. Reg. at 72,514]. EPA explained that Arizona's "overall approach" to the five-step BART analysis was "generally reasonable and consistent with the [Haze Regulations] and the BART Guidelines" [77 Fed. Reg. at 42,840]. But it determined that Arizona's BART analysis suffered from several flaws, particularly with respect to costs and visibility improvement, that resulted in NO_X control determinations "inconsistent" with the Haze Regulations. EPA found that Arizona's analyses with respect to SO_2 and particulate matter suffered from similar "deficiencies," 77 Fed. Reg. at 72,517, but nonetheless approved Arizona's determinations for these pollutants because the analytical flaws had no "substantive impact on [Arizona's] selection of controls" [77 Fed. Reg. at 42,841].

Explaining that the consent decree required EPA promptly to issue a FIP for any portion of Arizona SIP it disapproved, the final rule simultaneously issued a FIP addressing the disapproved elements [77 Fed. Reg. at 72,567–68]. EPA conducted a "new five-factor BART analysis" of the three power plants to evaluate Arizona's SIP and "to document the technical basis for proposing BART determinations in [EPA's] FIP," focusing in particular on analyzing the cost controls and visibility impacts associated with the different BART options [77 Fed. Reg. at 42,852].

Based on these analyses, EPA concluded that selective catalytic reduction (SCR) with low-NO_X burners and overfire air—the most stringent available retrofit control option—was the proper BART control for Coronado. EPA proposed NO_X emission limits much lower than those contained in Arizona's SIP: 0.050 lb/mmBtu (calculated on a rolling 30-boiler-operating-day average) for Coronado Unit 1, and 0.080 lb/mmBtu for Coronado Unit 2. EPA also proposed compliance deadlines, as well as recordkeeping and reporting requirements, to enforce the FIP's BART determinations [77 Fed. Reg. at 42,865, tbl. 24].

In the final rule, EPA revised certain elements of the proposed FIP in response to public comments and additional information [77 Fed. Reg. at 72,514]. Notably, EPA weakened the final NO_X emissions limits to "provide an extra margin of compliance" and changed its methodology to require plant-wide averaging [77 Fed. Reg. at 72,514–515]. EPA changed its proposed NO_X emission limits from 0.050 lb/mmBtu for Coronado Unit 1 and 0.080 lb/mmBtu for Coronado Unit 2 to an averaged limit of 0.065 lb/mmBtu across both units of the Coronado facility [77 Fed. Reg. at 72,514–515, tbl. 1]. The final rule also extended the compliance deadlines for installation and operation of the controls at the facilities.

Arizona and the Salt River Project Agricultural Improvement and Power District (SRP) (collectively, petitioners) filed timely petitions for review of the final rule. After the cases were consolidated, the court of appeals permitted respondent-intervenors to intervene in the consolidated action.

The court concluded that EPA did not act arbitrarily and capriciously when it disapproved in part the SIP's BART determinations for Coronado and issued a replacement FIP

as to the disapproved portions. The court therefore denied the consolidated petitions for review.

Arizona's Procedural Claim. Arizona contended that EPA could not properly evaluate BART determinations separately from the broader reasonable progress analysis, because BART determinations were just one aspect of achieving Section 169A's overall "reasonable progress" to the natural visibility goal [42 U.S.C. § 7491(b)(2)].

The court stated that it was not so. There is no requirement that EPA approve or disapprove a SIP submittal in a single action. To the contrary, the CAA expressly permits EPA to approve or disapprove a SIP "in part" [42 U.S.C. § 7410(c)(1), (k)(3)].

The court stated that under the Haze Regulations, SIPs must contain reasonable progress goals, 40 C.F.R. § 51.308(d)(1), as well as source-specific BART determinations, 40 C.F.R. § 51.308(e)(1). The implementation of the BART determinations would ultimately contribute toward meeting the reasonable progress goals. However, the CAA sets out standards for BART that are free-standing, source-by-source, and not dependent on the long term visibility goals identified. The court concluded that EPA did not act arbitrarily by considering Arizona's BART determinations separately from Arizona's reasonable progress analysis.

The SIP's Cost Analysis. The court observed that EPA found that the SIP's "overall approach" was "generally reasonable and consistent" with the Haze Regulations and the Guidelines [77 Fed. Reg. at 42,840]. However, EPA partially disapproved Arizona's BART determinations, including those pertaining to Coronado's NO_X emission controls.

The court noted that as one of the BART factors, states must consider the "costs of compliance" [42 U.S.C. § 7491(g)(2); 40 C.F.R. § 51.308(e)(1)(ii)(A)]. A state's cost calculations are critical to determining a BART control's "cost effectiveness," where " 'effectiveness' is measured in terms of tons of pollutant emissions removed, and 'cost' is measured in terms of annualized control costs" [Haze Regulations, 70 Fed. Reg. at 39,167].

The court stated that, in its proposed rule, EPA found "certain aspects" of Arizona's cost calculations "inconsistent" with the Guidelines and Cost Manual and "disagree[d] with the manner in which [Arizona] interpreted the cost-related information included in its [] SIP" [77 Fed. Reg. at 42,841]. With regard to Coronado, specifically, EPA noted in its proposed rule that SRP "provided summaries of total control costs, such as total annual operating and maintenance costs and total annualized capital cost, but did not provide cost information at a level of detail that included line item costs" [77 Fed. Reg. at 42,850]. The court stated that this omission meant that SRP did not provide Arizona "with control cost calculations at a level of detail that allowed for a comprehensive review" [77 Fed. Reg. at 42,851]. As a result, EPA explained, it "[did] not believe that [Arizona] was able to evaluate whether SRP's control costs were reasonable" [77 Fed. Reg. at 42,851]. Arizona's BART analysis was therefore inadequate because it "did not properly consider the costs of compliance for each control option" [77 Fed. Reg. at 42,851].

The court concluded that EPA's disapproval of the cost analysis underlying Arizona's BART determination for Coronado on that basis was not "arbitrary, capricious, [or] an abuse of discretion" [5 U.S.C. § 706(2)(A)]. Arizona simply relied on the cost data provided by SRP, despite the fact that the data failed to include sufficient detail for Arizona to meaningfully analyze the reasonableness of the costs of various control alternatives. The court noted that states are required by statute to consider "costs of compliance" in making BART determinations [42 U.S.C. § 7491(g)(2)]. When they are not presented with enough data to do so, EPA may reasonably conclude that their analysis is inadequate. The court stated that EPA's decision to do so was not arbitrary or capricious.

The SIP's Visibility Analysis. The court noted that as part of its BART analysis, a state must analyze "the degree of improvement in visibility which may reasonably be anticipated to result from the use" of alternative control technologies [40 C.F.R. § 51.308(e)(1)(ii)(A)]. EPA found no problems with the "technical adequacy of [Arizona's visibility] modeling" [77 Fed. Reg. at 72,519]. Rather, EPA found Arizona's interpretation of the visibility modeling for all three plants "problematic" [77 Fed. Reg. at 72,519]. The problems, EPA contended, resulted in Arizona understating the visibility benefits associated with installing SCR at Coronado. The court concluded that EPA's assessment of Arizona's visibility analysis considered the appropriate factors rationally, and so deferred to its conclusions.

The court observed that for Coronado, Arizona used a "visibility index" averaging the visibility benefits at the closest nine Class I areas, but did not evaluate such benefits separately at the most impacted Class I area, the Gila Wilderness Area [77 Fed. Reg. at 72,519]. The court stated that EPA's regulations "do not prescribe a particular approach to calculating or considering visibility benefits across multiple Class I areas," 77 Fed. Reg. at 42,841; states have the "flexibility to assess visibility improvements due to BART controls by one or more methods," Guidelines at 39,170. The indexing approach therefore "could be acceptable in itself as part of assessing multiple area impacts and improvements" [77 Fed. Reg. 72,519].

However, EPA concluded, "without *any* consideration of particular area improvements, the averaging process causes especially large benefits at some individual areas to be diluted or lost, effectively discounting some of the more important effects of the controls" [77 Fed. Reg. 72,519] (emphasis added by the court).

The court observed that, regardless of the methodology used, EPA maintained that Arizona's visibility analysis in its SIP was unreasonable because it used "two contrasting, yet equally incomplete, approaches to assessing visibility improvements." The court stated that the cumulative averaging approach taken by Arizona in its analysis for Coronado "is counter to [Arizona's] emphasis elsewhere in the SIP on the importance of considering the visibility improvement at the single area having the largest impact from a given facility" [77 Fed. Reg. at 72,519]. The upshot was the appearance that Arizona selectively chose for each plant a methodology that minimized the visibility improvement achieved by the more stringent emission controls at each location.

The court observed that Arizona made no attempt in its SIP, nor in its briefing in this appeal, to counter this appearance by explaining why it chose differing approaches to visibility analysis for different facilities. The court stated that SRP might be correct that "[t]he Guidelines allow states to use either or both approaches." However, a state must include in its SIP "an *explanation* of the CAA factors that led [Arizona] to choose that option over other control levels" Guidelines at 39,170–171 (emphasis added by the court). The court concluded that adopting inconsistent—indeed, contradictory—approaches without providing any explanation for that decision frustrated EPA's ability to "review the substantive content of the BART determination" [*North Dakota v. United States EPA* (8th Cir. 2013) 730 F.3d 750].

Arizona contended that the outcome of its BART determinations would not have changed even if it had adopted the approach to visibility analysis that EPA prescribed. The visibility improvements resulting from installing SCR, Arizona maintained, would in any event be "imperceptible" to the human eye.

The court stated that EPA expressly, and reasonably, rejected this argument when it promulgated the Haze Regulations and Guidelines in 2005.

The court concluded that EPA rationally determined that Arizona's BART visibility analysis for Coronado was unsupported by explanation and inconsistent with the CAA and its regulations. The court deferred to its conclusions.

The SIP's Choice of BART. The court noted that EPA's Guidelines require states to support their BART determinations with "documentation for all required analyses," including explanations of their BART five-factor analysis [40 C.F.R. § 51.308(e)(1)].

The court observed that in the final rule, EPA concluded that, although Arizona "presented information relevant to each of the BART factors" and "expressly stated" that it had considered those factors, it did not "provide[] an explanation regarding how this information was used to develop its BART determinations" [77 Fed. Reg. at 72,517]. More specifically, EPA found that Arizona did not discuss how the results of the visibility index were weighed against the other BART factors for Coronado [77 Fed. Reg. at 72,518; 77 Fed. Reg. at 42,851]. Further, EPA noted that while the SIP includes cost data, it "provides no explanation regarding how, or even if, th[e] cost information was used in arriving at its NO_X BART determinations" [77 Fed. Reg. at 72,517]. The court noted that "[i]n the case of . . . Coronado, the . . . SIP does not analyze th[e] cost information in even a qualitative manner" [77 Fed. Reg. at 72,517].

The court stated that a review of Arizona's BART technical support document supported EPA's analyses with regard to Coronado. Arizona's ultimate determination was that, "[a]fter reviewing the BART analysis provided by the company, and based upon the information above . . . BART control at [Coronado] for NO_X is . . . Low NO_X burners with OFA" with an emission rate of 0.32 lbs/mmBtu. The court further observed that before announcing that decision, Arizona provided several charts of data concerning the various controls' cost-effectiveness and visibility impacts. However, having done so, it provided no reasoning or rationale to justify its ultimate BART selection. There was simply no attempt made to explain why it chose one control technology over another, or how it evaluated the various BART factors, either individually or in combination.

The court noted that although the CAA affords states significant discretion in determining the appropriate levels of BART controls, EPA must review whether a state's determinations comply with the statute and its rules. The court stated that just as it could not in *Nat'l Parks Conservation Ass'n v. EPA* [(9th Cir. 2015) 788 F.3d 1134] review EPA's cost/benefit analysis absent any coherent agency analysis, EPA reasonably determined that it could not meaningfully review Arizona's parallel determination, because Arizona did not provide an adequate explanation of its underlying analysis, if any [*cf.* 40 C.F.R. § 51.308(e)(1)(ii)(A); Guidelines at 39,170–71].

The court stated that EPA's conclusion that Arizona did not adequately explain its NO_X BART determinations provided reasonable support for its partial disapproval of

Arizona's SIP. The court therefore deferred to EPA's determination.

The court, therefore, stated that EPA reasonably concluded that Arizona's cost and visibility impact analyses for Coronado suffered from significant analytical defects and that the SIP did not provide a reasoned explanation of the bases for the ultimate BART determination for Coronado. Although section 169A affords the states substantial authority to determine BART controls, the combination of these defects provided EPA reasonable grounds upon which to disapprove Arizona's BART determinations as to NO_X emissions limits at Coronado. The court concluded that EPA's partial disapproval of the SIP in this respect was not arbitrary or capricious.

EPA's Visibility Analysis. The court noted that under Section 169A and the Haze Regulations, EPA must perform the same BART analysis when promulgating a regional haze FIP as that performed by states in developing SIPs.

SRP contended that EPA's visibility analyses contained in its FIP was arbitrary and capricious. SRP first disputed EPA's "cumulative" approach. EPA estimated the visibility improvements that would occur at each of the Class I areas potentially impacted by Coronado's emissions and then aggregated those improvements. SRP contended this analysis resulted in "a large deciview number" that did not represent the actual perception of visibility conditions at any particular Class I area. The court stated that SRP's challenge to EPA's visibility improvement analysis suffered from two substantial defects.

The court observed that, first, EPA considered the "cumulative visibility improvement" resulting from various control technologies "[a]s a supplement" to considering deciview improvements at individual Class I areas. For Coronado, specifically, EPA explained that modeling showed that SCR control technology would result in visibility benefits at each of 11 Class I areas—including the Gila Wilderness Area, which EPA faulted Arizona for failing to consider—as well as on a cumulative basis. In response to petitioners' comments critiquing EPA's cumulative approach, EPA explained in the final rule that "[t]he approach is simply one way of assessing improvements at multiple areas, for consideration along with other visibility metrics" [77 Fed. Reg. at 72,532]. The court stated that SRP's claim that EPA "focused on this [cumulative] methodology almost exclusively" was not supported by the record.

The court further stated that, second, SRP's insistence on "human perception" as the determinative "cornerstone" for the BART determinations for each individual source was overstated. When promulgating the BART Guidelines, EPA explicitly disagreed "that the degree of improvement should be contingent upon perceptibility" when determining BART for an individual source [70 Fed. Reg. at 39,129].

The court stated that EPA's final rule provided a fully adequate explanation of its application of the deciview concept in the FIP. The Guidelines suggest that states use a minimum threshold of 0.5 deciviews to determine whether a source is subject to BART controls. EPA explained in its final rule, however, that "[s]maller improvements from controls should be considered in BART *determinations*, since they can be beneficial in considering effects from controls on multiple sources" [77 Fed. Reg. at 72,533 (emphasis added by the court)].

The court concluded that EPA's visibility improvement assessment was consistent with the statute and regulatory requirements, and supported by the record.

EPA's Cost Analysis. SRP challenged EPA's cost analysis, arguing that it "diverged" from the Guidelines and was "inadequate" to support its BART determinations for NO_X emissions. Additionally, SRP argued that EPA's cost assessment was flawed because EPA insisted on rigid adherence to the cost manual irrespective of site-specific costs.

SRP contended that in its supplemental analysis, "EPA excluded costs it deemed inconsistent with the [Cost Manual]" such as Allowance for Funds Utilized During Construction (AFUDC). The court stated that this argument restated petitioners' objections to EPA's reliance on the overnight costing methodology when it partially disapproved Arizona's SIP. The court stated that EPA's use of such a methodology in its own FIP's cost analysis was, without doubt, reasonable.

The court observed that, in rejecting Arizona's SIP, EPA explained that the use of the overnight method was "crucial to [its] ability to assess the reasonableness of the costs of compliance" [77 Fed. Reg. at 72,518]. EPA concluded that "it is reasonable for us to insist that the [Cost Manual] methodology be observed in the cost estimate process" [77 Fed. Reg. at 72,518]. Accordingly, it rejected comments that items like AFUDC should have been incorporated into its cost analysis, as they were "inconsistent with [the Cost Manual] methodology" [77 Fed. Reg. at 72,531].

The court stated that EPA's analysis was reasonable. The purpose of the cost analysis required as part of a BART determination is to foster comparison of the cost of the visibility improvements enabled by various control technologies. As EPA's comments indicated, cross-facility comparisons of similar sources with regard to the cost-effectiveness of a given control option aid in determining

cost-effectiveness at a specific source. Control options are likely to impact similar sources similarly; comparisons assure that the cost and benefit figures used for a particular site are realistic, rather than inflated in one direction or another. The court stated that consideration of AFUDC would not further this inquiry, as AFUDC is ultimately reflective of the implementing entity's financial and logistical situations, grounded in past decisions and in the company's financial policies and attitudes, not of the hard costs of the equipment and construction, which should be consistent across sites. While AFUDC and similar concepts are relevant for sales and ratemaking, including them would undermine the sort of "apples-to-apples" comparison that EPA asserted was necessary as part—but only part—of assessing the control options.

The court observed that this approach was consonant with the Guidelines, which specifically advise that "reasonable range[s]" for cost effectiveness are those that are "consistent with the range of cost effectiveness values used in other similar permit decisions over a period of time" [Guidelines at 39,168]. Moreover, adopting a costing methodology which focuses on achieving consistency and facilitating comparisons aligns with the CAA itself, which empowers EPA to promulgate national regulations concerning BART determinations.

Accordingly, the court rejected SRP's argument that the FIP's underlying cost analysis was arbitrary and capricious.

Achievability of the FIP's NO_X emission limits for Coronado. The court noted that Haze Regulations provide that the BART determination "must be based on an analysis of the best system of continuous emission control technology available and associated emission reductions *achievable* for each BART-eligible source that is subject to BART" [40 C.F.R. § 51.308(e)(1)(ii)(A)] (emphasis added by the court). The reviewing authority should "take into account the most stringent emission control level that the technology is capable of achieving," by considering "recent regulatory decisions and performance data (e.g., manufacturer's data, engineering estimates and the experience of other sources)" [Guidelines at 39,166].

SRP argued that the FIP's NO_X emission limit for Coronado—0.065 lb/mmBtu averaged across the facility—was not achievable. More specifically, it argued that (1) the emission limits were technically infeasible; and (2) EPA did not take into account the consent decree binding Coronado Unit 2 when formulating the emission limits.

The court stated that both of these arguments would be rendered moot if EPA's recent action proposing to revise the FIP's NO_X emission limit for Coronado resulted in a final revised FIP consistent with the proposal.

Additionally, SRP argued that the FIP's emissions limits were in conflict with EPA's own "presumptive" limits. SRP argued that EPA, unlike Arizona, did not consider the presumptive limits, and therefore violated the Guidelines.

The court stated that, as the final rule explained, EPA did consider the presumptive limits but found there was "no single presumptive NO_X limit that applied to any of these units," as each of the facilities "historically burned both bituminous and sub-bituminous coal" [77 Fed. Reg. at 72,529]. Accordingly, EPA instead "considered the technological basis for presumptive NO_X BART limits . . . as part of the five-factor analysis [it] performed for each facility" [77 Fed. Reg. at 72,529].

The court stated that in any event, SRP's argument that the "law requires [the presumptive] limits to be taken into account in any BART determination" was belied by the Guidelines. The court noted that presumptive emission limits are "rebuttable" and "do[] not preclude states or EPA from setting limits that differ from those presumptions" [77 Fed. Reg. at 72,529]. Instead, the Guidelines expressly allow for an alternative control level to be formulated based on the statutory factors, provided that the alternative limits are based on a reasoned BART analysis [70 Fed. Reg. at 39,171]. Moreover, the presumptive emission limits are presumed to be cost-effective, not presumed to be BART in every case.

The court stated that EPA acted reasonably in departing from Guidelines' rebuttable presumptive limits. However, because EPA had not yet completed its proposed revised FIP, the court declined to rule on the reasonableness of its emissions limits, as they were likely to be altered. This aspect of these proceedings was therefore stayed until EPA concluded the administrative process and issued its final revised FIP.

Simultaneous Disapproval of a SIP and Promulgation of a FIP. The court stated that the final rule's partial disapproval of Arizona's BART determinations constituted a trigger under the CAA for promulgating a FIP replacing those elements. The CAA expressly authorizes EPA to promulgate a FIP "at any time" within two years of disapproving a SIP. "At any time," includes simultaneously with the SIP's disapproval.

Arizona ultimately recognized that EPA had the authority to promulgate the FIP simultaneously with its partial disapproval, but maintained that EPA did not realize that it had discretion to provide Arizona up to two years to correct any deficiencies. EPA, Arizona

posited, harbored the erroneous belief that its obligations under the consent decree required it to act when it did.

Arizona contended that the January 2009 finding constituted only a determination that Arizona failed to submit a Section 309 SIP, and that the correct remedy for Arizona's asserted deficiency "was to impose a FIP supplying the missing Section 309 elements, not to impose a FIP under Section 308, as it did here." But, the court noted that, Section 309 provides an alternative mechanism for western states to comply with the CAA's visibility requirements for certain Class I areas. Such states must include Section 308 components for other Class I areas, and they remain subject to Section 308's requirements if they do not submit a Section 309 SIP. The court stated that Arizona expressly acknowledged that its Section 309 SIP submission lacked certain requirements under sections 51.309(d)(4)(viii) and (g). Because Arizona did not submit an adequate Section 309 SIP, it did not submit an adequate regional haze SIP. EPA was required to promulgate a FIP to fill in the gap.

The court concluded that EPA properly promulgated its FIP in the same rule as its partial disapproval of the SIP. Further, as EPA stated in the final rule, Arizona remained free to, at any time, "submit a revised SIP to replace the FIP" [77 Fed. Reg. at 72,571].

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 40.22[2] (State Implementation Plans: In General—Approval of SIPs and SIP Revisions by EPA).

Stay Granted: EPA Carbon Pollution Guidelines for Electric Utility Generating Units

West Virginia v. EPA
No. 15A773, U.S. S. Ct.
2016 U.S. LEXIS 981
February 9, 2016

The U.S. Supreme Court granted applications for a stay with respect to the Environmental Protection Agency's "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units" [80 Fed. Reg. 64,662 (October 23, 2015)] pending disposition of the applicants' petitions for review in the D.C. Circuit and disposition of the applicants' petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, the order terminates automatically. If the Court grants the petition for a writ of certiorari, the order terminates when the Court enters its judgment.

Regulatory Activity

Evaluation Procedure—New Aftermarket Diesel Particulate Filters—2007 Through 2009 Model Year On-road Heavy-duty Diesel Engines. The California Air Resources Board is proposing to amend 13 Cal. Code Reg. § 2222 and to incorporate by reference various documents. In this rulemaking action, ARB staff proposes that the Board approve for adoption an evaluation procedure that establishes the criteria for assessing whether aftermarket DPFs for 2007 through 2009 model year on-road heavy-duty diesel engines meet the criteria to be exempted from the anti-tampering prohibitions of Veh. Code § 27156. The proposed procedure will provide manufacturers that elect to manufacture aftermarket DPFs a legal pathway to market and sell such devices and will provide consumers a lower cost option than purchasing new OEM DPFs. The item will be heard during a one-day meeting of the Board commencing at 9:00 a.m., April 22, 2016, California Environmental Protection Agency, Air Resources Board, Byron Sher Auditorium, 1001 I St., Sacramento, CA. Written comments by 5:00 p.m., April 18, 2016, to Clerk of the Board, Air Resources Board 1001 I St., Sacramento, CA 95814. Comments maybe also submitted eletronically at 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., Visitors and Environmental Services Center, First Floor, Sacramento, CA 95814, (916) 322-2990. The documents are also available on the Board's website at www.arb.ca.gov/regact/2016/aftermarket2016/aftermarket2016.htm. Substantive inquiries: Shawn Daley, Manager, Retrofit Assessment Section, (626) 575-6972, or Yong Yu, Air Resources Engineer, (626) 450-6109. Procedural inquiries: Trini Balcazar, Regulations Coordinator, (916) 445-9564.

Automotive Refrigerant—Small Containers. The Air Resources Board is proposing to amend 17 Cal. Code Reg. §§ 95362, 95364, 95366, 95367 and 95369 and a document incorporated by reference concerning small containers of automotive refrigerant. The Board initially adopted the regulation in January 2009 to reduce greenhouse gas emissions associated with do-it-yourself servicing motor vehicle air conditioning (MVAC) systems. The regulation is comprised of a manufacturer-administered deposit, container return, and recycling program whereby retailers collect a refundable $10 deposit from consumers at the time of sale. Consumers reclaim the $10 deposit when they return used containers to the retailers. The original intent of the regulation was

that retailers would transfer all unclaimed consumer container deposits to manufacturers for use in enhanced education programs to benefit consumers of this product. However, ARB learned that retailers have been retaining unclaimed consumer deposits instead of transferring the funds to the manufacturers. The ARB staff is therefore proposing amendments to clarify the existing requirement that retailers must transfer the unclaimed consumer deposits they collect to the manufacturers, and to establish new quarterly recordkeeping and reporting requirements to ensure the retailers' compliance with this provision. In addition, ARB staff is proposing to expand the scope of how the unclaimed container deposit money is spent by the manufacturers, and to eliminate a provision for adjusting the deposit, which will be fixed at $10. Finally, staff is proposing to amend the Certification Procedures by requiring additional language on the label forbidding the venting of the refrigerant and encouraging consumers to either return the product after usage or retain and use it until empty. The regulation would also be amended to provide a one-year sell-through period so that the existing stock of product can be depleted prior to introduction of the product with new labels.

The item will be considered during a one-day meeting of the Board commencing at 9:00 a.m., April 22, 2016, California Environmental Protection Agency, Air Resources Board, Byron Sher Auditorium, 1001 I St., Sacramento, CA. Written comments by 5:00 p.m., April 18, 2016, to Clerk of the Board, Air Resources Board 1001 I St., Sacramento, CA 95814. Comments maybe also submitted electronically at 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., Visitors and Environmental Services Center, First Floor, Sacramento, CA 95814, (916) 322-2990. The documents are also available on the Board's website at www.arb.ca.gov/regact/2016/smallcans2016/smallcans2016.html. Substantive inquiries: Dr. Dongmin Luo, P.E., Manager, Air Quality and Climate Science Section, (916) 324-8496, or Mr. Winston Potts, P.E., Air Resources Engineer, Air Quality and Climate Science Section, (916) 323-2537. Procedural inquiries: Trini Balcazar, Regulations Coordinator, (916) 445-9564.

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective on a quarterly basis [Gov. Code § 11343.4]; 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 www.calregs.com.

Spark Ignition Marine Watercraft. Filed 2/8/16, effective 4/1/16. Adopts 13 Cal. Code Reg. §§ 2850, 2851, 2852, 2853, 2854, 2855, 2856, 2857, 2858, 2859, 2860, 2861, 2862, 2863, 2864, 2865, 2866, 2867, 2868, 2869, amends 13 Cal. Code Reg. §§ 2440, 2442. The primary purpose for this rulemaking action is to set more stringent evaporative emission standards than those adopted by the US EPA for Spark Ignition Marine Watercraft (SIMW). This rulemaking also includes provisions for certification, labeling, enforcement, and recall. New test procedures are established for determining evaporative emissions testing using the latest control technology to confirm the technical feasibility of these regulations. The goal of these regulations is to reduce reactive organic gases from SIMW in order to meet the federally mandated national ambient air quality standards. Additionally, these regulations will result in the reduced exposure to benzene, a toxic air contaminant. Information: Trini Balcazar, (916) 445-9564.

WILDLIFE PROTECTION AND PRESERVATION

Cases

Designation of Polar Bear Habitat by U.S. Fish & Wildlife Service Not Arbitrary, Capricious or Otherwise in Contravention of Applicable Law

Alaska Oil & Gas Ass'n v. Jewell
Nos. 13-35619, 13-35662, 13-35666, 13-35667, 13-35669, 9th Cir.
2016 U.S. App. LEXIS 3624
February 29, 2016

The court of appeals held that the designation of polar bear habitat by the U.S. Fish & Wildlife Service (FWS) was not arbitrary, capricious or otherwise in contravention of applicable law. It stated that the district court held FWS to a standard of specificity that the Endangered Species Act (Act) did not require. It held that FWS's designation of Unit 2 as critical denning habitat was not arbitrary and capricious where Unit 2 contained areas requiring protection for both birthing and acclimation of cubs, and FWS adequately explained its treatment of

the relatively few areas of known human habitation. The court held that FWS drew rational conclusions from the best available scientific date, as required by the Act, in its designation of both Unit 2 and Unit 3 as critical habitat for the polar bear. The court further held that FWS provided adequate justification to Alaska pursuant to Section 4(i) of the Act. Finally, the court held that Section 7 of the Act does not create an additional duty for FWS to consult with states on critical habitat designations.

Facts and Procedure. The purpose of the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., is to ensure the recovery of endangered and threatened species, not merely the survival of their existing numbers. To accomplish the goal of species recovery, the ESA directs the Secretaries of Interior and Commerce to list endangered and threatened species for federal protection [16 U.S.C. § 1533(a)(1), (2)]. The Secretary of Interior must also designate the habitat that is critical to each specie's conservation [16 U.S.C. § 1533(a)(3)(A)(i)]. The Secretary of Interior has delegated to the U.S. Fish & Wildlife Service (FWS) the authority to administer the ESA [50 C.F.R. § 402.01(b)].

The Secretary of Interior designates critical habitat "on the basis of the best scientific data available" after taking into consideration the probable economic, national security, and other relevant impacts [16 U.S.C. § 1533(b)(2)].

During this process, the Secretary of Interior must provide notice of any proposed designation of critical habitat to impacted states and solicit their feedback [16 U.S.C. § 1533(b)(5)(A)(ii)]. If the approved final designation conflicts with the state's comments, the Secretary of Interior must provide the state with written justification for its action [16 U.S.C. § 1533(i)]. Once an area is designated as critical habitat, federal agencies are required to consult with the Secretary of Interior before taking any action that may negatively impact the habitat [16 U.S.C. § 1536(a)(2)].

In 2008, FWS listed the polar bear as a threatened species under the ESA. After challenges from all sides, the D.C. Circuit upheld the designation [*In re Polar Bear ESA Listing & Section 4(d) Rule Litig.* (D.C. Cir. 2013) 709 F.3d 1].

In 2009, FWS proposed to designate an area of Alaska's coast and waters as critical habitat for the polar bear. The designation contained three "units." Unit 1, the sea ice habitat, comprised 95.9% of the total designation, while Units 2 and 3, the terrestrial denning and barrier island habitats, made up the final 4.1%.

The proposal drew fire from oil and gas trade associations, several Alaska Native corporations and villages, and the State of Alaska (plaintiffs), all of which sought to utilize the natural resources in Alaska's waters and North Slope that made up much of the designated habitat. After FWS granted final approval to the proposed designation, the objecting parties filed this action challenging the designation under the ESA and the Administrative Procedure Act [5 U.S.C. § 706 et seq.]. They principally argued that the habitat designation was unjustifiably large, and also claimed that FWS had failed to follow ESA procedure.

The district court denied the majority of the claims, but granted summary judgment to plaintiffs on two grounds [*Alaska Oil & Gas Ass'n v. Salazar* (D. Alaska 2013) 916 F. Supp. 2d 974]. Substantively, the district court faulted FWS for failing to identify specifically where and how existing polar bears utilize the relatively small portion of critical habitat designated as Units 2 and 3. Procedurally, the district court faulted FWS for failing to provide the State of Alaska with adequate justification for adopting a final rule not fully consistent with the State's submitted comments. The district court vacated the entire designation. FWS, joined by several defendant-intervenor environmental groups, appealed, and plaintiffs cross-appealed.

The court of appeals reversed the district court's judgment vacating the designation. It held that the designation was not arbitrary, capricious or otherwise in contravention of applicable law.

The Purpose of Habitat Designation and the Applicable Standard. The court stated that in *Nw. Ecosystem All. v. FWS* [(9th Cir. 2007) 475 F.3d 1136], it explained that so long as the agency "considered the relevant factors and articulated a rational connection between the facts found and the choices made," the court should defer to the agency's expertise and uphold the action. The court stated that FWS's designation of Units 2 and 3 more than satisfied that standard.

The court noted that under the ESA, once it had designated the species as "threatened," FWS had to determine where, within the polar bears' occupied range, the physical or biological features essential to polar bear conservation were found, and it was required to designate these areas as critical habitat. The ESA guidelines explain that these physical and biological elements essential to the species, known as "primary constituent elements" or PCEs, are at the heart of the critical habitat designation.

The court observed that FWS identified three areas containing PCEs essential to polar bear conservation: sea ice habitat, found in Unit 1; terrestrial denning habitat, found in Unit 2; and barrier island habitat, found in Unit 3.

The court also observed that the district court concluded that, although FWS properly identified the PCEs, it had failed to show specifically where within Units 2 and 3 those PCEs were located, as required by the ESA. FWS

argued on appeal that the district court erred because the ESA did not require the level of specificity that the district court insisted upon. In addition, FWS argued it reasonably designated Units 2 and 3 as areas containing PCEs based on the best scientific data available as required by the Act.

At the outset, the court agreed with FWS that the district court held it to a standard of specificity that the ESA does not require. The court observed that the district court asked FWS to identify where each component part of each PCE was located within Units 2 and 3, and to do so, with accurate scientific data, by establishing current use by existing polar bears. For illustration, with respect to terrestrial denning habitat, the district court suggested that FWS could designate only areas containing actual den sites, as opposed to designating areas containing habitat suitable for denning. The court noted that no such limitation to existing use appears in the ESA, and such a narrow construction of critical habitat runs directly counter to the ESA's conservation purposes. The ESA is concerned with protecting the future of the species, not merely the preservation of existing bears. And it requires use of the best available technology, not perfection.

The court noted that the ESA thus requires FWS, when designating critical habitat, to focus on the PCEs essential to protecting the polar bear. The court stated that by requiring proof of existing polar bear activity, the district court impermissibly shifted the focus of the critical habitat designation away from the PCEs. Since the point of the ESA is to ensure the species' recovery, it makes little sense to limit its protections to the habitat that the existing, threatened population currently uses. The court stated that the district court's construction of the critical habitat requirements thus contravened the ESA's conservation purposes by excluding habitat necessary to species recovery.

The court of appeals stated that the issue of whether habitat may be designated without proof of a species' activity has been recognized before. In *Alliance for the Wild Rockies v. Lyder* [(D. Mont. 2010) 728 F.Supp.2d 1126], the court explained that FWS could rationally conclude that areas with evidence of a species' reproduction contain essential PCEs, but could not designate only those areas where there was evidence of reproduction as critical habitat. The court of appeals here agreed with the *Alliance* court that "[w]hile it is rational to conclude areas with evidence of reproduction contain the primary constituent elements and should be designated as critical habitat, the Service could not flip that logic so it means critical habitat only exists where there is evidence of reproduction. Such a proposition alleviates the need to further consider the actual physical and biological features of the occupied area."

The court observed that the district court also criticized the designation as an attempt to designate "potential" habitat. The court noted that it had rejected a similar criticism by pointing out that the agency must look beyond evidence of actual presence to where the species is likely to be found. The focus must be on PCEs, not the current existence of a species in an area. The court stated that the standard FWS followed, looking to areas that contained the constituent elements required for sustained preservation of polar bears, was in accordance with statutory purpose and hence could not have been arbitrary, capricious, or contrary to law.

Unit 2: The Terrestrial Denning Habitat. The court observed that the final rule identified terrestrial denning habitat as a PCE for the polar bear, and it described topographic features to include coastal bluffs and riverbanks with: (1) steep, stable slopes for the den sites themselves; (2) access between den sites and the coast; (3) sea ice in proximity to the denning habitat prior to the onset of denning season in the fall; and (4) freedom from human disturbance. FWS harnessed technology to identify possible denning sites. Using radiotelemetry data collected on female polar bears between 1982 and 2009, FWS identified the areas east of the coastal town of Barrow where 95% of all confirmed and probable polar bear dens had occurred.

The court observed that to capture most of the sites, FWS designated as critical habitat an area extending 5 to 20 miles inland from the coast east of Barrow, and designated this area as Unit 2.

The court further observed that land west of the town of Barrow was not included within the designation, although it contained some features suitable for den sites. FWS chose not to include it within the designation because studies indicated that polar bears rarely den that far west, likely on account of a lack of access to sea ice in the fall.

The court observed that the district court nevertheless held that the designation of Unit 2 was arbitrary and capricious. The district court faulted FWS for failing to show that the entire Unit 2 area contained all the requisite physical and biological features. In particular, the district court found that the denning studies cited by FWS supported inclusion of the first macrohabitat feature of steep, stable slopes, but also showed that this feature occurred in only 1% of Unit 2. The court further observed that the district court also found that the studies inadequately established the existence of the second (access between dens and the coast) and fourth feature (absence of human disturbance) in Unit 2, and the district court strongly questioned whether FWS had sufficiently supported the existence of the third feature (sea ice in proximity of denning habitat to provide access). The

district court thus demanded scientific evidence of the existence of all of the characteristics of denning habitat in all of Unit 2.

The court stated that the district court did not make reference to the radiotelemetry data tracking female bear movements. The district court also did not appear to take into account the need for denning habitat to include not only the dens themselves, but also undisturbed access to and from the sea ice. The court stated that the statute calls for the best available scientific data, and this FWS utilized.

On appeal, plaintiffs contended that FWS acted arbitrarily and capriciously by mapping Unit 2 using a 5-mile incremental inland measurement, without identifying specifically where, within that area, all four elements of the terrestrial denning habitat PCE were located.

The court stated that to the extent that plaintiffs demanded greater scientific specificity than available data could provide, plaintiffs echoed the district court's error in demanding too high a standard of scientific proof. Plaintiffs on appeal concentrated more heavily on FWS's choice of a five-mile increment measurement inland from the coast to define the area of designation, essentially claiming it was arbitrary.

The court stated that FWS, however, provided a rational explanation for using the mapping methodology that it did. In the final rule, FWS explained that it viewed the method developed jointly with the U.S. Geological Survey (that did the actual mapping), as the best available choice. The method is designed to capture a "robust" estimation of the inland extent of the den use. The court noted that Polar bears typically den close to the coast, but some have denned as far as 50 miles inland. The 5-mile demarcation provided a straightforward, unbiased method for estimating the inland area in which 95% of the maternal dens are located.

The court observed that FWS further explained that it rejected restricting designation to an area covering known denning activity in favor of the "robust" five-mile increment because of several serious data limitations: (1) the uncertainties associated with fine-scale mapping of potential den site areas; (2) the limited size of the denning studies, which involved only 20–40 dens a year, when the total number of females denning in any one year is approximately 240; and (3) the fact that only a portion of the North Slope, which contains ample potential denning habitat, had been mapped. The court stated that all of the reasons FWS had provided for use of the five-mile increment were supported by the record.

The court stated that plaintiffs on appeal attempted unsuccessfully to poke holes in the analysis. They claimed the 5-mile increment did not accurately represent polar bear denning concentrations, pointing out that 95% of dens from Barrow to the Kavik River occur within 2.8 miles of the coast. The court stated that this argument, however, ignored the fact that in the eastern zone of Unit 2 (from the Kavik River to the Canadian border) 95% of dens occurred within 18.6 miles of the coast, not 2.8 miles. The area designated as Unit 2 was therefore an appropriate zone for purposes of site inclusion and administrative convenience and was not arbitrary or capricious.

Plaintiffs also asserted that future climate change was not an appropriate consideration under the ESA. Plaintiffs contended that FWS could only designate habitat that contained essential features at the time the species was listed, not habitat that might become critical in the future because of climate change or other potential factors. Plaintiffs argued there was no record evidence to explain how the proposed critical habitat was currently eroding due to climate change. They also argued that FWS failed sufficiently to connect evidence of climate change to its decision to use a five-mile increment. Plaintiffs instead suggested FWS relied on mere speculation that climate change would cause land with PCEs to erode in the future.

The court stated that the record belied these contentions, as the D.C. Circuit recognized in *In re Polar Bear*, *above*. The very climatic factors that plaintiffs criticized were those that the D.C. Circuit took into account in approving the listing of polar bears as threatened. The D.C. Circuit reviewed the bases for listing the polar bear and found that in collecting data on climate change and sea ice, FWS relied on numerous published studies and reports describing the effects of climate change. FWS explained in that case that the rapid retreat of sea ice in the summer and the overall erosion of sea ice throughout the year in the Arctic was "unequivocal and extensively documented in scientific literature." FWS further explained that a majority of state-of-the-art climate models predict sea ice will continue to recede substantially and that the Arctic will be seasonally ice-free by the middle of the 21st century. FWS also noted that the observational record of current sea ice losses indicates that losses seem to be about 30 years ahead of the modeled values, which suggests a seasonally ice-free Arctic may come a lot sooner than expected. The court stated that FWS properly took all of this information into account in designating the critical polar bear habitat challenged here.

The court stated that FWS established that polar bears are highly mobile and spend most of their time on sea ice. In the North Slope of Alaska, polar bears routinely den on the coastal plain, which they reach by walking across the relatively flat topography of that area. The court stated that the record also established that polar bears are faithful to particular denning areas, but not to particular den sites.

Accordingly, the data supported FWS's position that it is difficult (if not impossible) to predict precisely where they will move within denning habitat in the future.

The court observed that additional studies tracked polar bear activity and showed that polar bears move through all of Unit 2.

Plaintiffs argued that FWS failed to provide a reasonable explanation for including areas near some human activity in the designation, while excluding the Native communities of Barrow and Kaktovik from its final critical habitat designation, as well as all man-made structures such as buildings and paved roads. Plaintiffs pointed particularly to the designation's inclusion of the industrialized area of Deadhorse. The district court described Deadhorse as rife with structures and human activity.

The court stated that the record reflected, however, that Deadhorse is primarily an industrial staging area for oil and gas operations, and has no legally defined boundaries and almost no permanent residents. Further, the record showed that polar bears routinely move through Deadhorse, and have been known to den near there. Thus, the court stated that it was reasonable for FWS to conclude that despite some human activity, polar bears could still move through the Deadhorse area to access and locate den sites free from disturbance. As the final rule explained, FWS retained areas around Deadhorse because, among other reasons, "polar bears . . . are allowed to exist in the areas between the widely dispersed network of roads, pipelines, well pads, and buildings."

The court stated that FWS also sufficiently explained why it did not include areas in and near the communities of Barrow and Kaktovic. FWS carefully distinguished between the towns themselves and other land just outside their boundaries. FWS explained that the legal boundaries of Barrow themselves provided a buffer because they are well outside the developed area of the village. Therefore, FWS did not include a "buffer zone" around Barrow and several other native communities west of Barrow; those communities were already outside of the designated area.

Accordingly, the court held that FWS's designation of Unit 2 as critical denning habitat was not arbitrary and capricious. Unit 2 contained areas requiring protection for both birthing and acclimation of cubs, and FWS adequately explained its treatment of the relatively few areas of known human habitation.

Unit 3: The Barrier Island Habitat. FWS's Final Rule identified the third PCE for the polar bear as "barrier island habitat," consisting of the barrier islands off the coast and a buffer zone, "used for denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat." The entire barrier island PCE was designated as Unit 3.

The court stated that in criticizing the designation, the district court failed to take the entirety of the designation into account. The district court faulted FWS for the lack of evidence in the record showing specifically where on the barrier islands the uses take place, i.e., where bears move to seek den sites, refuge, and feeding habitat. The district court held, in effect, that only such specific areas, which the bears could be shown to utilize at the present time, could be designated as critical habitat.

The court stated that, given the statutory requirements, FWS appropriately looked to the specific features of the islands that meet the bears' critical needs and to the area in which they occur. The court observed that the final rule defined the barrier island habitat PCE in broad terms to be the barrier islands and associated spits, and the water, ice, and any other terrestrial habitat within 1 mile of the islands. The final rule explained the reason for such a designation was that bears use the barrier islands, associated spits, and surrounding water in ways that are essential to their existence and conservation. The court stated that the district court erroneously focused on the areas existing polar bears have been shown to utilize rather than the features necessary for future species protection.

The court stated that it understood that the record contained a confusing use of the key term "denning habitat," and this contributed to the district court's misdirected focus with respect to both Units 2 and 3. The district court was looking at denning studies cited by FWS that indicated that only 1% of Unit 2 was suitable as "denning habitat." The court stated that those studies used the term, however, to refer to the habitat suitable for the building of the actual den itself. Because the average den is about 20 feet wide (6.4 m), it was unsurprising that actual den sites themselves would encompass less than 1% of Unit 2. FWS identified the habitat necessary for birthing as well as the post natal care and feeding essential to survival.

The court observed that in its designation of Units 2 and 3, FWS defined denning habitat more broadly to include not only the denning site itself, but also the area necessary for access to the ice from the den. It considered the denning habitat essential for protection to encompass the areas where polar bears could not only successfully build a den, but also travel, feed, and acclimate cubs. The court stated that this was in accord with the statutory purposes, and thus it was not arbitrary or capricious for FWS to include areas necessary for such related denning needs.

The court stated that the administrative record supported the existence throughout the barrier islands of the features

suitable for denning. As the district court conceded, the record showed that many barrier islands provide denning habitat, as historically evidenced by denning polar bears. The record also demonstrated that the islands and the surrounding spits and marine environment provide refuge from human disturbance, and FWS cited evidence showing that polar bears regularly move across the barrier islands in search of denning, food, and rest.

In addition, the final rule explained that polar bears use barrier islands as migration corridors, moving between them by swimming or walking on ice or shallow sand bars. The court stated that, in the final analysis, with respect to both Units 2 and 3, plaintiffs disagreed with the scope of FWS's designation of critical habitat, but plaintiffs could not point to evidence that FWS failed to consider, or demonstrate that FWS's stated reasons were irrational or unsupported by the record. The court stated that FWS drew rational conclusions from the best available scientific data, which is what the statute requires [16 U.S.C. § 1533(b)(2)].

FWS Provided Adequate Justification to Alaska Pursuant to Section 4(i) of the ESA. The court noted that FWS is statutorily required to give certain state agencies notice of any proposed regulation to list species or designate critical habitat [16 U.S.C. § 1533(b)(5)(A)(ii)]. In this case, FWS gave the required notice and Alaska responded.

The court noted that FWS accepted written comments from the public during two different comment periods and held a number of public hearings. FWS contacted appropriate Federal, State, and local agencies; Alaska Native organizations; and other interested parties and invited them to comment on the proposed rule to designate critical habitat for the polar bear in Alaska. The court observed that during the first comment period, FWS requested comments on the proposed rule. After considering those comments, FWS reopened the public comment period and requested additional comments on the revised proposed rule.

The court further observed that the Alaska Department of Fish and Game (ADFG) submitted detailed comments. After adopting the final rule, FWS responded with a letter to Alaska's Governor, addressing Alaska's concerns that were not addressed in the final designation. FWS also cited to those sections of the final rule which addressed Alaska's comments.

Alaska contended that FWS's written justification was insufficient to comply with Section 4(i) of the ESA on the grounds that FWS failed to comply with the section's procedural requirements, and failed to consider and provide reasoned responses to several of Alaska's substantive comments.

The court noted that FWS claimed that the written justification called for by Section 4(i) of the ESA is not subject to judicial review. It further noted that the Ninth Circuit had not yet addressed this question, but the D.C. Circuit had. In *In re Polar Bear*, the D.C. Circuit construed Section 4(i) of the ESA to be a part of the process that is reviewable when the court reviews the final agency action. The D.C. Circuit explained that it is a review only of whether FWS satisfied the procedural requirements of Section 4(i) of the ESA. The D.C. Circuit stated that it could not assess the substantive adequacy of the agency's responses to the comments because the ESA does not specify what the substance of a written justification must be. The D.C. Circuit therefore analyzed whether FWS was fully aware of and took into account the commenting parties' interests and concerns, because that is what is required by the ESA in requiring a written justification. The court here stated that it would follow this approach.

The court observed that the district court found fault with FWS's justification because it incorporated by reference its responses to Alaska's comments contained in the final rule rather than including all of those responses verbatim in the letter to the governor. The district court found FWS violated Section 4(i) of the ESA by sending its response letter to the governor rather than ADFG, which had submitted the comments to FWS.

The court disagreed with the district court's conclusion that the response was inadequate. The court stated that there is nothing that it could perceive in the text of Section 4(i) of the ESA, or its purpose, that prevents FWS from referencing other publicly-available documents in support of its justifications. The only requirement for the justification in Section 4(i) of the ESA is that it be in writing. It does not foreclose cross-referencing other publicly available documents. The court stated that the district court therefore should not have imposed a "one document" requirement.

The court further stated that it was not improper for FWS to mail the response to Alaska's Governor instead of ADFG. Because the comment letters from Alaska and ADFG appeared to be speaking for Alaska rather than any of the agencies listed, FWS's action was warranted.

Finally, the court rejected Alaska's claim that FWS's letter failed to offer reasoned responses to each of ADFG's substantive comments. The court stated that it was clear FWS responded, in some way, to each of ADFG's substantive comments. It observed that Alaska seemed to disagree with the substantive content of those responses. Yet, the court stated that, Section 4(i) of the

ESA did not guarantee that Alaska would be satisfied with FWS's response. The court noted that because Section 4(i) of the ESA creates a procedural requirement, a court will not analyze the sufficiency of FWS's responses. The court stated that FWS provided written justification showing that it considered ADFG and Alaska's interests and concerns and, thus, satisfied its duties under Section 4(i) of the ESA.

Plaintiffs' Cross-Appeal. Plaintiffs argued that the "no-disturbance zone" around the barrier islands in Unit 3 did not contain an essential physical or biological feature, and that the evidence did not support the necessity or purpose of including the zone. The court stated that the district court correctly upheld the no-disturbance zone as a part of Unit 3 because it provided refuge from human disturbance.

Plaintiffs argued that FWS failed to harmonize inconsistent findings when it determined that the PCEs essential to the polar bear may require special management considerations or protection, while also stating that the designation of critical habitat would not result in changes to polar bear conservation requirements. The court stated that the latter statement was from FWS's economic impact assessment, and meant only that in light of existing regulatory measures, FWS could not foresee any additional expense for affected parties. The court stated that in the context of the special management or protection analysis, the existence of alternative protections or programs did not excuse FWS from designating critical habitat [*NRDC v. U.S. Dep't of Interior* (9th Cir. 1997) 113 F.3d 1121]. The court further stated that to the contrary, the notion that polar bears are already protected by some regulatory measures in designated areas was an indication that the habitat was critical. The court concluded that there was no conflict.

Plaintiffs next contended that FWS's assessment of the potential economic impacts was arbitrary and capricious because it grossly underestimated and excluded the indirect costs that would result from designation. Specifically, plaintiffs maintained that FWS's economic assessment failed to fully account for administrative costs, delay costs, and uncertainty and risk likely to result from critical habitat designation. The court agreed with the district court's finding that FWS did consider all such impacts.

The court observed that FWS undertook a formal economic impact assessment of the proposed critical habitat designation as required by Section 4(b)(2) of the ESA. FWS considered potential indirect costs of the designation arising from delay, litigation, uncertainty and risk, and more. FWS chose to address these impacts qualitatively rather than quantitatively because they were too uncertain to include in the final calculation.

The court stated that the final economic analysis thus provided a quantitative assessment of the likely direct costs of the designation, as well as a qualitative assessment of the more uncertain and speculative potential indirect costs. FWS's decision not to include those costs deemed too uncertain or speculative in the total potential incremental cost of the designation was within its discretion. The court stated that FWS's economic impact assessment, therefore, was not arbitrary and capricious.

Alaska argued that Section 7(a)(2) of the ESA created an independent duty, beyond the requirements of Section 4 of the ESA, for FWS to engage in consultation with any affected states before designating critical habitat.

Section 7 Does Not Create Independent Duty to Consult Regarding Critical Habitat Designation. The court observed that the district court concluded that Section 7(a)(2) of the ESA creates a duty to consult, but not one that applied in this case. The district court noted that Section 7 of the ESA governs the federal interagency consultation process, which applies only after an area has already been designated as critical habitat. It accordingly held that the statute did not require FWS to consult with Alaska during the initial critical habitat designation, but that it did require consultation with Alaska when later evaluating whether federal agency action would be likely to destroy or harm the designated habitat.

The court stated that the district court was correct in denying Alaska's claim, although it did not agree with the district court to the extent that it held that Section 7 of the ESA creates any independent duty to consult apart from the requirements of Section 4 of the ESA. The court noted that in 1982, Congress added the specific procedures for designating critical habitat to Section 4 of the ESA, including FWS's duty to consult with affected states [Pub. L. No. 97-304, 96 Stat. 1411 (Oct. 13, 1982)]. The court stated that if such a duty already existed under Section 7 of the ESA, Congress would not have had to mandate coordination with the states under Section 4 of the ESA. Furthermore, Section 4 of the ESA does not mention any additional duty to consult with affected states or reference Section 7 of the ESA to imply that additional procedural duties can be found there.

Finally, the court stated that, even if Section 7(a)(2) of the ESA contained additional processes regarding critical habitat designation, the plain text of the section indicates that consultation with states is discretionary, not mandatory. Congress's use of "as appropriate" language indicates that consultation with states under Section 7(a)(2) of the ESA is discretionary and not a separately enforceable obligation.

The court therefore held that Section 7 of the ESA does not create an additional duty for FWS to consult with states on critical habitat designations.

◗ **References:** Manaster and Selmi, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 81.11[6][b] (Section 4: Listing—Critical Habitat Designation—Critical Habitat Criteria).

Regulatory Activity

Final Regulations

The following regulatory action has been filed with the Secretary of State. Actions generally become effective on a quarterly basis [Gov. Code § 11343.4]; 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 www.calregs.com.

Marine Protected Areas. Filed 2/23/16, effective 2/23/16; amends Fish & Game Code § 632. The Marine Life Protection Act [Fish & Game Code § 2850 et seq.] established a programmatic framework for designating Marine Protected Areas (MPAs) in the form of a statewide network. The Marine Managed Areas Improvement Act [Pub. Res. Code § 36600 et seq.] standardized the designation of marine managed areas (MMAs), which include MPAs. This rulemaking (1) changes an MMA designation, (2) renames MMAs, (3) corrects aquaculture allowances, (4) refines MMA boundaries to improve compliance and enforceability, and (5) corrects errors and inconsistencies. Information: Sherrie Fonbuena, (916) 654-9866.

Humboldt Marten—Petition to List as Endangered Species—Notice of Findings. The California Fish and Game Commission, at its February 11, 2016, meeting, accepted for consideration the petition submitted to list the Humboldt marten as an endangered species. Pursuant to Fish & Game Code § 2074.2(e), the Commission determined that the amount of information contained in the petition, when considered in light of the Department of Fish and Wildlife's written report, the comments received, and the remainder of the administrative record, would lead a reasonable person to conclude there is a substantial possibility the requested listing could occur. Based on that finding and the acceptance of the petition, the Commission also provided notice that the species is a candidate species as defined by Fish & Game Code § 2068. Within one year of the date of publication of this notice of findings, the Department of Fish and Wildlife must submit a written report pursuant to Fish & Game Code § 2074.6 indicating whether the petitioned action is warranted. Copies of the petition, as well as minutes of the February 11, 2016, Commission meeting, are available for public review from Michael Yaun, Acting Executive Director, Fish and Game Commission, 1416 Ninth Street, Room 1320, Sacramento, California 95814, (916) 653-4899. Written comments or data related to the petitioned action should be directed to the Commission at this address.

CUMULATIVE SUBJECT INDEX

The following is an index of the subject matter covered in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2016 forward). This table directs the reader to the page on which each subject discussion begins.)

Vol.:Page

CUMULATIVE TABLE OF CASES

The following is a table of the cases discussed in the CALIFORNIA ENVIRONMENTAL LAW REPORTER for the current volume (January 2016 forward). This table directs the reader to the page on which each case discussion begins. Citations to the Official Reports and the California Reporter will be included as they become available.

Vol.:Page